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United States District Court,
N.D. Texas, Amarillo Division.

John Craig PURVIS, Pro Se, TDCJ-ID # 1002829
Plaintiff,
v.
Gary L. JOHNSON, Director, Joseph Domingues, Warden, Benny Brown, Asst. Warden, Daniel Whitaker, Captain, James Gambrell, Sgt., Douglas Lockhart, Chief of Classification, Dennis Markgraf, John Solis, Israel Reyna, and Larry Goucher,
Defendants.

No. 2:01-CV-0238. | Feb. 25, 2003.

Opinion

ORDER OF DISMISSAL

ROBINSON, J.

***1** Plaintiff JOHN CRAIG PURVIS, acting pro se and proceeding in forma pauperis while a prisoner confined in the Texas Department of Criminal Justice, Institutional Division, has filed suit pursuant to Title 42, United States Code, section 1983 complaining against the above-named defendants. On January 24, 2003, a Report and Recommendation was filed by the United States Magistrate Judge analyzing plaintiff's claims under Title 28, United States Code, sections 1915A and 1915(e)(2), as well as Title 42, United States Code, section 1997e(c)(1), and recommending plaintiff's claims be dismissed with prejudice for failure to state a claim on which relief can be granted.

Plaintiff filed his Objections on February 14, 2003. By his Objections, plaintiff argues his I-60's informed officials that his cellmate was threatening plaintiff every day. Despite plaintiff's description of his I-60's, review of the actual I-60's, attached to plaintiff's original complaint, reveals no statement that his cellmate had actually threatened him, only that plaintiff wanted to be moved because he was afraid of his cellmate due to his cellmate's size, racist attitude, and generally bad attitude. Further, plaintiff argues his verbal complaints to prison officials were sufficient because, plaintiff says, he stated he was trying to avoid a violent situation so he didn't get hurt. This information is not of a type which would indicate to prison officials that there existed a substantial risk of serious harm to plaintiff. In trying to obtain a cell transfer, an inmate is required to state the specific facts in his possession which substantiate his fear, not merely state that he has such a fear. This statement does not inform prison officials of the basis for plaintiff's fear and certainly does not indicate that there was a substantial risk of serious harm to plaintiff.

In order to analyze plaintiff's communications to prison officials, the Court inquired, by its Questionnaire, of the precise wording of plaintiff's oral statements and examined the written statements plaintiff submitted. Having reviewed the information plaintiff states he gave to prison officials, the Court concludes plaintiff gave generalities and hints, but did not explicitly state his cellmate was threatening him or provide any other specific basis for his fears, referring only to his cellmate's size and bad attitude. It doesn't matter how many officials plaintiff complained to or how many times he complained to each official. This information was not sufficient to place prison officials on notice that there was a substantial danger of serious harm to plaintiff. Consequently, plaintiff has failed to allege facts to support his claim of deliberate indifference to his safety.

Plaintiff objects that defendant LOCKHART is not mentioned in the Report and Recommendation and argues his cellmate's attack "stemmed from the fact that it dominoed from Lockharts failure to properly classify an inmate....[A]n investigation of classification records will undoubtedly show that the classification officer should have known [plaintiff's attacker] was a violent inmate, and this inmate should have been housed separately from other inmates as per T.D.C.J. policy for a inmate who has a taste for and history of violence [sic et passim]."

***2** Although plaintiff's allegations against LOCKHART are set forth in the Report and Recommendation, his claims against this defendant are not specifically analyzed. That defect is remedied below.

Plaintiff's speculation concerning what his attacker's classification records might show is not sufficient to support a claim that defendant LOCKHART or any other prison official knew of facts indicating plaintiff was in substantial danger of serious harm. Instead, the only actual fact plaintiff alleges LOCKHART knew was the contents of plaintiff's I-60 attached as Exhibit C to his original complaint. By this I-60, plaintiff states he is "housed with a back cellie who is very racial against whites he has no respect for me or anyone else I've tried to talk to him but his attitude is I'll beat the whole dorms ass and quite frankly I'm afraid of him will you please move me or him before something happens." Again, there is no specific statement by plaintiff that his cellmate has

actually threatened him and there are no specific facts showing plaintiff is in substantial risk of serious harm. Thus, plaintiff has failed to state facts to support a claim that LOCKHART was deliberately indifferent to a substantial risk of serious harm to plaintiff either with respect to his classification of plaintiff's attacker or his failure to respond to plaintiff's I-60. Consequently, plaintiff has failed to state a claim against defendant LOCKHART on which relief can be granted.

