

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JESSE H. NICHOLSON, JR.,)
)
 Plaintiff,)
)
 v.) Civil Action No. 00-588-SLR
)
ROBERT SNYDER, WARDEN;)
JOSEPH DUDLEK, STAFF LT.;)
and JANICE HENRY, CPT.,)
)
 Defendants.)

Jesse H. Nicholson, Smyrna, Delaware. Pro se.

Robert F. Phillips, Deputy Attorney General, State of Delaware
Department of Justice, Wilmington, Delaware. Counsel for
Defendants.

MEMORANDUM OPINION

Dated: August 10, 2001
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff Jesse H. Nicholson, Jr. is a Delaware prison inmate housed at the Delaware Correctional Center in Smyrna, Delaware, and has been such at all times relevant to his claim. Plaintiff filed suit against defendant Snyder on June 19, 2000, alleging violations of his Fifth, Eighth, and Fourteenth Amendment rights. (D.I. 1) On September 18, 2000, plaintiff amended his complaint to include First, Fifth, Eighth, and Fourteenth Amendment claims against defendants Dudlek and Henry. (D.I. 11) Plaintiff's allegations stem from his suspension as an educational clerk following a positive test for marijuana. (D.I. 1, ¶ 4) The court previously denied plaintiff's motion for a "temporary restraining order, declaratory judgment, and injunction." (D.I. 6) Currently before the court is defendants' motion for summary judgment. (D.I. 25) For the reasons that follow, the court grants in part and denies in part defendants' motion.

II. BACKGROUND

While an inmate in the Delaware Correctional Center ("DCC"), plaintiff had been employed as an educational clerk for approximately five years. (D.I. 1, ¶ 3) On September 29, 1999, plaintiff tested positive for marijuana. (D.I. 26 at A-1) On October 20, 1999, plaintiff pled not guilty to a charge

of "use of intoxicants/non-prescribed drugs." (Id. at A-2-3)
The DCC conducted a disciplinary hearing on April 25, 2000,
and plaintiff changed his plea to guilty. (Id. at A-4-8)
Plaintiff was sentenced to fifteen days confinement to
quarters for the violation. (Id. at A-8) Plaintiff signed
the record of disciplinary hearing, marking the box labeled
"will not appeal." (Id.) The confinement to quarters was
scheduled to begin on May 29, 2000 and end on June 12, 2000.
(Id. at A-9)

On May 2, 2000, plaintiff again tested positive for
marijuana. (Id. at A-11) On May 4, 2000, plaintiff was
suspended from his job. (D.I. 1, ¶ 4) Sometime between May
4, 2000, and May 18, 2000, the DCC reclassified plaintiff at a
different security level, leading to his termination as an

educational clerk. (D.I. 26 at A-12-14)¹ Plaintiff then filed suit against defendant Snyder on June 19, 2000.

On August 14, 2000, the DCC staff attempted to again test plaintiff for drug use, but plaintiff refused. (D.I. 11, ¶ 5) Defendant Dudlek placed plaintiff in "isolation" or "administrative segregation" for refusing to obey an order. (D.I. 11, ¶ 6; D.I. 26 at A-15-16) Plaintiff submitted a urine sample on August 21, 2000 and was subsequently released to the general prison population. (D.I. 11, ¶ 11) On September 18, 2000, plaintiff amended his complaint to add defendants Dudlek and Henry² and the events surrounding the August 2000 drug test.

¹According to defendants, plaintiff should have been reclassified because of the September 1999 drug offense; however, the unit in charge of reclassification, the Multi-Disciplinary Team ("MDT"), was not notified about the positive drug test until May 1, 2000. (D.I. 26 at 3) At that time, the MDT decided to retest plaintiff for drug use and base any reclassification decision on the retest. Defendants provided a document entitled "Justification for Request/Change of Recommendation" to support that theory. (D.I. 26 at A-10) Plaintiff claims the document is "forged" and has filed a motion ordering defendants to produce the original. (D.I. 44, ¶ 5; D.I. 27) Since it is not clear to the court who the author of the document is, the court does not rely upon it. Plaintiff's "Motion for Authenticity" is, therefore, moot.

²Plaintiff alleges that "[d]efendant Henry's responsibility was to review plaintiff's isolation status and determine whether plaintiff should be released from isolation." (D.I. 11, ¶ 10)

Plaintiff contends that defendant Snyder violated his rights under the Due Process Clause when he reclassified plaintiff within the DCC to a higher security level, which resulted in the termination of his prison job. (D.I. 1, ¶ 11-13) Plaintiff further contends that by ordering a subsequent urine test and putting plaintiff in isolation for disobeying an order, defendants Dudlek and Henry retaliated against him for filing the complaint against defendant Snyder. (D.I. 11, ¶ 14-17)

III. STANDARD OF REVIEW

A court shall grant summary judgment only 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). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life

Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

IV. DISCUSSION

A. Failure to Exhaust Administrative Remedies

Defendants argue that plaintiff did not exhaust his administrative remedies prior to filing this action pursuant

to the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a).³ Before filing "a civil action with respect to prison conditions,"⁴ a plaintiff-inmate must exhaust his administrative remedies, even if the ultimate relief sought is not available through the administrative process. See Booth v. Churner, 206 F.3d 289, 294-95 (3d Cir. 2000), aff'd, 532 U.S. ___, 121 S. Ct. 1819 (2001).

