

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

JOHN FLAMER,	:	
Plaintiff,	:	
	:	
v.	:	
	:	CIVIL ACTION
WARDEN ANDREWS, MRS. RIGGINS,	:	
MRS. CYNTHIA (WARD), DOCTOR	:	NO. 96-5486
CARRILLO, SGT. LEVANDOWSKI,	:	
MR. GOLDBERG, OFFICER CLEARY,	:	
NURSE TRACY, SECRETARY LINDA,	:	
CAPTAIN DOOLEY, MIKE SHANK,	:	
RICH ROBINSON, MIKE FALEY,	:	
NURSE MIKE, NURSE KRIS, ASST.	:	
WARDEN (LYON),	:	
Defendants.	:	

MEMORANDUM-ORDER

GREEN, S.J.

November , 1997

Presently before the court is Defendants' Motion for Summary Judgment and Plaintiff's Answer thereto.¹ Plaintiff filed an amended pro se Complaint on February 5, 1997 against the Defendants alleging a violation of his civil and/or constitutional rights under 42 U.S.C. § 1983. For the following reasons, Defendants' Motion for Summary Judgment is granted with respect to all Defendants except Defendants Andrews, Riggins, Dooley and Lyon.

I. FACTUAL BACKGROUND

The Plaintiff's deposition taken May 22, 1997 reveals the following allegations of fact. On July 16, 1996, Plaintiff was

¹ Note that this court received a letter filed October 6, 1997 from Plaintiff's attorney in another matter informing the court that Plaintiff is presently incarcerated at Lynchburg City Jail in Lynchburg, VA and that Plaintiff requests that all proceedings related to matters pending in this court be continued until Plaintiff is released from incarceration. As the present action was ready for disposition before Plaintiff's present incarceration, this motion will be decided without further delay.

assaulted by an inmate named "John" on A-Block at the Delaware County Prison. (Flamer dep., 5/22/97 at 100-102.) As a result of the assault, Plaintiff received a shank wound to his right arm and a black eye. (Flamer dep., 5/22/97 at 102.) Plaintiff states that prior to the assault, he wrote to Defendants Warden Andrews, Captain Dooley, Assistant Warden Lyon and Deputy Warden Riggins informing them that he feared for his safety because inmates were telling him that guards were trying to get them to beat him up. (Flamer dep., 5/22/97 at 120-24.) Plaintiff states that he has several letters to the Defendants stating that his life was being threatened. (Flamer dep., 5/22/97 at 121.)

Plaintiff claims that Defendant Officer Cleary ordered the assault and ordered several witnesses to say nothing about the assault. (Flamer dep., 5/22/97 at 142.) This allegation was based on information Plaintiff received from his cellmate and an inmate named Marvin Gross who said that they were told by "John," the inmate who allegedly assaulted Plaintiff, that Officer Cleary ordered the assault. (Flamer dep., 5/22/97 at 142-144.)

However, Plaintiff states he would not rely on the information that was given to him that Officer Cleary ordered the assault. (Flamer dep., 5/22/97 at 143-144). Rather, Plaintiff claims he is suing Officer Cleary because after the assault occurred, he did not write an incident report and did not inform medical of Plaintiff's injuries. (Flamer dep., 5/22/97 at 101, 106, 126, 144.) Plaintiff claims that he also informed Defendant Levandowski that he was assaulted on the day it happened, but

Levandowski also took no action. (Flamer dep., 5/22/97 at 124.) Plaintiff wrote a letter to Warden Lyon the day of the assault, and the next day, an investigation was conducted wherein Plaintiff was taken to the medical ward and his injuries were photographed. (Flamer dep., 5/22/97 at 103-04, 107.)

The day after the assault, Plaintiff was seen by Defendant Doctor Carrillo who wrapped Plaintiff's arm and administered eye drops. (Flamer dep., 5/22/97 at 107. Plaintiff states in his Complaint that the assault also caused numbness in his right first finger which was not treated by Defendants Dr. Carrillo, Goldberg and Ward. (Pl.'s Amended Complaint.) Plaintiff claims in his deposition that his three middle fingers on his right hand continue to be numb and were never treated despite Plaintiff writing numerous sick call slips referring to the injury. (Flamer dep., 5/22/97 at 107-110.) Plaintiff states that Defendants Nurse Mike and Nurse Kris refused to treat the numbness, and these two defendants also refused to treat his shank wound by failing to dress the wound freshly after he showered. (Flamer dep., 5/22/97 at 174-76.) The shank wound healed three weeks after Plaintiff received it. (Flamer dep., 5/22/97 at 177.) Plaintiff claims he has copies of over 100 sick call slips related to his injuries that have gone untreated. (Flamer dep., 5/22/97 at 119).

