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

JAMES JONES	:	CIVIL ACTION
v.	:	
COMMISSIONER MARTIN F. HORN, et al.	:	NO. 97-3921

MEMORANDUM AND ORDER

BECHTLE, J. JUNE 4, 1998

Presently before the court are defendants' motion for summary judgment, plaintiff James Jones' ("Jones") motion for an injunction regarding medical care, Jones' numerous pretrial motions and the responses thereto. For the reasons set forth below, the court will grant the motion for summary judgment and will deny the remaining motions.

I. BACKGROUND

This is a pro se prisoner civil rights action against numerous officials, administrative personnel and correctional officers (collectively "Defendants") at the State Correctional Institution at Frackville ("SCI-Frackville").[1] Defendants include: Commissioner Martin Horn, Superintendent Joseph Chesney, Accounting Clerk Cindy Walasavage, Deputy Superintendent Robert

1. This court has original jurisdiction over Jones' claims because they arise under the federal civil rights laws. 28 U.S.C. §§ 1331, 1343. The court has supplemental jurisdiction over Jones' state law claims because they form part of the same case or controversy as the federal claims. 28 U.S.C. § 1367(a).

Shannon, Correctional Officer Dean Harner, Lieutenant James Popson, Sergeant Steven Yoder, Unit Manager Russell Scheuren, Correctional Officer Daniel Murphy, Correctional Officer Theodore Collier, Correctional Officer Sean Resendez and Major John Kerestes.

On June 9, 1997, Jones filed a Complaint alleging that several guards used unreasonable force in restraining him in his cell while he was incarcerated at SCI-Frackville. On July 30, 1997, Jones filed a Supplemental Complaint. In his Supplemental Complaint, Jones additionally alleges that certain correctional officers, prison staff and administrative personnel deprived him of his constitutional rights and engaged in other forms of harassment in retaliation for Jones' legal activities. On December 3, 1997, Jones filed an Amended Supplemental Complaint. On December 3, 1997, Jones also filed a motion for a temporary restraining order and a preliminary injunction alleging that prison officials had replaced his shoe inserts with an "inferior product" and failed to give him medical support hose.

The factual allegations in Jones' Complaints and injunction motions can be categorized as claims of: (1) intimidation of Jones to discourage him from acting as a witness in another prisoner's civil rights case; (2) excessive force; (3) harassment; (4) denial of access to the courts; and (5) denial of adequate medical treatment.

Jones alleges that certain officers entered his cell on May 15, 1997 (the "May 15th Incident"). (Jones Dep. Tr. 10/16/97

at 21.) Most of the officers were wearing riot gear which covered their faces. These officers ordered Jones to place his hands on the wall of his cell and to face the wall. Id. Jones alleges he complied with these orders. Id. Jones states that a guard then accused Jones of attempting to hit him. Id. Jones further alleges that one guard turned him around and yelled at him and then turned him around again to face the wall. Id. Jones alleges that the guard then began pushing his head into the screen in front of him and then kicked his ankles apart. Id. at 21-22. The guards handcuffed Jones and left him for about ten minutes. Id. at 22. Jones alleges that when they returned, they forced him onto his bed, punched him, squeezed his handcuffs, hit him with nightsticks and twisted his limbs. Id. at 14-15. Jones also alleges that during the struggle, one of the guards told him that if he testified against them in another prisoner's civil rights case they would "get" him. Id. at 12.

Jones alleges that, following the May 15th Incident, prison guards engaged in harassment by repeatedly kicking his door and hitting the bars of his cell, making derogatory references to Jones' race and religious views and engaging in excessively repetitive searches of Jones' cell. Jones alleges that prison officials denied him access to the courts by restricting his access to the law library, opening and reading his legal mail, delaying the mailing out and delivery of legal documents and otherwise interfering with his access to legal materials and assistance.

In his motion for a temporary restraining order, Jones alleges that the prison denied him adequate medical treatment because prison officials did not provide him with the proper support hose and shoe inserts to alleviate his foot and leg pain.

II. DISCUSSION

A. Motion for Summary Judgment

1. Standard

Summary judgment shall be granted "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). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

To defeat a motion for summary judgment, the non-moving party must produce evidence to establish prima facie each element of its claim. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Such evidence and all justifiable inferences that can be drawn from it are to be taken as true. Anderson, 477 U.S. at 255. However, if the non-moving party fails to establish an essential element of his claim, the moving party is entitled to a judgment as a matter of law. Celotex, 477 U.S. at 322-23.

