IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROGER ATKINSON,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 99-562-JJF
	:	
DELAWARE DEPARTMENT OF CORRECTIONS, et al.,	:	
	:	
Defendants.	:	

Richard H. Morse, Esquire, YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware.
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MEMORANDUM OPINION

June 27, 2001
Wilmington, Delaware.

FARNAN, District Judge.

Presently before the Court is a Motion for Summary Judgment (D.I. 89) filed by Defendants Delaware Department of Corrections, Commissioner Stanley Taylor, Warden Raphael Williams, Major Perry Phelps, Sergeant Parker, Corporal Andre Green and Correctional Officer Fred Way, III ("State Defendants"). For the reasons stated below, State Defendants' Motion for Summary Judgment (D.I. 89) will be denied as it pertains to Counts I, III and IV of Plaintiff's Supplemental and Second Amended Complaint (D.I. 66).[1]

BACKGROUND

I. Procedural Background

Plaintiff Roger Atkinson originally filed a pro se Complaint (D.I. 2) on August 20, 1999. On November 19, 1999, State Defendants filed a Motion to Dismiss (D.I. 18). On September 29, 2000, Defendants' Motion to Dismiss was denied without prejudice with leave to renew upon Plaintiff's filing of an amended complaint (D.I. 45). After appointment of counsel, Plaintiff filed an Amended Complaint (D.I. 46) on October 12, 2000 and a Supplemental and Second Amended Complaint (hereinafter the "Complaint") on February 16, 2001 (D.I. 66). State Defendants renewed their original Motion to Dismiss (D.I. 81). By Memorandum Opinion, the Court granted State Defendants Motion to

[1] Because the Court resolved Count II on a separate basis, the Court did not reach the issue of whether Defendants were entitled to qualified immunity with respect to Count II. As a result, the Court will not address Count II in this Memorandum Opinion.

Dismiss as it pertained to any monetary claims against the Delaware Department of Corrections and State Defendants in their official capacities and denied the Motion to Dismiss with respect to all other claims.

II. Factual Background

Plaintiff's Complaint arises under the Eighth and Fourteenth Amendments of the United States Constitution, 42 U.S.C. §§ 1983 and 12132, 29 U.S.C. § 794 and the law of the State of Delaware. Count I of Plaintiff's Complaint asserts an Environmental Tobacco Smoke ("ETS") claim which Plaintiff alleges subjected him to cruel and unusual punishment. Plaintiff is seeking to enjoin Defendants, their agents and employees from exposing Plaintiff to ETS. Plaintiff is also seeking an award of compensatory and punitive damages with regard to the ETS claim. Counts III and IV of the Complaint include allegations that State Defendants retaliated against Plaintiff for taking legal action against them. Also, Plaintiff alleges that State Defendants have physically and verbally abused him and withheld his medications.

A. Environmental Tobacco Smoke Claim

According to evidence offered by Plaintiff, for approximately seven months of his incarceration at the Multi-Purpose Criminal Justice Facility ("MPCJF"), Plaintiff shared a cell with two cellmates, each of whom smoked constantly while they were in the cell. (Plaintiff's Amended Answers to Defendants' First Set of Interrogatories, Interrogatory Number 2

(hereinafter “Interrogatory Answer”) at 2; B2). He was kept for one and one half months with one cellmate who smoked constantly when in the cell. Id. He was kept in a cell for three weeks with a cellmate who smoked approximately ten cigarettes a day, for two months with a cellmate who smoked two to three cigarettes a day and has on other occasions been exposed to cellmates who smoked in the cell. Id.

Shortly after being exposed to ETS and suffering symptoms from it, Plaintiff complained about the ETS to the medical staff at the MPCJF and to Sgt. Sonata. He was removed only briefly from exposure to the ETS. Id.

After Sgt. Sonata had moved Plaintiff to a smoke-free area, Correctional Officer Fred Way (“C.O. Way”) moved him back to an area where he was exposed to smoke. Id.

Plaintiff wrote letters to Warden Williams, Capt. Lee, Major Phelps, Sgt. Parker and Commissioner Taylor about the exposure to ETS. The exposure did not cease. Id.

Sgt. Parker is in charge of MPCJF Pods 1F and 1E. Plaintiff complained to Sgt. Parker about the exposure to ETS, and Sgt. Parker refused to move him from the ETS. Id. Again, Plaintiff spoke to Sgt. Parker and Cpl. Green to request that he be moved from the exposure to ETS and was not moved. Id.

