

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

GARY CALHOUN,	:	CIVIL ACTION
Plaintiff,		:
		:
v.		:
		:
GEORGE WAGNER, et al.,		:
		:
Defendants.		:
		NO. 93-4075

GARY CALHOUN,	:	CIVIL ACTION
Plaintiff,		:
		:
v.		:
		:
GEORGE WAGNER, et al.,		:
		:
Defendants.		:
		NO. 93-4122

MEMORANDUM

Reed, J.

July 11, 1997

Plaintiff Gary Calhoun ("Calhoun"), proceeding *pro se*, brought two actions against defendants George Wagner, Warden of Berks County Prison ("Wagner"); Correctional Officer Lynch ("Lynch");¹ and the Berks County Prison Board and its individual members ("prison board"), all of whom (collectively referred to as "defendants") are affiliated with the Berks County Prison Facility ("Berks"). Calhoun alleges that, while he was a pretrial detainee at Berks, defendants violated his right to be free from punishment without due process in violation of 42 U.S.C. § 1983. Due Process protection is guaranteed to a pretrial detainee by the Fourteenth Amendment to the United States Constitution.

The above-captioned cases, arising out of similar events, have been consolidated for the purposes of adjudication pursuant to Federal Rules of Civil Procedure

¹The record does not indicate the first name of Correctional Officer Lynch. Lynch was only named as a defendant in Civil Action No. 93-4122.

42(a).² The motions for summary judgment by defendants in each of the respective cases are, on the Court's own motion, before the Court for reconsideration. (Document No. 4, Filing No. 1 and Document No. 4, Filing No. 2) This Court's orders dismissing the motions of defendants for summary judgment as premature (Document No. 6, Filing No. 1 and Document No. 7, Filing No. 2) are hereby vacated and set aside as improvidently entered. Plaintiff did file a Memorandum in Opposition to Defendants' Motion for Summary Judgment (Document No. 5, Filing No. 2). Plaintiff has filed no papers in either of these cases since 1993 and has otherwise taken no action to prosecute them.

I. UNDISPUTED FACTS

Calhoun was at all relevant times a pretrial detainee at Berks. See Answer of Defendants (Filing No. 2) ¶ 2. From Nov. 2, 1992 through Nov. 19, 1992, Calhoun was held in quarantine at Berks until he submitted to a required blood test. According to the evidence of record, Calhoun himself requested that he be held in "Protective Lockup" at Berks immediately after he was released from the prison quarantine facility. See Administrative Segregation Record of Gary Calhoun dated 11/19/92 (Def. Ex.A, Filing No. 2). The prison board granted his request, and Calhoun was housed in a cell in the segregated housing unit (A-2) until his discharge from Protective Lockup on September 27, 1993.³ Thus at his own request Calhoun conducted all of his daily activities, except exercise, in isolation as a result of his Protective Lockup status.

²All documents filed under Civil Action No. 93-CV-4075 are designated with their appropriate title and (Filing No. 1). All documents filed under Civil Action No. 93-CV-4122 are designated with their appropriate title and (Filing No. 2).

³Neither party offers an explanation of the circumstances surrounding Calhoun's discharge from Protective Lockup.

On July 10, 1993, Calhoun submitted an Inmate Communication Form to his "Shift Commander,"⁴ informing the staff member that at about 8:00 a.m. on that date the water supply had been "inadvertently turned off in A2-14 [(Calhoun's cell)] by C.O. Lynch," as a result of disciplinary action intentionally taken against the occupants of an adjoining cell (A-2-12). See Inmate Communication Form dated 7/10/93. On the same day, a staff member responded to Calhoun by explaining that: "[d]ue to the unfortunatety[sic] of the manner in which the plumbing is hooked up, this problem will try to be corrected as soon as possible. We are sorry for the inconvenience, however this will have to be till[sic] we can make some changes." Id. The water flow was returned to cell A-2-14 by 11:30 a.m. on July 12, 1993. See Mem. of Plaintiff (Filing No. 2) at 3. Calhoun notes that he "was supplied 6 oz. of milk or juice three times a day for each day the water was off." See Complaint of Plaintiff (Filing No. 2) ¶ 5(A).

On another Inmate Communication Form, dated July 9, 1993 and addressed to the warden, Calhoun wrote to "bring to [Wagner's] attension[sic] the fact that there are no fans on A-2." See Inmate Communication Form dated 7/9/93. Wagner responded to this communication promising that fans would be put in Calhoun's unit "ASAP." Id., Response dated 7/12/93. This promise was eventually fulfilled when two fans were provided. See Inmate Communication Form dated 8/1/93 (thanking the warden for "the two fans").