In a claim unrelated to the assault upon Plaintiff, Plaintiff claims that a light switch in Plaintiff's cell was broken which required Plaintiff to climb on the top bunk to turn

on the light. On one occasion while attempting to turn on the light, Plaintiff slipped as a result of a weakened condition on his left side and hit his face on the top bunk knocking out a tooth. (Flamer dep., 5/22/97 at 130, 133.) Plaintiff states that Defendants Ward and Goldberg were aware of Plaintiff's weakened condition on his left side which was due to a rotator cuff injury, yet they would not allow Plaintiff to be placed in the hospital. (Flamer dep., 5/22/97 at 133, 160-65.) Plaintiff admits that no doctor has ever told him that he needs to be placed in the hospital. (Flamer dep., 5/22/97 at 164.)

Plaintiff is suing Defendant Nurse Tracy and Secretary Linda because after he knocked out his tooth, he had to wait 30 minutes to be treated for the lost tooth. (Flamer dep., 5/22/97 at 144.) Secretary Linda, who was the secretary of the medical ward, is also being sued by the Plaintiff because the Plaintiff feels that he could not get proper medical attention because she did not like him and threatened to quit if the Plaintiff was put in the hospital. (Flamer dep., 5/22/97 at 145.)

Plaintiff claims he is also suing Defendants Ward, Goldberg and Dr. Carrillo because they denied him the right to work by not granting him medical clearance on account of his weakened left side. (Flamer dep., 5/22/97 at 146-47, 149-51.) Four to five months after Plaintiff was initially denied clearance, he received medical clearance and worked for five months as a runner. (Flamer dep., 5/22/97 at 152-53.) However, he did not receive clearance to work jobs other than the job as a runner

because the medical staff felt the other jobs would be too strenuous on his condition. (Flamer dep., 5/22/97 at 154.)

Plaintiff states he is suing Defendants Mike Shank, Rich Robinson and Mike Faley, all counselors at the prison, because they denied him access to the law library and refused to see him after he requested to be seen by a counselor. (Flamer dep., 5/22/97 at 166.) Plaintiff states that he was allowed to use the library once or twice a month. (Flamer dep., 5/22/97 at 170, 133.) According to the Plaintiff, Defendants Mike Shank and Rich Robinson also denied him work by failing to fill out applications for him to obtain a different job while he was working as a runner. (Flamer dep., 5/22/97 at 171-72.)

II. DISCUSSION

Summary judgment shall be awarded "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 dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Once the moving party has carried the initial burden of showing that no genuine issue of material fact exists, the nonmoving party cannot rely upon conclusory allegations in its pleadings or in memoranda and briefs to establish a genuine issue of material fact. Pastore v.

Bell Telephone Co. of Pa., 24 F.3d 508, 511 (3d Cir. 1994). The nonmoving party, instead, must establish the existence of every element essential to his case, based on the affidavits or by the depositions and admissions on file. Id. (citing Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992)); see also Fed. R. Civ. P. 56(e). The evidence presented must be viewed in the light most favorable to the non-moving party. Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983).

A. Due Process

Liberty interests protected by the Fourteenth Amendment may arise from two sources -- the Due Process Clause itself or the laws or regulations of the States. Layton v. Beyer, 953 F.2d 839, 842 (3d Cir. 1992). A plaintiff who brings a § 1983 claim under the Due Process Clause must allege and prove that (1) he was deprived of a protected liberty or property interest, (2) this deprivation was without due process, (3) the defendant subjected the plaintiff to this deprivation, (4) the defendant was acting under color of state law, and (5) the plaintiff suffered injury as a result of the deprivation. Sample v. Diecks, 885 F.2d 1099, 1113 (3d Cir. 1989). Due process protection for a state created liberty interest is limited to those situations where deprivation of that interest "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Griffin v. Vaughn, 112 F.3d 703, 706 (3d Cir. 1997) (quoting Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300 (1995)).

