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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

WILLIAM LEBRON CHURCH

v. CIVIL ACTION NO. 87-0204-R

CHUCK THOMPSON, etc., et al.

MEMORANDUM

Plaintiff William Lebron Church, a Virginia state prisoner, proceeding pro se, brings this action pursuant to 42 U.S.C. § 1983, challenging numerous conditions of his confinement. Jurisdiction is appropriate pursuant to 28 U.S.C. § 1343(a)(3). Plaintiff also alleges that he is entitled to recovery for the actions complained of under Virginia tort law and moves that the Court assert pendent jurisdiction over his state law claims.

Defendants have moved for summary judgment and plaintiff has rebutted their motion. Both parties have filed exhibits and affidavits, and the matter is ripe for disposition on the merits. In considering defendants' motion for summary judgment the Court considers the record in the light most favorable to plaintiff and draws all reasonable inferences therefrom which might support his position. See Cole v. Cole, 633 F.2d 1083 (4th Cir. 1980).

On December 12, 1986, plaintiff Church was approached by a fellow inmate, who, in the presence of defendants Tillis and Webster,

pushed plaintiff and took his tool shop timecard from his pocket. The inmate then proceeded to the tool shop and punched the timecard out, in the presence of defendant Jefferson. Despite plaintiff's protests to the officers, they took no action and he, out of anger and desperation, attacked the other inmate in an effort to retrieve his timecard. Defendant Howard then arrested plaintiff.

Some time thereafter, but no later than December 30, plaintiff was placed in pre-hearing detention pending an institutional adjustment committee determination of a charge of fighting with another inmate. No charges were brought against the other inmate.

After plaintiff was moved to pre-hearing detention in the C-Building, inventory was taken of his property. Meanwhile, the institutional classification committee met on January 7 and recommended continued pre-hearing detention until the adjustment committee disposed of the charges. During this time plaintiff suffered delays in inventorying in the personal property office, as a result of which he was denied the limited personal effects he had requested and which he was allowed by regulation to have in pre-hearing detention. Finally, the property office released them to him on January 12, 1987, one day before his release from the C-Building. The items in question were, among others, certain legal books, personal hygiene items, and a Bible (the Bible was never received while plaintiff was in detention). Also as a result of the inventory, plaintiff's television was confiscated.

Plaintiff complains of numerous conditions of his confinement in detention: no electricity to plug a radio into, only a light;[1] bare and faulty wiring ("fire would shoot out of it...light socket torn up...at times the power would go off"); showers in which the temperature controls malfunctioned, giving him a cold and the flu; walking in the nude by other inmates on the way to and from the shower and showering in the nude as other inmates made unsavory remarks of a sexual nature; a broken commode which leaked into a "huge puddle on the floor" of his cell; a stopped-up sink with only cold water; Sgt. Kit's refusal to allow him to have toothpaste and his inability to obtain a razor; loss of canteen privileges and recreation; inability to attend church services; incomplete servings of food which caused him to lose weight; improper ventilation and temperature control and smoke from burning mattresses; Sgt. Kit's improper distribution of writing materials; contracting another cold because he had to wear an ill-fitting coat on a visit to the dentist.

Other hardships included: noise (some of which was generated by defendant Sgt. Kit early in the mornings), no news, his unavailability to help other inmates with their law cases, loss of time from his institutional job, and denial of a pillow to sleep on.

Although plaintiff was acquitted of the institutional charge on January 12, he was not released from pre-hearing detention until

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[1]Elsewhere in his complaint, plaintiff alleges that there was "no light fixture for the electricity to plugg [sic.] for power when needed. They should have them and the power fixed." While the Court is obliged to draw the inferences most favorable to plaintiff, they must be reasonable. The Court does not find it reasonable to infer from these garbled descriptions that plaintiff's cell was not lighted.

the next day. On January 13, when he was released, he reported to the personal property office to retrieve the personal effects he was not allowed to have in pre-hearing detention. Defendant Eley, however, refused to return the balance of his property to him. One of the items plaintiff alleges he was unable to retrieve was his padlock to secure his cell. Consequently, when he left the items he had been afforded in pre-hearing detention in his cell in B-Building to go to dinner, his cell was unsecured. When he returned, his cell was ransacked and legal books and papers were missing. On January 15, after repeated efforts, he finally obtained from defendant Eley his effects which had been kept in the personal property office, but some of his legal books were missing. As a result of his inability to obtain his property after release from C-Building, he had no clean clothes or personal hygiene items during this period.

