UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

RAFIU ABIMBOLA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:04-cv-01017-RBP-HGD
	)	
CRAIG ROBINSON, *et al*.,	)	
	)	
Defendants.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

On February 10, 2006, the undersigned entered a report and recommendation that this action be dismissed for failing to state a claim upon which relief can be granted. Some of the findings in the initial report and recommendation were based upon the court's apparent mistaken understanding that the plaintiff was an unadmitted alien. The plaintiff has filed objections to the report in which he indicates that he is a lawful permanent resident of the United States. Based upon the plaintiff's objections, the following supplemental findings are warranted.

Access to Outdoor Recreation

In the initial report and recommendation, the court rejected the plaintiff's complaint that he has been denied outdoor recreation at the Etowah County Detention

Center based upon the fact that the allegation did not rise to the level of the "gross physical abuse" or "intentional and malicious infliction of harm" standards applicable to unadmitted aliens. *See Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987); *Adras v. Nelson*, 917 F.2d 1552 (11th Cir. 1990). However, based upon the allegations set forth in his objections, that standard is not applicable to the plaintiff.

In his objections, the plaintiff contends that he has been "detained without access to 'sunshine' or 'fresh air' at the Etowah County Jail for about two years." (Doc. #18, page 6). As a result, he states he suffers from high blood pressure, his skin has begun to turn pale white, his stomach has swollen to his chest, and he has developed an irregular heart beat. *Id*. at 7.

There appears to be no absolute right of pretrial detainees to outdoor exercise where the detention period is relatively brief. *See Wilson v. Blankenship*, 163 F.3d 1284 (11th Cir. 1998). However, the issue becomes less clear where the detention period continues over an extended period of time. In *Miller v. Carson*, 563 F.2d 741, the former Fifth Circuit found that the continuous incarceration of pretrial detainees without access to outdoor recreation, and where such recreation is reasonably possible without a large expenditure of funds, may amount to punishment in violation

of the Due Process Clause.[1] The Supreme Court has also recognized that detainees may be confined in conditions which involve "genuine privations and hardship" where such confinement is brief, but that Due Process questions arise where such conditions are presented to detainees over an extended period of time. *Bell v. Wolfish*, 441 U.S. 520, 542 (1979). In this case, the plaintiff's allegation that he has been deprived of sunlight and fresh air for a period of nearly 24 months at least states an initial claim to which defendants Wes Williamson, Sheriff James Hayes, and Dean Hoth should be required to respond.

Access to the Court

In the initial report and recommendation, the court found that the plaintiff had not stated a valid claim of denial of access, in part because of his failure to allege that he suffered any prejudice in pursuit of a legal claim. In his objections, the plaintiff contends that he has in fact suffered prejudice in a federal habeas corpus action in the United States Court of Appeals for the Second Circuit (*Abimbola v. Ashcroft*, 378 F.3d 173) and in a civil action pending in the Western District of Louisiana (*Brown, et al., v. Ridge, et al.,* No 04-759-A). With respect to the habeas action, the plaintiff was attempting to challenge the Board of Immigration Appeals' finding that

[1] The Eleventh Circuit has adopted precedent decision of the former Fifth Circuit rendered prior to October 1, 1981. *See Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

his conviction in Connecticut for larceny in the third degree constituted a "theft offense" and was therefore an aggravated felony under 8 U.S.C. 1101(a)(43)(G). The plaintiff argued that the conduct underlying his conviction constituted "fraud and deceit" rather than theft, and it would therefore not constitute an aggravated felony for INS purposes unless the amounts involved exceeded $10,000.00. *See* 8 U.S.C. § 1101(a)(43)(M)(I). The Second Circuit concluded that the Connecticut statute under which the plaintiff was convicted was in fact a "theft offense" for purposes of the INS rules, and thus the conviction made him removable as an aggravated felon. The plaintiff now states that while he was litigating that action, the Third Circuit decided the case of *Nugent v. Ashcroft*, 367 F.3d. 162, which involved the deportation proceedings of a lawful permanent resident and native of Jamaica who had been convicted under the Pennsylvania theft-by-deception statute. In that case, the Third Circuit concluded that because the Pennsylvania statute is "bottomed on 'fraud and deceit'" the appellant's conviction did not constitute an aggravated felony because it involved amounts less than $10,000.00. The plaintiff now contends that he was unaware of the decision in *Nugent* because of deficiencies in the Etowah Detention Center library and, as a result, he was prejudiced in his Second Circuit habeas appeal. He contends that this prejudice now supplies the "injury" necessary to state a claim for denial of access to the courts. In that regard, the plaintiff's argument is without