2. Discussion

Jones alleges a variety of claims under federal and state law. As employees of the Commonwealth acting within the scope of their duties, the Defendants are immune from state law claims under the statutory protection of sovereign immunity. 1 Pa. Cons. Stat. Ann. § 2310. Sovereign immunity has been waived only for certain negligence claims, none of which fit Jones' factual assertions. 42 Pa. Cons. Stat. Ann. §§ 8521-22. Therefore, to the extent that Jones has articulated state law claims, the court will dismiss those claims.

From a reading of Jones' Complaint, filings and deposition in light of his pro se status, Jones alleges what appears to be a claim under either 42 U.S.C. § 1985(2) or 42 U.S.C. § 1983. Jones alleges that the guards acted in concert to use excessive force to intimidate Jones from acting as a witness in another inmate's civil rights action. Jones alleges he witnessed several guards entering another inmate's cell and removing legal materials. According to Jones, that inmate filed an action against the guards and Jones was named as a witness in that action. (Jones Dep. Tr. 10/16/97 at 12.) Jones also alleges that after that inmate's suit was commenced, the guards entered Jones' cell, handcuffed him, physically restrained him on his bed and stated that they would "get" him if he testified against the guards. Id. Jones claims the guards then used excessive force during a struggle in removing his handcuffs. Id at 12-13.

The court will first analyze these allegations under 42 U.S.C. § 1985(2).[2] Because Jones is a potential witness, rather than a litigant to the action from which he was allegedly discouraged from testifying in, Jones does not have standing to assert a claim under section 1985(2). See David v. United States, 820 F.2d 1038, 1040 (9th Cir. 1987); Rode v. Dellarciprete, 845 F.2d 1195, 1206 (3d Cir. 1988)(citing David); see, e.g., Heffernan v. Hunter, No. 97-6041, 1998 WL 150953, at *3 (E.D. Pa. Mar 26, 1998)("The specific language of § 1985(2) 'shows that Congress intended to provide a damage remedy only for litigants whose right to pursue a claim in federal court has been hindered by a conspiracy. . . . Otherwise the term "witness" would have been contained in those remedial provisions.'")(quoting Rylewicz v. Beaton Serv., Ltd., 888 F.2d 1175, 1180 (7th Cir. 1989)). Even if the statute granted a witness a cause of action, Jones has not shown that his testimony was actually affected or that the other inmate's case was

2. The first clause of § 1985(2) states that "[i]f two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror" then under § 1985(3), "the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

hindered. Such an injury is a crucial element of a section 1985(2) action. See David, 820 F.2d at 1040 (requiring that plaintiff show "how she has been injured by her testimony . . . or her failure to appear in court"); Rode, 845 F.2d at 1207 (dismissing claim where plaintiff failed to allege, inter alia, a "claim that she was intimidated or hampered from being a witness"). Therefore, the court will dismiss Jones' claim under 42 U.S.C. § 1985.

In addition to the claim of witness intimidation, Jones' factual allegations can be analyzed under 42 U.S.C. § 1983.[3] There are two elements of a section 1983 claim. First, the conduct complained of must be committed by a person acting under color of state law. Second, the conduct must have deprived a person of rights, privileges or immunities secured by the federal Constitution or laws. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970); Kost v. Kozakiewicz, 1 F.3d 176, 184 (3d Cir. 1993).

There is no dispute that Defendants were Pennsylvania corrections officers, supervisors and staff at the time of the incident in question. Therefore, the first element of the test is satisfied because Defendants acted under color of state law.

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3. Jones names Defendants in their official and individual capacities. Persons acting in their official capacity are not persons subject to suit under 42 U.S.C. § 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 70-71 (1989)(holding "neither a State nor its officials acting in their official capacities are 'persons' under § 1983"). The court will dismiss the claims against Defendants in their official capacity.

The remaining issue is whether Jones has made a showing that Defendants deprived him of a federally secured right. The court will evaluate the evidence regarding the second element as to each defendant individually.

a. Commissioner Martin Horn and Superintendent Joseph Chesney

Jones alleges Commissioner Horn is "responsible for setting rules, regulations and policies" at SCI-Frackville. (Jones Dep. Tr. 10/16/97 at 5.) Jones alleges Superintendent Chesney is "supposed to be aware of every action of his subordinate officers" at SCI-Frackville. Id. at 25-26. A supervisor cannot be liable under section 1983 unless he or she had personal involvement in or knowingly acquiesced in the alleged wrongs. See Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988); Cyprus v. Diskin, 936 F. Supp. 259, 261 (E.D. Pa. 1996). A plaintiff must demonstrate that the supervisor participated in the deprivation by giving an order, setting a policy or approving or knowingly acquiescing in a subordinate's conduct. Gay v. Petsock, 917 F.2d 768, 771 (3d Cir. 1990). The court will dismiss the claims against Commissioner Horn and Superintendent Chesney because Jones fails to put forth any showing that these defendants were aware or personally engaged in any wrongful conduct.

