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United States District Court, N.D. New York.

Donovan BLISSETT, Plaintiff,
v.
Thomas A. COUGHLIN, III, Commissioner, Department of Correctional Services; Harold J. Smith, Superintendent; James E. Cochrane, D.S.S.; Eugene S. Lefevre, Superintendent; James Curran, D.S.S.; Liberty, Sergeant; R. Ball, Sergeant; Defayette, Lieutenant; Richard Gregoire; William Willis; A.C. Manning, Corrections Officer; Clifford M. Martin; T. Sears, Corrections Officer and several Corrections Officers and John Does, Defendants.

No. 84–CV–779 (LEK/DJS). | July 23, 1998.

Attorneys and Law Firms

Donovan Blissett, Plaintiff pro se.

Hon. Dennis C. Vacco, Attorney General of the State of New York, Litigation Bureau, the Capitol, Albany, New York, for Defendants, Steven H. Schwartz, Asst. Attorney General, of counsel.

Opinion

MEMORANDUM, DECISION, AND ORDER

KAHN, J.

***1** Presently before the Court is the defendants' motion for reconsideration of the July 1, 1994 Order by the Honorable Con. G. Cholakis which granted plaintiff summary judgment on his due process claim in light of the Supreme Court decision in *Sandin v. Connor,* 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). Permission to make this belated motion was granted by this Court in the Order dated September 25, 1997.

I. *FACTS*

On September 19, 1983, inmates at the Attica Correctional Facility, where plaintiff Donovan Blissett ("Blissett") was then incarcerated, staged a strike. One week later, plaintiff and 26 other inmates were transferred from Attica to the Clinton Correctional Facility where they were interviewed. On September 29, 1983, plaintiff and 23 other transferred inmates were served with misbehavior reports. A hearing was held on October 3, 1983 which resulted in Blissett's placement in Involuntary Protective Custody ("IPC"). Plaintiff was found to have violated Chapter VI, Title 7, Section 304.1(b) which reads: "Protective Admission, ... shall apply in the case of inmates who must for good cause be restricted from communication with the general population." Doc. # 44, Aug. 12, 1992, Defs. Motion for Summary Judgment, Ex. A. Hearing Trans.

Plaintiff asserts that after the hearing, he received 153 days in IPC which he served during 1983 and 1984. Blissett argues that his due process rights were violated at the hearing because he was not allowed to present evidence or witnesses on his behalf[1] and that he was not given sufficient notice of the charges against him. Defendants contend that Blissett's placement in IPC did not violate his due process rights because 153 days in IPC does not constitute an "atypical and significant hardship ... in relation to the ordinary incidents of prison life." *Sandin,* 515 U.S. at 484.

II. *DISCUSSION*

A. *Motion for Reconsideration*

The granting or denial of a motion for reconsideration is committed to the sound discretion of the District Court. *See McCarthy v. Manson,* 714 F.2d 234, 237 (2d Cir.1983). There are "only three possible grounds for any motion for reconsideration: (1) an intervening change in controlling law, (2) the availability of new evidence not previously available, and (3) the need to correct a clear error of law or prevent manifest injustice." *Larsen v. Ortega,* 816 F.Supp. 97, 114 (D.Conn.1992) (citing *Atkins v. Marathon LeTourneau Co.,* 130 F.R.D. 625, 626 (S.D.Miss.1990)).

Sandin applies retroactively to this case. *See Frazier v. Coughlin,* 81 F.3d 313, 317 (2d Cir.1996) (citing *Harper v. Virginia Dep't of Taxation,* 509 U.S. 86, 95–97, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993) (a rule of federal law "must be given full retroactive effect"). Further, because *Sandin* represents a significant change in the controlling law, and given the fact that plaintiff raised no objections to the motion when it was made in his presence at his trial on September 25, 1997, the Court will reconsider whether summary judgment should be granted.

B. *Summary Judgment Standard*

***2** Summary judgment must be granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to any material fact, and that the moving party is

entitled to summary judgment as a matter of law. Fed.R.Civ.P. 56; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Lang v. Retirement Living Pub. Co.,* 949 F.2d 576, 580 (2d Cir.1991). The moving party carries the initial burden of demonstrating an absence of a genuine issue of material fact. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Thompson v. Gjivoje,* 896 F.2d 716, 720 (2d Cir.1990). Facts, inferences therefrom, and ambiguities must be viewed in a light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Project Release v. Prevost,* 722 F.2d 960, 968 (2d Cir.1983). A genuine issue is an issue that, if resolved in favor of the non-moving party, would permit a jury to return a verdict for that party. *R.B. Ventures, Ltd. v. Shane,* 112 F.3d 54, 57 (2d Cir.1997) (citing *Anderson,* 477 U.S. at 248).

