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

CURT THOMAS	:	CIVIL ACTION
v.	:	
DONALD VAUGHN, et al.	:	NO. 97-6929

MEMORANDUM AND ORDER

BECHTLE, J. SEPTEMBER , 1998

Presently before this court are defendants Donald Vaughn, Lieutenant John Geist, Corrections Officer Brad Hall, Corrections Officer William Caldwell, Corrections Officer Thomas Kerpovich and Corrections Officer Kevin Ransom's (collectively "Defendants") motion for summary judgment, Defendants' Supplemental Brief in support of their motion for summary judgment and plaintiff Curt Thomas's responses thereto. For the reasons set forth below, the court will grant Defendants' motion for summary judgment on Thomas's due process claims. On Thomas's section 1983 claims, the court will grant the motion for summary judgment with respect to Defendants Vaughn, Hall, Caldwell, Kerpovich and Ransom and will deny Defendants' motion for summary judgment with respect to Defendant Geist.

I. BACKGROUND

This is a pro se prisoner civil rights action against numerous officials and corrections officers at the State Correctional Institution at Graterford ("SCI-Graterford").

Defendants include: Superintendent Donald Vaughn ("Vaughn"), Lieutenant John Geist ("Geist"), Corrections Officer Brad Hall ("Hall"), Corrections Officer William Caldwell ("Caldwell"), Corrections Officer Thomas Kerpovich ("Kerpovich") and Corrections Officer Kevin Ransom ("Ransom"). Thomas, who is proceeding pro se and in forma pauperis, alleges in his Amended Complaint that Defendants violated his constitutional right to be free from cruel and unusual punishment by failing to protect him from an assault by another inmate.[1]

The following factual summary reflects Thomas's version of the evidence. On July 23, 1997, Thomas was taken to and housed at SCI-Graterford. (Thomas Dep. at 7.) In early August, Thomas was supposed to have been transferred from SCI-Graterford, but the transfer was canceled. Id. at 20-23. On August 27, 1997, inmate Antion Bell ("Bell") was transferred from the Special Management Unit of the State Correctional Institution at Greene ("SCI-Greene") and placed in the same cell with Thomas. Id. at 24. Also on August 27, 1997, Thomas alleges that Bell told three unnamed officers that he, Bell, was supposed to be single-celled because he had come from the Special Management Unit at SCI-Greene.[2] Id. at 30-31. Inmates generally are placed in single-

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

[2] These officers are not named defendants in this action.

cell status, or "Z-code" status, because they are assaultive or dangerous to their cell partners. (Geist Decl. ¶ 6.) Between August 27 and 31, 1997, Thomas alleges that Bell told his counselor, Chuck Bobb, that he was not supposed to have a cellmate. (Thomas Dep. at 40-41.) Thomas also alleges that Bell told Geist on two occasions that he was not supposed to have a cellmate. Id. at 44-45. On both occasions, Thomas alleges that Geist responded by saying he would "look into it."[3] Id. Thomas and Bell remained in the same cell until August 31, 1997.

On the morning of August 31, 1997, Thomas and Bell had a verbal argument. (Thomas Dep. at 60.) Thomas, however, alleges that his voice was loud enough so that others could hear, although he is unsure whether any corrections officers were near his cell while he was arguing loudly with Bell. Id. at 62-64. Thomas did not call for assistance or inform anyone of his problem with Bell. Id. at 63.

Eventually, Thomas's and Bell's argument escalated into a fight. Id. at 64. Bell used his fists, hands and feet to hit and kick Thomas in the head, face, side and ribs. Id. at 64-65. Bell also pulled Thomas's hair. Id. Thomas did not call for help neither during nor after this first fight. Id. at 65.

Later, Corrections Officers Hall, Caldwell, Kerpovich and Ransom approached Thomas's and Bell's cell to determine if they wished to go to the yard for exercise. Id. By this time, Thomas

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[3] Geist denies that such conversations took place. (Geist Decl. ¶ 6.)

and Bell were no longer fighting, and both stated they wished to go to the yard. Id.

Thomas did not inform Hall, Caldwell, Kerpovich or Ransom of his recent fight with Bell. Id. at 67. Thomas alleges that these officers should have known he wished to be separated from Bell because they should have known he fought with Bell. Id. Thomas alleges the officers should have seen that Thomas's eye was closed shut due to swelling and that he had a "big knot" on his forehead. Id.

