UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

JESSE LANGSTON (#501713) **CIVIL ACTION**

VERSUS

JAMES M. LeBLANC, ET AL. **NO. 09-0812-RET-CN**

NOTICE

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the United States District Court.

In accordance with 28 U.S.C. § 636(b)(1), you have fourteen (14) days after being served with the attached Report to file written objections to the proposed findings of fact, conclusions of law and recommendations therein. Failure to file written objections to the proposed findings, conclusions, and recommendations within 14 days after being served will bar you, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions of the Magistrate Judge which have been accepted by the District Court.

ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.

Signed in chambers in Baton Rouge, Louisiana, February 25, 2010.

MAGISTRATE JUDGE CHRISTINE NOLAND

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

JESSE LANGSTON (#501713) **CIVIL ACTION**

VERSUS

JAMES M. LeBLANC, ET AL. **NO. 09-0812-RET-CN**

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

The pro se plaintiff, an inmate incarcerated at the Louisiana State Penitentiary ("LSP"), Angola, Louisiana, filed this proceeding pursuant to 42 U.S.C. § 1983 against Secretary James M. LeBlanc, Warden N. Burl Cain, Ass't. Warden Trey Poret, Capt. Whitaker, Capt. Donnell Sullivan, Lt. Samantha Angelle, Major Trent Barton, Lt.Col. David Kelone, Major Cassandra Temple, Sgt. David Duncan, Sgt. Earnest Griffin, Msgt. Piazza, Capt. Randolph Beauboeuf and an unidentified "Polygraph Examiner".[1] The plaintiff complains that his constitutional rights were violated on October 13, 2008, when he was raped by a co-inmate who had been moved into his cell two days previously by defendant Capt. Whitaker. After reporting this incident, the plaintiff was questioned by defendants Sullivan and Poret, was allowed to pack his belongings (from which the plaintiff's CD player had been taken by the offending co-inmate), and was escorted to the prison infirmary where he gave a statement to defendants Kelone and Temple.[2] The plaintiff complains that the clothing which he was wearing, which would have provided evidence to corroborate his claim

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[1] The plaintiff has not provided the identity of the person who allegedly conducted a polygraph examination on October 15, 2008. Accordingly, this person shall not be considered as a defendant in this proceeding in the absence of proper identification.

[2] In his Complaint, the plaintiff includes a one-line statement that, "[w]hile in the Major's office [on October 13, 2008], plaintiff was sexually harassed by Capt. Hunt." There are no factual details provided relative to this conclusory assertion, either as to what this sexual harassment consisted of or as to any injuries allegedly sustained. In any event, Capt. Hunt is not named as a defendant in this proceeding. As a result, the Court does not have before it the person responsible for the alleged offense. Accordingly, the Court declines to consider this claim to be a part of the instant proceeding.

of rape, was wrongly discarded by defendant Griffin. Thereafter, on October 15, 2008, the plaintiff was given a polygraph examination, during which the examiner allegedly asked improper questions and wrongly concluded that the plaintiff was lying about the incident. As a result, the plaintiff was charged with a disciplinary violation for having allegedly committed a sex offense, but after several disciplinary board proceedings, this charge was ultimately dismissed on November 20, 2008. Notwithstanding, the plaintiff was transferred to segregated confinement for his protection on January 7, 2009. Upon arrival at his new housing assignment, the plaintiff began receiving harassment from another co-inmate, who first attempted to commence a sexual relationship with the plaintiff and, when the plaintiff refused, began to threaten the plaintiff with physical harm. Although the plaintiff's initial requests for protection from the co-inmate were ignored by defendants Duncan and Barton, these defendants ultimately moved the plaintiff to administrative segregation on February 1, 2009. As a result, the plaintiff suffered no harm in fact at the hands of the co-inmate. The plaintiff complains, however, that the defendants falsely charged him at that time with a disciplinary violation ("aggravated disobedience"). At a subsequent disciplinary board hearing on February 4, 2009, the plaintiff pled guilty to the charge and was sentenced to punitive segregated confinement in Camp J at LSP. When the plaintiff thereafter appealed this sentence and complained of the actions of defendants Duncan and Barton, defendant Barton began harassing the plaintiff and informed other inmates on the tier about the plaintiff having been raped by a co-inmate. Although the plaintiff complained of defendant Barton's harassment, nothing was done to alleviate the problem.

