

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MICHAEL W. ROBERTS,)
)
 Plaintiff,)
)
 v.) Civil Action No. 00-742-SLR
)
 ROBERT E. SNYDER, ROBERT GEORGE,)
 CPT. OETTEL, SGT. LARSON, and)
 SGT. BAULL,)
)
 Defendants.)

MEMORANDUM AND ORDER

Plaintiff Michael W. Roberts is a pro se litigant who is presently incarcerated at the Delaware Correctional Center located in Smyrna, Delaware. His SBI number is 304536. He filed this action pursuant to 42 U.S.C. § 1983 and requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

I. STANDARD OF REVIEW

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331. Reviewing complaints filed pursuant to 28 U.S.C. § 1915 is a two step process. First, the Court must determine whether the plaintiff is eligible for pauper status. On August 10, 2000, the Court granted plaintiff leave to proceed in forma pauperis. On September 7, 2000, the Court ordered plaintiff to pay, within thirty days, an initial partial filing fee of \$.33. Plaintiff paid the initial partial filing fee on October 3, 2000.

Once the pauper determination is made, the Court must then determine whether the action is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant immune from such relief pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b)(1).¹ If the Court finds the plaintiff's complaint falls under any one of the exclusions listed in the statutes, then the Court must dismiss the complaint.

When reviewing complaints pursuant to 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A(b)(1), the Court must apply the Fed. R. Civ. P. 12(b)(6) standard of review. See Neal v. Pennsylvania Board of Probation and Parole, No. 96-7923 1997 WL 338838 (E.D. Pa. June 19, 1997)(applying Rule 12(b)(6) standard as appropriate standard for dismissing claim under § 1915A). Accordingly, the Court must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996). Pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers and can only be

¹ These two statutes work in conjunction. Section 1915(e)(2)(B) authorizes the court to dismiss an in forma pauperis complaint at any time, if the court finds the complaint is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant immune from such relief. Section 1915A(a) requires the court to screen prisoner in forma pauperis complaints seeking redress from governmental entities, officers or employees before docketing, if feasible and to dismiss those complaints falling under the categories listed in § 1915A (b)(1).

dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Estelle v. Gamble, 429 U.S. 97, 106 (1976) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

The standard for determining whether an action is frivolous is well established. The Supreme Court has explained that a complaint is frivolous "where it lacks an arguable basis either in law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989).² As discussed below, plaintiff's claims have no arguable basis in law or fact. Therefore, his complaint shall be dismissed as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A(b)(1).

II. DISCUSSION

A. The Complaint

1. The Amendments

Plaintiff initially filed this complaint against Robert Snyder, Robert George, Captain Nettles and Sergeant Larson. On August 28, 2000, plaintiff filed a motion to amend the complaint to correct the spelling of defendant "Nettel's" name to

² Neitzke applied § 1915(d) prior to the enactment of the Prisoner Litigation Reform Act of 1995 (PLRA). Section 1915 (e)(2)(B) is the re-designation of the former § 1915(d) under the PLRA. Therefore, cases addressing the meaning of frivolousness under the prior section remain applicable. See § 804 of the PLRA, Pub.L.No. 14-134, 110 Stat. 1321 (April 26, 1996).

"Oettel."³ "After amending once or after an answer has been filed, the plaintiff may amend only with leave of the court or the written consent of the opposing party, but 'leave shall be freely given when justice so requires.'" Shane v. Fauver, 23 F.3d 113, 115 (3d Cir.2000) (quoting Fed. R. Civ. P. 15(a)). The Court shall grant plaintiff's motion and enter an order directing the clerk to amend the caption of the complaint.

On September 18, 2000 plaintiff filed his third "Motion for Amending 1983 Complaint," requesting leave to add Lt. Baull as a defendant. Plaintiff alleges that as the "head of the classification department," Lt. Baull is a necessary party to the complaint. (D.I. 11) The Court shall grant plaintiff's motion and enter an order directing the clerk to amend the caption of the complaint. The Court will also consider plaintiff's allegations regarding Lt. Baull when making its decision in this matter.