When the moving party has met the burden, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.,* 475 U.S. at 586. At that point, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial ." Fed.R.Civ.P. 56; *Liberty Lobby Inc.,* 477 U.S. at 250; *Matsushita Elec. Indus. Co.,* 475 U.S. at 587. To withstand a summary judgment motion, evidence must exist upon which a reasonable jury could return a verdict for the nonmovant. *Liberty Lobby, Inc.,* 477 U.S. at 248–249; *Matsushita Elec. Indus. Co.,* 475 U.S. at 587. Thus, summary judgment is proper where there is "little or no evidence ... in support of the non-moving party's case." *Gallo v. Prudential Residential Servs.,* 22 F.3d 1219, 1223–1224 (2d Cir.1994) (citations omitted).

C. *Due Process*

There are two steps in analyzing a procedural due process claim. Initially, there must be a liberty interest at stake "which has been interfered with by the state." *Kentucky Dep't of Corrections v. Thompson,* 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989). Secondly, if a legitimate liberty interest is identified, the court must examine "whether the procedures attendant upon that deprivation were constitutionally sufficient." *Id.*

Protected liberty interests may arise form either the Due Process Clause of the Fourteenth Amendment itself, or from the laws of the states. *Hewitt v. Helms,* 459 U.S. 460, 466, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983). Recently, the Supreme Court has restricted the instances in which a liberty interest will be found to have arisen from the laws of the States. In *Sandin,* the Court, while continuing to recognize liberty interests, determined that "these interests will be generally limited to freedom from restraint which ... imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 U.S. at 484.

***3** As a result of this decision, the Second Circuit has found that an "inmate must establish that his confinement or restraint (1) creates an 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life' and (2) that 'the state has granted its inmates, by regulation or by statute, a protected liberty interest in remaining free from that confinement or restraint." ' *Arce v. Walker,* 139 F.3d 329, 334 (2d Cir.1998) (quoting *Sandin,* 515 U.S. at 482 and *Wright v. Coughlin,* 132 F.3d 133, 136 (2d Cir.1998)). The Second Circuit has presented several factors which district courts must consider in determining what constitutes an "atypical and significant hardship." *Sandin,* 515 U.S. at 482. "These include (1) the effect of disciplinary action on the length of prison confinement; (2) the extent to which the conditions of the disciplinary segregation differ from other routine prison conditions; and (3) the duration of the disciplinary segregation imposed compared to discretionary confinement." *Wright,* 132 F.3d at 136 (citing *Sandin,* 515 U.S. at 484). "In order to determine whether a liberty interest has been affected, district courts are required to examine the circumstances of a confinement and to identify with specificity the facts upon which its conclusion is based." *Id.* at 137 (citing *Miller v. Selsky,* 111 F.3d 7, 9 (2d Cir.1997); *Sealey v. Giltner,* 116 F.3d 47, 52 (2d Cir.1997) ("we have indicated the desirability of fact-finding before determining whether a prisoner has a liberty interest in remaining free from segregated confinement") and *Frazier,* 81 F.3d at 317 (affirming the dismissal of an inmate's action because the district court had done "extensive fact finding" and "extensive proof" had been adduced)). In order to proceed, the Court must examine the three elements set forth by the Second Circuit.

1. Effect of Proceeding on Length of Confinement

There is no evidence before the Court that the plaintiff's prison term was extended as a result of the hearing which placed him in IPC for 153 days. As a result, the Court concludes that this factor weighs toward establishing that Blissett's punishment was not "atypical and significant hardship" pursuant to *Sandin.*

2. Extent to which IPC Differs from General Population Confinement

As discussed earlier, the moving party carries the initial burden of demonstrating an absence of a genuine issue of material fact. Fed.R.Civ.P. 56. When the moving party has met the burden, the non-moving party "must do more than simply show that there is some metaphysical doubt

as to the material facts." *Matsushita Elec. Indus. Co.,* 475 U.S. at 586. At that point, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56. Thus, in this case, the plaintiff has the burden of showing that his placement in IPC for 153 days rises to the level of an "atypical and significant hardship" pursuant to *Sandin.* The extent to which the conditions of the disciplinary segregation differ from other routine prison conditions turns on a "comparison [between the conditions under which the prisoner is confined and] the conditions in the general population and in other categories of segregation." *Arce,* 139 F.3d at 336.