Plaintiff argues that defendants' § 1997e(a) defense

must fail because there are no "available" administrative remedies to challenge plaintiff's arbitrarily [sic] job suspension and termination, as claimed by Congress, by leaving the word "available" in § 1997e(a) merely meant to convey that if a prisoner is provided with no internal remedies, exhaustion would not be required. Therefore, § 1997e(a) permits prisoners to pursue their claims directly in federal court.

³The PLRA provides, in pertinent part:

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

⁴The term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison. 18 U.S.C. § 3626(g)(2).

(D.I. 44, ¶ 3)

The Inmate Grievance Procedure established by the Delaware Department of Correction states that "[e]very inmate will be provided a timely, effective means of having issues brought to the attention of those who can offer administrative remedies before court petitions can be filed." DCC Policy 4.4 (revised April 15, 1997). With certain exceptions, DCC Policy 4.4, Part V provides for a three-tier system of review of inmate grievances. Initially, after a written grievance is submitted to the Inmate Grievance Chair ("IGC"), investigation into the matter will be initiated and informal resolution attempted. If informal resolution is unsuccessful, the Resident Grievance Committee ("RGC") will convene and a hearing will be held, culminating in a recommendation which is forwarded to the Warden or his designee ("Warden"). If the Warden and the grievant concur with the RGC recommendation, the IGC closes the file and monitors issues of compliance. If the parties do not concur, the matter is referred to the Bureau Grievance Officer ("BGO"), who reviews the file. If the BGO concurs with the Warden's decision and the Bureau Chief of Prisons accepts the BGO's recommendation, the IGC closes the file and monitors compliance. Alternatively, the

BGO can attempt mediation between the grievant and the Warden or recommend outside review of the matter.

The IGP procedures specifically exclude "issues concerning Disciplinary, Classification, and Parole decisions." (D.I. 25 at C-3) Because such decisions are made within their own administrative context with attendant procedures, the Department of Correction sensibly determined not to add another layer of procedures (those of the IGP) which potentially could yield inconsistent results, not to mention added administrative burdens.

Plaintiff claims that he was wrongfully reclassified to a higher security level which resulted in the loss of his prison job. Regardless of whether plaintiff was afforded the process due for classification decisions, such decisions are specifically excluded under the IGP. Therefore, the court will not dismiss the complaint for failure to exhaust administrative remedies.

B. Plaintiff's Constitutional Claims

Although defendants failed to articulate a PLRA defense, most of plaintiff's claims nevertheless fail because they do not state constitutional violations. Plaintiff's claims are

asserted under 42 U.S.C. § 1983.⁵ Section 1983 claims have two essential elements: (1) the conduct complained of must be committed by a person acting under color of state law; and (2) the conduct deprives a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. See Kost v. Kozakiewicz, 1 F.3d 176, 184 (3d Cir. 1993)(citing Parratt v. Taylor, 451 U.S. 527, 535 (1981), overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327 (1986)). Plaintiff's § 1983 allegations include violations of his First, Fifth, Eighth, and Fourteenth Amendment rights.

1. First Amendment Claims

Plaintiff's First Amendment claims are limited to defendants Dudlek and Henry. He alleges that defendants Dudlek and Henry "retaliated against the plaintiff for initiating this litigation against defendant Snyder. . . ."

⁵Section 1983 provides, in pertinent part:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

(D.I. 11 at 7) The only allegations plaintiff makes against defendants Dudlek and Henry revolve around plaintiff's being ordered to submit a urine sample for drug testing in August 2000 and then placing plaintiff in administrative segregation for refusing to provide the sample. The August 2000 drug test came two months after plaintiff filed suit against defendant Snyder.

Prisoners have a constitutional right to be free from retaliation for exercising their constitutional rights. See White v. Napoleon, 897 F.2d 103, 111 (3d Cir. 1990). "The Supreme Court has explicitly held that an individual has a viable claim against the government when he is able to prove that the government took action against him in retaliation for his exercise of First Amendment rights." Anderson v. Davila, 125 F.3d 148, 160 (3d Cir. 1997)(citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)).