As the result of this exposure, Plaintiff has had itchy and burning eyes, chest pains, sore throat, persistent cough with sputum production, paroxysms of coughing and resulting headaches.

(Appendix to Plaintiff's Answering Brief (D.I. 93), at B20 (Report of Albert M. Rizzo, M.D.)).

B. Alleged Abuse by Correctional Officer Fred Way and Corporal Andre Green

Plaintiff also offers evidence that various MPCJF officials, including C.O. Way, have told Plaintiff that if he had not written the ETS complaints he would not be on administrative segregation. (Interrogatory Answer at 4; D.I. 93, at B4).

On repeated occasions, C.O. Way has read Plaintiff's personal mail over the intercom so that it could be heard by other inmates. Id.

On occasion, C.O. Way has withheld from Plaintiff papers he has requested from the law library. Id.

In late January or early February, 1999, C.O. Way went into Plaintiff's cell while he was sleeping, grabbed him by the leg and pulled Plaintiff from the bed. Plaintiff pulled away from him. C.O. Way responded that he had thought Plaintiff was dead. Id.

On March 29, 2000, C.O. Way took Plaintiff's clothing and refused to return it, leaving Plaintiff without his clothing for over ten hours. Also on that date, C.O. Way threatened to physically attack Plaintiff. Id.

On one occasion, C.O. Way came into Plaintiff's cell and threatened to smash his face into the wall. On another occasion, C.O. Way said they would hang Plaintiff. Id.

On multiple occasions, C.O. Way threatened to harm Plaintiff

because of the legal action Plaintiff had filed against C.O. Way. C.O. Way also cursed Plaintiff and made derogatory comments about his blindness. When Plaintiff asked C.O. Way to stop harassing him, C.O. Way cursed him and told Plaintiff he was above the law. Sgt. Parker was aware Plaintiff was receiving this treatment at the hands of C.O. Way and took no action to stop it. (Id. at 4-5; D.I. 93, at B4-5).

Plaintiff has been threatened by C.O. Way and Sgt. Parker, who told him that he will never make it to court. On various occasions, C.O. Way has threatened Plaintiff, telling him that he would "kick [his] ass," that he would take Plaintiff's privileges away and that there was nothing Plaintiff could do about it. (Id. at 5, D.I. 93, at B5).

On or before May 4, 2000, notes relating to Plaintiff's case were taken from his cell. On May 4, 2000, C.O. Way and C.O. Johnson read those notes to Plaintiff over the intercom. Id.

On various occasions, C.O. Way refused to permit Plaintiff to make telephone calls to his attorney. Id.

On various occasions, C.O. Way kept Plaintiff from receiving his medications. Id.

On various occasions, C.O. Way tampered with Plaintiff's food. Id.

C.O. Way and Sgt. Parker have placed Plaintiff on recreation alone, thereby depriving him of people who can read his mail or assist him with legal work, for the purpose of preventing

Plaintiff from proceeding with his civil action against C.O. Way and others. Id.

On October 5, 2000, C.O. Way refused to permit Plaintiff out for his one hour of recreation and falsely wrote in the log that Plaintiff had refused recreation. Id.

On December 26, 2000, Plaintiff was physically attacked by Corporal Green, who struck him in the face and head. This incident was investigated by the FBI, apparently due to complaints made by Plaintiff's mother. Thereafter, C.O. Way said to Plaintiff over the intercom that he would regret bringing the FBI into the matter and that he would make Plaintiff pay for doing that. Shortly thereafter, when Plaintiff was leaving the interview room C.O. Way ordered Plaintiff to take off his clothing. After Plaintiff disrobed, C.O. Way kicked the clothing around and said he had to make sure Plaintiff was not a woman, because all women are sent to W.C.I. (Id. at 4-5; D.I. 93, at B4-5).

On December 27, 2000, Corporal Green refused to bring Plaintiff his breakfast and lunch trays. (Id. at 6; D.I. 93, at B6).

On February 16, 2001, when Plaintiff returned from a court appearance, he was strip searched in booking, which is standard procedure. Plaintiff then returned to Pod 1F and, for no reason at all, was made to strip again by C.O. Way. Id.