merit. A finding by the Third Circuit involving a wholly different state statute would have no bearing on the Second Circuit's analysis of the Connecticut statute under which the plaintiff was convicted. It is not as though the plaintiff was unaware of the theory invoked by the appellant in *Nugent* and thus was deprived of and failed to present a viable argument. On the contrary, the plaintiff presented the same argument in his habeas petition as the appellant made in *Nugent*.[2] Unlike the appellant in *Nugent*, the plaintiff was simply unsuccessful. Thus, his contention that he was unaware of the *Nugent* case, which involved dissimilar facts and a different state statute, does not show that he suffered injury *because of* any perceived deficiencies in the Etowah library.

Likewise, the plaintiff's allegation that a magistrate judge has "recommended" dismissal of his civil action in the Western District of Louisiana does not allege sufficient injury to state a claim for denial of access. Not only does the plaintiff fail to state the nature of the deficiency which threatens to result in the dismissal of his complaint, he is extremely vague with respect to the connection between the alleged shortcomings of the Etowah law library and how those shortcoming affected his case

[2] In fact, the plaintiff was aware of and asserted this same argument before Immigration authorities as early as December of 2000. (Doc. #18, Exhibit 2). His assertion that the failure to learn about the *Nugent* decision somehow deprived him of valuable litigation assistance is, at best, disingenuous.

in Louisiana. Vague and conclusory allegations are insufficient to state a claim under § 1983. *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003); *Fullman v. Graddick*, 739 F.2d 553, 556-57 (11th Cir.1984). More importantly, it is clear on the face of the plaintiff's own allegations that he has not yet suffered actual prejudice in his Louisiana case. Conspicuously absent from the plaintiff's objections is any statement that the case has actually been dismissed. As such, the plaintiff has failed to allege that he has yet suffered injury as a result of alleged deficiencies at Etowah.

Restrictions on the Freedom of Religious Practice for Muslim Detainees

The initial report and recommendation found that the plaintiff had failed to state a claim with respect to his allegation that Muslim detainees are denied First Amendment rights to practice their chosen religion. The court found that the plaintiff had not alleged that he is a member of the Muslim faith or that he has personally been denied the opportunity to practice his chosen faith.[3] In his objections, the plaintiff asserts that he "was born into a muslim family" and the he "congregate[s] with the muslims on Fridays for Jumah." (Doc. #18, page 15). However, neither these

[3] The complaint in this action was filed jointly by several prisoners at the Etowah County Detention Center. On June 15, 2004, this action was deemed filed by Abimbola only; and the Clerk was directed to open separate cases for the other named plaintiffs. Additionally, the motion for class certification was denied in that same order. In his objections, the plaintiff makes the frivolous argument that because he was not ordered to amend his complaint following the separation of the case into separate actions, the court is now somehow estopped from denying his attempts to assert the religious claims on behalf of the other plaintiffs. The plaintiff's argument is wholly without merit and does not warrant further discussion herein.

statements nor his previous allegations show that the plaintiff actually practices the Muslim faith or how any efforts to practice that faith have been unconstitutionally curtailed by the Etowah staff.[4]

Retaliatory Transfer

It was recommended in the initial report that the plaintiff's retaliatory transfer claims be dismissed because he had failed to state which, if any, of the named defendants were directly involved in the transfers or that any of the named defendants were aware of his complaints at Concordia Parish Jail. Thus, the court concluded that he had failed to allege facts which supplied a "causal link" between his activities at Concordia and his transfer from that facility to other facilities, including the Etowah facility. In his objections, the plaintiff asserts that defendants Craig Robinson and Dean Hoth were "directly involved" in his transfer "out of Oakdale to Concordia[5] and then to this substandards (sic) 'Etowah.'"[6] (Doc. #18, page 18). He further asserts

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[4] It is interesting to note that in the plaintiff's Second Circuit habeas case, the court there noted that Abimbola had applied for asylum by asserting "that he would be killed by Muslim extremists if he returned to Nigeria because of his family's prominent position in their Christian church." *Abimbola v. Ashcroft*, 378 F.3d 173, 174 (2nd Cir. 2004).