***4** Defendants submit the affidavit of Anthony J. Annucci, the Deputy Commissioner and Counsel for the New York State Department of Correctional Services, in support of their contention that the confinement was typical of prison life. Citing *Scott v. Albury,* 138 F.3d 474, 479 (2d Cir.1998), Blissett argues that the information in the Annucci affidavit is not relevant because it does not discuss the conditions as they were in 1983 and 1984, the period of his confinement in IPC. The affidavit relies heavily on factual data and regulations that were not in force until after the plaintiff's confinement. The Court agrees that in *Scott,* the Second Circuit found that the *Sandin* analysis should be performed in light of conditions as they exist at the time of punishment, and as such, turns to the regulations that were in force during Blissett's confinement.

The regulations that were in effect during Blissett's 1983–84 confinement were codified in Title 7, Chapter VI, Part 300 of the New York Code of Rules and Regulations ("N.Y.C.R.R.") dated March 18, 1976. During this time, the Special Housing Unit was utilized for a variety of reasons, one of which was protective admission:

> [t]o provide suitable premises for protecting potential victims, insuring witnesses against intimidation, maintaining inmates who lack the strength to live in the general institutional community, controlling inmates whose violent emotions are out of control or who refuse to behave in an orderly fashion, or for maintaining inmates who must be restricted from communication with the general inmate population.

7 N.Y.C.R.R. § 300.3(b)(3); *see also* 7 N.Y.C.R.R. § 304.1(b) (protective admission shall apply to witnesses who are likely to be intimidated, inmates who are potential victims, inmates who lack the strength to live in the general population, or "for good cause, [inmates who should] be restricted from communication with the general inmate population"). Other types of SHU admission include automatic admission, detention admission, and adjustment admission. 7 N.Y.C.R.R. § 304.1. Under the old regulations, conditions of SHU confinement were largely identical for all purposes, however certain further restrictions were permitted after a finding that the inmate was guilty of a disciplinary violation after a hearing was conducted.

The conditions of confinement are also discussed at length in these regulations. Regarding personal items, "[e]ach inmate shall be provided with the following items ... to the same extent as such items are provided for inmates in the general population" which included clothing; bedding, personal hygiene items, cleaning supplies, and writing materials. 7 N.Y.C.R.R. § 301.3(a)(1–5). Inmates in SHU were also allowed to possess eyeglasses, books, and periodicals that would be permitted in the general population and there is no limit on "law books, periodicals, or other legal materials." 7 N.Y.C.R.R. § 301.3(b). Under these regulations, inmates were "permitted to have meals of the same type and in the same quantity as the meals available to inmates in the general population." 7 N.Y.C.R.R. § 301.4(a) Inmates in the SHU were permitted at least once each week and received "exercise outside of his cell for at least one hour each day and where weather permits such exercise shall be permitted out of doors." 7 N.Y.C.R.R. § 301.5(a) and (b). The regulations further provided that "[n]o inmate shall be deprived of the correspondence or visiting privileges available to inmates in the general population." 7 N.Y.C .R.R. § 301.6. Inmates in the SHU also received regular health inspections. 7 N.Y.C.R.R. § 303.3. From this information, the Court concludes that while it certainly is not the same, life in SHU is not significantly different from life in the general population or other types of segregated confinement. *Arce,* 139 F.3d at 336. In fact, as illustrated above, many of the privileges granted to SHU inmates are identical to privileges bestowed upon the general inmate population.

***5** Plaintiff only suggests one reason as to why this confinement was different from routine prison conditions; specifically that there was no periodic review required for inmates in IPC as compared to those prisoners who were in disciplinary confinement. Blissett asserts that even though the hearing was punitive in nature, the defendants placed him in IPC to avoid the periodic review that was required for inmates in disciplinary confinement. Plaintiff suggests that other differences exist, but his attempts to gather specific information on his confinement has been unsuccessful since he has been told that information relevant to his confinement was destroyed seven years after the hearing. Blissett's assertion that record is void of the facts needed to determine that his confinement was "atypical" does not satisfy the burden of establishing "specific facts that there is a genuine issue for trial."

