

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

THEODORE B. SAVAGE, et al., :
Plaintiffs, : CIVIL ACTION
v. :
CHUCKY JUDGE, et al., :
Defendants : No. 05-2551

MEMORANDUM AND ORDER

McLaughlin, J.

January 2, 2006

Plaintiffs Theodore Savage and Edward Abraham have sued numerous prison officials at SCI-Graterford under section 1983, claiming that they were retaliated against for their filing a previous lawsuit and for Abraham's agreement to testify for Savage at a hearing in that case. The moving defendants argue for dismissal on the grounds of res judicata, the improper joinder of Abraham's claims with Savage's, and the lack of factual support for the plaintiffs' conspiracy claim. Additionally, one defendant argues that Abraham's state-law claims are barred by sovereign immunity.

Also before the Court is Savage's motion to compel prison officials at SCI-Cresson, where Savage is now held, to deliver his outgoing legal mail. The Court will deny the mail motion and grant the motion to dismiss in part and deny it in part.

I. Litigation History

A. Wheeler v. Beard

In August of 2003, four prisoners at SCI-Graterford (including Savage and James Pavlichko, a former plaintiff in this case) brought suit against an array of prison officials. Wheeler v. Beard, Civil Action No. 03-4826, currently before the Honorable William H. Yohn (hereinafter "Wheeler"). In relevant part, the suit alleged that various Department of Corrections officials retaliated against the plaintiffs for filing Wheeler and a previous lawsuit, Fontroy v. Schweiker, Civil Action No. 02-2949 (hereinafter "Fontroy").

Abraham was scheduled to testify for Savage in January of 2005 at an evidentiary hearing about Savage's transfer out of SCI-Graterford to another correctional institution. It is not clear from the complaint whether the hearing was held. Savage voluntarily withdrew from Wheeler on January 12, 2006.

B. Abraham v. DiGuglielmo

On January 6, 2006, Abraham filed a lawsuit complaining of SCI-Graterford's newspaper and magazine subscription policy. Abraham v. DiGuglielmo, No. 06-58, currently before the Honorable Bruce W. Kauffman (hereinafter

"Abraham").¹ Abraham raised a claim of medical maltreatment based on several defendants' alleged indifference to his "testicle torsion" and also brought a section 1983 retaliation claim, alleging that several of the defendants were motivated by his agreement to testify for Savage in Wheeler to fabricate a misconduct charge against him. On September 13, 2006, Abraham stipulated that the case would concern only his medical maltreatment claim.

C. The Present Case

In June of 2005, Savage and Pavlichko instituted this action, suing eleven SCI-Graterford officials -- Judge, DiGuglielmo, Trojan, Canino, Moyer, Dohman, Campbell, Owen, Kovalchik, Matello, and Murray -- under sections 1983, 1985, and 1986, alleging that they were retaliated against for filing Wheeler and Fontroy.

The plaintiffs filed an amended complaint as of right on June 28, 2006. The complaint added Abraham as a plaintiff, dropped Campbell from the case, and added Karpinski, Thomas, Johnson, Williamson, Radle, and Smith as defendants. The amended complaint also contained several new claims of retaliation

¹ Savage sought to file suit along with Abraham, but his application to proceed in forma pauperis was denied under 28 U.S.C. 1915(g) because at least four of Savage's previous lawsuits were dismissed for frivolousness.

allegedly motivated by the plaintiffs' litigation activity in Wheeler and Abraham. Pavlichko voluntarily withdrew from this action on August 29, 2006.

The scope of the plaintiffs' case has been narrowed by their responses to the defendants' motions to dismiss. The plaintiffs have agreed to dismiss two of Savage's allegations: that several of the defendants falsely accused him of violations of various prison regulations in order to send him to the restricted housing unit; and that several defendants organized his transfer out of SCI-Graterford to another correctional institution in further retaliation for his lawsuits. With these dismissals, there are no claims remaining against Moyer or Owen, who will be dismissed from the case. The plaintiffs also agree that Williamson should be dismissed.

The following narrative, which assumes that the allegations in the plaintiffs' amended complaint are true, presents their remaining claims.

II. Factual Background

A. Retaliatory Prison Transfers

On "a number of occasions" (the plaintiffs have not provided dates), Thomas Dohman, an SCI-Graterford security captain, and Eric Radle, a lieutenant, threatened to transfer the plaintiffs to separate prisons if they continued their

"paperwork," a reference to their lawsuits. Dohman, Radle, and David Diguglielmo, the prison superintendent, placed notes in Abraham's file saying that he and Savage were "trouble makers [sic]" who have a "propensity for harassing institutional staff with litigation." In mid-2006, Abraham was transferred out of SCI-Graterford.