Plaintiff also sets forth claims against defendants based on (1) denial of access to the law library, (2) denial of access to his attorney, and (3) failure to protect him from assault while under protective custody. The underlying facts of these three claims are under dispute.

II. LEGAL STANDARD

⁴The identity of the Shift Commander at Berks is not available from the record.

The standard for a summary judgment motion is set forth in Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c) states that:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In addition, a dispute over a material fact must be "genuine," *i.e.*, the evidence must be such "that a reasonable jury could return a verdict in favor of the non-moving party." Id.

The moving party has the initial burden of identifying evidence that it believes shows an absence of genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). When the non-moving party will bear the burden of proof at trial, the moving party's burden can be "discharged by 'showing'--that is, pointing out to the District Court--that there is an absence of evidence to support the non-moving party's case." Id. at 325. If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party may not rely merely upon bare assertions, conclusory allegations or suspicions. Fireman's Ins. Co. of Newark v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982). The court must consider the evidence of the non-moving party as true, drawing all justifiable inferences arising from the evidence in favor of the non-moving party. Anderson, 477 U.S. at 255. To defeat the motion for summary judgment, the non-moving party must offer specific facts contradicting those set forth by the movant, thereby showing that there is a genuine issue for trial. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990).

III. DISCUSSION⁵

In order for a plaintiff to obtain relief in a § 1983 action, plaintiff must establish that the conduct at issue was committed by a person acting under color of state law and that the conduct deprived him of rights, privileges, or immunities secured by the Constitution or laws of the United States. See Carter v. City of Philadelphia, 989 F.2d 117, 119 (3d Cir. 1993). As a pretrial detainee, Calhoun's "claim is properly construed as a violation of the right of due process under the Fourteenth Amendment to the United States Constitution rather than as an alleged violation of the prohibition against cruel and unusual punishment found in the Eighth Amendment." Banks v. Lackawanna County Comm'rs, 931 F. Supp. 359, 362 (M.D. Pa. 1996) (citing Graham v. Connor, 490 U.S. 386, 395 n. 10 (1989); Bell v. Wolfish, 441 U.S. 520, 538-39 (1979)). The United States Court of Appeals for the Third Circuit has held that "the standard for violations of the Eighth Amendment based on nonmedical conditions of confinement . . . would also apply to [] pretrial detainees through the Due Process Clause." Kost v. Kozakiewicz, 1 F.3d 176, 188 (3d Cir. 1993) (citing Wilson v. Seiter, 501 U.S. 294 (1991) for the applicable Eighth Amendment standard) (internal citation omitted); see also City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983) ("[T]he due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner."); Colburn v. Upper Darby Township, 838 F.2d 663, 668 (3d Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989) (same).

The Eighth Amendment is violated when a plaintiff is deprived of "the minimal civilized measures of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981); Young v. Quinlan, 960 F.2d 351, 359 (3d Cir. 1992). To successfully prove an

⁵The Court must be particularly liberal in construing the pleadings submitted by pro se inmate litigants. See Haines v. Kerner, 404 U.S. 519, 521 (1972).

Eighth Amendment violation, a plaintiff must prove both an objective element -- that the deprivation was sufficiently serious -- and a subjective element -- that a prison official acted with deliberate indifference. Young, 960 F.2d at 359-60; see Bell, 441 U.S. at 537-38 (holding that pretrial detainees must show that prison conditions are the product of punitive intent on the part of state actors in order to prove a due process violation).

1. Sufficiently Serious Deprivation

Calhoun alleges that he requested and was denied access to the law library from Oct. 26, 1992 through February 1993, and to his attorney from Nov. 2, 1992 through Nov. 26, 1992. Nevertheless, plaintiff has admitted both (1) that he requested the isolation of Protective Lockup⁶ which I infer is what prevented his access to the library after the required quarantine period, and (2) that he was allowed at least four telephone calls to the office of his attorney during the twenty-four day period of the alleged deprivation. See Complaint of Plaintiff (Filing No. 1) ¶¶ 5-8. I conclude therefore that the purported deprivations alleged were not sufficiently serious to meet the objective element of an Eighth Amendment claim. Even assuming that the allegations of plaintiff could be proven, he has failed to show any injury, let alone the kind of "actual injury" to his litigation or legal affairs necessary for a successful "access to the courts" claim. See Hudson v. Robinson, 678 F.2d 462, 466-67 (3d Cir. 1982) (quoting Kershner v. Mazurkiewicz, 670 F.2d 440, 444 (3d Cir. 1982) with approval); see also Strickler v. Waters, 989 F.2d 1375, 1381 (4th Cir. 1993). Therefore, I will grant the motion for summary judgment with respect to the access to courts claim.