An inmate does not have a right to be placed in the cell of his choice. Sheehan v. Beyer, 51 F.3d 1170, 1175 (3d Cir. 1995) (citing Hewitt v. Helms, 459 U.S. 460, 468, 103 S. Ct. 864, 869 (1983); Montanye v. Haymes, 427 U.S. 236, 242, 96 S. Ct. 2543, 2547 (1976)). Neither the Constitution, nor any federal statute, guarantees a prison inmate the right to work while incarcerated. James v. Quinlan, 866 F.2d 627, 629-30 (3d Cir.), cert. denied, 493 U.S. 870, 110 S. Ct. 197 (1989).

In the present case, Plaintiff did not have the right to be housed in protective custody or in the hospital at any time during his incarceration. Plaintiff also had no liberty or property interest in prison employment while incarcerated at the Delaware County Prison. Furthermore, the decision not to house Plaintiff in the hospital or in protective custody and the decision not to grant Plaintiff clearance to work in the prison did not impose atypical and significant hardship on him in relation to the ordinary incidents of prison life. Therefore, Plaintiff has failed to state a claim that he was denied due process by Defendants Andrews, Dooley, Lyon, Riggins, Ward or Goldberg concerning the conditions of his confinement. Plaintiff has also failed to state a claim that he was denied due process by Defendants Ward, Goldberg, Carrillo, Shenk or Robinson concerning his employment or lack thereof during his incarceration.

B. Access to the Courts

"[T]he fundamental constitutional right of access to the

courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Bounds v. Smith, 430 U.S. 817, 828 97 S. Ct. 1491, 1498 (1977). In claiming a violation of the right of access to the courts, a plaintiff must demonstrate an "actual injury" such that the alleged shortcomings in the library or legal assistance hindered his efforts to pursue a legal claim. Lewis v. Casey, 116 S. Ct. 2174, 2180 (1996); see also Oliver v. Fauver, 118 F.3d 175 (3d Cir. 1997).

In the present case, Plaintiff admits he used the library once or twice a month. Even if the use of the library once or twice a month would constitute a violation of Plaintiff's right to access to the courts, Plaintiff has failed to allege any actual injury as a result of being denied additional use of the library. Therefore, Plaintiff has failed to state a claim against Defendants Shenk, Robinson, and Faley for denying him access to the law library.

C. Eighth Amendment

The Eighth Amendment's prohibition against cruel and unusual punishment protects prisoners against the "unnecessary and wanton infliction of pain." Whitley v. Albers, 475 U.S. 312, 319, 106 S. Ct. 1078, 1084 (1986)(citations omitted). To prove a violation of the Eighth Amendment, an inmate must show that he has been deprived of the minimal civilized measure of life's necessities and that such deprivation was sufficiently serious.

Young v. Quinlan, 960 F.2d 351, 359-360 (3d Cir. 1992)(citations omitted). The plaintiff must also prove that the prison official acted with deliberate indifference subjecting him to that deprivation. Id. Where a plaintiff claims a denial of medical treatment, the plaintiff must demonstrate a deliberate indifference to serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291 (1976). Deliberate indifference has been defined as subjective recklessness, or the actor's conscious disregard of substantial harm that may result from his or her action. Farmer v. Brennan, 511 U.S. 825, 839, 114 S. Ct. 1970, 1980 (1994).

The Eighth Amendment's prohibition against cruel and unusual punishment has been interpreted to impose a duty on prison officials to take reasonable measures to protect prisoners from violence at the hands of other prisoners. Hamilton v. Leavy, 117 F.3d 742, 746 (3d Cir. 1997)(citing Farmer, 511 U.S. at 833, 114 S. Ct. At 1976). A prison official's deliberate indifference to a substantial risk of harm to an inmate constitutes an Eighth Amendment violation. Id. (citing Farmer, 511 U.S. at 828, 114 S. Ct. at 1974). To survive a summary judgment on an Eighth Amendment claim, a plaintiff must produce sufficient evidence of (1) a substantial risk of serious harm; (2) the defendant's deliberate indifference to that risk; and (3) causation. Id. A prison official's knowledge of a substantial risk is a question of fact and can be proved by circumstantial evidence. Id. at 747.