Although plaintiff argues he suffered a physical injury to support his claim for damages for psychological harm stemming from defendant GAMBRELL's acts or omissions, the injuries to which plaintiff points are those which resulted from the attack by his cellmate, not from GAMBRELL's alleged subsequent failure to properly report the attack or his disposition of the weapon. Consequently, those physical injuries will not support monetary damages for psychological harm resulting from GAMBRELL's subsequent acts or omissions.

The Court has made an independent examination of the records in this case and has examined the Magistrate Judge's Report and Recommendation, as well as the objections filed by the plaintiff.

The Court is of the opinion that the objections of the plaintiff should be OVERRULED and that the Report and Recommendation of the United States Magistrate Judge should be ADOPTED by the United States District Court, as supplemented herein.

This Court, therefore, does OVERRULE plaintiff's objections, and does hereby ADOPT the Report and Recommendation of the United States Magistrate Judge, as supplemented herein.

IT IS THEREFORE ORDERED that, pursuant to Title 28, United States Code, sections 1915A and 1915(e)(2), as well as Title 42, United States Code, section 1997e(c)(1), the Civil Rights Complaint filed pursuant to Title 42, United States Code, Section 1983, by plaintiff JOHN CRAIG PURVIS IS DISMISSED FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

***3** Any motions still pending are hereby DENIED.

The Clerk will mail a copy of this Order to the plaintiff and to any attorney of record by first class mail. The Clerk will also mail a copy of this Order to TDCJ-Office of the General Counsel, P.O. Box 13084, Capitol Station, Austin, Texas 78711, and to Claire Laric at the United States District Court for the Northern District of Texas, Dallas Division.

IT IS SO ORDERED.

REPORT AND RECOMMENDATION

AVERITTE, Magistrate J.

Plaintiff JOHN CRAIG PURVIS, acting pro se and while a prisoner incarcerated in the Texas Department of Criminal Justice, Institutional Division, has filed suit pursuant to Title 42, United States Code, Section 1983 complaining against the above-referenced defendants and has been granted permission to proceed in forma pauperis.

By his September 4, 2002, Amended Complaint, plaintiff claims the defendants failed to protect him from another inmate, violating his right to be safe from cruel and unusual punishment under the Eighth Amendment. Specifically, plaintiff alleges he was attacked by his cellmate on March 11, 2001, resulting in the loss of his front teeth, six stitches in his mouth, impaired speech, and physical and mental scars which will last all his life. Plaintiff alleges that, upon learning of the attack, defendant Sergeant GAMBRELL disposed of the weapon used by plaintiff's attacker by giving it to another inmate so his paperwork would be reduced. Plaintiff asserts he wrote an I-60,[1] exhibit A to plaintiff's original complaint, to defendant DOMINGUES on February 26, 2001; an I-60 to defendant WHITAKER, exhibit B to plaintiff's original complaint, on February 28, 2001; an I-60 to defendant MARKGRAF, also exhibit B to plaintiff's original complaint, on February 28, 2001; and an I-60 to defendant LOCKHART, exhibit C to plaintiff's original complaint, on February 28, 2001, all in an attempt to inform prison officials of his danger. In addition, plaintiff states he sent another I-60, exhibit D to plaintiff's original complaint, to defendants DOMINGUES and BROWN on March 5, 2001, as a further request for help.

Plaintiff alleges that, before the attack, he also spoke with defendants MARKGRAF, SOLIS, REYNA, and GOUCHER concerning "the issues and the danger at hand" but received no relief. By his September 23, 2002, response to question nos. 13 through 16 of the Court's Questionnaire, plaintiff adds factual specifics to this claim as follows. Plaintiff states that, as he exited the cafeteria one day, he approached defendant MARKGRAF and said, "Lieutenant, I need to have a word with you. I have a problem with my cellie and I'm afraid something is going to happen to me if ..." Plaintiff states defendant MARKGRAF interrupted him and told him to go back to his building.

Plaintiff alleges that, while he was sitting in the cafeteria, defendant SOLIS approached the table to tell plaintiff to

leave when plaintiff asked to talk to him. Plaintiff says he and then told SOLIS his cellie was unstable, he was trying to avoid a violent situation, and asked was there any way he could be moved or have his cellie moved. Plaintiff says SOLIS responded by laughing and saying, "Oh, what, inmate. You scared?" He says SOLIS then walked off.

***4** Plaintiff states that he saw defendant REYNA in the cafeteria and asked to have a word with him about a potential problem. He says he told REYNA he was in fear of violence from his cellie. Plaintiff states REYNA responded plaintiff would have a problem with him if plaintiff didn't go shave and left.