According to Plaintiff, he has written Warden Williams,

Major Phelps, Commissioner Taylor and Sgt. Parker, and has spoken to Cpl. Green, about the harassment he received from C.O. Way.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) provides that a party is entitled to summary judgment where "the pleadings depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of 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 always bears the initial responsibility of informing the Court of the basis for its motion, and identifying those portions of the materials which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553 (1986). The moving party is not required to negate the nonmovant's claim, but is only required to point out the lack of evidence supporting the nonmovant's claim. Country Floors, Inc. v. Partnership Composed of Gepner & Ford, 930 F.2d 1056, 1061 (3d Cir. 1991). Once the moving party meets his or her burden, the burden shifts to the nonmovant to go beyond the mere allegations or denials of the pleadings and designate "specific facts showing that there is a genuine issue for trial." Id.; Celotex, 477 U.S. at 324, 106 S. Ct. at 2553. In determining whether there is a triable dispute of material fact, the Court must construe all inferences from the underlying facts in the light most favorable to the nonmovant. See Spain v.

Gallegos, 26 F.3d 439, 446 (3d Cir. 1994). However, the mere existence of some evidence in support of the nonmovant will not be sufficient to support a denial of a motion for summary judgment; there must be enough evidence to enable a jury to reasonably find for the nonmovant on that issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2510 (1986). Thus, if the evidence is "merely colorable, or is not significantly probative," summary judgment may be granted. Id.

DISCUSSION

I. Count I - Environmental Tobacco Smoke Claim

In Count I of the Complaint, Plaintiff alleges that he has been exposed to unreasonably high levels of environmental tobacco smoke which have posed an unreasonable risk of serious damage to his present and future health. In a claim alleging exposure to ETS, the United States Supreme Court has held that the inmate must prove both that objectively, there is exposure to unreasonably high levels of ETS, and that subjectively, prison officials have shown deliberate indifference to his exposure. Helling v. McKinney, 509 U.S. 25, 35 (1993).

With respect to the objective factor, an inmate "must show that he himself is being exposed to unreasonably high levels of ETS." Id. at 36. The objective factor also "requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk.

In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate." Id.

In this case, according to evidence offered by Plaintiff, for approximately seven months of his incarceration at the Multi-Purpose Criminal Justice Facility ("MPCJF"), Plaintiff shared a cell with two cellmates, each of whom smoked constantly while they were in the cell. (Plaintiff's Amended Answers to Defendants' First Set of Interrogatories, Interrogatory Number 2 (hereinafter "Interrogatory Answer") at 2; B2). He was kept for one and one half months with one cellmate who smoked constantly when in the cell. Id. He was kept in a cell for three weeks with a cellmate who smoked approximately ten cigarettes a day, for two months with a cellmate who smoked two to three cigarettes a day and has on other occasions been exposed to cellmates who smoked in the cell. Id. Plaintiff has complained of various symptoms and problems as a result of his exposure to ETS in the prison, and his claim is supported by medical evidence. In his April 17, 2001 report, Albert A. Rizzo, M.D., a Wilmington pulmonary specialist, states:

> Based on his medical history, it is within reasonable medical probability that symptoms of itchy and burning eyes, chest pains, sore throat, persistent cough with sputum production, paroxysms of coughing and resulting headaches would [sic] all precipitated by exposure to second hand smoke.

(D.I. 93, at B20). Upon reviewing the record in a light most favorable to Plaintiff, the Court concludes that genuine issues

of material fact exist as to: (1) whether Plaintiff was exposed to unreasonably high levels of ETS; and (2) whether it is contrary to current standards of decency for anyone to be exposed to sufficient environmental tobacco smoke to cause the symptoms Plaintiff suffered.

With respect to the subjective factor of "deliberate indifference," Plaintiff must show that Defendants knew he faced a substantial risk of serious harm and disregarded that risk by failing to take reasonable measures to abate it. Farmer v. Brennan, 511 U.S. 825, 847 (1994). It is sufficient to show Defendants' knowledge by circumstantial evidence, "and a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Id. at 842. This factor "should be determined in light of the prison authorities' current attitudes and conduct." Helling, 509 U.S. at 36 (stating that adoption of a smoking policy may bear heavily on the inquiry into deliberate indifference). Here, Plaintiff offers evidence that he talked to prison officials on various occasions about his health conditions and physical symptoms and had written to them about his exposure to ETS. Upon reviewing the evidence in a light most favorable to Plaintiff, the Court concludes that a genuine issue of material fact exists as to whether Defendants were deliberately indifferent to a substantial risk of serious harm to Plaintiff.