In the yard, Thomas told Corrections Officer Stanley that he wanted to be separated from Bell.[4] Id. Stanley responded that Thomas would be separated from Bell and transferred to another cell. Id. at 68. Thomas stated that he should not have to leave the cell because he was there before Bell. Id. at 98. Thomas did not tell any other officers in the yard about his wish to be separated from Bell.

After an hour in the yard, Corrections Officers Hall, Caldwell, Kerpovich and Ransom returned Thomas to his cell. Id. at 72. Thomas realized he was returning to his same cell and that Bell was still in the cell. Id. at 73. Thomas asked Corrections Officers Hall, Caldwell, Kerpovich and Ransom why he was being put back into the cell with Bell. Id. at 73-74. The Corrections Officers responded by ordering Thomas into the cell. Id. Then one of the officers told Thomas to pack his things

[4] Corrections Officer Stanley is not a defendant in this case.

because he was moving to another cell. Id. at 77.

Thomas did not inform Corrections Officers Hall, Caldwell, Kerpovich or Ransom of his recent fight with Bell, nor did he inform them of his wish not to be in the same cell with Bell. Thomas, however, alleges that the officers should have recognized from Thomas's "gestures" that he did not want to go back into the cell with Bell. Id. at 75-76. Thomas also alleges the guards knew Bell would attack Thomas from the way Bell was pacing the cell. Id. at 76. Thomas further asserts that the guards knew Bell had been assaulting Thomas because one of the guards called him "lumpy." Id. at 92.

While Thomas was packing his things and the officers were "out of sight," Bell began beating on Thomas a second time. Id. at 78. This second fight lasted only a couple of minutes. When Bell heard Officer Nedab coming down the hall, Bell stopped hitting Thomas. Id. at 79.

Officer Nedab stood in front of Thomas's and Bell's cell to determine what had taken place.[5] Id. Bell then took Thomas's cigarettes from him. Id. Thomas defended himself by fighting with Bell. Id. at 79-80. This third fight lasted another couple of minutes until eight or nine corrections officers, including Hall, Caldwell, Kerpovich and Ransom, rushed in to break it up. Id. at 82. Thomas was then handcuffed and taken to the cell prepared for him as a result of his complaint to Officer Stanley.

[5] Officer Nedab is not a defendant in this case.

Id.

On August 31, 1997, after being transferred to his new cell, Thomas was immediately taken to the infirmary because his eye was closed shut, he had a knot on his head, he had a swollen nose and he was having respiratory problems. Id. at 83-84. X-rays were taken of his skull and right rib area. (Huhn Decl. ¶ 5.) Thomas's injuries included bruised ribs and a scratched eye. On September 4, 12, 23, October 2, 1997, and January 9, 1998, various doctors examined Thomas's forehead and rib cage, and prescribed Motrin and Naprosyn for pain. Id. On December 10, 1997, Dr. Morris diagnosed Thomas with a corneal abrasion and mild swelling of the soft tissue surrounding the right eye. Id. He prescribed medication and gave Thomas an eye patch. Id.

Thomas received a prison misconduct for failing to obey Officer Nedab's command to stop fighting with Bell. (Thomas Dep. 89-90.) Thomas was sentenced to thirty days in disciplinary custody. Id. at 90. Bell was sentenced to sixty days in disciplinary custody. Id. On September 10, 1997, Thomas was transferred to the State Correctional Institution at Greensburg. Id. at 90-91.

II. LEGAL STANDARD FOR SUMMARY JUDGMENT MOTIONS

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).

On a motion for summary judgment, the non-moving party has the burden to 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 its claim, the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 322-23.

III. DISCUSSION

The court will first address whether Defendants can be liable in their official capacities. The court will then address Thomas's section 1983 claims, and whether they are barred by section 1997e(e) of the Prison Litigation Reform Act. Last, the court will address Thomas's due process claims.

