

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RONALD WALKER	:	CIVIL ACTION
	:	
v.	:	
	:	
THOMAS L. JAMES, JOHN A. BELSER,	:	
GARY OLINGER, JOSEPH MURPHY,	:	
DONALD T. VAUGHN, SCHMELTZ,	:	
TOM ROWLANDS, LESLIE S. HATCHER,	:	
PENNSYLVANIA DEPARTMENT OF	:	
CORRECTIONS, and JOHN DOE'S 1-20	:	NO. 03-3541
NORMA L. SHAPIRO, S.J.		JANUARY 23, 2007

MEMORANDUM AND ORDER

This is a *pro se* action under 42 U.S.C. § 1983. Plaintiff Ronald Walker, a prisoner at the State Correctional Institution at Graterford (“SCI”), alleges violations of the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as Pennsylvania common law torts of assault and battery, intentional infliction of emotional distress, invasion of privacy, gross negligence, negligent infliction of emotional distress, and harassment. These claims arise from Walker’s being treated as a sex offender and forced to give DNA samples in 1995 and 2002. Defendants have filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6). For the reasons set forth in this opinion, defendants’ motion to dismiss is granted.

I. Procedural History

Ronald Walker is currently serving an aggregate sentence of 19 to 49 years on convictions for unlawful restraint, possession of an instrument of crime, reckless endangerment, criminal trespass, and three counts of kidnapping. Walker filed an application to proceed in a § 1983 action *in forma pauperis* on June 9, 2003. After this court granted Walker leave to proceed *in forma pauperis*, Walker filed a complaint against the Pennsylvania Department of Corrections

and its employees, Thomas James, John Belser, Gary Olinger, Joseph Murphy, Donald Vaughn, Schmeltz, Tom Rowlands, Leslie Hatcher, and seven unknown John Does. Defendants filed a motion to dismiss Walker's complaint; this court dismissed the claims for damages against the Department of Corrections as barred by the Eleventh Amendment. An attorney was appointed to represent Walker. Walker filed a counseled first amended complaint to which defendants filed a motion to dismiss and Walker responded. Walker's counsel then withdrew and Walker was given leave to file a second amended complaint. Walker filed a second amended *pro se* complaint. Defendants have moved to dismiss under Fed.R.Civ.P. 12(b)(6); Walker filed a response in opposition.

II. Factual Background

Walker's second amended complaint avers: in 1995, defendant Vaughn and several John Does asserted, on the basis of Montgomery County Criminal Court records, that Walker was a convicted sex offender; they claimed the right to take a DNA sample from Walker willingly or by force, but assured Walker that the sample would be sent to the Pennsylvania state police and that Walker would not have to submit another sample; in June 2000, defendants Belser, Rowlands, Murphy and others informed Walker that because he was a convicted sex offender, all persons under the age of 18 must be removed from Walker's visiting list under Department of Corrections policy; between December 2000 and June 2001, Walker was ordered to participate in a sex offenders' program; Walker was also denied eligibility for outside clearance and the pre-release program—in addition to other benefits offered to other inmates of good standing—because of his false classification as a sex offender; between June 10 and July 13, 2001, defendants Belser, Murphy, Rowlands and others denied Walker's requests for visits from family members

because of Walker's sex offender status; on August 5, 2002, Walker was forced to submit another DNA sample; the next day, Walker filed an inmate grievance form.

A copy of the inmate grievance form was attached to defendants' motion to dismiss. In the grievance, Walker argued that the August 5, 2002 DNA sampling was a violation of his constitutional rights, at the first DNA sampling he was told he would not have to participate again, and his false classification as a sex offender had not been corrected despite his attempts to notify officials. On October 21, 2002, after Walker's repeated attempts to contest his classification as a sex offender, the Pennsylvania Department of Corrections admitted its files contained no record of Walker's conviction for a sex offense.¹ Walker's second amended complaint further avers: between August 2, 2002 and March 21, 2003, defendant Schmeltz harassed Walker by calling him a sex offender in front of other inmates and guards; on March 21, 2003, after discovering Walker was preparing a civil complaint against him, defendant Schmeltz assaulted Walker with a key; another guard prevented Schmeltz from physically harming Walker; and between March 21 and March 31, 2003, defendant Schmeltz and others