Therefore, the Court will deny Defendants' Motion for

Summary Judgment on the ETS claim because the Court concludes that the evidence offered by Plaintiff raises genuine issues of material fact.

II. Counts III & IV - Alleged Abuse Claims

In relation to Counts III & IV of the Second Amended Complaint, Plaintiff states claims of retaliation and alleged abuse by Defendants. The Second Amended Complaint asserts, among other allegations, the following:

1. On May 2, 2000 without justification, Correctional Officer Way physically attacked plaintiff using excessive force, maliciously, for the purpose of causing harm. Correctional Officer Way and another officer pushed plaintiff down, stepped on him and hit and kicked him. (D.I. 66, ¶ 45).
2. On June 5, 2000, without justification Correctional Officer Fred Way physically attacked plaintiff, using excessive force, maliciously for the purpose of causing harm. Correctional Officer Way struck and grabbed plaintiff about the face and neck, causing injury to plaintiff's head. (D.I. 66, ¶ 46).
3. On December 26, 2000, Cpl. Green attempted to start a verbal dispute with plaintiff. When plaintiff walked away from Cpl. Green in an effort to avoid the dispute, Cpl. Green attacked him, using excessive force, maliciously, for the purpose of causing harm, punching

plaintiff in the face and head. (D.I. 66, ¶ 55).

Relating to these allegations, Plaintiff offers sworn answers to interrogatories that state:

1. In April, 2000 inmate Anthony Lichaa began threatening plaintiff. Plaintiff made MPCJF guards aware of the threats but they took no action to prevent harm to plaintiff. After several days of threatening plaintiff, inmate Lichaa attacked him on May 2, 2000. C.O. Way and C.O. Johnson entered the fray, but rather than immediately stopping the attack joined in on it. Sgt. Parker observed this happening and took no action to stop it. During that altercation C.O. Way stepped on plaintiff's face, hit plaintiff in the body and kicked him. C.O. Johnson participated in the attack on plaintiff. (Interrogatory Answer at 6; D.I. 93, at B6).
2. On June 5, 2000, plaintiff was told to go to an interview room. In response to his asking why, he was told by C.O. Way "I'm looking for a reason to kick your ass." He refused to leave his cell in response to this and was pulled by the neck while being choked, from one cell to another and was punched in the face and side and kicked in the groin, by C.O. Fred Way. (Interrogatory Answer at 6; D.I. 93, at B6).
3. On December 26, 2000, Cpl. Green attempted to start a

> verbal dispute with plaintiff. Plaintiff began walking away and was pushed from behind by Cpl. Green. He turned around and was struck again. Cpl. Green followed plaintiff into the cell and kept on hitting him. (Interrogatory Answer at 7; D.I. 93, at B7).

According to Plaintiff, he has written Warden Williams, Major Phelps, Commissioner Taylor and Sgt. Parker, and has spoken to Cpl. Green, about the harassment he received from C.O. Way.

In support of their Motion, Defendants offer as evidence various affidavits that reveal a version of events in stark contrast to the version offered by Plaintiff.

Upon reviewing the record, the Court concludes that genuine issues of material fact exist with respect to Counts III and IV of the Second Amended Complaint. Therefore, the Court will deny Defendants' Motion for Summary Judgment on Counts III and IV.

III. Qualified Immunity

Under the doctrine of qualified immunity, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Generally, courts approach issues concerning qualified immunity utilizing a three part inquiry: (1) whether the allegations state a claim for the violation of rights secured by the United

States Constitution; (2) whether the rights and laws at issue are clearly established; and (3) whether a reasonable competent official should have known that his conduct was unlawful, in light of the clearly established law. See Siegert v. Gilley, 500 U.S. 226, 232 (1991).

As the Court of Appeals for the Third Circuit has recently recognized, when a defendant claims qualified immunity in a Section 1983 action, the court's "first task is to assess whether the plaintiff's allegations are sufficient to establish the violation of a constitutional or statutory right at all." Gruenke v. Seip, 225 F.3d 290, 298 (3d Cir. 2000). Once this threshold inquiry is satisfied, then the court must determine "whether, as a legal matter, the right that the defendant's conduct allegedly violates was a clearly established one, about which a reasonable person would have known." Id.