B. Retaliatory Use of Excessive Force

On January 6, 2006, while Savage and Abraham were in Abraham's cell, Karpinski, Johnson (no first names provided), and Lavan Thomas assaulted Abraham while Thomas said, "file more paperwork you fuckin [sic] piece of shit." H.S. Smith, the officers' supervisor, watched the assault but did not intervene. Abraham was then placed in a strip cell where he was denied food and water for seven days. On January 17, 2006, Johnson entered Savage's cell and assaulted him for seeking an investigation into the assault of Abraham.

C. Retaliatory Separation

On January 18, 2006, Dohman placed the plaintiffs in different housing units in retaliation for Abraham's agreement to testify as a witness for Savage at a hearing in connection with Wheeler. The plaintiffs alone among SCI-Graterford inmates were disallowed from visiting the yard or the law library together.

The separation order was briefly lifted by Diguglielmo before being reinstated at Dohman's request.

III. Claims

The plaintiffs believe that the foregoing acts were committed in retaliation for their litigation activity in Wheeler and Abraham in violation of section 1983. Because the plaintiffs have stipulated to the dismissal of several of Savage's allegations, the remaining claims are: Abraham's retaliatory prison transfer claim against DiGuglielmo, Dohman, and Radle; both plaintiffs' retaliatory separation claim against Dohman²; and both plaintiffs' retaliatory use of excessive force claim against Thomas, Johnson, Karpinski, and Smith. The plaintiffs bring a section 1983 conspiracy claim in connection with the retaliatory acts against all of the remaining defendants.

Both plaintiffs bring additional claims based on their alleged beatings. Abraham alleges an Eighth Amendment violation by Thomas, Johnson, Karpinski, and Smith, and violations of state assault and battery laws by Thomas, Johnson, and Karpinski. Savage brings an Eighth Amendment, an assault, and a battery

² Although the amended complaint contains allegations concerning events at SCI-Cresson and SCI-Rockview where Savage and Abraham are now housed, the plaintiffs have stated that they are not raising claims based on events that occurred outside of SCI-Graterford. Br. in Opp. at 7. The retaliatory separation claim concerns only the events recounted in Part II.C, supra.

claim against Johnson.

IV. Analysis

A. The Mail Motion

The plaintiffs request that the Court order officials at SCI-Cresson to deliver Savage's mail. The Court will deny the motion. The Court is powerless to grant the plaintiffs' request because no SCI-Cresson official is a defendant in this case.

Additionally, Savage's alleged difficulty in delivering mail has not caused him any detriment. He has not alleged that the Court has not received any of his communications, and the Court mailed to the defendants copies of the pleadings with which they had not been served. The Court has, as the plaintiffs requested by letter, treated the plaintiffs' brief in opposition and supplemental brief in opposition as responsive to all of the defendants' motions to dismiss.

B. The Motions to Dismiss

Johnson, Kovalchik, and Karpinski have not been served with the amended complaint. The other defendants have moved to dismiss in three separate motions. All of the moving defendants argue that the plaintiffs' remaining claims should be dismissed because: (1) Savage's claims are barred by res judicata; (2) Abraham's claims are improperly joined with Savage's; and (3) the

plaintiffs' conspiracy claim is not pleaded with sufficient factual specificity. Additionally, Thomas argues that sovereign immunity bars Abraham's assault and battery claims.

1. Savage and Res Judicata

The defendants argue, on the basis of Wheeler, that Savage's claims are barred by res judicata. Res judicata applies if: (1) the earlier judgment is final and on the merits; (2) the claims are the same as those asserted in the prior action; and (3) the parties are the same as, or in privity with, the parties from the earlier action. Huck v. Dawson, 106 F.3d 45, 49 (3d Cir. 1997). Res judicata bars a litigant from raising matters that were actually litigated, or could have been litigated, in the prior suit. Id.

Savage's claims of retaliatory separation and retaliatory use of excessive force are not barred by res judicata because they were not "actually litigated" in Wheeler, nor could they have been. The former claim encompasses several events, the first of which took place on January 18, 2006. Compl. ¶¶ 65-67. The latter claim stems from a January 17, 2006 incident. Savage's withdrawal from Wheeler could not have been with prejudice to his right to raise claims based on events that occurred after his dismissal. Further, the defendants against whom Savage's claims are brought are not defendants in Wheeler.

2. Abraham and Joinder

The defendants argue that Abraham is improperly joined under Federal Rule of Civil Procedure 20(a) and that the Court should sever Abraham from this case pursuant to Rule 21. Rule 20(a) provides in part that plaintiffs may join together in an action if they assert a right to relief arising out of the same series of transactions and if their claims raise common questions of law or fact. The Court finds that joinder is appropriate because the plaintiffs' claims satisfy this test.