¹ There is no longer inaccurate sex offense history in Walker's file. After filing this § 1983 action, Walker, filing a separate action for writ of *habeas corpus*, argued his denial of parole violated due process because the parole board relied on inaccurate sex offense history in his file. Walker sought as relief that the chairman of the parole board issue an internal memorandum stating: 1) Walker was not convicted of statutory rape, staff should not treat Walker as if he were convicted of statutory rape, and no summarization reports regarding Walker should contain a conviction for statutory rape; 2) the "Static 99" sex offender form is not applicable to Walker, and all such forms are to be removed from Walker's file; 3) paperwork relating to home plan investigations should not list Walker as a sex offender; 4) Walker is not subject to Megan's Law; and 5) copies of the memorandum shall be placed in Walker's central office file and in any parole files where Walker is incarcerated. On August 15, 2006, the chairman of the parole board issued an internal memorandum providing all requested relief. By order of September 28, 2006, this court found Walker had a substantive due process right in parole decisions based on accurate information, but denied Walker's *habeas* petition as moot.

filed a false misconduct report against Walker to prevent an investigation of the attack on Walker.

Walker seeks compensatory and punitive damages, attorneys' fees and costs, and any other reasonable and just relief.

III. Discussion

When considering a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the court must accept as true all the allegations and reasonable inferences drawn from the complaint, when viewed in the light most favorable to plaintiff. Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997). A motion to dismiss should be granted "if it appears to a certainty that no relief could be granted under any set of facts which could be proved." Id. A court need not credit a complaint's "bald assertions" or "legal conclusions." Id.

A. Department of Corrections Sovereign Immunity

Generally, states are immune from suits in the federal courts by private parties. Const. Amend. 11; Hans v. State of Louisiana, 134 U.S. 1, 15 (1890) (applying state sovereign immunity to suits by a citizen against his own state). This immunity extends to claims brought against states pursuant to 42 U.S.C. § 1983. Quern v. Jordan, 440 U.S. 332, 342 (1979). The state's sovereign immunity applies to the Pennsylvania Department of Corrections as a state agency. Lavia v. Pennsylvania, 224 F.3d 190, 195 (3d Cir. 2000). The Pennsylvania legislature has expressly declined to waive the Commonwealth's Eleventh Amendment immunity except in specific circumstances not applicable here.² See 1 Pa.Cons.Stat. Ann. § 2310 (1998); 42 Pa.

²The Pennsylvania legislature has waived state sovereign immunity only with respect to claims for damages for vehicle liability; medical-professional liability; care, custody or control of personal property; Commonwealth real estate, highways and sidewalks; potholes and other dangerous conditions; care, custody or control of animals; liquor store sales; National Guard activities; and toxoids and vaccines. See Pa.C.S.A. § 8522(b).

Cons.Stat.Ann. § 8521(b) (1980). The Pennsylvania Department of Corrections is immune from suit by Walker in this court and will be dismissed.

B. Statute of Limitations

Some of Walker's claims are barred by the statute of limitations. Section 1983 claims are subject to the state statute of limitations for personal injury actions, Bougher v. Univ. of Pittsburgh, 882 F.2d 74, 78 (3d Cir. 1989), which, in Pennsylvania, is two years. 42 Pa.C.S.A. § 5524 (2004). Walker filed a petition to proceed *in forma pauperis* on his § 1983 claim on June 9, 2003. All claims arising prior to June 9, 2001 are barred unless some exception applies. When borrowing a state statute of limitations in a civil rights case, a federal court will adopt the state's exceptions thereto if they do not undermine the underlying policies of the federal cause of action, but the burden is on the plaintiff to establish tolling of the statute. Swietlowich v. County of Bucks, 610 F.2d 1157, 1162 (3d Cir. 1979).

Under Pennsylvania law, the statute of limitations may be tolled by plaintiff's lack of knowledge or defendants' fraudulent concealment.

Even if plaintiff suffers an injury, the statute of limitations does not run until the plaintiff knows, or reasonably should know: 1) he has been injured, and 2) his injury was caused by another party's conduct. Mest v. Cabot Corp., 449 F.3d 502, 510 (3d Cir. 2006). The statute of limitations begins to run when it objectively appears that the plaintiff "is reasonably charged with the knowledge that he has an injury caused by another." Id. at 510-11; Ackler v. Raymark Indus., Inc., 380 Pa.Super. 183, 551 A.2d 291, 293 (1988). A court must address the "ability of the damaged party, exercising reasonable diligence, to ascertain the fact of a cause of action." Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80, 85 (1983).