[5] In his initial complaint, the plaintiff states that the alleged retaliatory transfer occurred from Concordia to Pine Prairie because of "several complaints of their harsh treatment at Concordia." (Doc. #1, page 9). There is no allegation that the plaintiff complained about conditions at Oakdale. Thus, his complaint states that the retaliatory transfer took place *out of* Concordia not *to* Concordia. It is unclear why he now asserts allegations regarding a transfer from Oakdale to Concordia.

[6] The plaintiff also states that Nancy Hooks, ICE Officer in Charge at Oakdale, who was not named as a defendant in the initial complaint, was also directly involved in his transfers. He urges

that defendant Craig Robinson was either directly involved in the "transfer decision" or he "adopted policy and customs for which [the plaintiff] complained which led to his transfer." (Doc. #18, page 19).

As stated in the initial report and recommendation, claims alleging retaliation must be factual; and mere conclusory allegations of retaliation will not suffice. *Adams v. James*, 797 F. Supp. 940, 948 (M.D. Fla. 1992). To state a valid claim, a plaintiff must present "specific facts" which show that he was subjected to retaliation because he exercised a constitutional right. *Frazier v. Dubois,* 922 F.2d 560, 562 n.1 (10th Cir. 1990). In this case, the plaintiff has set forth no specific facts which show which, if any, of the defendants ordered his transfer because of retaliatory motives. He provides no specific dates and times of transfers or how those transfers correlate to specific complaints. His general and conclusory allegations that the defendants, as a whole, were "directly involved" in his transfers, or that they "adopted policies" which caused the plaintiff to complain, lack sufficient specificity to state a valid claim. In reviewing a complaint, the court "need only accept 'well-pleaded facts' and 'reasonable inferences drawn from those facts.'" *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003); *quoting Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485

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the court to allow him to amend to include her as a defendant. For the reason stated in the discussion above, his request is DENIED.

(11th Cir.1992). In this instance, the lack of specific facts pointing to any one defendant makes it impossible for the court to reasonably draw the inference that any of them engaged in retaliatory conduct. "[C]omplaints relying on the civil rights statutes are insufficient unless they contain some specific allegations of fact indicating a deprivation of rights, instead of a litany of general conclusions that shock but have no meaning." *Barr v. Abrams*, 810 F.2d 358 (2nd Cir. 1987).

Access to Medical Care

In his initial complaint, the plaintiff made no mention that he personally was in need of any specific medical care. Instead, the complaint asserted a claim on behalf of another detainee with respect to an alleged denial of adequate doses of insulin. (Doc. #1, page 10). Accordingly, the initial report recommended that the claim be dismissed based upon the plaintiff's lack of standing to assert a claim on behalf of another detainee. *Harris v. Evans*, 20 F.3d 1118 (11th Cir. 1994). In his objections, the plaintiff now asserts, belatedly, that he suffers from "poor eyesight" and is being denied regular examination by an eye doctor.[7]

[7] He asserts that he should be allowed to visit an eye doctor every six months. He admits that he was examined in April of 2005 and provided glasses. However, he states that the glasses "broke the same week" due to alleged poor quality and have not been replaced. (Doc. #18, page 22).

Medical treatment violates the Eighth Amendment only when it is so grossly incompetent, inadequate or excessive as to shock the conscience or to be intolerable to fundamental fairness. *Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991). The conduct of prison officials must run counter to evolving standards of decency or involve the unnecessary and wanton infliction of pain to be actionable under § 1983. *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Nothing in the plaintiff's new allegations meets this strict burden. Although he has not been allowed to see an eye doctor at the frequency he desires, his vision issues have not been ignored by the prison staff; and he admits that he has been examined and provided glasses. A mere difference of opinion between an inmate and the prison medical staff as to treatment or diagnosis will not, alone, give rise to a cause of action under the Eighth Amendment. *Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991).