2. The Allegations

Plaintiff raises what appears to be several unrelated claims in his complaint. First, plaintiff alleges that on October 9, 1996, he was sentenced to four (4) years at level V

³ On August 15, 2000 plaintiff filed his first "Motion for Amending Complaint" identifying "John Doe" as inmate Darren Waip. (D.I. 5) Under Fed. R. Civ. P. 15(a) plaintiff may amend the complaint once as a matter of course at any time before a responsive pleading is served. As this case has not been served on the defendants, the Court construes the first "Motion for Amending Complaint" (D.I. 5) simply as plaintiff's amended complaint.

followed by six (6) months of in-patient drug abuse treatment and that he was to be held at level V until bed space became available. Plaintiff next alleges that on March 17, 2000, defendant Snyder approved plaintiff's transfer to the "V.O.P.U. Bld. for probations [sic]." (D.I. 2 at 3) Plaintiff alleges that as the head of classification, Lt. Baull is responsible for "following sentence [sic] order imposed by the Honorable Judge: Mr. William C. Carpenter Jr." (D.I. 11) Plaintiff further alleges that Lt. Baull is responsible for plaintiff being illegally held at Level V from March 17, 2000 until June 11, 2000. Id.

Plaintiff's next claim appears to be that defendant Larson failed to protect him from an assault. Plaintiff alleges that sometime in May 2000, he had a confrontation with inmates Chris Nester, DeShawn Harris and Allen Simms. Plaintiff admits that he pushed Chris Nester and, therefore, was subject to disciplinary charges. (D.I. 2 at 6) Plaintiff alleges that he asked not to be placed in the disciplinary housing unit because inmate Harris's brother was also housed there. Despite his protests, defendant Larson placed plaintiff in the disciplinary housing unit. Plaintiff alleges that as soon as defendant Larson left the area, inmate Harris's brother Michael approached him with several other inmates and "verbally assaulted [sic] me until I was struck about my face by Michael Harris." (D.I. 2 at 7) Plaintiff alleges that after this incident, he asked to be placed

in protective custody. In response to his request, plaintiff alleges that he was placed in a holding cell for five (5) days, "without a shower and proper meals." (D.I. 2 at 8) Plaintiff appears to contend that he was subjected to cruel and unusual punishment during this five day period.

Plaintiff further alleges that on May 10, 2000, he spoke with defendants George and Oettel and "begged" to be placed in protective custody because he was in fear for his life. (D.I. 2 at 8) Plaintiff alleges that he informed these defendants that, "[t]here were always rumors about me being gay and my abilities to function was always one of embarrassed and uneasy, forcing me to accept humiliation from the entire staff as well as my peers." (D.I. 2 at 7) In response to his request, plaintiff was placed in a different housing area. On June 12, 2000, however, plaintiff alleges that he was subject to a second assault under the following circumstances: He and Darren Waip were negotiating a price for cigarettes "because ciggerettes [sic] are prohibited at the V.O.P.U. Bld.," when Waip threatened to report him. Plaintiff alleges that Waip slapped him, but goes on to admit that, "when I finally came out of the bath area I noticed [Waip] putting on his boots as if he wanted to still fight and he scared me because it was only a reaction when I slapped him twice in the facial area." (D.I. 2 at 8) Plaintiff alleges that defendants George and Oettel were deliberately indifferent to his safety and failed to protect him from this

assault.

Plaintiff requests "compensatory damages for mental anguish, emotional distress, [and] personal humiliation in the amount of \$35,000." Plaintiff also requests \$10,000.00 in punitive damages from each defendant. Finally, plaintiff requests that all disciplinary charges incurred during his confinement in the V.O.P.U. building be removed from his records. (D.I. 2 at 3) On August 28, 2000, plaintiff filed a motion for appointment of counsel. Because the Court finds that plaintiff's complaint is frivolous, his motion for appointment of counsel is moot.