Walker argues his claim based on the 1995 DNA sampling is not barred because he did not realize until 2002 that defendants were acting on the basis of false documents. But during each incident prior to June 9, 2001, Walker was put on notice of an injury caused by another's conduct. Unlike cases where the discovery rule applies, the injuries here were not latent, but immediately apparent to Walker. In June, 2000, defendants Belser, Rowlands and Murphy informed Walker that all minors must be removed from his visiting list because he was a sex offender. Second Amended Compl. at 3. From December 2000 through June 2001, Walker had to participate in a sex offenders program and was denied benefits. *Id.* Walker evidently knew he was not a sex offender when each of the events prior to June 9, 2001, arose. Walker argues he did not know until 2002 whether the courts or the defendants were at fault for documents falsely stating his conviction for a sex offense; but he knew of the allegedly false documents in 1995.³ Walker need not know the exact nature of his injury for the statute to run. *Mest* at 510. Walker knew he was injured when he was falsely labeled a sex offender in 1995. This constituted sufficient knowledge for Walker to ascertain if he had a cause of action. To toll the statute of limitations because Walker did not know more would extend the scope of the discovery rule.

The statute of limitations may also be tolled in Pennsylvania in cases of fraudulent concealment. Where the wrongdoer acts by concealment or deceit to hide facts which would put the plaintiff on inquiry, the statute of limitations does not begin to run until the time of discovery or the date when with reasonable diligence one would have been led to discovery. *Swietlowich*,

³ Paragraph 2 of Walker's second amended complaint reads: "In the year of 1995 Defendant Vaughn, and several John Doe Defendants employed by the DOC, while acting in concert with each-other and others unknown, accused Plaintiff of being a convicted Sex Offender. When Plaintiff denied that he was a convicted Sex Offender the Defendants produced documents that they alleged were authentic Montgomery County Criminal Court Records verifying, as they alleged, Plaintiff's conviction."

610 F.2d at 1162; Deemer v. Weaver, 324 Pa. 85, 88, 187 A. 215, 216 (1936). It is the effect upon the plaintiff, not the intention of the defendant, that matters. Nesbitt v. Erie Coach Co., 416 Pa. 89, 96, 204 A.2d 473, 477 (1964). The plaintiff must establish that he relied to his detriment on the defendant's wrongful acts. Id. at 96.

In Swietlowich, plaintiff alleged police officers did not comply with their duty to periodically monitor their prisoners and, as a result, they failed to prevent her husband's suicide. 610 F.2d at 1160. The plaintiff did not take legal action until four years after her husband's death, when a newspaper article alerted her that the police may have falsified records of her husband's confinement. Id. at 1161. At trial, the plaintiff testified that shortly after her husband's death, the police told her officers had checked on her husband periodically in his cell; a week later, at the police station, the police told the plaintiff and her son that officers had checked in on her husband every half hour or so in his cell. Id. There was trial testimony that officers made additions or alterations to the cell check log after the suicide. Id. The jury found the police records had been fraudulently altered but the suit was barred by the statute of limitations. Id. On appeal, the Court of Appeals remanded the case because the district judge should have directed the jury to consider: 1) whether the plaintiff was reasonably misled by the police statements following her husband's death; and 2) when a reasonable person would have relied on the police assurances. Id. at 1163.

The facts here are distinguishable. In Swietlowich, after the police assured the plaintiff they had monitored her husband periodically, plaintiff had no reason to suspect the police did not do so. Ronald Walker was certain he was not a convicted sex offender regardless of the court records shown to him. Even if defendants had falsified the Montgomery County Criminal Court

records (as Walker implies in his opposition to the motion to dismiss),⁴ Walker could not have reasonably relied on them. The statute of limitations was not tolled by plaintiff's failure to discover or defendants' fraudulent concealment. Walker's claims arising prior to June 9, 2001 are barred.

