

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT J. MASON,)
)
 Plaintiff,)
)
 v.) Civil Action No. 01-630-SLR
)
 RICHARD KEARNEY, CORRECTIONAL)
 MEDICAL SERVICES, and RANDY)
 PARKER,)
)
 Defendants.)

MEMORANDUM ORDER

Plaintiff Robert J. Mason, SBI #179702, a pro se litigant, is presently incarcerated at the Sussex Correctional Institution ("SCI") located in Georgetown, Delaware. Plaintiff 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 plaintiff is eligible for pauper status. On September 18, 2001, the court granted plaintiff leave to proceed in forma pauperis and ordered him to pay \$7.00 as an initial partial filing fee within thirty days from the date the order was sent. Plaintiff paid \$7.00 on September 27, 2001.

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)-1915A(b)(1).¹ If the court finds plaintiff's complaint falls under any 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)-1915A(b)(1), the court must apply the standard of review set forth in Fed. R. Civ. P. 12(b)(6). See Neal v. Pennsylvania Bd. 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 dismissed for failure to state a claim if it appears

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 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).

'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 in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989).² As discussed below, plaintiff's Fourteenth Amendment, due process claim has no arguable basis in law or in fact, and shall be dismissed as frivolous pursuant to 28 U.S.C. §§ 1915(e) (2) (B)-1915A(b) (1). However, plaintiff's Eighth Amendment claims are not frivolous within the meaning of 28 U.S.C. §§ 1915(e) (2) (B)-1915A(b) (1).

II. DISCUSSION

A. The Complaint

Plaintiff raises both Eighth and Fourteenth Amendment claims in his complaint. First, plaintiff alleges that he was punished for refusing to participate in the Key Program by being placed in isolation for 10 days and losing privileges for 80 days. (D.I. 2

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).

at 4) Next, plaintiff alleges that the inmate co-ordinators in the Key Program are abusive. Furthermore, plaintiff alleges that defendant Parker has "instructed the inmates in authority to abuse him and other inmates." (D.I. 5 at 2) Specifically, plaintiff alleges that he was forced to "sit tight for long periods of time to the point that I developed hemorrhoids, or if I wasn't sitting I was standing tight for long periods to the point that my limbs went numb." (Id.) He further alleges that on several occasions he was forced to put on "3 pair of clothes at once[,] including a hat and coat[,] and was forced to run up and down the steps many times to the point that I almost passed out from exhaustion." (Id.) Finally, he alleges that he was never allowed to sleep more than four or five hours per night. (Id.) Plaintiff requests that the court suspend his sentence and enjoin the defendants from forcing him into the Key Program and/or sanctioning him if he refuses to participate. (Id. at 3) He also requests that the court award him "open monetary damages." (Id.)

B. The "Motion for Summary Judgment by Default"

On March 28, 2002, plaintiff filed a "Motion for Summary Judgment by Default" because the defendants "have refused to answer" the complaint. (D.I. 5) However, the defendants are not required to answer the complaint until properly served. See Fed. R. Civ. P. 4. As this is an in forma pauperis case subject to

screening under 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1), the court has not yet directed the United States Marshal to serve the complaint. To the extent that plaintiff is requesting the court to enter a default judgment, his motion shall be denied.

However, the plaintiff has also included additional allegations in the motion. The court, therefore, also construes this motion as an amended complaint pursuant to Fed. R. Civ. P. 15(a). On May 5, 2002, plaintiff filed a "Writ of Mandamus" requesting that the court rule on his motion. (D.I. 6) Plaintiff's "Writ" is denied as moot.

C. Analysis

1. Plaintiff's Requested Habeas Corpus Relief

Plaintiff appears to be alleging that his sentence was unconstitutional because he was forced to attend the Key Program or spend "many more years in prison." (D.I. 2 at 3) Plaintiff requests that this court issue an order suspending his current sentence. (Id.) To the extent that plaintiff is challenging the duration of his sentence, his sole federal remedy is by way of habeas corpus. See Preiser v. Rodriguez, 411 U.S. 475 (1973). Furthermore, plaintiff cannot request relief under § 1983, unless he proves that the sentence he is challenging has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of

habeas corpus. See Heck v. Humphrey, 512 U.S. 477, 487 (1994). In this case, plaintiff has not proved that his sentence was reversed or invalidated by any means required under Heck. Consequently, plaintiff's claim that his sentence is unconstitutional has no arguable basis in law or in fact. Therefore, to the extent that plaintiff is challenging his sentence, the court shall dismiss plaintiff's claim as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1). However, such dismissal shall be without prejudice to plaintiff's filing a petition for writ of habeas corpus.

2. Plaintiff's Fourteenth Amendment Claim

Plaintiff alleges that he was punished for quitting the Key Program and that such punishment violates his rights under the Fourteenth Amendment Due Process Clause. Plaintiff requests that the court enjoin the defendants from forcing him to participate in the Key Program and from disciplining him for refusing to participate in the Key Program. Analysis of plaintiff's due process claim begins with determining whether a constitutionally protected liberty interest exists. See 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 an "atypical and significant hardship in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. at 483-84. Segregation for a period of 10 days and loss of privileges "falls within the expected parameters of the sentence imposed by a court of law." Id. at 485. Furthermore, the type of sanction plaintiff received, "by itself, is not sufficient to create a liberty interest, and [plaintiff] does not claim that another constitutional right (such as access to the courts) was violated." Smith v. Mensinger, 293 F.3d 641, 653 (3d Cir. 2002). Therefore, the court concludes that plaintiff's classification to the Key Program, as well as his subsequent segregation and loss of privileges, were "within the normal limits or range of custody [his] conviction authorizes the State to impose." Meachum v. Fano, 427 U.S. 215, 225 (1976).

