

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.
Attorney for Plaintiff.

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Attorneys for State Defendants.

MEMORANDUM OPINION

June 26, 2001
Wilmington, Delaware.

FARNAN, District Judge.

Presently before the Court is a Motion to Dismiss (D.I. 81) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure filed by Defendants Delaware Department of Corrections, Commissioner Stanley Taylor, Warden Raphael Williams, Major Perry Phelps, Sergeant Parker, Corporal Green and Correctional Officer Fred Way ("State Defendants"). For the reasons stated below, State Defendants' Motion to Dismiss (D.I. 81) will be granted in part and denied in part.

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 referred to as the "Complaint") on February 16, 2001 (D.I. 66).

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. In Count II of the Complaint, Plaintiff asserts claims under the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12132 and the Rehabilitation Act, 29 U.S.C. § 794. Plaintiff alleges that prison officials have denied him access to prison facilities, services and programs, including the library, because of his blindness. Counts III and IV include allegations that State Defendants retaliated against Plaintiff for his filing of the Complaint. Also, Plaintiff alleges that State Defendants have physically and verbally abused him and withheld his medications.

In their Motion to Dismiss, State Defendants do not address Plaintiff's claim that as a blind person he has been deprived of many privileges afforded the general inmate population, in violation of the ADA and Rehabilitation Act. State Defendants also do not address the claims that Plaintiff has been verbally abused and physically attacked by two correctional officers. Therefore, the Court will not address Plaintiff's claims under the ADA and Rehabilitation Act, nor will the Court address any retaliation or harassment claims at this time.

STANDARD OF REVIEW

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move to dismiss a pleading 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). As such, when considering a motion to dismiss, a court must accept as true all allegations in the complaint and must 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). However, the Court is "not required to accept legal conclusions either alleged or inferred from the pleaded facts." Kost, 1 F.3d at 183 (citation omitted). 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. 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). The subjective factor deals with deliberate indifference and "should be determined in light of the prison authorities' current attitudes and conduct." Id. at 36. Deliberate indifference is present when the defendant fails "to act despite his or her knowledge of a substantial risk of serious harm." Daniels v. Delaware, 120 F. Supp. 2d 411, 426 (D. Del. 2000) (citing Pew v. Connie, 1997 U.S. Dist. LEXIS 18222 (E.D. Pa. Nov. 14, 1997)). For the objective factor, Plaintiff "must show that he himself is being exposed to unreasonable high levels of ETS." Id. at 35.

Plaintiff claims he was subjected to second hand smoke since his incarceration in 1998 at the Multi-Purpose Criminal Justice Facility ("MPCJF") in Wilmington, Delaware because he was being periodically placed with cellmates who smoked tobacco. As a result of this exposure, Plaintiff alleges that he experiences shortness of breath, pain and tightening in his chest, dry mouth, sweating and arm numbness. Plaintiff also asserts complaints of headaches, nausea, burning and tearing eyes, itching and burning skin, coughing, coughing up phlegm, sore throat, dizziness and an inability to eat due to the second hand smoke.

Upon reviewing the Complaint in a light most favorable to Plaintiff, the Court is satisfied that Plaintiff has alleged sufficient facts to withstand a motion to dismiss on the ETS claim. Therefore, State Defendants' Motion to Dismiss Count I of the Complaint will be denied.

II. ETS Claim as Opposed to a Housing Classification Claim

Defendants contend that Plaintiff has used his ETS claim to object to his housing classification. A prisoner in the custody of Delaware DOC does not have a constitutional interest in his or her housing classification. Brown v. Cunningham, 730 F. Supp. 623 (D. Del. 1990). A housing classification system "determines the required custodial level of an individual after identifying his vocational, educational, mental and physical needs. Housing assignments form an "integral part of the system of incentives and rewards central to the proper functioning of the [prison]." Anderson v. Redman, 429 F. Supp. 1105, 1121 (D. Del 1977). Reading the Second Amended Complaint, however, the Court concludes that Plaintiff is objecting to smoking conditions for health reasons only, not as a result of any vocational, educational, mental and physical needs. Therefore, the Court concludes that State Defendants' argument that Plaintiff's ETS claim should be treated as a housing classification claim, at this juncture, is unpersuasive.

III. Defendants' Wrongful Conduct in ETS Claim

Defendants contend that Plaintiff has failed to adequately identify how they participated in, personally directed, or acquiesced in the events which he claims deprived him of constitutional rights. Plaintiff has alleged that Defendants were well aware of the ETS to which he was being exposed and failed to take remedial action. In fact, Plaintiff contends that

he talked to prison officials on various occasions and had written to them about his health conditions and physical symptoms. According to Plaintiff, State Defendants kept moving Plaintiff to cells containing smoking cellmates. Therefore, the Court concludes that Plaintiff has adequately alleged personal involvement by the State Defendants by claiming that prison officials were aware of Plaintiff's ETS condition but failed to alleviate his ETS-related health problems.

IV. Eleventh Amendment Immunity

State Defendants contend that Plaintiff's Complaint must be dismissed because State Defendants are immune from monetary liability in their official capacities under the Eleventh Amendment. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Furthermore, the United States Supreme Court has stated that:

Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity, or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity.

Will v. Michigan Dep't of State Police, 491 U.S. 58, 66

(1989)(citations omitted). In that regard, the Supreme Court has held that Congress did not intend to override a State's Eleventh

Amendment immunity when it enacted Section 1983. Quern v. Jordan, 440 U.S. 332, 345 (1979). In addition, Section 1983 only allows claims against "persons," which does not include claims seeking monetary relief from state officials who are sued in their official capacities. Will, 491 U.S. at 71 n.10. Applying the above standards, the Court concludes that Plaintiff's claims for monetary damages against the Delaware Department of Corrections and against the State Defendants in their official capacity are barred under the Eleventh Amendment.

V. Qualified Immunity

Defendants contend that they are entitled to qualified immunity because they acted in good faith, without gross or wanton negligence, in the performance of their discretionary duties. The Court concludes that, at this point in the proceedings, a fact question exists on this issue, and, therefore, the Court will not dismiss Plaintiff's claim on qualified immunity grounds.

VI. State Tort Claims Act

Defendants contend that the State Tort Claims Act shields Defendants in their individual capacities for alleged tortious acts because they clearly acted without gross or wanton negligence. 10 Del. C. § 4001. Because it is unclear at this stage whether Defendants acted in bad faith, the Court will not dismiss Plaintiff's claim on this basis.

CONCLUSION

For the reasons discussed above, State Defendants' Motion to Dismiss (D.I. 81) will be granted as it pertains to any monetary claims against the Delaware Department of Corrections and State Defendants in their official capacities and denied with respect to all other claims.

An appropriate Order will be entered.

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 CORRECTIONS, et al., :
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 Defendants. :

ORDER

WHEREAS, presently before the Court is State Defendants' Motion to Dismiss (D.I. 81);

NOW THEREFORE, for the reasons set forth in the Memorandum Opinion issued this date, IT IS HEREBY ORDERED this 26 day of June 2001 that State Defendants' Motion to Dismiss (D.I. 81) is **GRANTED** as it pertains to Plaintiff's claims for monetary damages against the Delaware Department of Corrections and State Defendants in their official capacities and **DENIED** with respect to all other claims.

UNITED STATES DISTRICT JUDGE