C. Administrative Exhaustion

Walker's claims arising after June 9, 2001—except for the claims based on the August 5, 2002 DNA sampling—are barred for failure to exhaust. The Prison Litigation Reform Act of 1995 (“PLRA”) states, “no action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). The availability of administrative remedies to a prisoner is a question of law. Ray v. Kertes, 285 F.3d 287, 291 (3d Cir. 2002). Defendants bear the burden of raising and proving failure to exhaust as an affirmative defense. Brown v. Croak, 312 F.3d 109, 111 (3d Cir. 2002). To determine whether an inmate has properly exhausted a claim, the court must evaluate the inmate's “compliance with the prison's administrative regulations governing inmate grievances, and the waiver, if any, of such regulations by prison officials.” Spruill v. Gillis, 372

⁴ Walker's opposition to the defendants' motion to dismiss his second amended complaint reads:

“As to the Defendants accusation ‘that Plaintiff knew the moment DNA was taken from him that he was no Sex Offender and therefor something was [wrong,] Plaintiff avers that once the Defendants showed Plaintiff that they had only acted on what the Courts had allegedly sent them, and because Plaintiff knew for a fact that his trial transcripts clearly showed that this sex issue came up at Plaintiff's trial, Plaintiff had no way of knowing then, at that moment in time, that the Court document shown to Plaintiff by the Defendants was not an authentic Court document. Wherefore, Plaintiff, at that exact period in time, possessed no sufficient critical facts to put Plaintiff on notice that the Defendants, and not the Courts, were the true culprits.”

F.3d 218, 222 (3d Cir. 2004). The court may consider the indisputably authentic documents related to plaintiff's grievances on a motion to dismiss without converting it to a motion for summary judgment. Spruill, 372 F.3d at 223.⁵

The Pennsylvania Department of Corrections provides a grievance form for inmates. Inmates are encouraged to resolve problems with staff informally through direct contact or by sending a request slip, but the Department of Corrections Policy Statement provides that “[the] Grievance Form, DC 804, Part I . . . is the proper form to be used for submission of a grievance and it should be completed according to the directions provided.” Commonwealth of Pa., Dep’t of Corr., Consolidated Inmate Grievance Review System, Policy Statement DC-ADM 804 V(B) (Oct. 20, 1994). Defendants aver, and Walker does not contest, the Department of Corrections inmate grievance procedure was available and known to Walker. The defendants admit Walker’s claims based on the August 2002 DNA sampling have been administratively exhausted. However, they argue Walker did not exhaust the inmate grievance procedure regarding Walker’s mandatory participation in a sex offenders’ program, the denial of family visits, or the harassment and assault from defendant Schmeltz. Walker admits his claims based on defendant Schmeltz’s harassment and assault have not been administratively exhausted.

Walker’s August 2002 grievance statement, attached to defendants’ motion to dismiss, reads:

⁵ Defendants improperly captioned this motion as a Fed.R.Civ.P. 12(b)(6) motion to dismiss. Since failure to exhaust administrative remedies is an affirmative defense, defendants should have moved for a judgment on the pleadings under Fed.R.Civ.P. 12(c), rather than a dismissal under Fed.R.Civ.P. 12(b). Spruill, 372 F.3d at 223 n.2. However, since there is no material difference between the legal standards, the court will continue to refer to defendants’ motion as a “motion to dismiss.” See id.

“On 8/5/02 at 9:00 A.M., I was escorted to the Assessment Unit. Upon my arrival I was involuntarily subjected to submitting a DNA sample of blood and being fingerprinted. This violation of my Constitutional Rights was the second separate time in the past several years that I had been involuntarily subjected to submitting a DNA sample. When I involuntarily participated in the first DNA procedure several years ago, I was told that I would not have to submit another sample of DNA. I also was led to believe that said DNA sample was being collected and being placed into a State Wide Law Enforcement Agency DNA Bank. One of which the State Police, amongst others, would be in control of. As of 8/5/02 this belief of mine was proven wrong. This second DNA procedure on 8/5/02 was a clear and flagrant violation of my Due Process & Equal Protection Rights. I was involuntarily subjected to submit to this DNA procedure under the misleading assumption that I had been arrested, prosecuted, and convicted of the charge of Statutory Rape over 41 years ago. The record in the present case will show that I, on several different occasions, tried to explain to my Counselor, my Unit Manager, and Mr. Rowlands, that the information in their possession that they were using against me was incorrect. I told them that if they checked with the Courts, they would find that no Authentic Documents existed that would support the information in SCI-Graterford’s Record Files. As of the date of this Grievance it is apparent that none of the above has attempted to correct this error. Being as it is mandatory under 42 U.S.C. §1997e(a) and, being in accord with DC-ADM 804 to be able to completely exhaust my administrative remedies, I am requesting Monetary Relief in the amount of \$500,000.00 from each party involved in this matter.”