The defendants' alleged campaign of retaliation comprised a series of transactions involving both plaintiffs either as joint victims (their separation) or as witnesses (the assault and battery), and they bring claims against the same defendants. The factual commonality in the plaintiffs' claims is reflected in the identical legal theories on which they rely.³

³ The defendants argue that severance is appropriate because of the differences between the original and the amended complaint. The relevant comparison, however, is between Abraham and Savage's claims as they are asserted in the amended complaint because these are the claims that they seek to join.

The Court is likewise not persuaded by the defendants' arguments that severance is necessary to fulfill the filing requirements of the Prison Litigation Reform Act ("PLRA"). (Williamson Br. in Supp. at 7-8; Br. in Reply at 2-4.) The Court assumes that the defendants base their argument on 28 U.S.C. 1915(b), which states, "if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee." The Court notes that the provision is a filing fee requirement and does not by itself support the argument that the plaintiffs' claims must be severed. If section 1915(b) requires each prisoner proceeding in forma

The defendants further argue that it is more appropriate for Abraham to bring his claims in Abraham, but Abraham has agreed to pursue only his medical maltreatment claims in that case.⁴

3. The Conspiracy Claim

The defendants argue that the plaintiffs' conspiracy claim is not put forth with sufficient factual specificity. The Court disagrees.⁵

A conspiracy claim must allege the general composition of the conspiracy, its broad objectives, and each defendant's role; a general allegation of conspiracy without a statement of facts is insufficient. Rose v. Bartle, 871 F.2d 331, 366 (3d Cir. 1989); Maples v. Boyd, 2004 WL 1792775 at *8 (E.D. Pa.

pauperis to pay the full filing fee, an issue the Court does not decide, the requirement can be met whether or not the prisoners proceed in a single lawsuit. See, e.g., Boriboune v. Berge, 391 F.3d 852 (7th Cir. 2004).

⁴ Abraham's retaliation claim in Abraham centered on a fabricated misconduct charge in November of 2005. The dismissal of the claim with prejudice therefore poses no bar to Abraham's retaliation claims in this case, which are unrelated. See Br. in Opp. Ex. A.

⁵ The proposed order filed with the plaintiffs' supplemental brief in opposition states that the conspiracy claim should be dismissed. The Court assumes that this is a typographical error. The plaintiffs' brief in opposition argues that the conspiracy claim should go forward. The defendants, in arguing in their reply brief that the conspiracy claim should be dismissed, appear likewise to assume that the plaintiffs contest the dismissal of the conspiracy claim.

2004). A conspiracy claim under section 1983 must allege specific facts suggesting that there was a mutual understanding among the conspirators to take actions directed toward an unconstitutional end, although the "meeting of the minds" by the defendants may be tacit and need not be proved through direct evidence. Wesley v. Hollis, 2004 WL 945134 at *4 (E.D. Pa. 2004); Dill v. Oslick, 1999 WL 508675 at *8 (E.D. Pa. 1999).

As outlined above, the only claims that remain in the case besides the conspiracy claim are Abraham's prison transfer claim against DiGuglielmo, Dohman, and Radle, and both plaintiffs' retaliatory separation and assault-related claims against Karpinski, Johnson, Smith, and Thomas. With the dismissal of Savage's restricted housing unit and prison transfer claims, several of the defendants -- Matello, Canino, Judge, Trojan, and Murray -- are no longer implicated in any of the plaintiffs' factual allegations. Consequently, the conspiracy claim against them must be dismissed.

According to the amended complaint, the facts that support the conspiracy claim against the remaining defendants are: Dohman's preventing the plaintiffs from visiting the yard or the law library together in contravention of an SCI-Graterford policy; Dohman's and Radle's threats to transfer the plaintiffs to different prisons if they pursued their litigation; the notes placed in the plaintiffs' files by Radle, DiGuglielmo, and Dohman

about the plaintiffs' harassment of prison staff with their litigation; Abraham's transfer out of SCI-Graterford; Thomas, Johnson, and Karpinski's acting in concert to beat Abraham; Thomas's comment made during Abraham's assault about the plaintiffs' "paperwork"; and Smith's acquiescence to the beating.

The Court is unable to conclude that the plaintiffs' conspiracy claim is factually deficient as a matter of law. Although the plaintiffs have not pointed to a specific moment when the defendants agreed to take retaliatory action, they have alleged facts that suggest that the defendants were actuated by a common desire to punish the plaintiffs for their lawsuits. The facts alleged by the plaintiffs are more elaborate for some of the defendants than for others, but they allow for an inference that the defendants agreed, at least tacitly, to violate the plaintiffs' constitutional rights. The plaintiffs have alleged the conspiracy's object (retaliation against the plaintiffs) its composition (the named defendants) and each conspirator's role (outlined above), and therefore the conspiracy claim against the remaining defendants is factually sufficient.