Pursuant to 28 U.S.C. § 1915(e), the Court is authorized to dismiss an action or claim brought in forma pauperis if the Court determines that

the claim is frivolous, malicious, or fails to state a claim upon which relief may be granted. Cf., Green v. McKaskle, 788 F.2d 1116 (5th Cir. 1986). An action or claim is properly dismissed as frivolous if it lacks an arguable basis either in fact or in law. Denton v. Hernandez, 504 U.S. 25, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992), citing Neitzke v. Williams, 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); Hicks v. Garner, 69 F.3d 22 (5th Cir. 1995). Further, a § 1915(e) dismissal may be made at any time before or after service of process and before or after an answer is filed. Cf., Green v. McKaskle, supra.

Applying the above standard to the plaintiff's allegations, the Court concludes that the plaintiff's claims fail to rise to the level of constitutional violations.

Initially, it appears from the plaintiff's Complaint that he has sued the defendants in both their individual and their official capacities. Notwithstanding, § 1983 does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. Neither a State, nor its officials acting in their official capacities, are "persons" under § 1983. Will v. Michigan Department of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Thus, it is clear that the plaintiff fails to state a claim under § 1983 against the defendants in their official capacities.

Turning to the plaintiff's asserted against the defendants in their individual capacities, the plaintiff first complains that defendant Whitaker should not have placed the offending co-inmate in the plaintiff's cell on October 11, 2008. In this regard, however, the law is well-settled that although the Eighth Amendment to the United States Constitution affords a prisoner a constitutional right to be protected from the constant threat of harm or violence at the hands of other inmates, Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981); Johnston v.

Lucas, 786 F.2d 1254 (5th Cir. 1986), in order for there to be liability in connection with this cause of action, there must have been a conscious or callous indifference on the part of the defendant to the prisoner's right to be protected from such harm. Johnston v. Lucas, supra. Mere negligence is not a basis for liability under § 1983. Oliver v. Collins, 904 F.2d 278 (5th Cir. 1990); Thompkins v. Belt, 828 F.2d 298 (5th Cir. 1987). Nor are mere violations of state regulations actionable under § 1983. Jackson v. Cain, 864 F.2d 1235 (5th Cir. 1989). Rather, the determinative question is whether the prison official subjectively knew that the inmate faced a substantial risk of serious harm, yet disregarded that risk by failing to take reasonable steps to abate it. Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)("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").

In the instant case, it appears clear that, at most, the plaintiff has alleged that defendant Whitaker negligently caused or contributed to the occurrence of this incident. Specifically, the plaintiff does not assert that there was any prior conflict between himself and the offending co-inmate of which the defendant should have been aware, and the plaintiff does not allege that he made any complaints to the defendant regarding the co-inmate being moved into the plaintiff's cell or regarding the co-inmate's behavior during the two days prior to the rape. In fact, the plaintiff concedes that the offending co-inmate requested the move to the plaintiff's cell, not to physically harm the plaintiff, but in hopes of pursuing a consensual sexual relationship. At most, therefore, the plaintiff's complaint is that defendant Whitaker failed to exercise due diligence or reasonable care in ascertaining the co-inmate's motives. Specifically, there is absolutely nothing in the plaintiff's allegations which tends to suggest that the defendant

intended for this incident to occur, had notice that it was likely to occur, or exhibited deliberate indifference to the plaintiff's health or safety at any time. The plaintiff himself appears to concede that he had no reason to anticipate the attack from the co-inmate prior to the incident. Accordingly, even accepting as true that defendant Whitaker was careless in assigning the offending co-inmate to the plaintiff's cell, this does not state a claim of constitutional dimension absent some alleged knowledge on the defendant's part of impending harm to the plaintiff which the defendant ignored.

Turning to the plaintiff's claims against defendants Sullivan, Poret, Kelone, Temple, Griffin and Beauboeuf, the plaintiff asserts that after the incident of October 13, 2008, he reported the incident to defendant Sullivan and thereafter spoke with defendant Poret (and an unidentified person from the mental health staff) about the attack. The plaintiff concedes that he was then immediately removed from the presence of the offending co-inmate, was escorted to the prison infirmary for examination and/or treatment, and was allowed to sign protection papers against the co-inmate. Thereafter, after being examined at the prison infirmary, the plaintiff gave a statement to defendants Kelone and Temple and was ultimately given a polygraph examination by an unidentified polygraph examiner. The plaintiff complains, however, that defendant Sullivan never recovered his stolen CD player from the offending co-inmate, that defendant Griffin wrongly discarded his clothing, and that defendant Beauboeuf charged him with a wrongful disciplinary report.