Calhoun further alleges that the sixty-one hour water shut-off and the period without fans for ventilation⁷ constitute punishment in violation of his civil rights as a pretrial

⁶See Complaint of Plaintiff (Filing No. 1) ¶ 9.

⁷Neither party offers the exact date on which fans were placed in the plaintiff's unit, though the evidence shows that

detainee. In determining whether an inmate has been deprived of the minimal civilized measure of life's necessities, the court may consider the duration of the deprivation experienced by the prisoner. See Hoptowit v. Ray, 682 F.2d 1237, 1258 (9th Cir. 1982) (citing Hutto v. Finney, 437 U.S. 678, 685 (1978)) ("[I]n considering whether a prisoner has been deprived of his rights, courts may consider the length of time that the prisoner must go without these benefits. The longer the prisoner is without such benefits, the closer it becomes to being an unwarranted infliction of pain." (internal citations omitted)). The officials responded to each of Calhoun's communication forms in a timely fashion, the first within three days, and these responses attest to the willingness of the prison staff to address his complaints. See Inmate Communication Forms (Filing No. 2), Responses dated 7/10/93; 7/12/93; 8/3/93. Furthermore, the Court of Appeals for the Third Circuit has acknowledged the balancing test established by the Supreme Court to determine whether or not confinement conditions or restrictions punish a pretrial detainee:

Under Bell, a court must determine whether a confinement condition or restriction is punitive by weighing the evidence that it is intended to punish, purposeless, or arbitrary against the possibility that it is "an incident of some other legitimate governmental purpose," such as "maintaining institutional security and preserving internal order."

Simmons v. City of Philadelphia, 947 F.2d 1042, 1068 (3d Cir. 1991) (quoting Bell, 441 U.S. at 538, 546).

Concerning the water shut-off, the plaintiff himself acknowledges the legitimate goal of prison order served by reprimanding and forestalling the efforts of neighboring inmates in the segregation unit who had attempted to flood their cells with water. See Inmate Communication Form dated 7/10/93. Additional evidence shows that

the period could not have been longer than three weeks and may have been shorter.

There is no evidence of the effect of the absence of a fan in plaintiff's cell, but it is assumed that the cell would be more comfortable for plaintiff in the summer with a fan.

Calhoun received fluids to drink throughout the water shut-off and that the prison resolved the situation within sixty-one hours. I find that the totality of these circumstances preclude the alleged deprivation from being considered punishment in violation of a pretrial detainee's due process rights. Therefore, even if Lynch was responsible for the water shut-off to plaintiff's cell, because of the legitimate purpose behind the action and the short duration of the alleged deprivation, the factual situation does not give rise to a constitutional violation. With regard to the lack of ventilation, it is significant to note, as Calhoun did, that only the segregation unit of Berks (A-2) lacked fans.⁸ Calhoun had requested placement in segregated housing and, according to the affidavit of Wagner⁹ as well as the supporting evidence offered by the defendants,¹⁰ Calhoun could have been released from this "poorly ventilated" housing block had he merely requested release from Protective Lockup. Therefore, I find that the deprivation involving water and fans does not constitute a sufficiently serious deprivation to amount to an Eighth Amendment violation.

Calhoun's final claim arises from an allegation that he "received injuries" as the result of an assault perpetrated by a general population inmate, Robert Davies ("Davies"), on Dec. 18, 1992. See Complaint of Plaintiff (Filing No. 1) ¶ 12.¹¹ He alleges

⁸See Inmate Communication Form (Filing No. 2) dated 7/9/93 ("All of the other blocks have fans.").

⁹See Def. Affidavit A (Filing No. 2) (" . . . Gary Calhoun requested Protective Lockup in Cellblock A and in the event he notified any official at Berks County Prison that he wanted to leave Protective Lockup, he would have been immediately transferred to general population.").

¹⁰See Release From Protective Lockup Form, Def. Ex. A (Filing No. 2) at 1.