B. Analysis

1. Plaintiff's Due Process Claim

Plaintiff alleges that both defendants Snyder and Baull are responsible for holding him illegally at Level V from March 17, 2000 to June 11, 2000. Plaintiff's sentence included six months of drug and alcohol abuse treatment at Level IV. However, plaintiff was "*to be held at Level V until bed space becomes available.*" (D.I. 2 at 3)(emphasis added). Although plaintiff couches this claim in terms of illegal confinement, in essence, he is claiming that his classification to the V.O.P.U. building violated his due process rights under the Fourteenth Amendment.

Analysis of plaintiff's due process claim begins with determining whether a constitutionally protected liberty interest

exists. Sandin v. Connor, 515 U.S. 472 (1995); Hewitt v. Helms, 459 U.S. 460 (1983). "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. at 466.

The Supreme Court has explained that liberty interests protected by the Due Process Clause are limited to "freedom from restraint" which imposes "atypical and significant hardship in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. at 483-84. Plaintiff's placement in the V.O.P.U. building is "within the normal limits or range of custody [his] conviction authorizes the State to impose."⁴ Meachum v. Fano, 427 U.S. 215, 225 (1976). At the time plaintiff was classified to the V.O.P.U. building, his sentence of four (4) years at Level V had not yet expired.

Furthermore, this Court has repeatedly determined that the Department of Correction statutes and regulations do not provide prisoners with liberty or property interests protected by the Due Process Clause. Jackson v. Brewington-Carr, No. 97-270, 1999 U.S. Dist. LEXIS 535 (D. Del. Jan. 15, 1999) (holding that statutes and regulations governing Delaware prison system do not provide inmates with liberty interest in remaining free from

⁴ The "V.O.P.U" building houses both prisoners sentenced to Level V custody, and prisoners sentenced to Level IV, work release. It appears that plaintiff was housed in the Level V section of this facility from March 17, 2000 until June 11, 2000.

administrative segregation or from a particular classification); Carrigan v. State of Delaware, 957 F.Supp. 1376 (D. Del. 1997) (holding that prisoner has no constitutionally protected interest in a particular classification); Abdul-Akbar v. Dept. of Correction, 910 F.Supp. 986 (D. Del. 1995) (holding that inmates have no "legitimate entitlement" to employment or rehabilitation). Plaintiff's claim that the defendants Snyder and Baull violated his right to due process has no arguable basis in law. Therefore, plaintiff's Fourteenth Amendment due process claim against defendants Snyder and Baull is frivolous and shall be dismissed pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1).

2. Plaintiff's Eighth Amendment Claims

a) Failure to Protect

Plaintiff presents two separate failure to protect claims. First, plaintiff alleges that defendant Larson failed to protect him from Michael Harris. Second, plaintiff alleges that defendants George and Oettel failed to protect him from Darren Waip.

In order to state a claim under § 1983 against prison officials for failure to adequately protect, the plaintiff must demonstrate: 1) that he is "incarcerated under conditions posing a substantial risk of serious harm"; and 2) that the officials were deliberately indifferent to the risk of harm. Hamilton v.

Leavy, 117 F.3d 742, 746 (3d Cir. 1997) (quoting Farmer v. Brennan, 511 U.S. 825, 834 (1994)); Carrigan v. State of Delaware, 957 F.Supp. at 1381-82. Deliberate indifference requires that prison officials know of and disregard an excessive risk of harm. Id.

In this case, plaintiff's description of his confrontation with Chris Nester and his subsequent confrontation with Michael Harris indicates that there was no risk of "serious" harm involved. Plaintiff does not allege that he was threatened by either DeShawn or Michael Harris before the confrontation. Plaintiff requested protective custody simply because he knew Michael Harris was confined in the disciplinary housing unit. As soon as plaintiff notified the correctional officers on duty that Michael Harris had slapped him, both he and Michael Harris were separated. Defendant Larson was not deliberately indifferent to any risk of serious harm to plaintiff. Hamilton, 117 F.3d at 746. Plaintiff's claim against defendant Larson has no arguable basis in law or in fact. Therefore, plaintiff's Eighth Amendment failure to protect claim against defendant Larson is frivolous and shall be dismissed pursuant to §§ 1915 (e)(2)(B) and 1915A (b)(1).