On the grievance form, Walker also described the actions he had taken before submitting the August 2002 grievance. He stated, “I asked for help in resolving this problem on several different occasions. I communicated with Mr. Murphy, Mr. Belser, and Mr. Rowlands. I also communicated with Deputy DiGuglielmo and Mr. Joseph P. Maher, (J.J. Peters Institute).” Walker argues he submitted requests for assistance with the issues in his complaint, and that the August 2002 grievance was an extension of these requests. Walker’s earlier requests for assistance do not constitute administrative exhaustion of his grievances.⁶ Department of

⁶ Walker attached as Exhibit 3 to his opposition to the motion to dismiss a request to Mr. Rowlands. In the request, Walker contested his sex offender status and asked for a copy of the document stating that Walker was found guilty of statutory rape. Walker also claimed that after discussing the matter with him, Mr. Maher wrote a memorandum explaining why Walker was not an appropriate candidate for the sex offenders’ program, and Deputy DiGuglielmo decided to remove the restrictions on Walker’s visitation rights. The most relevant portion of the request

Corrections regulations clearly provide that a written grievance form must be filed. Though Walker attempted to contest his mandatory participation in a sex offenders' program and the denial of family visits by writing a letter to Mr. Belser and by submitting an inmate request, he does not claim that he filed separate grievance forms with respect to these issues.

Walker did not refer to his participation in the sex offenders' program, or to the denial of family visits, anywhere in his August 2002 grievance form. Walker argues that when, in his August 2002 grievance, he "asked for help in resolving this problem on several different occasions," the term "this problem" referred to his mandatory participation in a sex offenders' program and the denial of visits from family members. Walker's vague reference in the grievance form to "this problem" does not cover claims which he failed otherwise to describe in

reads:

"I now ask that you allow me to undo this wrong that has been done to me. I have never been found guilty of Statutory Rape, I was only arrested for it. Once the District Attorney realized the circumstances of my case, they charged me with Fornication & Bastardy, made me pay \$7.50 a-week for child support plus Fine & Costs. You will find no Court documents that show that there was ever a proceeding that took place that showed that I was found guilty of Statutory Rape. I ask that I be allowed to have/or see a copy of the document that you showed Mr. Belser. I am trying to correct this error before I go before the Parole Board, I don't want them trying to use this error against me. I need to at least know from you where the information you are relying on comes from, in that way I will know who to lodge my complaint against."

In his response to Walker's request, also attached as Exhibit 3, Thomas Rowlands stated: "The documentation used to 'verify' the statements a part of your criminal history. Each case stated is clearly recorded. The DOC has no recourse but to accept this report as fact. Additionally, the Department of Corrections has no legal authority to intervene on your behalf in any dispute you may have with the courts. You must challenge through your own attorney."

Walker attached as Exhibit 4 a request to Mr. Belser for the C.P. numbers for files related to Walker's 1960 statutory rape and bastardy and fornication charges. John Belser's response states, "There are no C.P. Nos. available."

the form. There has been a failure to exhaust the claim for mandatory participation in sex offender programs and deprivation of family visits.

D. False Classification as a Sex Offender

The next issue is whether Walker has administratively exhausted his claim that his false classification as a sex offender violated his Fourteenth Amendment due process rights. In his August 2002 grievance, Walker complained that he was “involuntarily subjected to submit to this DNA procedure under the misleading assumption that I had been arrested, prosecuted, and convicted of the charge of Statutory Rape over 41 years ago.” Walker then claimed he tried to explain to prison officials he was not a sex offender, but the officials did not attempt to correct the error in his file. These statements do not sufficiently exhaust Walker’s claim that his false classification as a sex offender violated due process. The main thrust of Walker’s August 2002 grievance was the unconstitutionality of the DNA sampling. A straightforward reading of the grievance shows that Walker used his false classification as a sex offender merely to illustrate why the DNA sampling violated his equal protection and due process rights; the grievance does not assert the false classification itself violates Walker’s rights. Any claim that Walker was falsely classified as a sex offender is barred for failure to exhaust.

