IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ANGEL PEREZ, Plaintiff, v. CAPTAIN DAVID HOLMAN, et al., Defendants.	)	C.A. No. 96-419-GMS

MEMORANDUM AND ORDER

I. INTRODUCTION

On August 19, 1996, Angel Perez ("Perez") file a *pro se* complaint against Captain Holman, Lieutenant Eames, and Sergeant Walrabenstein (collectively the "defendants") of the Delaware Correctional Center (DCC) pursuant to 42 U.S.C. § 1983.[1] In his complaint, Perez alleges that while he was incarcerated in the DCC, the defendants violated his Eighth and Fourteenth Amendment rights by exposing him to second-hand, or environmental, tobacco smoke (ETS). Presently before the court is the defendants' motion for summary judgment. (D.I. 51). Because Perez has not met his burden of demonstrating that (1) his health was unreasonably endangered and (2) the defendants acted with deliberate indifference, the court will grant the defendants' motion for summary judgment.

II. BACKGROUND

At the time of filing his complaint, Perez was incarcerated in the DCC. Perez alleges that the

[1]Several of these defendants were added via amendment during the pendency of this case. Perez also included Warden Snyder as a defendant in his complaint, but the court dismissed the complaint against him on November 14, 1996.

defendants knew of his health condition and still exposed him to ETS by smoking and by allowing other inmates to smoke in his presence. He seeks $200,000 in compensatory and punitive damages and presently requests the court to appoint him counsel. He was released from the DCC on January 18, 1998.

In support of their motion for summary judgment, the defendants presented the court with the affidavit of the Statewide Medical Director, Dr. Keith Ivens that detailed eight ETS related prison examinations. At each examination, Perez was found to be found healthy. On June 23, 1992 and June 20, 1996, Perez received a Lung/Chest x-ray that found (1) his lungs to be free of acute infiltrates and (2) that there was no active disease in his chest. On, August 6, 1992, Perez reported to an attending physician that he had difficulty breathing. The physician, however, noted that Perez's lungs were ascultated, finding full expansion, good aeration, and no signs of respiratory disease. On March 3, 1995, an examination of Perez's lungs revealed that they were free of congestion. This conclusion was supported by an April 10, 1995 x-ray. The same x-ray also revealed no evidence of inflammation or neoplasm. Sputum cultures taken on April 14, July 11, and July 13, 1995, indicated that Perez's lungs tested negative for mycobacterium. In his affidavit, Dr. Ivens testified that when the examination results from prison are considered, Perez's allegations are unfounded.

Supplementing the affidavit of Dr. Ivens was that of the DCC Inmate Transfer Officer Sonja Lewis.[2] Lewis stated Perez was transferred several times during the time that he was at the DCC. Upon

[2]The defendants also submitted an affidavit by Lt. Bernie Williams of the DCC. Lt. Williams' affidavit states that Perez had previously filed a grievance against Sgt. Walrabenstein (one of the defendants), charging him with smoking in front of the inmates. According to Lt. Williams, Perez was later charged with and plead guilty to lying about the incident. Since this affidavit appears directed to Perez's credibility and the strength of his allegations – a determination the court cannot make at this stage of the proceedings – the court will give it little, if any weight in deciding the instant motion.

returning to the DCC from Pennsylvania (where he had been previously sent), Perez was transferred eight times from August 7, 1995 to August 19, 1997. Not only were the transfers between buildings, but they were also between different cells in the same building. Although it is unclear why these transfers were made, it appears that, at minimum, Perez was transferred to a cell with a non-smoker after he filed the instant complaint.[3]

In his answering brief, Perez attached a physician's note dated December 8, 1999. The note advised that Perez should not smoke or be in the company of those who do because of his shortness of breath/broncho spasms, "which [are] probably secondary to smoking." Furthermore, Perez alleges that the defendants intentionally housed him with inmates that smoked in retaliation for filing this action (rather than as an accommodation). He did not provide the court with any other medical evidence regarding ETS, his health, or statistics relating to smoking in the DCC.

III. STANDARD OF REVIEW

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). On summary judgment, the court cannot weigh the evidence or make credibility determinations. *See International Union, United*

[3]The defendants' brief reads too much into Lewis' affidavit. Lewis does not state the reasons for the transfers, but merely the dates and locations. Thus, although there may be no evidence that Perez was transferred so as to remove him from the presence of non-smokers, there is similarly no evidence that the transfers were in retaliation for his complaints about smoking. Perez's allegations that he was transferred "for no reason at all" fall short of the Third Circuit's requirements for proving retaliation. *See Rauser v. Horn*, 241 F.3d 330, 233 (3d Cir. 2001) (establishing three prong test prisoner must satisfy to prove retaliation). Additionally, Perez offers absolutely no competent evidence to support his eleventh hour claim that his complaints about smoking lead to an extension of his sentence.

Auto., Aerospace & Ag. Implement Workers of America, U.A.W. v. Skinner Engine Co., 188 F.3d 130, 137 (3d Cir. 1999) ("At the summary judgment stage, a court may not weigh the evidence or make credibility determinations; these tasks are left to the fact finder."). Instead, the court can only determine whether there is a genuine issue for trial. *See Abraham v. Raso,* 183 F.3d 279, 287 (3d Cir. 1999). In doing so, the court must look at the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences and resolving all reasonable doubts in favor of that party. *See, e.g., Pacitti v. Macy's*, 193 F.3d 766, 772 (3d Cir. 1999). With these standards in mind, the court will discuss the most relevant facts giving rise to this lawsuit.