A. The Eleventh Amendment Bars Thomas's Claims Against Defendants in Their Official Capacities

The Eleventh Amendment immunizes state agencies and their employees acting within the scope of their official capacities from suit in federal court. Seminole Tribe of Florida v. Florida, 116 S. Ct. 114 (1996). This immunity may only be

removed by congressional abrogation or by state consent. Id. at 1122-23. Congress has not exercised its power to abrogate state sovereign immunity with respect to Thomas's claims. In addition, Pennsylvania has not waived its sovereign immunity by consenting to suit in the federal courts for Thomas's claims. See 42 Pa. Con. Stat. Ann. § 8521(b) (retaining sovereign immunity from suit in federal courts). Thus, the Eleventh Amendment bars all claims against Defendants in their official capacities.

B. Thomas's 42 U.S.C. § 1983 Claim

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 and supervisors 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. The remaining issue is whether Thomas has made a showing that Defendants deprived him of a federally secured right.

Thomas's claims that Defendants failed to protect him from an attack by his cellmate, Bell, fall under the Eighth Amendment. Prison officials have a duty under the Eighth Amendment to protect prisoners from violence at the hands of others. Farmer

v. Brennan, 511 U.S. 825, 833 (1994). Eighth Amendment claims are governed by a two-part test containing subjective and objective elements. Id. at 834; Nami v. Fauver, 82 F.3d 63, 67 (3d Cir. 1996). Under the objective element, Plaintiff must prove that the deprivation was sufficiently serious. Wilson v. Seiter, 501 U.S. 294, 298 (1991). Under the subjective element, Plaintiff must establish deliberate indifference on the part of prison officials. The term deliberate indifference means that "an official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless 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.

The Third Circuit recently stated that "to survive summary judgment on an Eighth Amendment claim asserted under 42 U.S.C. § 1983, a plaintiff is required to produce sufficient evidence of (1) a substantial risk of serious harm; (2) the defendants' deliberate indifference to that risk; and (3) causation." Hamilton v. Leavy, No. 95-7309, 1997 WL 356923, at *4 (3d Cir. June 30, 1997).

1. Substantial Risk of Harm

In assessing whether the risk of inmates being subjected to assaults by their cellmates is sufficiently serious to trigger constitutional protection, "the focus must be, not the extent of

the of the physical injuries sustained in an attack, but rather, the existence of a 'substantial risk of harm.'" Feliciano v. Goord, No. 97 Civ. 263(DLC), 1998 WL 436358, *5 (S.D.N.Y. July 27, 1998); see Farmer, 511 U.S. at 833 (quoting Hudson v. Palmer, 468 U.S. 517, 526 (1983)) ("Having incarcerated 'persons [with] demonstrated proclivit[ies] for antisocial criminal, and often, violent, conduct,' having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course."). Although a prisoner's injuries need not be significant, the Eighth Amendment does require the injury to be more than de minimis. Hudson v. McMillan, 503 U.S. 1, 9-10 (1992).

Here, Thomas was subjected to a substantial risk of serious harm. He was placed in a cell with Bell, a "Z-code" prisoner, someone who was supposed to be single-celled because he was assaultive or dangerous to other inmates. Further, Thomas's injuries are more than de minimis. Defendants argue Thomas's injuries were de minimis. In support, they cite cases involving injuries which lasted only a few days. See Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997)(stating that bruised ear lasting only three days was de minimis); Luong v. Hatt, 979 F. Supp. 481, 486 (N.D. Tex. 1997)(holding cuts, abrasions and scratches which went away in two or three days were de minimis). Here, Thomas sustained bruised ribs which caused pain weeks after the date they were sustained. In addition, Thomas was treated on

December 10, 1997, months after the August 31, 1997 fight, for blurred vision, tearing and twitching of the right eye. (Huhn Decl. ¶ 5.) These injuries were caused by a corneal abrasion and mild swelling of the right eye sustained on August 31, 1997. Id. The court finds that these types of injuries, which lasted weeks and even months after the alleged incident, are more than de minimis and are thus sufficient to trigger constitutional protection under the Eighth Amendment.

2. Deliberate Indifference

With respect to the subjective element of an Eighth Amendment analysis, Thomas's claims of Defendants' deliberate indifference will be examined separately as to each defendant.

a. Vaughn

A supervisor cannot be liable under § 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). The 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).