b. Accounting Clerk Cindy Walasavage

Jones names Cindy Walasavage because he believes that she was responsible for a delay in the filing of his legal

papers. (Jones Dep. Tr. 10/16/97 at 23-24.) Jones' action was delayed for about a month, but it was eventually filed and he was permitted to proceed in forma pauperis. Id. Claims of interference with a prisoner's access to the courts are analyzed under the First Amendment. Lewis v. Casey, 116 U.S. 2174, 2180 (1996). A plaintiff must show some injury, such as the loss of a legal claim. Id.; see also Oliver v. Fauver, 118 F.3d 175 (3d Cir. 1997). Jones' claims in this case may have been subject to delay, however he has not alleged that any of his claims have not been properly presented to the court subsequent to the delay. Therefore, the court will dismiss the claims against Ms. Walasavage.

c. Deputy Superintendent Robert Shannon

Jones alleges that Deputy Superintendent Shannon ("Shannon") pointed at Jones' cell immediately before the May 15th Incident, directing officers to the cell. (Jones Dep. Tr. 10/16/97 at 7-8.) Jones also alleges that following the incident, Deputy Superintendent Shannon denied him access to the law library after the May 15th Incident, stating that the law library "is a privilege" and that Jones was "not entitled to it." Id. at 9.

To the extent that Jones claims Shannon directed the officers to the cell, Jones does not allege that Shannon ordered the officers to strike Jones or harm him in any way. As noted above, Jones must demonstrate that the supervisor participated in the constitutional deprivation by giving an order or approving or

knowingly acquiescing in a subordinate's conduct. Gay v. Petsock, 917 F.2d 768, 771 (3d Cir. 1990). To the extent that Jones could possibly show Shannon ordered the guards to inflict excessive force upon Jones, the court will address the excessive force claims below.

To the extent that Jones claims he was denied access to the law library, there is no "abstract, free-standing right to a law library or legal assistance." Lewis v. Casey, 116 S. Ct. 2174, 2180 (1996). It is the right of access to courts which the Constitution guarantees. Id. Thus, Jones' claims as to the law library do not state a cause of action under 42 U.S.C. § 1983. The court will dismiss the claims against Shannon.

d. Correctional Officer Dean Harner[4]

Jones alleges that CO Harner was present at the May 15th Incident and engaged in the altercation. (Jones Dep. Tr. 10/16/97 at 15.) Jones alleges that CO Harner grabbed him and turned him around and then turned him toward the wall of the cell. Id. at 21-22. Jones states that CO Harner then pushed his head into the screen and kicked his ankles apart. Id. at 22. CO Harner and the other officers then left Jones handcuffed in the cell for about ten minutes.

These claims of excessive force will be analyzed under the Eighth Amendment. Eighth Amendment claims are governed by a

4. In Jones' deposition, he refers to CO Harner as "CO Horn." Id. at 25. However, Jones appears to reference CO Harner, not Commissioner Martin Horn.

two-part test containing subjective and objective elements. See Farmer v. Brennan, 511 U.S. 825, 834 (1994); Nami v. Fauver, 82 F.3d 63, 67 (3d Cir. 1996). Under the objective element, a plaintiff must demonstrate that the deprivation was sufficiently serious. Wilson v. Seiter, 501 U.S. 294, 298 (1991). Under the subjective element, a plaintiff must establish a culpable state of mind on the part of prison officials. Id. The description of CO Harner's activity describes only a de minimis use of force. De minimis use of force is not actionable unless it is "repugnant to the conscience of mankind." Hudson v. McMillian, 503 U.S. 1, 10 (1992). The actions described by Jones do not meet this standard. Thus, these claims do not rise to the level of a constitutional depravation. The court will dismiss the claims against CO Harner.

