

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

RANDY OGROD : CIVIL ACTION
 :
 v. :
 :
 UNITED STATES OF AMERICA, :
 et al. : NO. 06-5496

MEMORANDUM AND ORDER

McLaughlin, J.

August 10, 2007

Randy Ogrod injured his finger in a fall while at home on furlough as part of a pre-release program from prison. Shortly after Ogrod scheduled surgery to repair the injury, the Bureau of Prisons ("BOP") ordered the revocation of his pre-release custody and his re-incarceration. Ogrod has brought a seven count complaint against the United States, a BOP Community Corrections Manager, and two BOP medical professionals alleging constitutional and tort violations stemming from his re-incarceration and from the delay in providing him medical care for his injured finger.¹

The defendants have moved to dismiss four counts of the complaint: a false imprisonment claim against the United States; a due process claim and a constitutional retaliation claim against the BOP Community Corrections Manager; and a state law

¹ Ogrod also sued John Doe and Richard Roe, two BOP employees. At the Rule 16 conference, counsel for the plaintiff stated that he will not pursue Doe or Roe.

negligence claim against the medical professionals. The plaintiff consents to the dismissal of the state law negligence claim against the two medical professionals and the Court will grant the motion to dismiss the other three claims.

I. The Complaint

Upon his conviction, Ograd was committed to the custody of the BOP from 2000 to 2005. In February of 2005, Ograd was moved from the Federal Detention Center ("FDC") in Philadelphia to the Luzerne Community Corrections Center ("LCCC") as part of a pre-release program.

On May 15, 2000, while at home on furlough, Ograd suffered a fall, injuring his third finger on his left hand. When he contacted the LCCC to request permission to seek treatment at the Franklin Hospital Emergency Room, he was told to return to receive a pass to travel to a free health clinic the next morning. The clinic referred him back to the hospital, and Ograd then received permission to seek treatment there.

After an x-ray, he learned that his injury would require surgery to repair tendon damage. With permission from the LCCC, he saw an orthopedic specialist and scheduled surgery for May 20. On May 19, after paying his deposit for the procedure, he was informed that defendant Deborah J. Mann, the BOP Community Corrections Manager charged with his supervision at

the LCCC, had revoked his pre-release custody and would re-incarcerate him at the FDC. He remained there until his release date on July 1, 2005.

At the FDC, Ograd was seen by two medical professionals, G. Reynolds, M.D., and A. Zorrilla, N.P. However, he was not permitted a consultation with a surgeon until June 22, 2005. Ograd alleges that this delay in treatment has resulted in permanent injuries in the finger, including arthritis and stiffness.

Ograd filed a complaint against the United States, Mann, Reynolds, Zorrilla, and unspecified BOP officials, John Doe and Richard Roe. Against the United States, he has brought claims for negligence, false imprisonment, and breach of the duty to protect, pursuant to the Federal Tort Claims Act ("FTCA"). Against Mann, Reynolds, and Zorrilla, he has asserted a claim for the denial of medical care under the Eighth Amendment. Against Mann, he has also alleged the constitutional claims of violation of due process and retaliation. Ograd's claims for negligence, breach of duty, and denial of medical care are not at issue in this memorandum.

II. Discussion

Ograd alleges that: (1) the re-incarceration at the FDC was in response to the exercise of his constitutional right to

seek medical care and, therefore, constituted an unconstitutional retaliation; (2) because the re-incarceration was retaliatory, it constitutes false imprisonment under Pennsylvania law; and (3) the re-incarceration violated his right to due process of law. The Court will dismiss these three claims.

A. Retaliation

A government action which standing alone is not unconstitutional, may give rise to a retaliation claim if it is grounded upon a desire to punish for the exercise of a constitutionally protected right. Allah v. Seiverling, 229 F.3d 220, 224-25 (3d Cir. 2000). In order to state a claim, the plaintiff must show the exercise of a constitutionally protected right, a resulting adverse action, and a causal connection between them. Rauser v. Horn, 241 F.3d 330, 333 (3d Cir. 2001).²

The plaintiff claims that the constitutional right at issue is the right to seek medical care that he contends is protected by the Eighth Amendment. The defendants argue that there is no constitutional right to seek medical care but only to receive medical care when in prison. The Court agrees with the defendants.

² Because the Court dismisses the claim for failure to show a constitutional right, it will not discuss the latter elements.

The Eighth Amendment requires prison officials to provide adequate medical care to people in their custody. Estelle v. Gamble, 429 U.S. 97, 103 (1976). This does not include a prisoner's right to seek medical care outside the prison facility or from a specific provider. The plaintiff's theory goes well beyond the holding and rationale of Estelle.

Even if the Court were to recognize such a broad right to seek medical care, the defendant would be entitled to qualified immunity because the Court could not find that such a right was "clearly established." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The defense of qualified immunity looks to whether a government official's conduct violates a constitutional right that is clearly established. The Supreme Court has required courts to define the right at issue at a particularized level of generality. Anderson v. Creighton, 483 U.S. 635, 639-640 (1987). In Anderson, the Court stated that "extremely abstract" conceptions would eviscerate the purpose of the qualified immunity doctrine by permitting nearly all claims, so long as plaintiffs were clever enough to phrase them broadly. Id. at 639.