Retaliation protection extends to complaints for which a person has no independent constitutional right. See Mt. Healthy, 429 U.S. at 283. Thus, even if plaintiff is not entitled to a prison job or a disciplinary hearing, defendants cannot discriminate against him for exercising his First Amendment rights. To state a retaliation claim, plaintiff would have to demonstrate: (1) that he engaged in protected

activity; (2) that the defendants responded with retaliation; and (3) that his protected activity was the cause of the retaliation. See Anderson, 125 F.3d at 161.

The only defense that defendants offer against plaintiff's First Amendment claim is the fact that defendant Snyder was not officially served with the complaint until October 13, 2000 – well after the August 2000 drug test was ordered; thus, Dudlek and Henry could not retaliate against Nicholson for something they did not know about. However, there is no record evidence to this effect. Indeed, there is a possibility that at least one of the defendants knew about the lawsuit before Snyder was officially served, as the certificate of service indicates that Snyder was given copies of the complaint and the motion for a temporary restraining order on June 19, 2000. (D.I. 2)

If defendants Dudlek and Henry did not know about the lawsuit against Snyder, they would be entitled to summary judgment on the issue of retaliation. However, the court cannot grant summary judgment based on pure speculation. The defendants have not responded to plaintiff's discovery requests. Absent any meaningful discovery on the issue, the court denies defendants' motion for summary judgment on the First Amendment claim.

2. Fifth and Fourteenth Amendment Claims

Plaintiff alleges that defendant Snyder deprived plaintiff of due process of law by suspending him from his job without a disciplinary referral report or incident report. (D.I. 1 at 5) Plaintiff likewise alleges due process violations against defendants Dudlek and Henry for allegedly putting plaintiff in isolation for no reason and without a hearing.

Evaluating a due process claim first requires determining whether the alleged violation implicates a constitutionally protected property or liberty interest. See Sandin v. Conner, 515 U.S. 472 (1995). "Liberty interests protected by the Fourteenth Amendment may arise from two sources – the Due Process Clause itself and the laws of the States." Hewitt v. Helms, 459 U.S. 460, 466 (1983). With regard to prison inmates, states may create protected liberty interests, however,

these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Sandin, 515 U.S. at 484 (internal citations omitted).

In evaluating plaintiff's due process claim, "the court is directed to look first to the nature of the sanction" to determine whether it constitutes an "atypical and significant hardship." Chapman v. Dudlek, No. 95-73-SLR, 1997 WL 309442, at *3 (D. Del. April 18, 1997). If the sanction rises to such a level, "the court must then review the relevant procedure to determine its sufficiency under the Due Process Clause." Id.

Plaintiff alleges that his placement in isolation without a hearing violated his due process rights. However, neither Delaware law nor DCC regulations create a liberty interest in a prisoner's classification within an institution. See 11 Del. C. § 6529(e).⁶ Furthermore, the Supreme Court in Hewitt held that "[a]s long as the conditions or degree of confinement to which [a] prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to

⁶Section 6529(e) provides:

Nothing in this chapter shall be construed to require the Department to institute or maintain any system of classification of convicted persons for the purpose of assignment to institutions or housing units within institutions. However, the Department may, at its discretion, institute or maintain any such system at any or all of its institutions.

11 Del. C. § 6529(e).

judicial oversight.'" Hewitt, 459 U.S. at 468 (quoting Montanye v. Haymes, 427 U.S. 236, 242 (1976)). Thus, the transfer of a prisoner from one classification to another has been found to be unprotected by "'the Due Process Clause in and of itself,'" even though the change in status involves a significant modification in conditions of confinement.

Hewitt, 459 U.S. at 468 (citation omitted); Moody v. Daggett, 429 U.S. 78 (1976); see also Lott v. Arroyo, 785 F. Supp. 508, 509 (E.D. Pa. 1991) (holding that plaintiff transferred from group home to correctional facility had no constitutionally enforceable right to participate in work release program); Brown v. Cunningham, 730 F. Supp. 612 (D. Del. 1990) (stating that plaintiff's transfer from general population to administrative segregation, without being given notice and opportunity to challenge it, was not violation of plaintiff's liberty interest). Accordingly, defendants' decision to place plaintiff in isolation cannot be viewed as falling outside the scope of "the sentence imposed upon him [or] otherwise violative of the Constitution." There is no indication of record that plaintiff's placement in isolation imposed an "atypical or significant hardship on [him] in relation to the ordinary incidents of prison life" so as to impinge upon his protected liberty interests.

Likewise, neither Delaware law nor any other authority creates a liberty interest in the right to participate in a work or education program. See James v. Quinlan, 866 F.2d 627, 629-30 (3d Cir. 1989). Therefore, plaintiff cannot prevail on a claim for violation of a liberty interest created by the due process clause or State law. To the extent that plaintiff alleges due process violations, the court grants defendants' motion for summary judgment.

