

Farnan, District Judge.

Presently before the Court is a Motion To Dismiss (D.I. 19) filed by Defendants Attorney General M. Jane Brady, Rick Kearney and Ellie Shackles ("State Defendants") and a Motion to Amend Complaint (D.I. 27) filed by Plaintiff. For the reasons stated below, the Court will deny Plaintiff's Motion to Amend Complaint (D.I. 27) and grant State Defendants' Motion to Dismiss (D.I. 19).

BACKGROUND

Plaintiff Donald R. White is an inmate sentenced to a period of incarceration within the Delaware Department of Correction ("DOC"). At the time Plaintiff filed the instant action, he was incarcerated at Sussex Correctional Institution ("SCI") in Georgetown, Delaware. Presently, Plaintiff is housed at the Delaware Correctional Center ("DCC") in Smyrna, Delaware.

According to the Complaint, on May 23, 1999, when Plaintiff was an unsentenced inmate, Plaintiff was attacked and assaulted by sentenced inmate LaReese Asberry. (D.I. 2, at 3). Though imprecise, Plaintiff's Complaint can be fairly characterized as alleging Eighth Amendment and Fourteenth

Amendment Due Process and Equal Protection violations. To date, Plaintiff has failed to respond to State Defendants' Motion To Dismiss. Consequently, the Court will proceed to rule on this motion.

STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may dismiss a complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). The purpose of a motion to dismiss is to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). When considering a motion to dismiss, a court must accept as true all allegations in the complaint and draw all reasonable factual inferences in the light most favorable to the plaintiff. Neitzke v. Williams, 490 U.S. 319, 326 (1989); Piecknick v. Pennsylvania, 36 F.3d 1250, 1255 (3d Cir. 1994). The Court is "not required to accept legal conclusions either alleged or inferred from the pleaded facts." Kost, 1 F.3d at 183. Dismissal is only appropriate when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him

to relief." Conley v. Gibson, 355 U.S. 41, 45 (1957).

DISCUSSION

I. Claims Under 42 U.S.C. § 1983 For Violation Of Constitutional Rights

In a Section 1983 action, the plaintiff must prove a violation of an underlying constitutional right. See 42 U.S.C. § 1983. Because Plaintiff was a pretrial detainee at the time of the alleged attack, the Due Process Clause of the Fourteenth Amendment applies to his claim. Kost v. Kozakiewicz, 1 F.3d 176, 188 (3d Cir. 1993). Pretrial detainees are not within the ambit of the Eighth Amendment but are entitled to the protections of the Due Process clause. Id. As the United States Supreme Court observed in City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 244 (1983), the Due Process rights of a pretrial detainee are "at least as great as the Eighth Amendment protections available to a convicted prisoner."

In order to state a claim for a constitutional violation based on "failure to prevent harm," Plaintiff must first show "that he is incarcerated under conditions posing a substantial risk of serious harm." Farmer v. Brennan, 511 U.S. 825, 834 (1994). The standard for both Eight Amendment and Fourteenth Amendment Due Process "failure to prevent harm"

claims is that of "deliberate indifference." Kost, 1 F.3d at 185. In order to prove Defendants acted with "deliberate indifference," Plaintiff must show that the prison officials "consciously disregarded a substantial risk of serious harm." Farmer, 511 U.S. at 839.

The Court also notes that the Constitution does not grant pretrial detainees a liberty interest in being housed separately from sentenced inmates. Hoover v. Watson, 886 F.Supp. 410, 417 (D. Del. 1995).

Upon reviewing the allegations in Plaintiff's Complaint, the Court concludes that Plaintiff has not alleged any facts to show that State Defendants acted with deliberate indifference towards Plaintiff's safety. Plaintiff does not allege any facts to imply that State Defendants were on notice about a substantial risk of serious harm to Plaintiff, and that they were deliberately indifferent towards that risk. For example, Plaintiff does not allege that he had been attacked by Asberry or any other inmate prior to this incident on May 23, 1999, nor does Plaintiff allege that he had warned the prison officials of the possibility that he could be attacked. Thus, the Court concludes that Plaintiff fails to state a Fourteenth Amendment Due Process claim.

Further, Plaintiff has failed to allege any facts in

support of his Fourteenth Amendment Equal Protection claim. The Fourteenth Amendment Equal Protection Clause requires that similarly situated persons should be treated alike. Plyler v. Doe, 457 U.S. 202, 216 (1982). Thus, in order to prevail on an Equal Protection claim, Plaintiff must show that other inmates in his situation have been treated differently. See Strum v. Clark, 835 F.2d 1009, 1016 (3d Cir. 1987)(equal protection analysis requires party to show government action benefitting one and burdening another).

In this case, Plaintiff has failed to allege any facts to support his claim that others in his situation were treated differently. Thus, the Court concludes that Plaintiff fails to state a claim under the Equal Protection Clause of the Fourteenth Amendment. Because the Court concludes that Plaintiff fails to state a constitutional claim under 42 U.S.C. § 1983, the Court will grant State Defendants' Motion To Dismiss (D.I. 19).

II. Motion To Amend Complaint

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, a party may amend its pleading once as a matter of course at any time before a responsive pleading is served. Otherwise, a party may amend its pleading by leave of court or by written consent of the adverse party. A court shall freely

grant leave to amend when justice so requires. Fed. R. Civ. Pro. 15.

Here, Plaintiff moved to amend his Complaint on August 9, 2000. (D.I. 27). State Defendants filed their Answer (D.I. 16) to the Complaint on March 24, 2000, thereby precluding Plaintiff from amending his Complaint as a matter of right.

The futility of amendment is one of the factors that a trial court may consider in denying a motion to amend. F.D.I.C. v. Bathgate, 27 F.3d 850, 874 (3d Cir. 1994). Thus, Plaintiff's Motion to Amend should be denied if none of the claims Plaintiff seeks to add or amend would survive a motion to dismiss. See id. The proposed Counts of Plaintiff's Amended Complaint (D.I. 27) seek to impose liability on Defendants based on mere allegations of negligence. (D.I. 27). It has long been held that negligence claims are not encompassed within § 1983. Davidson v. O'Lone, 752 F.2d 817, 826 (3d Cir. 1989). Moreover, general allegations of administrative negligence fail to state a constitutional claim under § 1983. Rizzo v. Goode, 423 U.S. 362, 370-77 (1976). Thus, the Court concludes that Plaintiff's amendment would be futile and, therefore, the Court will deny Plaintiff's Motion to Amend Complaint (D.I. 27).

CONCLUSION

For the reasons discussed, Plaintiff's Motion to Amend Complaint (D.I. 27) will be denied and State Defendants' Motion To Dismiss (D.I. 19) will be granted.

An appropriate Order will be entered.