Although the adjustment committee hearing ended in plaintiff's favor, wrongful institution of disciplinary proceedings does not of itself rise to the level of a constitutional deprivation. Accordingly, to the extent plaintiff is alleging the same, it does not state a claim under § 1983. **Pollard v. Baskerville**, 481 F. Supp. 1157 (E.D. Va. 1979).

Plaintiff may be alleging that defendants enforced Department of Corrections regulations discriminatorily by writing a charge against him but not against the other inmate when they were both involved in the altercation. Prisoners may not be subjected to arbitrary punishment by prison officials. **Howard v. Smyth**, 365 F.2d 428 (4th Cir. 1966). For plaintiff to succeed on this theory he must

show intentional and purposeful discrimination by defendants. Kelly v. Cooper, 502 F. Supp. 1371 (E.D. Va. 1980); Yick Wo v. Hopkins, 118 U.S. 356 (1886). Plaintiff's complaint does not make such a showing. In his rebuttal, for the first time, he claims that defendants had an ulterior motive to harm him because they disliked his court activity. The Court finds this contention unsubstantiated. It is a conclusory allegation which does not set up a genuine issue of material fact as to defendants' intent. See White v. Boyle, 538 F.2d 1077, 1079 (4th Cir. 1976).

Further, while the inmates were treated differently, there was no infringement of a fundamental right suffered by plaintiff and the difference in treatment was not the result of a suspect classification. Consequently, if there were a rational basis for the difference in treatment, it would pass equal protection muster. See McGinnis v. Royster, 410 U.S. 263, 270 (1973); Kersh v. Bounds, 501 F.2d 585, 588 (4th Cir. 1974), cert. denied, 420 U.S. 925 (1975). In the instant case, as plaintiff admits, the other inmate violated two tool shop rules proscribing horseplay and punching another inmate's timecard. In contrast, as plaintiff admits, he was observed attacking another inmate, which was a sufficient basis for a charge of a violation of the divisional guideline proscribing fighting with another inmate. Consequently, there was a rational basis for his placement in detention and the commencement of disciplinary proceedings against him but not against the other inmate. Consequently, plaintiff may not maintain an equal protection claim on this basis. See McGinnis; Royster.

Moreover, since, as plaintiff admits, he attacked the other inmate, there is ample support for defendants' initiation of disciplinary proceedings against him and no due process grounds on which to challenge the same. See Superintendent v. Hill, 53 U.S.L.W. 4778 (June 17, 1985); Phillips v. Gathright, 468 F. Supp. 1211, 1212 (W.D. Va.), aff'd, 603 F.2d 219 (4th Cir. 1979).

The failure of defendants Webster and Tillis to protect plaintiff from being pushed by the other inmate and from having his timecard taken does not state a claim under § 1983. Of course, prison officials must protect inmates from violence where there is a pervasive risk of harm. See Shrader v. White, 761 F.2d 975 (4th Cir. 1985). In the instant case, plaintiff has not alleged any pervasive risk of harm was posed to him by the other inmate until the "attack" on plaintiff, brief as it was, actually occurred. Moreover, the minor physical contact which the other inmate made with plaintiff's person does not rise to the level of violence to which plaintiff is entitled to protection under the Eighth Amendment, however indifferent defendants may have been. See Estelle v. Gamble, 429 U.S. 97 (1976); cf. Van Horn v. Lukhard, 392 F. Supp. 384 (E.D. Va. 1975).