Denial of Access to Nutritional Food

In the initial report and recommendation, the court found that the plaintiff's allegations regarding lack of adequate nutrition failed to state a claim under constitutional standards. In his objections, the plaintiff makes the general and conclusory allegation that the food served him is "insufficient for Kindergarten children." (Doc. #18, page 24). He supports this opinion by stating that he is served "beans every day for lunch and dinner and grits every day for breakfast" and that he

is served meat only once per week. *Id*. However, he again fails to show that he has suffered any adverse health affects from the diet provided. As stated in the initial report and recommendation, the Constitution only requires that prisoners be provided "reasonably adequate food" which contains "sufficient nutritional value to preserve health." *Hamm v. Dekalb County*, 774 F.2d 1567, 1575 (11th Cir. 1985). The plaintiff has presented no new factual allegations which show that the Etowah County Detention Center has failed to meet these minimum constitutional standards.

Access to Telephone

The plaintiff objects to the finding in the initial report and recommendation that he has failed to state a claim with respect to telephone access. He contends that the a charge of $1.00 per minute for local calls and $2.50 per minute for international calls is "tantamount to denial of telephone communication altogether." (Doc. #18, pages 25-26). He states that his Second Circuit habeas appeal and his civil action in the Western District of Louisiana were "stymied" because of the phone rates. He contends that he could have obtained assistance from "legal advocates" and "other sources" had the Etowah administration provided phone service at a "reasonable" rate. *Id.* at 25.

The vague nature of the plaintiff's newly asserted grounds are not sufficient to state a claim for denial of access to the courts based upon the alleged "extortionate"

phone rates. He has merely asserted the conclusory allegation the he could have obtained "pertinent case law" from outside sources "but for" the phone rates charged at Etowah. More importantly, as explained earlier in this report, the two cases cited by the plaintiff (his habeas petition and his W.D.La. civil action) are not sufficient to show that he has suffered actual prejudice in the nature of a denial of access to the courts. Thus, his use of those examples to attempt to show that the phone rates at Etowah have resulted in a denial of access is without merit. Additionally, the Eleventh Circuit has concluded that a restriction on telephone use by prisoners does not, alone, violate the First Amendment where prisoners have alternative means of communicating with the outside world, including visitation and the mails. *See Pope v. Hightower*, 101 F.3d 1382, 1385 (11th Cir. 1996). Coupled with the fact that prisoners are not entitled a specific rate for their phone calls,[8] it seems clear that the plaintiff has failed to state a First Amendment claim.

Alleged Assault on Detainee Enrique Lopez:

The complaint alleges that four guards at the Etowah facility beat, kicked, and maced fellow detainee Enrique Lopez in his cell. The plaintiff contends that as a cellmate of Lopez, he suffered sneezing and coughing of blood as a result of being

[8] See *Johnson v. State of Cal.*, 207 F.3d 650, 656 (9th Cir. 2000) and *Arsberry v. Illinois*, 244 F.3d 558 (7th Cir. 2001).

in the vicinity when the mace was sprayed. In the initial report, the undersigned recommended that the plaintiff's claim be dismissed for the reason that he has no standing to assert an claim on behalf of Lopez and because his own claims did not rise to the level of gross physical abuse or intentional and malicious infliction of harm standard applicable to unadmitted aliens. The plaintiff now objects to that portion of the initial report which found that he had failed to state a claim because of his status as an unadmitted alien.

Claims involving excessive force against pretrial detainees are governed by the Due Process Clause of the Fourteenth Amendment rather than the Eighth Amendment's cruel and unusual punishment clause. However, because the applicable standard is the same under either standard, Eighth Amendment case law involving the treatment of convicted prisoners applies to cases involving the treatment of pretrial detainees. *Bozeman v. Orum,* 422 F.3d1265 (11th Cir. 2005). Under applicable Eighth Amendment case law, the courts have recognized that maintaining institutional security and preserving internal order and discipline are essential goals of a prison administration and may require limitation or retraction of the constitutional rights of prisoners. *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L.Ed.2d 47 (1979). Prison officials must therefore be free to take appropriate action to ensure the safety of inmates and staff, and the courts will not normally

second-guess prison officials on matters involving internal security. *Wilson v. Blankenship*, 163 F.3d 1284 (11th Cir. 1998). When disciplinary action is taken by a prison official to prevent a security threat or to restore official control, the court's Eighth Amendment inquiry focuses on whether force was applied in a good faith effort to maintain or restore discipline or was undertaken maliciously or sadistically to cause harm. *Sims v. Mashburn*, 25 F.3d 980 (11th Cir. 1994). The factors to be examined in determining whether the use of force was wanton and unnecessary include an evaluation of: 1) the need for the application of the force, 2) the relationship between that need and the amount of force used, 3) the threat reasonably perceived by the responsible officials, and 4) any efforts made to temper the severity of the response. *Hudson*, 503 U.S. 7.