Plaintiff's claim against defendants George and Oettel must also fail. Plaintiff alleges that these defendants should have known he was in danger because of the rumors about him. In response to plaintiff's concerns, the defendants moved him to a

different housing area. Plaintiff never told either defendant that he was afraid of any specific person. By moving plaintiff to a different housing area, both defendant George and defendant Oettel acted reasonably in response to plaintiff's request. Plaintiff's subsequent exchange with inmate Waip had nothing to do with the rumors about plaintiff. Rather, it was the result of a disagreement about the price of cigarettes. Neither defendant George nor defendant Oettel could have reasonably anticipated this turn of events based on plaintiff's reasons for requesting protective custody. "If a prison official responds reasonably to a risk to an inmate's safety, he or she cannot be found to have acted with a sufficiently culpable state of mind." Hamilton, 117 F.3d at 747. Plaintiff's claim against defendants George and Oettel has no arguable basis in law or in fact. Therefore, plaintiff's Eighth Amendment failure to protect claim against defendants, George and Oettel is frivolous and shall be dismissed pursuant to §§ 1915 (e)(2)(B) and 1915A (b)(1).

b) Living Conditions

Plaintiff alleges that after the incident with Michael Harris, plaintiff was held in a holding cell for five days "without a shower or proper meals." (D.I. 2 at 8) "It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." Helling v. McKinney, 509 U.S. 25,

32 (1993). In order to prove that being placed in a holding cell for five days without a shower or "proper" meals violates the Eighth Amendment, plaintiff must satisfy a two-prong test: (1) objectively, the deprivations must be sufficiently serious; and (2) subjectively, the defendant must evince a "deliberate indifference" to the inmate's health or safety. Farmer v. Brennan, 511 U.S. 825, 834 (1994) (citing Wilson v. Seiter, 501 U.S. 294 (1991)). Serious harm will be found only when the conditions of confinement "have a mutually enforcing effect that produces the deprivation of a single identifiable human need such as food, warmth, or exercise[.]" Blizzard v. Watson, 892 F.Supp. 587, 598 (D. Del. 1995) (citing Wilson v. Seiter, 501 U.S. at 303-304).

In this case, plaintiff alleges that he was not allowed to shower for five (5) days. This short duration did not deprive plaintiff of the "minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981); See Smith v. Matty, No. 86-4664, 1986 U.S. Dist. WL 118225 (E.D. Pa. Oct. 22, 1986)(denying plaintiff access to a shower over a four day period "is not of constitutional merit, assuming hygienic conditions were minimally adequate."). Plaintiff also alleges that he was denied "proper" food. While plaintiff has not explained what he means by "proper" food, it appears that he was not denied all food. The Eighth Amendment prohibition against cruel and unusual punishment requires that prisoners be provided

nutritionally adequate food. Robles v. Coughlin, 725 F.2d 12, 15 (2d Cir. 1983). Plaintiff has not alleged that the food was not nutritionally adequate. Nor has plaintiff alleged that he suffered any ill health as a consequence. The Court concludes that plaintiff has failed to allege deprivations sufficiently serious to satisfy the objective component of the two-prong test. Consequently, the Court need not address potential deficiencies in plaintiff's allegations regarding the subjective component. Plaintiff's claim that his conditions of confinement violated his Eighth Amendment right to be free from cruel and unusual punishment has no arguable basis in law or in fact and shall be dismissed pursuant to §§ 1915 (e)(2)(B) and 1915A (b)(1).

NOW THEREFORE, IT IS HEREBY ORDERED this 27th day of March, 2001, that:

1) Plaintiff's motion to amend the complaint (D.I. 10) is granted. The Clerk shall amend the caption to reflect the corrected spelling of defendant Oettel's name.

2) Plaintiff's motion to amend the complaint (D.I. 11) is granted. The Clerk shall add Lt. Baull as a defendant in the caption.

3) Plaintiff's complaint is dismissed as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1).

4) Plaintiff's motion for appointment of counsel (D.I. 9) is moot.

5) The Clerk shall mail a copy of the Court's Order to

the plaintiff.

United States District Judge