Plaintiff alleges that, while on the sidewalk going back to his building, he saw defendant GOUCHER exit the cafeteria and said, "Sergeant, I've got a problem with my cellie." Plaintiff says GOUCHER then replied that he didn't want to hear plaintiff's problems and ordered him to go on.

Plaintiff states he did not file a life endangerment report because TDCJ policy states that inmates should first try to resolve the problem verbally and, if that does not work, you should go to the written stage.[2]

Plaintiff added further allegations to his September 4, 2002, Amended Complaint, stating that inmate Jones, his attacker, was in TDCJ-ID for a violent crime, had been moved from cell to cell because he could not get along with any of his cellmates, and attacked two more inmates on the unit after his attack on plaintiff. Thus, plaintiff contends, officials "knew there was a substantial risk of danger from Inmate Jones" and ignored such risk.

Concerning GAMBRELL's failure to document the use of a weapon and his improper disposition of the weapon, plaintiff says his resulting harm was that his attacker was not placed in closed custody, which gave him several opportunities to threaten further harm to plaintiff. Plaintiff states this has caused him mental anguish and great fear for his life.

Plaintiff requests $220,000.00 in compensatory damages and a full set of tooth implants.

JUDICIAL REVIEW

When a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity, the Court must evaluate the complaint and dismiss it without service of process, Ali v. Higgs, 892 F.2d 438, 440 (5th Cir.1990), if it is frivolous,[3] malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C.1915A; 28 U.S.C.1915(e)(2). The same standards will support dismissal of a suit brought under any federal law by a prisoner confined in any jail, prison, or other correctional facility, where such suit concerns prison conditions. 42 U.S.C.1997e(c)(1). A *Spears* hearing need not be conducted for every *pro se* complaint. Wilson v. Barrientos, 926 F.2d 480, 483 n. 4 (5th Cir.1991).[4]

The Magistrate Judge has reviewed plaintiff's pleadings and has viewed the facts alleged by plaintiff both in his September 4, 2002, Amended Complaint and in his September 23, 2002, response to the Court's Questionnaire to determine if his claim presents grounds for dismissal or should proceed to answer by defendants.

THE LAW AND ANALYSIS

The Eighth Amendment affords prisoners protection against injury at the hands of other inmates; however, liability for an Eighth Amendment deprivation requires the same delinquency in denial of protection against harm from other inmates as it does for denial of medical care. Johnson v. Lucas, 786 F.2d 1254, 1259 (5th Cir.1986)(Eighth Amendment). Thus, there must be an allegation of facts which will support deliberate indifference on the part of officials. *Wilson v. Seiter,* 504 U.S. 962, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). Not every injury suffered by a prisoner at the hands of another rises to the level of a constitutional violation. Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970, 1977, 128 L.Ed.2d 811, 823 (1994). The plaintiff prisoner must demonstrate: (1) he is incarcerated under conditions "posing a substantial risk of serious harm," and (2) that the defendant prison official's state of mind is one of "deliberate indifference" to the prisoner's health or safety. Horton v. Cockrell, 70 F.3d 397, 401 (5th Cir.1995); Jones v. Greninger, 188 F.3d 322, 324-25 (5th Cir.1999).

***5** Deliberate indifference is defined as a failure to act where prison officials have knowledge of a substantial risk of serious harm to inmate health or safety. Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970, 1981, 128 L.Ed.2d 811 (1994).

In this regard the Supreme Court has cautioned:

> [A] prison official cannot be found liable under the Eighth Amendment ... unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Farmer v. Brennan, 511 U.S. at 837-38, 114 S.Ct. at 1979. It is only under exceptional circumstances that a prison official's knowledge of a substantial risk of harm may be inferred by the obviousness of the substantial risk. "[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause of commendation, cannot under our cases be condemned as infliction of punishment." Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970, 1979, 128 L.Ed.2d 811, 823 (1994).

Defendants DOMINGUES, BROWN, WHITAKER, MARKGRAF, SOLIS, REYNA, and GOUCHER

Initially, the Court notes plaintiff alleges no fact showing the defendants, or any of them, made the necessary inference that there was a substantial risk of serious harm to plaintiff and then ignored such inference. On the facts alleged, plaintiff's claim is that the defendants' knowledge of a substantial risk of serious harm may be inferred from the obviousness of that substantial risk.

Nevertheless, review of the facts presented by plaintiff does not show a risk of serious harm so obvious as to support an inference that defendants knew of such risk.