There is no evidence on the record that before August 31, 1997, Vaughn was ever personally aware that Thomas and Bell were cellmates, that they had problems, or that Bell was "Z-coded". (Thomas Dep. 46-48.); (Vaughn Decl. ¶ 2-4.) Nor is there evidence that Thomas ever informed Vaughn, by speech or in

writing, that Bell was “Z-coded” or that they had any problems. Id. Thomas's allegations that Vaughn should have known that Bell was supposed to be single-celled because of his supervisory position in the prison are insufficient to show any personal involvement or knowing acquiescence on the part of Vaughn.

b. Geist

There is a genuine issue of material fact with regard to Geist's knowledge and deliberate indifference toward Thomas. Thomas stated he heard Bell tell Geist on two different occasions that he was supposed to be single-celled, and that on each occasion Geist responded by saying he would look into it. However, Geist denies these conversations ever took place. Because there is conflicting evidence as to whether Geist had knowledge of Bell's “Z-code” status, summary judgment must be denied with respect to Defendant Geist.

Defendants argue that knowledge of an inmate's violent tendencies is insufficient to show deliberate indifference. In support, they cite Oetken v. Ault, 137 F.3d 613 (8th Cir. 1998). Oetken involved an Eighth Amendment claim against prison officials for failing to protect an inmate from assault by his cellmate. Id. at 613. The court held that evidence that the plaintiff's cellmate was transferred to the plaintiff's cell because he had been in a recent fight with another cellmate was insufficient to state an Eighth Amendment claim. Id. at 614. Evidence at trial showed that even after an inmate is involved in a fight, they are often double-celled due to shortages of cell-

space, but that care was taken to place the fighting inmate with someone with whom he had no history of problems. Id. The court also found there was no evidence at trial corroborating plaintiff's claim that he told corrections officers his cellmate posed a threat to him. Id.

Oetken is distinguishable from this case for two reasons. First, there is no evidence on the record here that "Z-coded" prisoners are sometimes double-celled. In fact, Geist stated in his declaration that had he known of Bell's "Z-code" status he would have separated Bell and Thomas. (Geist Decl. ¶ 5.) Second, Oetken was decided after a trial on the merits. As Thomas's claims are currently at the summary judgment stage, Thomas is not required to corroborate his claims that he heard Bell tell Geist on two occasions that Bell was "Z-coded." Thomas's statements in his deposition are sufficient to raise a genuine issue of material fact.

Defendants also cite Jacobs v. Arvonio, 1993 WL 285854 (D.N.J.), as persuasive authority. Jacobs also involved an inmate who was assaulted by his cellmate. Id. at *3. The plaintiff claimed that prison officials failed to protect him from harm by failing to properly classify his cellmate as a violent inmate. Id. at *5. The court rejected plaintiff's claim stating, "the allegation that prison officials incorrectly categorized his attacker does not, by itself, state a cause of action under section 1983. At most, plaintiff's claim sounds in negligence." Id.

Jacobs is also distinguishable from Thomas's claims. The issue here is not whether Defendants were negligent in failing to classify Bell as a violent inmate. Bell was already "Z-coded." Instead, the issue here is whether Geist knew of and consciously disregarded Bell's "Z-code" status, thus placing Thomas at a substantial risk of harm. Because there is a genuine issue of material fact as to Geist's state of mind the court will not grant summary judgment in his favor.

c. Hall, Caldwell, Kerpovich and Ransom

There is no genuine issue of material fact with respect to these Corrections Officers' deliberate indifference toward Thomas. There is no evidence on the record to support a claim that any of these Corrections Officers knew Bell was supposed to be single-celled. Thomas never expressly communicated to these guards that Bell was "Z-coded." These guards were not present at any time where Bell himself said that he was not supposed to have a cellmate.