In the present case, the plaintiff pleads no specific facts which directly show a deprivation of rights. In other words, with respect to prisoners, the actions alleged to have been taken by the guards violate the Constitution only when they are unnecessary and wanton or are done maliciously or sadistically to cause harm. *Whitley v. Albers*, 475 U.S. 312 (1986). The plaintiff's bare allegations do not show that the guards' actions were unnecessary or wanton with respect to the overall circumstances that may have been associated with the incident. Standing alone, the guards' actions would not automatically constitute an Eighth Amendment violation

when viewed in the context of a prison setting where the need for security, order, and discipline are paramount. As stated above, when force is used in a good faith effort to maintain or restore discipline, the Constitution is not necessarily violated. In this case, the plaintiff has pled no facts which address the four factors outlined in *Hudson* for evaluating excessive force complaints, nor do his bare allegations alone show that the guards' actions were undertaken maliciously. Therefore, the plaintiff has not stated facts which meet the subjective component of an Eighth Amendment claim. *See Boddie v. Schnieder,* 105 F.3d 857, 862 (2nd Cir. 1997). "[C]omplaints relying on the civil rights statutes are insufficient unless they contain some specific allegations of fact indicating a deprivation of rights, instead of a litany of general conclusions that shock but have no meaning." *Barr v. Abrams*, 810 F.2d 358 (2nd Cir. 1987).

Even if the plaintiff had stated a valid constitutional claim, he would not have been able to assert that claim against the named defendants. Nothing in the complaint shows that any of the defendants were in any way involved in the incident. Supervisory officials are not liable in a *Bivens* action or a § 1983 action under the theory of *respondeat superior* for the unconstitutional acts of their subordinates. *Gonzalez v. Reno,* 325 F.3d 1228 (11th Cir. 2003); *Harris v. Ostrout*, 65 F.3d 912, 917 (11th Cir. 1995).

Other Detention Standards Violations

Finally, the plaintiff asserts new claims in his objections which allege that the defendants have violated INS detention standards by failing to allow him and other detainees to perform work for wages and by failing to provide socks, underwear, and T-shirts to the detainees. However, the mere fact that agency regulations or procedures have been violated does not, alone, result in a constitutional violation. *See Magluta v. Samples*, 375 F.3d 1269, 1279 n.7 (11th Cir. 2004); *United States v. Caceres*, 440 U.S. 741 (1979). Because there is no underlying constitutional violation based upon the facts alleged, the plaintiff has failed to state a claim.

RECOMMENDATION AND NOTICE OF RIGHT TO OBJECT

Accordingly, for the reasons stated above, the magistrate judge RECOMMENDS that all claims in this action, except the claim against Wes Williamson, Sheriff James Hayes, and Dean Hoth that the plaintiff has been denied access to outdoor recreation, be DISMISSED for failing to state a claim upon which relief can be granted, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

Plaintiff may file specific written objections to this report and recommendation within eleven (11) days from the date it is filed in the office of the Clerk. Failure to file written objections to the proposed findings and recommendations contained in

this report and recommendation within eleven (11) days from the date it is filed shall bar an aggrieved party from attacking the factual findings on appeal. Written objections shall specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection. Objections not meeting this specificity requirement will not be considered by a district judge.

A party may not appeal a magistrate judge's recommendation directly to the United States Court of Appeals for the Eleventh Circuit. Appeals may be made only from a final judgment entered by or at the direction of a district judge.

The Clerk is DIRECTED to serve a copy of this report and recommendation upon the plaintiff and counsel for defendants.

DONE this 10th day of July, 2006.

HARWELL G. DAVIS, III
UNITED STATES MAGISTRATE JUDGE