Even if Walker had administratively exhausted his claim that his classification as a sex offender violated due process, his substantive and procedural due process claims must be considered in light of qualified immunity. A government official performing discretionary functions has qualified immunity from civil damages liability if the allegedly unlawful official action was objectively reasonable in light of clearly established rules. See Anderson v. Creighton, 483 U.S. 635, 638-39 (1987). The court must consider: 1) whether the facts alleged show the officer’s conduct violated a constitutional right; and 2) whether the right was clearly

established. Saucier v. Katz, 533 U.S. 194, 201 (2001). The right allegedly violated must have been “clearly established” in a particularized and relevant sense; a reasonable official must understand that his or her actions violate that right. Anderson, 483 U.S. at 640. The unlawfulness must be apparent in light of pre-existing law. Id.

Walker claims his false classification as a sex offender violates substantive due process. Executive action violates substantive due process only when it shocks the conscience. County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998); United Artists Theatre Circuit v. Township of Warrington, 316 F.3d 392, 399 (3d Cir. 2003). Defendants’ mistaken classification of Walker as a sex offender, and any indifference to Walker’s arguments that he was not a sex offender, is not conscience-shocking, and therefore does not violate Walker’s substantive due process rights. Even if Walker had exhausted his administrative remedies, Walker’s substantive due process claim based on his false classification as a sex offender would be dismissed.

Walker also claims his false classification as a sex offender, and defendants’ unresponsiveness to his statements that he was not a sex offender, violated his procedural due process rights. The requirements of procedural due process apply only to the deprivation of liberty and property interests recognized under the Fourteenth Amendment. Board of Regents v. Roth, 408 U.S. 564, 569 (1972). Inmates have a protected liberty interest in freedom from restraint which “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” Sandin v. Conner, 515 U.S. 472, 484 (1995). An inmate’s classification as a sex offender constitutes a significant hardship on the ordinary incidents of prison life. Neal v. Shimoda, 131 F.3d 818, 829 (9th Cir. 1997) (finding a procedural due process interest where inmates’ classification as sex offenders resulted in stigmatizing consequences and mandated participation in a Sex Offender Treatment Program as a prerequisite

to parole). Walker was falsely classified as a sex offender, and remained so despite his repeated attempts to notify prison officials that he was wrongly classified. He avers that, as a result of this false classification, he was required to participate in a mandatory sex offenders' program and the prison guards and other prisoners stigmatized him. The record does not show any hearing or attempt on the part of defendants to follow up on Walker's protests about his sex offender status, or to confirm that status before requiring Walker to participate in a sex offenders' program. Walker therefore may have a cognizable procedural due process claim based on his false classification as a sex offender.

The second element of the qualified immunity inquiry requires the court to consider whether Walker's right to some procedural inquiry into his sex offender status is clearly established. While the right has been established in another circuit, see Neal, 131 F.3d 818, neither the Court of Appeals for this circuit nor the Supreme Court has required prison officials to comply with specific procedures whenever a prisoner contests his or her sex offender status. Walker does not have a clearly established procedural due process right with respect to his classification as a sex offender. Therefore, even if Walker has administratively exhausted his claim that his false classification as a sex offender violated his procedural due process rights, defendants are entitled to qualified immunity against that claim.

E. DNA Sampling in 2002

Walker alleges that the DNA sampling violated the Fourth, Eighth, and Fourteenth Amendments of the U.S. Constitution.

1. Fourth Amendment

Blood tests constitute searches implicating the Fourth Amendment. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616-17 (1989). This rule applies to inmates. Groceman v.

U.S. Dept. of Justice, 354 F.3d 411, 413 (5th Cir. 2004). The Fourth Amendment only protects individuals from unreasonable searches and seizures. Skinner, 489 U.S. at 619. Whether a search is reasonable depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself, and involves balancing “on the one hand, the degree to which [the search] intrudes upon an individual’s privacy and, on the other hand, the degree to which [the search] is needed for the promotion of legitimate governmental interests.” U.S. v. Knights, 534 U.S. 112, 119 (2001).

Inmates possess a lower expectation of privacy than do other citizens. See Hudson v. Palmer, 468 U.S. 517, 526 (1984) (Fourth Amendment proscription against unreasonable searches does not apply within prison cells). The Court of Appeals, in holding the Federal DNA Analysis Backlog Elimination Act of 2000 constitutional, found privacy interests implicated by the collection of DNA from criminal offenders are minimal, United States v. Sczubelek, 402 F.3d 175, 184 (3d Cir. 2005), and the government has a “compelling interest in the collection of identifying information of criminal offenders,” because collecting DNA helps solve future crimes and exculpate individuals for crimes they did not commit. Id. at 185. After Walker was convicted of a violent felony and incarcerated, the government had a legitimate and compelling interest in collecting his DNA as a reliable means of identification. Given Walker’s lower expectation of privacy and the government interest in maintaining the DNA of violent offenders, defendants’ actions were reasonable.⁷ Walker’s Fourth Amendment claim will be dismissed.