e. Lieutenant James Popson

Jones alleges that during the May 15th Incident, Lieutenant Popson directed several officers into his cell while Jones was handcuffed and standing. (Jones Dep. Tr. 10/16/97 at 11.) Popson then ordered Jones onto the bed, grabbed his neck and squeezed the handcuffs tighter for "a matter of seconds." Id. at 14. Jones further alleges that the other guards hit and punched him, poked him and twisted his legs while Popson pulled his arms back and squeezed the handcuffs. Id. at 15. Following the incident, Jones was examined at SCI-Frackville by Physician Assistant Michael Sims. Id. at 32-33; (Defs.' Mot. Summ. J. Ex. 2.) The record shows Sims examined Jones and found minor

abrasions on Jones' forehead and right hand and was prescribed Bacitracin and either Motrin or Tylenol. (Jones Dep. Tr. 10/16/97 at 32.); (Defs.' Mot. Summ. J. Ex. 2.) Jones also alleges he received some bruises from the incident, although they are not reflected in the medical report. (Jones Dep. Tr. 10/16/97 at 16.) In sum, Jones describes a restraint of his person on the bed, followed by removal of the handcuffs during which a struggle ensued resulting in minor injuries. The restraint of Jones does not rise to the sort of force that is "repugnant to the conscience of mankind." Hudson v. McMillian, 503 U.S. 1, 10 (1992). See, e.g., Collins v. Bopson, 816 F. Supp. 335, 340 (E.D. Pa. 1993)(finding guard's tight application of handcuffs and plaintiff's resistance causing abrasions on wrist was de minimis); Robinson v. Link, No. 92-4877, 1994 WL 463400, at *1 (E.D. Pa. Aug. 25, 1994)(holding that plaintiff being "placed in handcuffs, 'pulled' along the corridor by his handcuffs, and hit in the back" was de minimis); Brown v. Vaughn, No. 91-2911, 1992 WL 75008, at *1-2 (E.D. Pa. Mar. 31, 1992)(stating guard punching inmate in chest and spitting on him was de minimis). The court will dismiss the claims against Lieutenant Popson.

f. Sergeant Steven Yoder

Jones alleges that Sergeant Yoder was present at the May 15th Incident and was involved in the altercation. (Jones Dep. Tr. 10/16/97 at 16, 29-31.) The court will dismiss the claims against Sergeant Yoder because the court has determined

that the restraint of Jones in his cell did not rise to the level of a constitutional deprivation.

g. Unit Manager Russell Scheuren

Jones believes Unit Manager Scheuren was nearby during the May 15th Incident or aware of its occurrence. (Jones Dep. Tr. 10/16/97 at 17.) Jones also states that Scheuren denied his request for law library access and answered his request for the removal of a noise shield on his cell door with the response that Jones "knows why" he has the shield on the door. Id. at 18. Jones does not claim that Scheuren was in the cell during the May 15th Incident, nor does he claim Scheuren was one of the officers involved in the altercation. Id. at 20. To the extent that Jones alleges denial of access to the law library, the court has noted above that such an activity does not deprive a prisoner of a constitutional right. Lewis v. Casey, 116 S. Ct. 2174, 2180 (1996). While Jones alleges that Unit Manager Scheuren has knowledge of the altercation in Jones' cell, Jones does not allege that he ordered or participated in the May 15th Incident and therefore does not allege an actionable Eighth Amendment claim. The court will dismiss the claims against Unit Manager Scheuren.

h. Correctional Officer Daniel Murphy

Jones also alleges that CO Murphy entered his cell during the May 15th Incident and identified him to the officers present and then left the cell. Id. at 31. Jones alleges that following the May 15th Incident, CO Murphy withheld writing pens and toilet paper from him. Id. at 18-19. Jones also alleges one incident when CO Murphy delayed delivering toilet paper for much

of the day and then drew "smiley faces" on the toilet paper when it was delivered. Id. at 19. Jones also states that when he complained about the incident he received a misconduct the following day. Id. at 31.

To the extent that Jones alleges that CO Murphy directed the officers to engage in excessive force against him, the court has determined that the restraint of Jones in his cell did not rise to the level of a constitutional depravation. To the extent that he alleges verbal abuse, such abuse does not state a constitutional depravation. See, e.g., McLean v. Secor, 876 F. Supp. 695, 698 (E.D. Pa. 1995)("It is well established that verbal harassment or threats of the sort detailed above will not, without some reinforcing act accompanying them, state a constitutional claim"). To the extent that he alleges poor living conditions in his cell, the required state of mind is "deliberate indifference." Wilson v. Seiter, 501 U.S. 294, 303 (1991)(holding that claims challenging prison conditions must meet deliberate indifference standard). The term "deliberate indifference" means that "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). The denial of writing pens and the delay of delivery of toilet paper does not present an excessive risk to inmate health or safety. To the extent that Jones alleges that he has suffered false

allegations and misconducts, a prisoner has no constitutionally guaranteed protection from being falsely or wrongly accused of institutional misconduct. Bodge v. Zimmerman, No. 86-6051, 1988 WL 100749, at *5 (E.D. Pa. Sept. 23, 1988); Freeman v. Rideout, 808 F.2d 949, 951 (2d Cir. 1986), cert. denied, 485 U.S. 982 (1988). Therefore, the court will dismiss the claims against CO Murphy.