Fed.R.Civ.P. 56.

Plaintiff fails to suggest in any relevant way that his confinement was atypical or a significant hardship. He does not suggest that he suffered in any way other than the mere fact that he was in IPC for 153 days. The Second Circuit has held that allegations such as the denial of personal property including clothing, the deprivation of food, the loss of privileges such as telephone, packages, and conjugal visits, and the denial of work incentive programs should be resolved in the plaintiff's favor on a motion for summary judgment. *Wright,* 132 F.3d at 138. No such allegations have been made here. In short, Blissett "has not shown that the conditions of his confinement in the SHU were dramatically different from the 'basic conditions of [his] indeterminate sentence ." ' *Frazier,* 81 F.2d at 317 (quoting *Sandin,* 515 U.S. at 485); *see also Spence v. Senkowski,* 1998 WL 214719,*3 (N.D.N.Y. April 17, 1998) (no liberty interest in avoiding SHU confinement where, "[o]ther than the length of time plaintiff was confined to SHU, plaintiff ... offered little evidence to demonstrate that his punishment was of such a nature as to confer a constitutionally protected liberty interest").

3. Length of Confinement

It is well established that the 153 day period of confinement at issue here is not, in and of itself, "an atypical or significant hardship." *See Spence,* 1998 WL 214719 at *3. The Second Circuit has found that short periods of confinement such as the thirty days in *Sandin* are not considered "atypical" by the Second Circuit. *See Frazier* 81 F.3d 313 (30 days confined to cell upheld after extensive fact finding). However, periods of confinement exceeding short durations which were once routinely held to be typical by the district courts in the Northern District of New York[2] have not been upheld in other cases with similar durations. However, the cases were reversed on grounds other than duration, most commonly for further development of the factual record. None of the cases found were not reversed on the basis of duration alone. For example, in *Miller v. Selsky,* 111 F.3d 7 (2d Cir.1997), the Second Circuit found that *Sandin* did not create a blanket rule that disciplinary confinement would never create a liberty interest and remanded after the plaintiff served of 125 days in SHU. Similarly, in *Brooks v. DiFasi,* 112 F.3d 46 (2d Cir.1997), the Second Circuit found that the district court had not engaged in enough fact-finding and remanded the case after the plaintiff had spent 180 days in keeplock confinement. Also, in *Sealey,* 116 F.3d 47, the Second Circuit reversed a finding that 152 days in SHU was not atypical on the basis that factual development was necessary. More recently, in *Wright,* 132 F.3d at 138, the Second Circuit reversed a finding of summary judgment for the defendants after the plaintiff served 168 days in SHU and 120 days in keeplock because the district court failed to resolve factual questions in favor of the non-moving plaintiff. Most recently, in the case of *Scott* discussed earlier, the Second Circuit reversed the district court's finding that 60 days in SHU did not create a liberty interest because the court failed to apply the applicable regulations in its analysis. 138 F.3d at 479.

***6** This Court believes that sufficient fact-finding has been undertaken and that the 153 days that Blissett spent in IPC does not constitute an "atypical and significant hardship on the [plaintiff] in relation to the ordinary incidents of prison life." *Sandin,* 515 U.S. at 484.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is GRANTED and the case DISMISSED in its ENTIRETY; and it is further

ORDERED that the Clerk serve a copy of this order on all parties by regular mail.

IT IS SO ORDERED.

Footnotes

1 Judge Cholakis found that "[a]ll the process the Constitution requires for prisoners facing administrative segregation is some notice of the charges against them and an opportunity to present their views concerning the decision as to whether or not they will be placed in IPC [Involuntary Protective Custody]. July 1, 1994 Order at 5. "There is no right under the United States Constitution to call witnesses or present evidence." *Id.* This decision is not challenged and the Court sees no reason to reconsider that finding.

2 *See e.g. Delaney v. Selsky,* 899 F.Supp. 923 (N.D.N.Y.1995) (197 days in an SHU does not rise to the level of a protected liberty interest); *Carter v. Carriero,* 905 F.Supp. 99, 104 (W.D.N.Y.1995) (270 days not a cognizable liberty interest after *Sandin*); *Polanco v. Allan,* 1996 WL 250237 (N.D.N.Y.1996) (McAvoy, C.J.) (365 Days not a protected liberty interest).