4. Sovereign Immunity

Thomas argues that Savage's assault and battery claims

are barred by sovereign immunity.⁶ Sovereign immunity protects a state official from suit unless the cause of action falls within one of several statutory exceptions or the official's action falls outside the scope of his or her employment. Stackhouse v. Pennsylvania, 892 A.2d 54, 58-59 & n.5 (Pa. Commw. Ct. 2006)(listing the exceptions to sovereign immunity outlined in 42 Pa. C.S.A. § 8522). See also Cooper v. Beard, 2006 WL 3208783 at *16 (E.D. Pa. 2006); Robus v. Pa. Dep't of Corrections, 2006 WL 2060615 at *8 (E.D. Pa. 2006); Story v. Mechling, 412 F.Supp. 2d 509, 519 (W.D. Pa. 2006); Johnson v. Knorr, 2005 WL 3021080 at *8 (E.D. Pa. 2005); La Frankie v. Miklich, 618 A.2d 1145, 1148-49 (Pa. Commw. Ct. 1992).

Abraham's state law claims against Thomas do not fall within one of the exceptions to sovereign immunity listed in section 8522. The claims are therefore barred unless Thomas was acting outside the scope of his employment during the alleged assault.

Under Pennsylvania law, an action falls within the scope of employment if it: (1) is the kind that the employee is employed to perform; (2) occurs substantially within the job's authorized time and space limits; (3) is motivated at least in

⁶ As with the conspiracy claim, the Court assumes that a typographical error accounts for the statement in the plaintiffs' proposed order agreeing to the dismissal of Abraham's assault and battery claims. See note 5, supra.

part by a desire to serve the employer; and (4) if force was used by the employee against another, the use of force is not unexpected by the employer. Restatement (Second) of Agency § 228; Brumfield v. Sanders, 232 F.3d 376, 380 (3d Cir. 2000)(stating that the Pennsylvania Supreme Court has adopted the Restatement's definition of "scope of employment"); Robus, 2006 WL 2060615 at *8.

The Court cannot, at this stage in the litigation, find as a matter of law that Thomas' actions occurred within the scope of his employment as an SCI-Graterford corrections officer. See, e.g., Miller v. Hogeland, 2000 WL 987864 at *3-4 (E.D. Pa. 2000)(denying a motion to dismiss because the limited record prevented a determination of whether the acts were committed in the scope of employment); Johnson v. Knorr, 2005 WL 3027401 at *1 (E.D. Pa. 2005)(holding that disputed issues of material fact prevented summary judgment on whether the defendant was acting within the scope of employment when he assaulted the plaintiff).

The complaint alleges only that the assault was undertaken to punish Abraham for his agreement to testify for Savage in Wheeler. It has not been established that Thomas' retaliatory motive was in part a desire to serve his employer, the Department of Corrections. Further, although Thomas' employer might expect that Thomas would use force during the course of his employment, it would not necessarily expect the use

of excessive force "divorced from any need of the officer to exert control over the prisoner." See Velykis v. Shannon, 2006 WL 3098025 at *4. Consequently, the Court finds that Thomas is not entitled to sovereign immunity at the pleading stage.

An appropriate order follows.

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THEODORE B. SAVAGE, et al.,	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	
	:	
CHUCKY JUDGE, et al.,	:	
Defendants	:	No. 05-2551

ORDER

AND NOW, this 2nd day of January, 2006, upon consideration of the defendants' motions to dismiss (Docket Nos. 38, 46, and 48), the plaintiffs' brief in opposition and supplemental brief in opposition, and the defendants' reply thereto; and the plaintiffs' Motion for Court Order (Docket No. 47) and the defendants' opposition thereto, IT IS HEREBY ORDERED that for the reasons stated in the accompanying memorandum, the Motion for Court Order is DENIED and the motions to dismiss are GRANTED IN PART and DENIED IN PART as follows:

1. The motion is GRANTED with respect to Savage's retaliatory restricted housing unit placements and retaliatory prison transfer claims;

2. The motion is GRANTED with respect to the conspiracy claim against defendants Judge, Matello, Canino, Murray, and Trojan. These defendants, as well as Moyer, Owen, and Williamson, are dismissed from the case;

3. The motions are DENIED in all other respects.

4. IT IS FURTHER ORDERED that the Clerk of Court shall remove the case from civil suspense.

BY THE COURT:

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