⁷ Defendants claim that when they took Walker’s DNA samples, they acted under earlier versions of Pennsylvania’s DNA Detection of Sexual and Violent Offenders Act, codified at 35 P.S. §§ 7651.101-1102 (1995) and 42 Pa. C.S. §§ 4701-4741 (2002). Both were superceded by the most recent DNA statute, 44 Pa. C.S.A. §§ 2301-2306, enacted on November 30, 2004, after Walker filed his first complaint. The version of the DNA Detection of Sexual and Violent Offenders Act in effect at the time of Walker’s August 2002 DNA sampling was 42 Pa. C.S. §§ 4701-4741. Defendants admit that 42 Pa. C.S. §§ 4702 (2002), authorizing the withdrawal of

2. Eighth Amendment

Walker does not have a viable Eighth Amendment claim. The Eighth Amendment prohibits infliction of cruel and unusual punishment. U.S. Const. amend. VIII. A violation of the Eighth Amendment occurs only when the alleged punishment is “objectively, sufficiently serious.” Farmer v. Brennan, 511 U.S. 825, 834 (1997). The Eighth Amendment does not protect an inmate against an objectively *de minimis* use of force. Smith v. Mensinger, 293 F.3d 641, 649 (2002). The withdrawal of a blood DNA sample is not “objectively, sufficiently serious” punishment. See Boreland v. Vaughn, 1993 WL 62707 (E.D. Pa.), *aff’d*, 22 F.3d 300 (3d Cir. 1994) (summary judgment granted in favor of defendant, where inmate claimed injecting him by needle against his will caused “severe pain, dizziness, weakness throughout his body, painful swelling in his left hand, and left a scar,” because the conduct was not sufficient to constitute a violation of the Eighth Amendment). Walker’s Eighth Amendment claim will be dismissed.

3. Substantive Due Process

Walker’s contention that the 2002 DNA sampling violated his substantive due process rights also fails to state a claim. Where the Fourth Amendment provides an explicit textual source of constitutional protection against physically intrusive government conduct, that Amendment, and not the more generalized notion of “substantive due process” must apply. See Graham v. Connor, 490 U.S. 386, 395 (1989) (holding a diabetic’s § 1983 claim that police used excessive force during an investigatory stop was to be decided under the Fourth Amendment and not under substantive due process). Walker does not claim that the results of his 2002 DNA

blood from inmates convicted of kidnaping, was not in effect until December 19, 2002.

sampling were improperly disclosed in violation of his right to medical privacy. Cf. Doe v. Delie, 257 F.3d 309, 317-18 (3d Cir. 2001). Walker's generalized substantive due process claim will be dismissed.

F. State Law Claims

In addition to his federal claims, Walker alleges state law claims of assault and battery, intentional infliction of emotional distress, invasion of privacy, gross negligence, negligent infliction of emotional distress, and harassment. Under Pennsylvania's Sovereign Immunity Act, 42 Pa.Cons.Stat. Ann. §§ 8521-8528, state officials and employees acting within the scope of their employment are immune from suit under state law, unless the plaintiff establishes that the cause of action falls under one of the specifically enumerated exceptions to immunity. Dean v. Commonwealth of Pa., 561 Pa. 503, 507-508 (2000). Pennsylvania's waivers of immunity do not apply to this action. Walker's pendent state law claims will be dismissed.

**IN THE UNITED STATES DISTRICT COURT
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PENNSYLVANIA DEPARTMENT OF	:	
CORRECTIONS, and JOHN DOE'S 1-20	:	NO. 03-3541

ORDER

AND NOW, this 23rd day of January, 2007, for the reasons stated in the accompanying memorandum, it is **ORDERED** that:

1. This action is **DISMISSED** under Fed.R.Civ.P. 12(b)(6) for failure to state a claim.
2. The Clerk of Court is directed to mark this case closed.

/s/ Norma L. Shapiro
Norma L. Shapiro, S.J.