Plaintiff claims that Defendants Cleary and Levandowski failed to conduct an investigation and notify the medical department immediately after the Plaintiff was injured in the assault. An investigation was, however, conducted the following day, and Plaintiff was also treated for his injuries the day after the assault. Based on the facts presented by the Plaintiff, Plaintiff has failed to produce sufficient evidence for a reasonable jury to conclude that Defendants Cleary and Levandowski subjected him to cruel and unusual punishment in failing to investigate the assault and failing to inform medical immediately after the assault occurred.

Plaintiff claims that Nurse Mike and Nurse Kris refused to treat his shank wound and that Defendants Dr. Carrillo, Nurse Mike, Nurse Kris and Mr. Goldberg refused to treat Plaintiff for numbness in his fingers. Concerning the shank wound, Plaintiff has failed to produce sufficient evidence for a reasonable jury to conclude that the Defendants actions constituted cruel and unusual punishment. With regard to the numbness in Plaintiff's fingers, assuming Plaintiff is in possession of the 100 sick call slips he refers to in his deposition, Plaintiff has still failed to produce any evidence that these particular Defendants had knowledge of these slips or the injury and deliberately disregarded the injury. Plaintiff's Answer does not include any affidavits, depositions, admissions on file or any other evidence to support the assertions he makes regarding his Eighth Amendment claim. Even considering the Plaintiff's deposition of 5/22/97,

the deposition testimony, along with the Plaintiff's Complaint and Answer, still do not produce sufficient evidence for a reasonable jury to conclude that the Defendants deliberately disregarded Plaintiff's serious medical needs during the time period in question.

Plaintiff claims that Defendants Andrews, Riggins, Dooley and Lyon failed to protect him from the assault in violation of the Eighth Amendment. Plaintiff claims that these Defendants were informed by him in writing that he feared for his safety because inmates had told him that guards were trying to get him beaten up. Plaintiff states that he has several letters to the Defendants stating that his life was being threatened. Defendants have not responded to this allegation in their Motion for Summary Judgment, nor have they presented any evidence on the matter. Plaintiff has failed to provide the court with the letters he refers to in his deposition, however, this court will assume that Plaintiff can prove the facts testified to in his deposition. Therefore, taking the facts in the light most favorable to the Plaintiff, Plaintiff has produced sufficient evidence to raise a genuine issue of material fact as to whether Defendants Andrews, Riggins, Dooley and Lyon had knowledge of a substantial risk of serious harm to the Plaintiff and deliberately disregarded that risk.

An appropriate Order follows.

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

JOHN FLAMER,	:	
Plaintiff,	:	
	:	
v.	:	
	:	CIVIL ACTION
WARDEN ANDREWS, MRS. RIGGINS,	:	
MRS. CYNTHIA (WARD), DOCTOR	:	NO. 96-5486
CARRILLO, SGT. LEVANDOWSKI,	:	
MR. GOLDBERG, OFFICER CLEARY,	:	
NURSE TRACY, SECRETARY LINDA,	:	
CAPTAIN DOOLEY, MIKE SHANK,	:	
RICH ROBINSON, MIKE FALEY,	:	
NURSE MIKE, NURSE KRIS, ASST.	:	
WARDEN (LYON),	:	
Defendants.	:	

ORDER

AND NOW, this day of November, 1997 upon consideration of Defendants' Motion for Summary Judgment and Plaintiff's Answer thereto, IT IS HEREBY ORDERED that:

(1) Defendants' Motion is GRANTED with respect to Defendants Mrs. Cynthia Ward, Doctor Carrillo, Sgt. Levandowski, Mr. Goldberg, Officer Cleary, Nurse Tracy, Secretary Linda, Mike Shank, Rich Robinson, Mike Faley, Nurse Mike and Nurse Kris.

(2) Defendants' Motion is DENIED with respect to Plaintiff's Eighth Amendment claim against Defendants Andrews, Riggins, Dooley and Asst. Warden Lyon for a failure to protect him from the inmate assault.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.