¹¹There is no documentation offered as evidence of the nature of the alleged injuries or to support the claim that the event actually occurred. There is no incident report nor any evidence that Calhoun sought treatment or received medical attention for his alleged injuries.

that the defendants' failure to protect him from this attack, while he was under protective custody, amounts to a violation of the "contract" he signed with the defendants as well as a violation of his due process rights. See id. ¶¶ 9, 10, 12. With regard to the alleged contract violation, Calhoun offers no evidence of any document or policy that required "constant and direct" supervision by Berks' staff while under self-imposed protective custody. Even if he could prove that such a contract existed, a breach of contract claim is not appropriate in a § 1983 action. In addition, "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." Daniels v. Williams, 474 U.S. 327, 328 (1985). With regard to his constitutional claim:

It is well settled that a prison inmate enjoys a Fourteenth Amendment liberty interest in being protected from assault by other inmates. . . . However, prison officials violate an inmate's liberty interest and his right to be free from cruel and unusual punishment only when they demonstrate intentional conduct or deliberate indifference in allowing a prisoner to be assaulted.

Cephas v. Truitt, 940 F. Supp. 674, 681 (D. Del. 1996) (citing Young, 960 F.2d at 360;

Davidson v. O'Lone, 752 F.2d 817, 821-22 (3d Cir. 1984) (en banc), *aff'd sub. nom.* Davidson v. Cannon, 474 U.S. 344 (1985)) (internal citations omitted). In a recent case,

Hamilton,¹² the Court of Appeals for the Third Circuit found that a prisoner who was violently assaulted by another prisoner offered enough evidence to survive defendants' motion to dismiss his Eighth Amendment claim. The plaintiff in Hamilton had been denied placement in protective custody by prison officials even after an initial recommendation from the prison board that he be placed in protective custody because of the long history and continued problem of violent assaults and threats against him. Unlike the situation in Hamilton, here the plaintiff presents no evidence of a history of violence or threats upon which a factfinder could conclude that any defendant "must have known" of the risk to the safety of plaintiff in allowing him to enter a stairwell, allegedly unsupervised. See

¹²Hamilton v. Leavy, No. CIV.A.95-7309, 1997 WL 356923 (3d Cir. June 30, 1997).

Complaint of Plaintiff (Filing No. 1) ¶ 12. Therefore, in order for the failure-to-protect claim in the case *sub judice* to survive summary judgment, plaintiff must show deliberate indifference on the part of defendants.

2. Deliberate Indifference

"The second prong [of an Eighth Amendment claim] is a subjective inquiry that requires the plaintiff to demonstrate that the prison officials acted with deliberate indifference" to his alleged deprivation. DiFilippo v. Vaughn, No. CIV.A.95-909, 1996 WL 355336, at *4 (E.D. Pa. June 24, 1996) (citing Wilson, 501 U.S. at 302-04). This element of an Eighth Amendment claim is predominantly an inquiry into the state of mind of the defendants. Even assuming plaintiff has proffered evidence of a sufficiently serious deprivation with respect to the failure-to-protect claim, I find that because there is no evidence from which a reasonable jury could find that any of the defendants acted with deliberate indifference to the alleged assault of Calhoun, the motion of defendants for summary judgment should be granted.

There is no evidence that any prison official "kn[ew] or should have known of a sufficiently serious danger to [the] inmate." Young, 960 F.2d at 360-61.

This standard "connotes something more than a negligent failure to appreciate the risk . . . , though something less than a subjective appreciation of the risk. The 'strong likelihood' of [harm] must be 'so obvious that a lay person would easily recognize the necessity for' preventative action; the risk of . . . injury must be not only great, but also sufficiently apparent that a lay custodian's failure to appreciate it evidences an absence of any concern for the welfare of his or her charges."

Cephas, 940 F. Supp. at 681 (quoting Young, 960 F.2d at 361 (alterations in original) (citations omitted)). Furthermore, as the Court of Appeals for the Third Circuit has pointed out, the Supreme Court has explained in hypothetical terms the type of circumstantial evidence necessary for a finding of actual knowledge on the part of a prison official:

if an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past," and the circumstances suggest that the defendant-official being sued had been exposed to information

concerning the risk and thus "must have known" about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk.