i. Correctional Officer Theodore Collier and Correctional Officer Sean Resendez

Jones names CO Collier and CO Resendez for alleged "name-callings" such as that Jones is "the great white story writer" and for warning others to "watch out" for Jones because he would sue them. (Jones Dep. Tr. 10/16/97 at 19, 26-27.) Jones also alleges that the two officers would bang their keys on his cell door when they walked by. Id. at 27. Jones also alleges that after he complained, CO Resendez issued a misconduct for possessing a controlled substance. Id. at 27, 29. Jones states the misconduct was dismissed on one count and he received a penalty for ten days on another. Id. at 29.

To the extent Jones alleges verbal abuse and banging on cell doors, the court has already noted that such harassment does not deprive Jones of a constitutional right. To the extent that Jones alleges that he has suffered false allegations and misconducts, the court has already concluded that a prisoner has no constitutionally guaranteed protection from being falsely or

wrongly accused of institutional misconduct. The court will dismiss the claims against CO Collier and CO Resendez.

j. Major John Kerestes

Jones names Major Kerestes because he called Jones a "racist, wanna be jailhouse lawyer" on June 18, 1997. (Jones Dep. Tr. 10/16/97 at 24-25.) The court will dismiss the claims against Major Kerestes because, as noted above, verbal abuse does not give rise to a constitutional claim.

3. Summary

Defendants have shown that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. Accordingly, the court will grant the motion for summary judgment.

B. Jones' Motion for an Injunction Regarding Medical Care

In addition to his Complaint, Jones has also filed a motion to compel Defendants to provide him with certain medical devices. Specifically, Jones alleges that he was not given proper support hose and shoe inserts to alleviate his leg and foot pain. Defendants have supplied an affidavit that Jones has in his possession medically approved stockings, insoles and arch supports. (Defs.' Response to Plf.'s Mot. for Preliminary Injunction Ex. 1.) In the context of Eighth Amendment claims alleging the failure to provide adequate medical care, the applicable state of mind is “deliberate indifference.” Wilson, 501 U.S. at 303. As noted above, the term “deliberate

indifference" means that "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference." Farmer, 511 U.S. at 837. While Jones may not be satisfied with the brand or style of the medical devices the prison has given him, Jones is unlikely to succeed on the merits of his claim that the prison officials are deliberately indifferent to a substantial risk of harm. See Durmer v. O'Carroll, 991 F.2d 64, 67 (3d Cir. 1993)(noting "prison authorities are accorded considerable latitude in the diagnosis and treatment of prisoners"). The court will deny the motion.

C. Jones' Additional Motions

Jones has filed and the court has reviewed a number of motions regarding various pretrial issues including appointment of counsel, discovery matters, the submission of trial exhibits and approval of trial witnesses. As to Jones' request for appointment of counsel, the court denied a previous request for counsel in its Memorandum Order dated November 25, 1997. The court finds no reason to alter its ruling in its November 25th Order and will deny the instant request for counsel for the same reasons as set forth in that previous Order. From the filings and papers submitted to the court, it appears that the issues raised in the remaining motions have either been resolved or are mooted by the court's holdings above. The court will deny the outstanding motions.

III. CONCLUSION

For the foregoing reasons, the court will grant the motion for summary judgment and will deny the remaining motions.

An appropriate Order follows.

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

JAMES JONES	:	CIVIL ACTION
v.	:	
COMMISSIONER MARTIN F. HORN, et al.	:	NO. 97-3921

ORDER

AND NOW, TO WIT, this 4th day of June, 1998, upon consideration of defendants' motion for summary judgment, plaintiff James Jones' ("Jones") motion for an injunction regarding medical care, Jones' numerous pretrial motions and the responses thereto, IT IS ORDERED that:

1. defendants' motion for summary judgment is GRANTED and Judgment is entered in favor of all defendants and against Jones;
2. Jones' motion for an injunction is DENIED;
3. Jones' request for counsel is DENIED; and
4. the remaining motions are DENIED.

LOUIS C. BECHTLE, J.