IV. DISCUSSION

While incarcerated, the DCC must assume some responsibility for Perez's safety and general well being since Perez was unable to care for himself. *See Helling v. McKinney*, 509 U.S. 25, 32 (1993). In the context of future harm, however, the Eighth Amendment only protects against deliberate indifference to prison health problems. *See Little v. Lycoming County*, 912 F.Supp. 809, 815 (M.D. Pa. 1996). To prove that the defendants violated his Eighth Amendment rights, Perez must demonstrate that (1) objective evidence shows that he was exposed to unreasonably high levels of ETS, and (2) the defendants have shown deliberate indifference to his exposure. *See id.* at 818.

A. Exposure To ETS

Turning to the first prong, Perez must demonstrate that his exposure to ETS caused actual health injury. *See Helling*, 509 U.S. at 25. The only evidence that Perez submitted to the court was an ambiguous four line physician's note that stated that in December 8, 1999, Perez suffered from shortness of breath and also recommended an inhaler prescription. The defendants, on the other hand, presented

the court with an affidavit from Dr. Ivens that detailed eight medical examinations during Perez's incarceration. After he reviewed Perez's exam results that consisted of three x-rays, three sputum cultures, and various tests, Dr. Ivens opined that Perez did not suffer from an ETS associated health condition.

In the face of the defendants' evidence, the doctor's note Perez offers is insufficient. First, it is dated after Perez's release from the DCC – it is unclear where the alleged harm occurred. Second, it is ambiguous; it only states that Perez's ailments are "probably secondary to smoking."[4] Even if Perez was exposed to an unreasonable amount of ETS while at the DCC (and not after he was released from prison), there is no competent evidence regarding the number of smoking inmates with whom Perez came into contac, the frequency they smoked, or the seriousness of Perez's condition. Thus, Perez has not produced any evidence to demonstrate that his exposure to cigarette smoke created a "risk . . . [that is] so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk." *See id.* at 36.

B. Deliberate Indifference

Even if Perez met the first, objective prong, his claim must fail. Under the second, subjective prong, Perez must demonstrate that the defendants exhibited deliberate indifference to his health conditions caused by ETS. To have been deliberately indifferent, the defendants' actions had to have been more than inadvertence or a good faith error; they must have been obdurate and wanton. *See Whitley v. Albers*, 475 U.S. 312, 319 (1986); *see also Little*, 912 F. Supp. at 815. This standard requires the defendants to have knowledge of Perez's condition and to have deliberately chosen to ignore it. *See Young v. Quinlan*, 960

[4]The lack of medical evidence or explanation is especially troubling. Given the wording of the note, it is possible that the doctor's information as to the reasons for Perez's condition could come from Perez himself, rather than any medical examination.

F.2d 351, 361 (3d Cir. 1992)

For Perez to succeed on his Eighth Amendment claim, he must demonstrate that the defendants knew or should have known about his medical condition caused by cigarette smoke and that they deliberately chose to ignore it. *See, e.g., Bogue v. Vaughn*, Civ.A.No. 91-5046, 1993 WL 497851, at *5 (E.D. Pa. Dec. 1, 1993). Given this standard, the record simply does not support Perez's claims. On the contrary, at the time of his incarceration, Perez received numerous medical examinations that did not suggest any health condition due to ETS. Indeed, the medical reports detailed several test results that consistently indicated that he did not suffer from any ailments related to ETS. Rather than avoiding knowledge of Perez's alleged medical condition related to ETS, the DCC took active steps to assess Perez's health. Since Perez has not alleged improper or inadequate medical care, he cannot argue that the tests and medical examinations were insufficient.

Had Perez been able to prove that the defendants knew of his condition, he still would have the to meet the obdurate and wanton standard of deliberate indifference. *See Bogue*, 1993 WL 497851 at *5. In his complaint, Perez claimed that the defendants were deliberately indifferent for not housing him with a non-smoking inmate. The record, however, demonstrates otherwise. Not only was Perez moved several times, but there is no evidence that the defendants were indifferent to his complaints (or even that Perez complained to the defendants).[5]

V. CONCLUSION

Perez has failed to prove either prong of the *Helling* test needed to demonstrate an Eighth

[5]On the contrary, it appears that as to one of the defendants, Sgt. Walrabenstein, Perez's claims are belied by the record. *See* note 2, *supra*.

Amendment violation.[6] On the contrary, based upon the record before it, the court concludes that the defendants took adequate steps to identify any health problems Perez might have faced and took proper steps in the face of his complaints. Perez's failure to present enough evidence is more a reflection on the strength of his case than on the defendants' actions. Thus, court will grant the defendants' motion for summary judgment.

For these reasons, IT IS HEREBY ORDERED that:

1. The defendants' motion for summary judgment (D.I. 51) is GRANTED.

2. Summary judgment be and is hereby ENTERED in favor of the defendants on all claims against them.

3. Perez's motion to appoint counsel (D.I. 58) is DENIED as moot.

Dated: August 29, 2001

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE

[6]There is absolutely no evidence on the record to support a Fourteenth Amendment violation.