Hamilton, 1997 WL 356923, at *5 (quoting Farmer v. Brennan, 511 U.S. 825, 842-43 (1994)). Plaintiff fails to allege any facts which could support the conclusion that any of the defendants knew or should have known of the potential for harm to plaintiff posed by Davies. Plaintiff has offered no documented history of attacks or threats against him, and he never alleges that he specifically informed any defendant of a risk of violence against him from Davies or other inmates.

Plaintiff fails to allege with any particularity that either Wagner or the prison board actually participated in, or even had actual knowledge of, the risk of assault posed by Davies.¹³ Plaintiff appears to impute knowledge of the risk to Wagner simply because Wagner is the warden. Wagner's position at Berks is not enough to hold him liable in a § 1983 case. "[T]he mere fact that a defendant is in a supervisory position is insufficient to find him liable as there is no respondeat superior liability in § 1983 cases." Crager v. Pennsylvania Dep't of Corrections, No. CIV.A.92-3705, 1992 WL 168091, at *2 (E.D. Pa. July 10, 1992) (citing Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1082 (3d Cir. 1976)); see also Parratt v. Taylor, 451 U.S. 527, 537 n.3 (1981); Polk County v. Dodson, 454 U.S. 312, 325 (1981). With regard to the prison board, its members were responsible for granting plaintiff's protective custody status request. The board made its recommendation without knowledge of a particular safety reason for Calhoun's request for such status. Therefore, the board members can not be found to have acted with deliberate indifference towards a risk of harm to plaintiff from prisoner assault. Cf. Hamilton, 1997 WL 356923, *6

¹³Plaintiff never alleges that defendant Lynch was involved in, or even had knowledge of, the failure to protect plaintiff. All claims involving Lynch have already been discussed, and I have found that the alleged deprivations are not sufficiently serious, obviating any inquiry into deliberate indifference.

(finding that the failure of the MDT (prison board) to take additional steps after staff ignored its recommendation that prisoner with history and risk of violent attacks be granted protective custody could be viewed as deliberate indifference). Finally, Calhoun fails to allege with particularity that any staff member could have been deliberately indifferent to the risk of harm created in allowing Calhoun to enter a stairwell unsupervised. The Court of Appeals for the Third Circuit has held that to be liable in § 1983 cases a defendant must be personally involved in the alleged wrongful conduct. "Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity." Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988); see also Saunders v. Horn, 959 F. Supp. 689, 693 (E.D. Pa. 1996) (citing Rode with approval). Calhoun never alleges that he informed any prison staff member of a threat or risk that he would be assaulted. Without such evidence, plaintiff fails to make out a claim for failure to protect under the Due Process Clause. See Cephas, 940 F. Supp. at 681. Therefore, a jury would have to engage in speculation or conjecture to find that any of the defendants had knowledge of any deprivation and acted with deliberate indifference.

Viewing the facts in the light most favorable to plaintiff and drawing all reasonable inferences therefrom, plaintiff has failed to show facts which, if proven, could persuade a trier-of-fact that defendants acted with deliberate indifference towards any sufficiently serious deprivation. Accordingly, I will grant the motion for summary judgment of defendants with respect to the claims of plaintiff.¹⁴

¹⁴Although the defendants may be entitled to qualified immunity, because I grant the motion for summary judgment on other grounds, the issue of immunity need not be reached. "Government officials performing discretionary functions are entitled to qualified immunity, 'shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.'" Litz v. City of Allentown, 896 F. Supp. 1401, 1411

An appropriate order follows.

n.11 (E.D. Pa. 1995) (quoting Anderson v. Creighton, 483 U.S. 635, 638 (1987)).

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ORDER

AND NOW, this 11th day of July, 1997, upon reconsideration of the motions of defendants for summary judgment (Document No. 4, Civil Action No. 93-4075; Document No. 4, Civil Action No. 93-4122) pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the response of the plaintiff in Civil Action No. 93-4122, together with the pleadings, affidavits, admissions on file, having found that (1) plaintiff's alleged deprivations regarding access to the library, his attorney, water flow, and fans are not sufficiently serious deprivations, and that (2) there is no evidence from which a reasonable jury could find that defendants George Wagner, Correctional Officer Lynch, or the Berks County Prison Board had knowledge of any serious deprivation of plaintiff Gary Calhoun or acted with deliberate indifference thereto, and for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that the motions of defendants are **GRANTED. FINAL JUDGMENT IS ENTERED** in favor of defendants

George Wagner, Correctional Officer Lynch, and the Berks County Prison Board and against plaintiff Gary Calhoun.

LOWELL A. REED, JR., J.