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

ERIC MCCOY,	:	**CIVIL ACTION**
Plaintiff,	:	
v.	:	
JOSEPH W. CHESNEY, et al.,	:	
Defendants.	:	**NO. 95-2552**

M E M O R A N D U M

Reed, J. **July 2, 1997**

Plaintiff Eric McCoy ("McCoy" or "plaintiff") brought this action against Superintendent Joseph W. Chesney ("Chesney"), Robert D. Shannon ("Shannon"), Bruce K. Smith ("Smith"), Unit Manager Russell Scheuren ("Scheuren"), and Business Manager John Lasota ("Lasota") (collectively referred to as "defendants"), all of whom are employed by the State Correctional Institution at Frackville, Pennsylvania ("Frackville"), claiming that they deprived him of his constitutional rights under the Eighth and Fourteenth Amendments in violation of 42 U.S.C. § 1983.[1] Jurisdiction over this case is proper pursuant to 28 U.S.C. §§ 1331, 1343.

Currently before this Court are the motions of plaintiff for summary judgment (Document No. 29)[2] and the motion of defendants for summary judgment (Document No.

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[1]Plaintiff initially also named Francis P. Davison ("Davison") as a defendant. In the response of plaintiff to defendant's motion to dismiss the complaint, plaintiff withdrew all claims against defendant Davison. Accordingly, all claims against defendant Davison were dismissed with prejudice by this Court. See Mem. and Order of this Court dated March 15, 1996. In addition, this Court dismissed the claim of plaintiff for relief under 42 U.S.C. § 1983 for violations of the Fourteenth Amendment. The claim seeking relief against defendants under § 1983 for violations of the Eighth Amendment remains.

[2]Plaintiff filed a "Disposition of Motion," which defendants construed as a motion for summary judgment and in response filed Document No. 32 entitled "Response by Defendants to Plaintiff's Motion for Summary Judgment." I will construe the filing of

28) pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff is seeking "damages in excess of $5000 and any other relief [that] this Court deem[sic] proper and just." See Complaint of Plaintiff at 4. Upon consideration of the motions of plaintiff and defendants, and the various responses and briefs of the parties thereto, the motion of plaintiff will be denied and the motion of defendants will be granted.

I. FACTUAL BACKGROUND[3]

Plaintiff McCoy is an inmate at Frackville. On November 18, 1994, McCoy was charged with prison misconduct for lying to an employee and refusing to obey orders. See Misconduct Report No. 495299. After pleading guilty to the misconduct charge of refusing to obey orders, the prison placed McCoy on cell restriction from November 25, 1994 through December 24, 1994. Approximately one month after release from cell restriction, plaintiff began to complain to various prison staff members that he had no job, no idle pay, and therefore no money to purchase personal hygiene items[4] from the Frackville

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plaintiff as did defendants because the intended purpose of plaintiff in filing the "Disposition of Motion" is unclear, and the standards by which a court decides a motion for summary judgment do not change when the parties file cross motions. See Duff Supply Co. v. Crum & Forster Ins. Co., No. CIV.A.96-8481, 1997 WL 255483 (E.D. Pa. May 8, 1997).

[3]On cross-motions for summary judgment, the court must determine separately on each party's motion whether judgment may be entered in accordance with the summary judgment standard. See Sobczak v. JC Penny Life Ins. Co., No. CIV.A.96-3924, 1997 WL 83749 (E.D. Pa. Feb. 18, 1997). In accordance with the standard of review for a motion for summary judgment, the facts will be viewed in the light most favorable to plaintiff and all inferences shall be taken in favor of the plaintiff, the non-moving party, on consideration of the motion of defendants for summary judgment. See Carnegie Mellon Univ. v. Schwartz, 105 F.3d 863, 865 (3d Cir. 1997). As to the motion of plaintiff for summary judgment, the facts and inferences shall be considered in the light most favorable to the defendants.