By Webster's and Tillis' failure to retrieve the card and Jefferson's allowing it to be punched out, plaintiff only suffered a property deprivation. Consequently, his allegation that the other inmate took and misused his timecard does not state a claim under § 1983. Hudson v. Palmer, 468 U.S. 517 (1984); Daniels v. Williams, 474 U.S. 327 (1986). Nor was defendants' failure to retrieve the timecard,

or otherwise prevent its being punched out, so shocking as to implicate plaintiff's substantive due process rights. See Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980). Consequently, plaintiff may not maintain his § 1983 action on this basis.

There are certain unavoidable disadvantages of confinement in detention as compared to life in general prison population. Assignment to detention is not per se cruel and unusual punishment. Breeden v. Jackson, 457 F.2d 578 (4th Cir. 1972). Moreover, there is no due process violation where an inmate is placed in detention pending a disciplinary hearing without the benefit of a hearing on the detention itself, so long as he is not kept there for an unreasonable period of time. See White v. Booker, 598 F. Supp. 984 (E.D. Va. 1984).

However, the conditions in detention, like the conditions in general population, must be measured against "'the evolving standards of decency that mark the progress of a maturing society,'" in determining whether these conditions violate the Eighth Amendment. Sweet v. South Carolina Department of Corrections, 529 F.2d 854, 860 (4th Cir. 1975), quoting Trop v. Dulles, 356 U.S. 86 (1958). The Eighth Amendment requires that prisoners be provided adequate lighting. Shrader. Plaintiff has alleged that the electrical wiring, apparently in his cell, was faulty. However, aside from a reference to power outages, which he has described as nothing more than sporadic, plaintiff has not alleged that he was deprived of illumination or that he suffered any harm from the faulty condition of the electric wiring in his cell. Consequently, plaintiff has not stated a claim under § 1983 on this basis. See Shrader; cf. Dawson v. Kendrick, 527 F. Supp. 1252 (S.D. W. Va. 1981).

While plaintiff caught a cold and the flu as a result of the faulty temperature control in the showers, the record indicates that the illness he suffered was not serious enough for him to seek medical attention from the prison doctor. While a showing of physical harm from conditions of confinement complained of in the prison may enable a plaintiff to state a claim under § 1983, plaintiff has not alleged, and the record does not reveal, that the harm he suffered from this condition was offensive to contemporary notions of decency as required by **Rhodes v. Chapman**, 452 U.S. 337 (1981); **See Shrader.**

Plaintiff's allegations that he was subjected to ridicule and sexual remarks on his way to and from the shower are not cognizable under § 1983. The Court of Appeals has not recognized a constitutional right of prison inmates not to be subjected by state action to involuntary exposure of their genitalia to members of the same sex. Cf. Lee v. Downs, 641 F.2d 1117 (4th Cir. 1981) (Prisoners have the right not to be seen naked by members of the opposite sex.); **cf. Logan v. Shealy**, 660 F.2d 1007 (4th Cir. 1981), **cert. denied**, 455 U.S. 942 (1982). Further, warden Muncy's affidavit indicates that it is prison policy for corrections officers to escort inmates in the C-Building to the showers and that the C-Building inmates have no direct contact with other inmates. Plaintiff has not rebutted this contention. Plaintiff may have felt fear of attack in addition to ridicule as he walked to and from the shower and as he showered. However, under the circumstances, it was not reasonable to fear that an attack would actually occur. Moreover, plaintiff has not alleged serious mental and emotional deterioration which must be present for

exposure to the threat of attack to constitute cruel and unusual punishment. See Shrader.

The Eighth Amendment requires that prisoners be furnished with a sink and a commode. Sweet. A leaking commode may fall short of the basic sanitary requirements imposed by the Eighth Amendment. Id. at 860. However, plaintiff's grievances Nos. 0100011 and 0100258 submitted to the Court as exhibits indicate that during the time plaintiff was in his cell in C-Building, the prison maintenance department was constantly working on the sinks and commodes and that his were repaired while he was in his cell. Plaintiff's complaint alleges the sink was never fixed, but even accepting the version of events set forth in the complaint, it cannot be said that such defendants as were aware of these conditions wantonly inflicted them on plaintiff. See Shrader at 978. Also, the lack of hot water in the sink does not state a claim under § 1983. Minns v. Simpson, 391 F. Supp. 1156 (W.D. Va. 1975).