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. Carrigan v. State of Delaware, 957 F. Supp. 1376 (D. Del. 1997); Jackson v. Brewington-Carr, No. 97-270, 1999 U.S. Dist. LEXIS 535 (D. Del. Jan. 15, 1999). Plaintiff's claim that the defendants violated his right to due process has no arguable basis in law or in fact. Therefore, the court shall dismiss this claim as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B) -

1915A(b) (1).

3. Vicarious Liability

Supervisory liability cannot be imposed under § 1983 on a respondeat superior theory. See Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362 (1976). In order for a supervisory public official to be held liable for a subordinate's constitutional tort, the official must either be the "moving force [behind] the constitutional violation" or exhibit "deliberate indifference to the plight of the person deprived." Sample v. Diecks, 885 F.2d 1099, 1118 (3d Cir. 1989) (citing City of Canton v. Harris, 489 U.S. 378, 389 (1989)). Here, plaintiff does not raise any specific allegations regarding defendants Kearney and Correctional Medical Service. Rather, plaintiff implies that these defendants are liable simply because of their supervisory positions. (D.I. 5 at 2)

Nothing in the complaint indicates that either defendant Kearney or defendant Correctional Medical Service were the "driving force [behind]" defendant Parker's actions, or that they were aware of plaintiff's allegations and remained "deliberately indifferent" to his plight. Sample v. Diecks, 885 F.2d at 1118. Consequently, plaintiff's claim against defendants Kearney and Correctional Medical Service has no arguable basis in law or in fact. Therefore, plaintiff's claim against defendants Kearney

and Correctional Medical Service is frivolous and shall be dismissed pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

4. Plaintiff's Claim Against Defendant Parker

Plaintiff alleges that defendant Parker has violated his constitutional right to be free from cruel and unusual punishment by instructing certain inmates to abuse plaintiff. Specifically, plaintiff alleges that he was forced to sit or stand "tight" for long periods of time, causing hemorrhoids and numbness. (D.I. 2 at 4) He further alleges that during his time in the Key Program, he was never allowed to sleep more than four or five hours a night. (Id.) The court finds that these claims are not frivolous within the meaning of 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1) and an appropriate order shall be entered.

NOW THEREFORE, at Wilmington this 26th day of September, 2002, IT IS HEREBY ORDERED that:

1. Plaintiff's "Motion for Summary Judgment by Default" (D.I. 5) is DENIED.
2. Plaintiff's "Writ of Mandamus" is DENIED as moot.
3. To the extent that plaintiff is challenging duration of his sentence, the claim is DISMISSED without prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).
4. Plaintiff's Fourteenth Amendment due process claim is DISMISSED as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-

1915A(b) (1) .

5. Plaintiff's vicarious liability claim against defendants Kearney and Correctional Medical Service is DISMISSED as frivolous pursuant to 28 U.S.C. §§ 1915(e) (2) (B)-1915A(b) (1) .

IT IS FURTHER ORDERED that:

1. The clerk of the court shall cause a copy of this order to be mailed to plaintiff.

2. Pursuant to Fed. R. Civ. P. 4(c) (2) and (d) (2), Plaintiff shall complete and return to the clerk of the court an **original** "U.S. Marshal-285" form for defendant Parker, as well as for the Attorney General of the State of Delaware, pursuant to DEL. CODE ANN. tit. 10 § 3103(c). Failure to submit this form may provide grounds for dismissal of the lawsuit pursuant to Fed. R. Civ. P. 4(m) .

3. Upon receipt of the form(s) required by paragraph 2 above, the United States Marshal shall forthwith serve a copy of the complaint (D.I. 2), the "Motion for summary Judgment by Default" (D.I. 5), the "Writ of Mandamus" (D.I. 6), this memorandum order, a "Notice of Lawsuit" form, the filing fee order(s), and a "Return of Waiver" form upon each of the defendants so identified in each 285 form.

4. Within **thirty (30) days** from the date that the "Notice of Lawsuit" and "Return of Waiver" forms are sent, if an executed "Waiver of Service of Summons" form has not been received from a

defendant, the United States Marshal shall personally serve said defendant(s) pursuant to Fed. R. Civ. P. 4(c)(2) and said defendant(s) shall be required to bear the cost related to such service, unless good cause is shown for failure to sign and return the waiver.

5. Pursuant to Fed. R. Civ. P. 4(d)(3), a defendant, who before being served with process timely returns a waiver as requested, is required to answer or otherwise respond to the complaint within **sixty (60) days** from the date on which the complaint, this order, the "Notice of Lawsuit" form, and the "Return of Waiver" form is sent. If a defendant responds by way of a motion, said motion shall be accompanied by a brief or a memorandum of points and authorities and any supporting affidavits.

6. No communication, including pleadings, briefs, statement of position, etc., will be considered by the court in this civil action unless the documents reflect proof of service upon the parties or their counsel. The clerk of the court is instructed not to accept any such document unless accompanied by proof of service.

Sue L. Robinson
UNITED STATES DISTRICT JUDGE