[4]Plaintiff asked for "toothpaste, deodorant, soap, and a skin moisturizer." See Inmate's Request to Staff Member (Chesney) dated 3/8/95.

commissary. He learned that under the prison rules he would not be eligible to receive either a prison job or idle pay for at least 90 days, as a result of his misconduct. Accordingly, plaintiff lacked the necessary funds to purchase hygiene items for a period of three months, between December 24, 1994 and March 23, 1995.[5] It is undisputed that several times throughout the relevant three month period McCoy notified three of the named defendants: (1) Chesney, Superintendent of Frackville; (2) Scheuren, Unit Manager of the housing block of plaintiff during the relevant period; and (3) Smith, Deputy Superintendent for Centralized Services, of his indigency and need for personal hygiene items by sending Inmate Request Forms to their respective offices. The defendants ignored his requests for hygienic assistance, instructed McCoy to redirect his requests to the Business Office managed by Lasota, or assured McCoy in writing that the request would be forwarded to the appropriate office. The repeated requests by plaintiff were ultimately to no avail, leaving him without toothpaste, deodorant, or skin moisturizer for a three-month period[6].

II. LEGAL STANDARD

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

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[5]On March 23, 1995, a $15.00 gift was deposited into McCoy's Inmate Account, providing him with sufficient funds to buy hygiene items.

[6]It is undisputed that state-issue soap was available, upon request, to plaintiff at all times. See Memorandum in Support of Plaintiff's Motion in Opposition to Summary Judgment at 3.

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. DISCUSSION[7]

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,

[7]**The 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).

119 (3d Cir. 1993). Plaintiff claims that defendants violated his Eighth Amendment right to be free from cruel and unusual punishment when they denied him personal hygiene items for three months. Defendants contend that plaintiff is responsible for his failure to properly obtain hygiene items during the relevant three-month period. Defendants further contend that even assuming they failed to provide McCoy with hygiene items, such a deprivation does not give rise to an Eighth Amendment claim. Finally, defendants contend that they are entitled to qualified immunity from damages and that this suit is otherwise barred by the Eleventh Amendment.

A. Eighth Amendment Claim

The Eighth Amendment is violated when an inmate 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 Eighth Amendment violation, an inmate 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. Because I find that the alleged deprivation is not "sufficiently serious," I will not address the "deliberate indifference" element of the analysis.

1. Sufficiently Serious Deprivation

Plaintiff claims that he had no access to toothpaste, soap, deodorant, and skin moisturizer during a three month period. "The Eighth Amendment prohibits deliberate indifference to needs of prisoners, including the basic elements of hygiene." See Carver v. Bunch, 946 F.2d 451, 452 (6th Cir. 1991). Nevertheless, "[t]he Supreme Court has made clear that 'the Constitution does not mandate comfortable prisons, and prisons . . . which house persons convicted of serious crimes [] cannot be free of discomfort.'" DiFilippo v. Vaughn, No. CIV.A.95-909, 1996 WL 355336, at *4 (E.D. Pa. June 24, 1996) (quoting Rhodes, 452 U.S. at 349). Although certain deprivations, including the deprivation

of non-essential hygiene items, may appear to be restrictive, "they are part of the penalty that criminal offenders pay for their offenses against society." Rhodes, 452 U.S. at 347.

The Court of Appeals for the Third Circuit has not specifically delineated which personal hygiene items constitute basic necessities. Though, it appears that courts in other circuits have examined conditions involving the deprivation of soap, toilet paper, toothbrushes, and toothpaste in the context of Eighth Amendment claims. See McCray v. Burrell, 516 F.2d 357, 369 (4th Cir. 1975) (considering soap and a toothbrush to be among those "essential articles of hygiene"). See generally Chandler v. Baird, 926 F.2d 1057, 1063-65 (11th Cir. 1991) (examining deprivation of soap, toothbrush, toothpaste, and toilet paper as a possible Eighth Amendment violation); Harris v. Fleming, 839 F.2d 1232, 1235 (7th Cir. 1988) (same). The evidence of record indicates that "state-issue soap"[8] and showers were available to plaintiff at all times. See Mem. of Plaintiff in Opposition to Summary Judgment at 4. In the Ninth Circuit, the Court of Appeals found that there was no Eighth Amendment violation where inmates were allowed showers every other day and liquid soap and toothpowder were provided instead of bar soap and toothpaste. See Acuna v. Rowland, 24 F.3d 244, 244 (9th Cir. 1994). At Frackville, although commercial brand soap was only available for purchase, plaintiff had access to a sufficient substitute and thus was not deprived of that basic necessity. In DiFilippo the district court found that the deprivation of a wash cloth and a change of undergarments was not an Eighth Amendment violation, concluding that a wash cloth is not essential to maintain cleanliness. See DiFilippo, 1996