It is clear that plaintiff did not receive his personal hygiene items from the personal property office until the day before his release from his cell in C-Building.[2] Deprivation of personal hygiene materials (in the instant case, toothpaste, a razor, and apparently shaving cream as well) may state a § 1983 claim as a violation of the Eighth Amendment. Sweet, at 860; Dawson at 1288-89. Accepting plaintiff's version of the facts as true, the deprivations complained of approach the denial of basic sanitation requirements proscribed by the Eighth Amendment. However, plaintiff has not

[2] The due process implications of this deprivation are discussed infra.

alleged that defendant Kit's failure to supply him with toothpaste was the result of more than simple negligence. See **Estelle**; **Shrader** at 978. Moreover, his temporary failure to supply plaintiff with the toilet articles in question is not so "shocking to the conscience" as to offend society's "evolving standards of decency." See **Trop**.

Nor do plaintiff's allegations of loss of canteen privileges state a claim for which relief may be granted under § 1983. **See Allgood v. Morris**, 724 F.2d 1098, 1101 (4th Cir. 1984). Also, defendants' exhibits indicate he was afforded the recreational opportunities required by **Sweet** at 865-66. Plaintiff's contention that there was no prison issue coat which fit him and that, as a result, he could not avail himself of the recreational opportunities is frivolous and does not suffice to create a genuine issue of material fact as to this issue.

Defendants' affidavits demonstrate that the prison chaplain was available to plaintiff, and he has not rebutted this contention. To the extent plaintiff is alleging that he was not allowed to attend church services with the general prison population, he does not state a claim for which relief can be granted under § 1983. **Sweet** at 863.

Of course, the Eighth Amendment requires that prison authorities meet inmates' basic nutritional requirements. **Sweet**, at 860. Plaintiff's allegation that the portions of food he received at mealtime were too small and imbalanced is supported only by a general contention that he lost weight. Plaintiff makes no attempt to show any calorie deficiency. Defendants' exhibit entitled "DAILY DAT[A?] SHEET" shows plaintiff was served three meals per day, apparently for

each full day he was in C-Building. See Sweet at 862. Consequently, plaintiff has not stated a claim for deprivation of his nutritional needs of a constitutional dimension. Id.

Plaintiff's allegation that the C-Building was improperly ventilated because the temperature erratically changed from hot to cold does not state a claim for relief under § 1983. Plaintiff has alleged nothing more than discomfort, for which § 1983 does not provide relief. See Shrader at 987. Plaintiff also alleges that the fires set in C-Building by other inmates polluted the air. Plaintiff does not allege he suffered any illnesses or injury as a result. Moreover, warden Muncy's affidavit establishes that when fires are set in his institution, the exhaust system is activated to clear out the smoke.[3] Consequently, even had he established the existence of a condition shocking to the conscience, see Allgood, plaintiff cannot establish that the condition was inflicted wantonly and recklessly by defendants. See Shrader at 978.

The remainder of plaintiff's claims regarding conditions of confinement in detention (except for the deprivation of his Bible and law books) merely assert losses of privileges as the result of confinement to segregation and do not allege that they were the

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[3]Plaintiff moves that warden Muncy's affidavit be stricken, because he was not the warden during the events complained of and, consequently, does not have personal knowledge of them. Muncy's affidavit speaks from first-hand knowledge of the prison's policies and is based, at least in part, on records kept in the ordinary course of business pertaining to the events complained of. See Swain v. Garribant, 354 F. Supp. 631, 634 (E.D.N.C. 1973). That those policies exist tends to prove that they were implemented during the events complained of. Consequently, plaintiff's motion is DENIED.

result of anything more than defendants' simple negligence. As such, these remaining claims do not state a cause of action under § 1983. See Allgood; Ross v. Reed, 719 F.2d 689, 698 n. 13 (4th Cir. 1983); Estelle; Shrader at 978.