In Anderson v. Creighton, 483 U.S. 635 (1987), the United States Supreme Court elaborated on the meaning of the phrase "clearly established right." Recognizing that the application of this standard turns on whether the legal issue is characterized broadly or narrowly, the Supreme Court concluded that the right allegedly violated must be clearly established in a more particularized, fact specific sense. Id. at 639-640 (citations omitted). As the Court explained:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that

> an official action is protected by qualified immunity unless the very action in question has been previously held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 639.

In interpreting the Anderson approach to the "clearly established right" prong of the qualified immunity test, the Court of Appeals for the Third Circuit has rejected a strict reading of Anderson which would require near factual identity between cases. Under the Third Circuit's more flexible approach, the qualified immunity question involves two governing inquiries:

> First, in order for the governing law to be sufficiently well established for immunity to be denied, it is not necessary that there have been a previous precedent directly in point. . . . The ultimate issue is whether, despite the absence of a case applying established principles to the same facts, reasonable officials in the defendants' position at the relevant time could have believed, in light of what was in the decided case law, that their conduct would be lawful. Second, even where the officials clearly should have been aware of the governing legal principles, they are nevertheless entitled to immunity, if based on the information available to them, they could have believed their conduct would be consistent with those principles.

Acierno v. Cloutier, 40 F.3d 597, 620 (3d Cir. 1994) (citing Good v. Dauphin County Soc. Servs. for Children & Youth, 891 F.2d 1087, 1092 (3d Cir. 1989)).

With these principles in mind, the Court will address whether Defendants are entitled to qualified immunity with

respect to Plaintiff's ETS claim.[2]

First, the Court concludes that in light of the precedent established by the Supreme Court in Helling, Plaintiff's allegations, that Defendants, with deliberate indifference, exposed him to levels of ETS that pose an unreasonable risk of serious damage to his health, are sufficient to state a cause of action under the Eighth Amendment. See Helling, 509 U.S. at 35.

Second, applying the principles of Helling, the Court concludes that Plaintiff's right under the 8th and 14th Amendments to not be unreasonably exposed with indifference to ETS has been clearly established by the Helling precedent. In Helling, the Supreme Court held that a prisoner's Eighth Amendment claim could be based upon possible future harm, as well as present harm, arising out of exposure to ETS, which is similar to the facts adduced by Plaintiff. Id. In fact, the Supreme Court remanded the case to the District Court to provide an opportunity for the plaintiff to prove his allegations. Id.

Third, in light of what was decided in the case law, the Court concludes that the unlawfulness of Defendants' alleged actions was apparent, and, thus, their conduct was objectively

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[2] The Court concluded in Part II of its Discussion, supra, that genuine issues of material fact exist with respect to Counts III and IV of the Second Amended Complaint. The Court concludes that Defendants are not entitled to qualified immunity on Counts III and IV because a reasonable person would have known that unlawfully attacking and harassing Plaintiff violated his constitutional rights, and Defendants did not argue otherwise in their briefing of their Motion for Summary Judgment.

unreasonable. Viewing the facts in a light most favorable to Plaintiff, the Court concludes that Defendants have not offered a sufficient explanation at this stage of the proceedings to justify their alleged failure to reasonably address Plaintiff's complaints of ETS. While it might be determined at trial that the facts offered by Defendants are more persuasive, the Court cannot conclude, as a matter of law at this juncture, that the conduct alleged by Plaintiff did not violate a clearly established constitutional right.

Thus, the Court concludes that Defendants are not entitled to qualified immunity with respect to Plaintiff's Eighth Amendment ETS claim because Plaintiff has adduced sufficient evidence that Defendants should have reasonably known that their conduct violated a clearly established constitutional right possessed by Plaintiff.

CONCLUSION

For the reasons discussed above, State Defendants' Motion for Summary Judgment (D.I. 89) will be denied as it pertains to Counts I, III and IV of Plaintiff's Second Amended Complaint.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROGER ATKINSON, Plaintiff, v. DELAWARE DEPARTMENT OF CORRECTIONS, et al., Defendants.	:	Civil Action No. 99-562-JJF

ORDER

WHEREAS, presently before the Court is State Defendants' Motion for Summary Judgment (D.I. 89);

NOW THEREFORE, for the reasons set forth in the Memorandum Opinion issued this date, IT IS HEREBY ORDERED this 27 day of June 2001 that State Defendants' Motion for Summary Judgment (D.I. 89) is **DENIED** as it pertains to Counts I, III and IV of Plaintiff's Second Amended Complaint.

UNITED STATES DISTRICT JUDGE