3. Eighth Amendment Claims

Plaintiff's complaint also includes allegations of Eighth Amendment violations, which are presumably complaints that the defendants subjected him to cruel and unusual punishment. In evaluating plaintiff's Eighth Amendment claim, the court recognizes that "'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.'" Farmer v. Brennan, 511 U.S. 825, 832 (1994) (quoting Helling v. McKinney, 509 U.S. 25, 31 (1993)). To establish a cognizable Eighth Amendment claim, a prisoner-plaintiff must demonstrate: (1) that the deprivation was sufficiently serious, i.e., objectively harmful enough to establish a constitutional violation; and (2) that the prison official acted with a sufficiently culpable state of mind, i.e., deliberate indifference. See Hudson v. McMillian, 503 U.S. 1, 5-6 (1992).

Plaintiff does not allege that, while in isolation, he was denied basic human needs, such as food, clothing, shelter, sanitation, medical care, and personal safety. Absent such allegations that he has been deprived of "the minimal civilized measure of life's necessities," plaintiff has failed to raise a genuine issue of material fact as to whether his confinement was cruel and unusual punishment. See Griffin v. Vaughn, 112 F.3d 703, 709 (3d Cir. 1997)(quoting Young v. Quinlan, 960 F.2d 351, 359 (3d Cir. 1992)). Thus, defendants' motion for summary judgment is granted regarding any alleged Eighth Amendment violations.

C. Defendants' Immunity Defenses

The defendants assert that they are shielded from liability pursuant to the doctrines of Eleventh Amendment, sovereign, and qualified immunity.⁷

1. Eleventh Amendment and Sovereign Immunity

State officials are entitled to sovereign and Eleventh Amendment immunity for money damages in their official capacities. See Hafer v. Melo, 502 U.S. 21 (1991); Corey v. White, 457 U.S. 85 (1982); Harlow v. Fitzgerald, 457 U.S. 800 (1982); Edelman v. Jordan, 415 U.S. 651 (1974); Osprina v.

⁷Defendant Snyder also seeks summary judgment based on his lack of personal involvement. Since the only remaining claim is plaintiff's First Amendment retaliation claim, and since plaintiff makes no First Amendment allegations against defendant Snyder, the court need not reach this question.

Dep't of Corrs., State of Del., 749 F. Supp. 572 (D. Del. 1990). "[T]he Supreme Court has held that neither a State nor its officials acting in their official capacities are 'persons' under § 1983." Osprina, 749 F. Supp. at 577 (citing Will v. Mich. Dep't. of State Police, 491 U.S. 58, 71 (1989)).

Plaintiff's complaint seeks compensatory, punitive and injunctive relief. To the extent that plaintiff seeks money damages against the defendants in their official capacity, defendants' motion for summary judgment is granted.

2. Qualified Immunity

Defendants Dudlek and Henry are "persons" within the meaning of § 1983. As correctional officers, however, defendants presumptively enjoy qualified immunity for actions taken within the scope of their discretionary authority. Nevertheless, this immunity is not absolute because of the public's interest in deterring government officials from unreasonably invading or violating individual rights. See Anderson v. Creighton, 483 U.S. 635, 639 (1987).

Whether qualified immunity exists is a question of law for the court. See Orsatti v. N.J. State Police, 71 F.3d 480, 483 (3d Cir. 1995). A jury, however, should decide any disputed factual issues relevant to that determination. See Karnes v. Skrutski, 62 F.3d 485, 491-92 (3d Cir. 1995); Wiers v. Barnes, 925 F. Supp. 1079, 1086 (D. Del. 1996). The United

States Supreme Court set forth the test for qualified immunity in Harlow v. Fitzgerald, 457 U.S. 800 (1982). In Harlow, the Court ruled that government officials performing discretionary functions generally enjoy qualified immunity from liability unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818.

Plaintiff alleges that defendants violated his constitutional right to seek redress in the courts. Without any meaningful discovery on the issue, the court is unable to conclude that the defendants acted in good faith in the performance of their discretionary duties. Thus, to the extent that plaintiff seeks injunctive relief against defendants or compensatory relief against the defendants in their individual capacities, defendants' motion for summary judgment is denied.

V. CONCLUSION

For the foregoing reasons, the court grants in part and denies in part defendants' motion for summary judgment. The complaint against defendant Snyder is dismissed in its entirety. Plaintiff's Fifth, Eighth, and Fourteenth Amendment claims against defendants Dudlek and Henry are dismissed. With respect to the remaining First Amendment claim, plaintiff's claims are dismissed to the extent that he seeks

damages against the remaining defendants in their official capacities.

Although plaintiff's complaint that he was unconstitutionally deprived of his prison job and placed in isolation is without merit, the defendants failed to meet their burden of proof with respect to the First Amendment retaliation claim. Plaintiff shall be entitled to discovery on that issue. An appropriate order shall issue.