Inmates must be afforded reasonable opportunities to exercise religious freedom guaranteed by the First and Fourteenth Amendment. Cruz v. Beto, 405 U.S. 319, 322 n. 2 (1972); Dettmer v. Landon, 799 F.2d 929, 933 (4th Cir. 1986). Most of the delay plaintiff encountered in obtaining his Bible is attributable to the inventorying of his property. Defendants' affidavits contain uncontradicted assertions that plaintiff was afforded other opportunities to exercise his religion while in his cell in C-Building. The Court declines to find that the policy of inventorying property of inmates assigned to detention is an exaggerated response to conditions of internal prison order and security. See Dettmer; O'Lone v. Estate of Shabazz, 55 U.S.L.W. 4792 (U.S. June 9, 1987).

There is no reason in the record for plaintiff's inability to receive his Bible in his cell in C-Building after inventorying. However, the Court's deference to the inventorying practices and policies at the state penitentiary in these circumstances also requires that it decline to exercise a supervisory role to determine whether the delays in inventorying were unnecessary or unreasonable and when the policy of providing inventoried items such as the Bible in this case to inmates in detention at their request has not been followed. See Dettmer. Plaintiff has at most alleged that he was deprived of his Bible as the result of an administrative error or misunderstanding in which the Court declines to involve itself. Id.

The property office's refusal to provide plaintiff his legal materials pending inventory is cause for concern. Plaintiff's grievance regarding this matter, submitted as an exhibit, reveals that he was concerned that without the legal materials, he would miss several court deadlines. Of course, prison officials' willful destruction of an inmate's legal materials states a § 1983 claim. **Carter v. Hutto**, 781 F.2d 1028 (4th Cir. 1986). The record does not indicate, and plaintiff has not alleged, that he was in fact prejudiced in the maintenance of any action as a result of the deprivation. Nor was the deprivation permanent. Consequently, plaintiff has not alleged an infringement of his right of access to the courts cognizable under § 1983. Magee v. Waters, 810 F.2d 451 (4th Cir. 1987); cf. Carter.

Construing plaintiff's pleadings and exhibits liberally, when the property office finally furnished him the balance of his property (that not provided to him in C-Building), certain of his legal books were missing. Plaintiff does not allege that the loss of the books interfered with any pending action, denying him meaningful access to the courts. Consequently, this allegation does not state a claim for which relief can be granted under § 1983. Magee; cf. Carter. While legal materials were missing and/or in a state of disarray when his cell in B-Building was ransacked, plaintiff has not alleged personal involvement of the defendants in the actions complained of. See Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); Vinnedge v. Gibbs, 550 F.2d 926 (4th Cir. 1977).

The remaining delays plaintiff suffered in receiving his other property do not constitute a denial of either procedural or substantive due process cognizable under § 1983. See Daniels; Hudson; Hall.

Finally, plaintiff's claim that he was held over one day in pre-hearing detention <u>after</u> the hearing exonerating him does not state a constitutional deprivation cognizable under § 1983. **See Shango v. Jurich**, 608 F. Supp. 931 (N.D. Ill. 1985).

For the foregoing reasons, defendants' motion for summary judgment will be GRANTED and the complaint DISMISSED. The Court declines to exercise jurisdiction over any pending state claims. See Smith v. Wythe-Grayson Regional Library Board, 657 F. Supp. 1216 (W.D. Va. 1987), citing United Mineworkers v. Gibbs, 383 U.S. 715 (1966).

Should plaintiff desire to appeal written notice of appeal must be filed with the Clerk of the Court within thirty (30) days of the date of entry hereof.

Let the Clerk send a copy of this Memorandum and of the accompanying order to plaintiff and to counsel for defendants.

An appropriate order shall issue.

UNITED STATES DISTRICT JUDGE

Date: ______________________

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