There is also no evidence on the record to support a claim that these Corrections Officers knew Bell posed a threat to Thomas. Thomas asserts that these Corrections Officers "should have known" that Bell did assault and would again assault Thomas. Thomas points to his physical appearance after the first fight, the gestures he made when placed back into his cell with Bell, and the name ("lumpy") that one of the guards called him. The deliberate indifference standard, however, requires that an official actually know of an excessive risk. Farmer, 114 S. Ct.

at 1979. In that regard, no evidence on the record attributes actual knowledge to Hall, Caldwell, Kerpovich or Ransom. Thomas never communicated his fear of Bell to these Corrections Officers. Thomas never told these Corrections Officers of his desire to be separated from Bell. Thomas did not even report his fight with Bell to these Corrections Officers. In fact, Thomas's only communication with Hall, Caldwell, Kerpovich or Ransom was his question asking why he was returned to the cell with Bell. Without more, Thomas has failed to show the actual knowledge necessary to meet the Eighth Amendment's requirement of deliberate indifference.

3. Causation

Because only Thomas's claim against Geist raises a genuine issue of material fact, the court will only examine the issue of causation with respect to Geist. If Geist knew of Bell's "Z-code" status, then Geist also knew Bell posed a risk of harm to Thomas. If Geist failed to act to protect Thomas, he knowingly disregarded the risk that Bell would assault Thomas. Because Thomas suffered exactly the type of harm of which Geist may have been aware, the causation element of his § 1983 claim is satisfied.

C. 42 U.S.C. 1997e(e)

Under the Prisoner Litigation Reform Act ("PLRA"), "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior

showing of physical injury." 42 U.S.C. 1997e(e). Section 1997e(e) bars inmate claims for damages based purely on mental and emotional distress. Feliciano v. Goord, No. 97 Civ. 263(DLC), 1998 WL 436358, *5 n.4 (S.D.N.Y. July 27, 1998); Heisler v. Kralik, 981 F. Supp. 830, 837 n.3 (S.D.N.Y. 1997). Here, Thomas is seeking mental anguish and emotional damages, based at least in part on the physical injuries sustained from Bell's assault. As this claim is not based solely on emotional distress, § 1997e(e) is not a bar to Thomas's recovery.

D. Thomas's Due Process Claims

In his deposition, Thomas claimed his scheduled August, 1997 transfer to another prison should not have been canceled. To the extent that Thomas alleges this cancellation is a section 1983 claim for violation of his due process rights, his claim must fail. Due process does not protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Meachum v. Fano, 427 U.S. 215, 225 (1976).

Thomas also claims his due process rights were violated by Defendants at his disciplinary hearing for the fights on August, 31, 1997, because the hearing examiner denied without explanation Thomas's request for a witness.[6] These claims are insufficient

[6] In its Order of December 17, 1997, this court dismissed Thomas's due process claim against his hearing examiner, Mary Canino, as frivolous pursuant to 28 U.S.C. § 1915(e), stating, "[t]he Supreme Court has held that prison regulations on disciplinary confinement of inmates do not create a liberty interest enforceable under 42 U.S.C. § 1983." See Sandin v. Conner, 515 U.S. 472 (1995).

to withstand a summary judgment motion. A defendant in a civil rights action must have personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of respondeat superior. Parrat v. Taylor, 451 U.S. 527, 537 n.3 (1981). Thomas has failed to present the court with any evidence that any of the Defendants were personally involved in the hearing examiner's refusal to grant Thomas's witness request. The court will grant summary judgment in favor of all Defendants on these claims.

IV. CONCLUSION

For the foregoing reasons, the court will grant Defendants' motion for summary judgment on Thomas's due process claims. On Thomas's section 1983 claims, the court will grant the motion for summary judgment with respect to Defendants Vaughn, Hall, Caldwell, Kerpovich and Ransom, and will deny the motion for summary judgment with respect to Geist.

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DONALD VAUGHN, et al.	:	NO. 97-6929

ORDER

AND NOW, TO WIT, this th day of September, 1998, upon consideration of defendants' motion for summary judgment and supplemental brief in support of its motion for summary judgment, and plaintiff Curt Thomas's responses thereto, IT IS ORDERED that said motion is GRANTED IN PART and DENIED IN PART. Thomas's due process claims against all defendants are DISMISSED. Thomas's section 1983 claims are DISMISSED as to defendants Vaughn, Hall, Caldwell, Kerpovich and Ransom. Judgment is entered in favor of defendants Vaughn, Hall, Caldwell, Kerpovich and Ransom and against plaintiff Thomas. The motion for summary judgment is DENIED as to Thomas's section 1983 claim against defendant Geist.

LOUIS C. BECHTLE, J.