Plaintiff's I-60s, found in the file as exhibits A, B, C, and D attached to plaintiff's original complaint, cite his cellmate's size, racist attitude, and generally bad attitude as the basis for plaintiff's fear and contain a request for cell reassignment. At no point does plaintiff say his inmate has actually threatened him nor does plaintiff ask to file a life endangerment report against him. Plaintiff has stated he never received any response to his I-60s and there is no indication DOMINGUES, BROWN, MARKGRAF or WHITAKER was ever personally aware of them. Moreover, review of the verbal complaints plaintiff made to defendants MARKGRAF, SOLIS, REYNA, and GOUCHER shows plaintiff, while sometimes referring to possible violence, never said his cellmate had threatened him or gave any reason to support an inference that his was anything other than another case of two inmates who didn't like their cell assignments. Plaintiff's account of defendants' responses to his complaints clearly shows the defendants did not draw the inference that there was a substantial risk of serious harm to plaintiff. Since people are celled together involuntarily in prisons, officials must be wary of attempts by prisoners to manipulate assignments and cannot be expected to change cell assignments because two inmates don't like each other. The facts plaintiff presented in his I-60s and in his verbal complaints to officials do not indicate a substantial risk of serious harm so obvious as to support an inference that prison officials perceived such risk.

***6** Plaintiff attempts to show prison officials knew of his danger by alleging they knew his cellmate was incarcerated for a very violent crime, was moved several times because he did not get along with his cellmates, and attacked two other inmates after the attack of which plaintiff complains. These facts are insufficient to show officials knew plaintiff was in substantial risk of serious danger. The crime for which an inmate is incarcerated is only one of many factors considered by prison officials in classifying and housing inmates. Further, prison officials could have had no knowledge of the two subsequent attacks plaintiff mentions. Additionally, the fact that plaintiff's attacker had experienced other problems with cellmates, whom plaintiff does not state were also attacked, would only support an inference that plaintiff was not in danger of actual violence.

For the reasons set forth above, plaintiff's allegations do not show deliberate indifference by the defendants to a substantial risk of serious harm to plaintiff and, therefore, plaintiff has failed to state a claim on which relief can be granted.

In addition, the Court notes that prison officials operate under various restrictions, both practical[5] and legal,[6] concerning the housing of inmates and must demand that specific facts, not general complaints of incompatibility be provided to support an inmate's request for cellmate change. Any other approach would leave the system open to easy manipulation, compromising security and discipline. Plaintiff's failure to inform prison officials of any actual threats by his cellmate and his failure to even attempt to file a life endangerment report after his unsuccessful oral complaints, coupled with the paucity of facts plaintiff presented in his complaints and I-60s, demonstrates the defendants are clearly protected from his present claims by qualified immunity.

Defendant GAMBRELL

The only harm to which plaintiff can point which resulted from GAMBRELL's failure to document the use of a weapon in plaintiff's attack and the disposition of such weapon is that plaintiff has been subjected to further threats as a result of the classification of his attacker, resulting in fear and mental anguish. Plaintiff's fear and mental anguish will not support an award of monetary damages because there is no underlying physical injury for this claim. The attack on plaintiff and resulting physical injury did not result from any acts or omissions alleged against defendant GAMBRELL and, therefore, will not support the mental anguish claim. The Prison Litigation Reform Act requires a physical injury before a prisoner can recover for psychological damages. 42 U.S.C. S 1997e(e) ("No federal civil action may be brought by a prisoner ... for mental or emotional injury suffered while in custody without a prior showing of physical injury."). Consequently, plaintiff has failed to

state a claim against defendant GAMBRELL on which relief can be granted.

Defendant JOHNSON

***7** At page 3, question no. IV.B. of his September 4, 2002, Amended Complaint, plaintiff alleges defendant JOHNSON is responsible for "under training of staff, failure to maintain security, deprivation of rights, cruel & unusual punishment, reckless disregard, etc." Plaintiff makes absolutely no factual allegation to support any portion of these vague and conclusory claims against defendant JOHNSON, and it appears his inclusion as a defendant is actually based on his supervisory position; however, the acts of subordinates trigger no individual section 1983 liability for supervisory officers. Champagne v. Jefferson Parish Sheriff's Office, 188 F.3d 312, 314(5th Cir.1999). A supervisory official may be held liable only when he is either personally involved in the acts causing the deprivation of a person's constitutional rights, or there is a sufficient causal connection between the official's act and the constitutional violation sought to be redressed. Thompkins v. Belt, 828 F.2d 298, 304 (5th Cir.1987); Douthit v. Jones, 641 F.2d 345, 346 (5th Cir.1981) (per curiam). Plaintiff has alleged no fact demonstrating personal involvement by JOHNSON and has alleged no fact showing any causal connection between any act of JOHNSON's and the alleged constitutional violation. Consequently, plaintiff's allegations against this defendant fail to state a claim on which relief can be granted.