[8]Plaintiff has attempted to revive his initial allegation that he was deprived of soap by stating that "all inmates can't use [state-issue] soap because it causes a rash." See Mem. of Plaintiff in Opposition to Summary Judgment at 3. Plaintiff fails to allege that he was susceptible to a rash from the state-issue soap. Even assuming that such soap did cause discomfort to the plaintiff, he never alleges that he notified anyone of this problem. Thus, plaintiff fails to show that the defendants could have acted with deliberate indifference on this issue.

WL 355336, at *5 ("Although some personal hygiene items such as toothpaste, soap, and toilet paper may be considered minimal necessities of civilized life, a wash cloth does not fall into this category." (internal citations omitted) (emphasis added)). I agree. I find that where soap and showers are available, deodorant and skin moisturizer are at least as non-essential to basic hygiene as a wash cloth, and therefore these items do not fall into the category of minimal necessities, which if not made available to a prisoner could give rise to a finding of cruel and unusual punishment.

The only remaining item that plaintiff alleges he was deprived of is toothpaste. It is a widely accepted fact that brushing one's teeth without toothpaste is sufficient to maintain good oral hygiene.[9] Plaintiff never made any request for, nor alleged that he was deprived of, a toothbrush. Having requested toothpaste, which is generally used in conjunction with a toothbrush, the only reasonable inferences that can be taken from his failure to request a toothbrush are that plaintiff either (1) had a toothbrush available to him or (2) was satisfied with the personal hygiene he maintained without brushing his teeth or using a toothbrush. Although Frackville provides toothpaste in the welfare bags that are made available to some indigent prisoners, this item must otherwise be purchased from the commissary, unlike soap which is always available to all Frackville prisoners at no cost. Thus, it appears that the prison considers toothpaste a non-essential hygiene item; more akin

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[9] "A small amount of toothpaste with flouride is recommended, although not essential to good oral hygiene." Oral Hygiene: Let's Brush Up on Products, Ariz. Republic, Oct. 17, 1996, § Healthy Living, at HL2.

"We are creatures of habit and victims of advertising when it comes to using some oral hygiene products. 'It's the toothbrush that does the work, not the toothpaste. You can do an extremely adequate job without toothpaste.' Toothpaste basically makes our mouths feel better and our breath fresher . . . ." Look Mom, It's OK Not to Use Toothpaste; Brush is What Does the Job, Dentists Say, Fla. Times Union, Aug. 27, 1996, § Body and Mind, at D-1 (quoting dentist, Dr. Irving Zamikoff of Zamikoff, Klement, and Jungman, D.D.S., P.A.).

to shaving cream, razors, and a comb than to soap and water. See Declaration of Scheuren at 4 ("An indigent inmate may obtain a welfare bag containing a toothbrush, toothpaste, a razor, shaving cream, and a comb by submitting a request to the Business Manager."). Finally, plaintiff has never alleged that he suffered any physical harm from the deprivation of toothpaste. Cf. Penrod v. Zavaras, 94 F.3d 1399, 1404 (10th Cir. 1996) (finding that denial of toothpaste and razors was sufficient to raise genuine issue of material fact with regard to an Eighth Amendment violation because plaintiff showed that serious harm stemmed from the deprivation: he had to be treated by a dentist for bleeding and receding gums as well as for tooth decay).