The United States Court of Appeals for the Third Circuit applied these principles to a Fourth Amendment claim in Bartholomew v. Pennsylvania, 221 F.3d 425, 429 (3d Cir. 2000). The Court framed the issue in that case not as whether it was

clearly established that search warrants must be particular, but rather as "whether it was clearly established that one has a constitutional right to be free from searches pursuant to a warrant based upon a sealed list of items to be seized" Following that precedent here, the issue is whether it was clearly established law that a prisoner had a constitutional right to seek medical care from an outside source. The answer is no. Qualified immunity, therefore, would bar the claim even if the Court were to find an alleged constitutional violation.

B. False Imprisonment

The FTCA provides that the United States may be held liable for injuries occurring from the acts and omissions of government employees while acting within the scope of their employment. 28 U.S.C. § 1346(b). For claims under the FTCA, state law will govern. Id. Under Pennsylvania law, the tort of false imprisonment requires that the plaintiff show that he was detained, and that the detention was unlawful. Renk v. City of Pittsburgh, 641 A.2d 289, 293 (Pa. 1994).

Ogrod cannot show that his restraint at the FDC was unlawful. A prisoner does not hold a constitutional entitlement to detention at a specific facility, Montanye v. Haymes, 427 U.S. 236, 243 (1976), or against transfers between prison facilities, Meachum v. Fano, 427 U.S. 215, 224-25 (1976). There is also no

statutory entitlement to a specific placement, as the BOP has broad discretion in deciding when transfers are appropriate. See 18 U.S.C. § 3621(b).

Ogrod's false imprisonment claim is inconsistent with this framework. Ogrod had no entitlement to his placement at the LCCC, and the BOP was not required to keep him there. Throughout his time at both facilities, Ogrod remained in the custody of the BOP, which was explicitly empowered to transfer him if it deemed it appropriate. Nor does the allegation that the re-incarceration resulted from an unconstitutional retaliation change the analysis because the Court has already held that the retaliation count does not state a claim.

C. Due Process

A plaintiff asserting a claim for a violation of due process must first identify a cognizable property or liberty interest implicated by the violation. Bd. of Regents v. Roth, 408 U.S. 564, 570-71 (1972). A liberty interest can arise from the Constitution or a statutory source. Asquith v. Dep't of Corrections, 186 F.3d 407, 409 (3d Cir. 1999).

The Constitution does not create a protected liberty interest in a prisoner's placement within a specific facility, Montanye, 427 U.S. at 242, or in transfers between facilities. Meachum, 427 U.S. at 224-25. The Constitution does, however,

create a liberty interest in a parole status, which includes pre-parole release. See Morrissey v. Brewer, 408 U.S. 471, 482 (1972); Young v. Harper, 520 U.S. 143, 152-53 (1997).

In comparing a custody status to parole, the dispositive factor is whether the inmate has left institutional confinement. Asquith, 186 F.3d at 411. In Asquith, the court considered a claim for a liberty interest implicated by the transfer of a prisoner from a halfway house to the general prison population. Id. at 409. The court held that although his freedom was "substantially similar" to that in Young, the plaintiff was under institutional confinement because he remained within a strictly supervised facility. Id. at 410-11.

The law underlying the confinement can be a statutory source of a liberty interest, but only where the change in status imposes an "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). Atypicality is not a measure of the degree of restraint on the freedom of a prisoner before and after the transfer. Asquith, 186 F.3d at 412. Rather, it is a measure of the degree of restraint between the expectation resulting from the conviction and the subsequent confinement. Id.

Under Asquith's framework, Ograd's complaint fails to assert a liberty interest. His situation at the LCCC falls

within the definition of institutional confinement, and, therefore, does not represent parole. During his time there, Ogrod remained under Mann's supervision, as evidenced by the fact that he required permission to seek medical care at the Emergency Room. Although he was permitted furloughs, his degree of freedom was no greater than that of the plaintiff in Asquith, who similarly possessed the ability to leave the facility for a number of personal reasons.

Nor is there any statutory source of a liberty interest here because Ogrod's re-incarceration cannot rise to the level of an atypical hardship. Although his return to the FDC severely constricted his freedom, the overall degree of restraint was consistent with his expectations upon his conviction. There is no allegation that the conditions at the FDC were excessive or inconsistent with expectations. As such, his confinement cannot be an atypical hardship.

An appropriate Order follows.

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ORDER

AND NOW, this 10th day of August, 2007, upon consideration of defendants' Motion to Dismiss Counts II, V, VI, and VII of the Complaint (Docket No. 10), plaintiff's opposition, and defendants' response thereto, IT IS HEREBY ORDERED that said motion is GRANTED. Counts II, V, VI, and VII are dismissed.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.