REMAINING CLAIMS

Plaintiff complains a post-assault request "to be interview[ed] under the Lamar issue, because plaintiff was in fear of being housed with a black due to experiences that resulted in injury to plaintiff" was denied by defendant DOMINGUES, placing plaintiff in constant fear for his life. The *Lamar*[7] agreed judgment filed September 22, 1977, provides that the assignment of inmates "shall be made on the basis of rational objective criteria and shall not be made on the basis of race, color, religion or national origin .... so as to bring about the maximum possible integration of the cells consonant with the factors of security, control and rehabilitation. In no case, however, will an inmate be housed in the same cell with another inmate or inmates when such assignment would constitute a clear danger to security, control and rehabilitation." Plaintiff's generalized fear does not present facts indicating a clear danger to security, control, or rehabilitation would result from his being celled with an African-American inmate and is precisely the kind of inchoate prejudice that *Lamar* does not allow prison officials to accommodate. Consequently, plaintiff's claim in this respect lacks an arguable basis in law and is frivolous. Neitzke v. Williams, 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

Lastly, plaintiff's complaints concerning the lack of response to his I-60 by Internal Affairs and to his affidavit requesting prosecution of inmate Jones by the County of Hartley, as well as plaintiff's May 16th grievance, all of which were filed after the assault by Jones, do not indicate any involvement by any of the named defendants or any resulting harm to plaintiff. Thus, these allegations fail to state a claim.

CONCLUSION

***8** Pursuant to Title 28, United States Code, sections 1915A and 1915(e)(2), as well as Title 42, United States Code, section 1997e(c)(1), it is the RECOMMENDATION of the Magistrate Judge to the United States District Judge that the Civil Rights Complaint filed pursuant to Title 42, United States Code, Section 1983, by plaintiff JOHN CRAIG PURVIS be DISMISSED WITH PREJUDICE FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED.

The United States District Clerk shall mail a copy of this Report and Recommendation to plaintiff and to any attorney of record, utilizing the inmate correspondence reply card or certified mail, return receipt requested, as appropriate. Any party may object to the proposed findings and to the Report and Recommendation within fourteen (14) days from the date of this Order. Rule 72, Federal Rules of Civil Procedure, and Rule 4(a)(1) of Miscellaneous Order No. 6, as authorized by Local Rule 3.1, Local Rules of the United States District Courts for the Northern District of Texas. Any such objections shall be in writing and shall specifically identify the portions of the findings, recommendation, or report to which objection is made, and set out fully the basis for each objection. Objecting parties shall file the written objections with the Clerk of the Court and serve a copy of such objections on the Magistrate Judge and on all other parties. The failure to timely file written objections to the proposed factual findings, legal conclusions, and the recommendation contained in this report shall bar an aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court. Douglass v. United Services Automobile Ass'n, 79 F.3d 1415, 1428-29 (5th Cir.1996)(en banc).

IT IS SO RECOMMENDED.

Footnotes

1 An I-60 is a TDCJ-ID form utilized for miscellaneous inmate communications to officials, including requests of various kinds. It is not a life endangerment report.

2 See plaintiff's September 23, 2002, response to question no. 9 of the Court's Questionnaire.

3 A claim is frivolous if it lacks an arguable basis in law or in fact, Booker v. Koonce, 2 F.3d 114, 115 (5th Cir.1993); *see, Denton v. Hernandez,* 504 U.S. 25, 112 S.Ct. 1728, 1733, 118 L.Ed .2d 340 (1992).

4 *Cf,* Green v. McKaskle, 788 F.2d 1116, 1120 (5th Cir.1986) ("Of course, our discussion of *Spears* should not be interpreted to mean that all or even most prisoner claims require or deserve a *Spears* hearing. A district court should be able to dismiss as frivolous a significant number of prisoner suits on the complaint alone or the complaint together with the *Watson* questionnaire.").

5 Only a finite number of cells exist to accommodate reassignments.

6 The agreed judgment filed September 22, 1977, in Lamar v. Coffield, H-72-1393 required prison officials to achieve maximum possible integration of the cells consonant with the factors of security, control and rehabilitation.

7 Lamar v. Coffield, H-72-1393.