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 three month deprivation alleged here is significantly long and is distinguishable from situations where the deprivation of a basic hygiene item continued for a relatively short time period, but because the only material deprivation is the deprivation of toothpaste, the Eighth Amendment is not implicated by this set of facts. Cf. Matthews v. Murphy, No. 90-35458, 1992 WL 33902, at *4 (9th Cir. Feb. 25, 1992) (finding no Eighth Amendment violation where inmate was allegedly deprived of a towel, toothbrush, toothpowder, soap, and other personal hygiene items for 34 days following a riot); Harris, 839 F.2d at 1235 (finding no constitutional violation where prison officials failed to provide prisoner with soap, toothbrush and toothpaste for ten days). From the evidence of record it is clear that McCoy had soap and water available to him at all times; that he never requested a toothbrush nor

specifically informed any defendant that he was "unable to brush his teeth;"[10] and that while not conclusive here, he never alleged that any physical harm was caused by the alleged deprivation. Thus, I conclude that the deprivation of toothpaste alone, even for a three month period of time, can not be considered a sufficiently serious deprivation. See Stewart v. Wright, 101 F.3d 704, 704 (7th Cir. 1996) ("Dry cell conditions such as not being able to flush the toilet or brush teeth are mere inconveniences. . . . [I]t is well settled that conditions which are temporary and do not result in physical harm are not actionable under the Eighth Amendment."); cf. Chandler, 926 F.2d at 1063-65 (11th Cir. 1991) (concluding that plaintiff was entitled to have trier of fact determine whether the condition of being deprived of soap, toothpaste, a toothbrush, and toilet paper violated the Eighth Amendment); DiFilippo 1996 WL 355336, at *5. See generally Young, 960 F.2d at 364-65 (finding that conditions of forcing an HIV-positive prisoner to "live in his own excrement for four days," not allowing him to bathe or shower, not providing him with toilet paper despite his diarrhea, not providing him with water to drink, suggesting instead that he drink his urine, and not allowing him to wash his hands before eating "would if proved demonstrate a violation of the basic concepts of humanity and decency that are at the core of the protections afforded by the Eighth Amendment.").

Viewing the facts in the light most favorable to plaintiff and drawing all reasonable inferences therefrom, plaintiff has failed to show facts which could persuade a reasonable trier-of-fact that defendants Chesney, Shannon, Scheuren, Smith, and Lasota violated his Eighth Amendment rights. Since this Court's ruling on the motion to dismiss, the evidentiary record has developed to show that the deprivation of toothpaste is the only

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[10] See Declaration of Scheuren at ¶ 10; see also conclusory and confusing unsworn Response of Plaintiff at 3. The conclusory, unsworn response of plaintiff that the declaration of Scheuren is false is not sufficient to create a genuine issue of material fact.

material deprivation at issue in this case. That deprivation, by itself, is not sufficiently serious to give rise to a constitutional violation.[11] Plaintiff has presented no genuine issues of material fact in connection with his Eighth Amendment claim, and defendants are entitled to summary judgment on this claim as a matter of law. Accordingly, I will grant the motion for summary judgment of defendants. Because no genuine issues of material fact remain with regard to the sufficiently serious nature of the deprivation at issue, I will deny the motion for summary judgment of plaintiff.

An appropriate order follows.

[11]Without a "sufficiently serious" deprivation, this Court does not reach a "deliberate indifference" analysis because an Eighth Amendment claim can not succeed without a sufficiently serious deprivation.

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ERIC MCCOY,	:	
	:	**CIVIL ACTION**
Plaintiff,	:	
	:	
v.	:	
	:	
JOSEPH W. CHESNEY, et al.,	:	
	:	**NO. 95-2552**
Defendants.	:	

ORDER

AND NOW, this 2nd day of July, 1997, upon consideration of the motion of plaintiff Eric McCoy for summary judgment (Document No. 29) and the motion of defendants Joseph W. Chesney ("Chesney"), Robert D. Shannon ("Shannon"), Bruce K. Smith ("Smith"), Russell Scheuren ("Scheuren"), and John Lasota ("Lasota") for summary judgment (Document No. 28) pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the various responses and briefs of the parties thereto, together with the pleadings, affidavits, admissions on file, having found that the deprivation of toothpaste for three months does not constitute a sufficiently serious deprivation, and for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that the motion of plaintiff is **DENIED** and the motion of defendants is **GRANTED**. Judgment is hereby entered in favor of defendants Chesney, Shannon, Smith, Scheuren, and Lasota and against plaintiff Eric McCoy.

LOWELL A. REED, JR., J.