The plaintiff's claims against these defendants fail to rise to the level of constitutional violations. It appears clear that, when advised of the incident involving the plaintiff and the co-inmate, the defendants took action to remove the plaintiff from the dangerous situation, to provide him with access to medical treatment, and to conduct an investigation into the plaintiff's claim. The mere fact that the

investigation was improperly conducted according to the plaintiff, through the discarding of his clothing and through a deficient polygraph examination, is of no moment inasmuch as the plaintiff has no constitutional right to have his complaints addressed, investigated, or favorably resolved by prison officials, and there is no procedural due process right inherent in such a claim. See Geiger v. Jowers, 404 F.3d 371 (5th Cir. 2005). Further, the fact that the plaintiff was charged with an alleged wrongful disciplinary report is of no significance. The law is clear under § 1983 that allegations that an inmate plaintiff has been reported or punished for an act which he did not commit do not amount to a denial of due process unless the punishment imposed upon the inmate amounts to an atypical, significant deprivation (evaluated in the context of prison life) in which the State might conceivably have created a liberty interest for the benefit of the inmate. Sandin v. Conner, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). In the instant case, the plaintiff concedes that the disciplinary report charged against him was dismissed without consequence or punishment. Accordingly, there can be no claim relative to these defendants.[3]

Similarly, the plaintiff's claims asserted against defendants Duncan and Barton fail to rise to the level of constitutional violations. In this regard, the plaintiff alleges that, upon being transferred to

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[3] Although the plaintiff complains that defendant Sullivan never recovered and returned the plaintiff's stolen CD player, this claim is not properly before the Court. In the first place, it was not defendant Sullivan who initially stole the CD player but the offending co-inmate, who has not been named as a defendant herein. Further, to the extent that the plaintiff asserts that defendant Sullivan should have recovered the CD player from the offending co-inmate, this is a claim of property deprivation which the Court will not entertain. Random and unauthorized deprivations of property by state officials (and by extension a failure to recover stolen property) do not violate the federal constitution if an adequate post-deprivation state remedy exists. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 383 (1984). Louisiana has ample remedies under which the plaintiff could have proceeded for recovery of his property or for the reimbursement for its loss. Marshall v. Norwood, 741 F.2d 761 (5th Cir. 1984).

protective custody in Camp C at LSP in January, 2009, he began to receive sexual advances and then threats from a co-inmate. Although the plaintiff contends that his initial requests for protection from this co-inmate were ignored, it is apparent that no harm in fact befell the plaintiff and that he was ultimately removed from the tier on February 1, 2009, by the defendants. Although the plaintiff complains that he was thereafter charged with a false disciplinary report by defendant Duncan, which resulted in the plaintiff being found guilty and sentenced to segregated confinement at Camp J at LSP, this claim, as previously noted, is not one of constitutional dimension. Sandin v. Conner, supra (holding that a sentence to segregated confinement does not result in a significant and atypical punishment in the context of prison life). Further, the plaintiff's claim that defendant Barton thereafter publicized to the tier that the plaintiff had been raped by a co-inmate and also subjected the plaintiff to verbal abuse and harassment after the plaintiff filed a disciplinary appeal and administrative grievance against the defendants is not of constitutional magnitude. Injury to reputation, without more, is not a liberty interest protected under the Fourteenth Amendment to the United States Constitution. Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); Siegert v. Gilley, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991). And allegations of verbal abuse and harassment alone do not present claims under § 1983. McFadden v. Lucas, 713 F.2d 143 (5th Cir.), cert. denied, 464 U.S. 998, 104 S.Ct. 499 (1983)("Mere threatening language and gestures of a custodial officer do not, even if true, amount to a constitutional violation."). See also Burnette v. Phelps, 621 F.Supp. 1157 (M.D. La. 1985); Johnson v. Glick, 481 F.2d 1028, 1033 n.7 (2d Cir. 1973). The allegations against the defendants regarding harassment and verbal abuse are therefore insufficient to state a claim of a constitutional

violation.

Finally, to the extent that the plaintiff seeks to hold defendants Secretary LeBlanc, Warden Cain, Lt. Angelle and Msgt. Piazza responsible for the events complained of, it appears that the plaintiff has failed to make any allegations of personal participation by these defendants in the events complained of. Under federal law, to be liable under § 1983, a person must either be personally involved in conduct causing an alleged deprivation of a constitutional right, or there must be a causal connection between the actions of that person and the constitutional violation sought to be redressed. Lozano v. Smith, 718 F.2d 756 (5th Cir. 1983). Any allegation that these defendants are responsible for the actions of their subordinates or co-employees is, alone, insufficient to state a claim under § 1983. Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Further, in the absence of direct personal participation by a supervisory official in an alleged constitutional violation, the plaintiff must allege that the deprivation of his constitutional rights occurred either as a result of a subordinate's implementation of the supervisor's affirmative wrongful policies or as a result of a breach by the supervisor of an affirmative duty specifically imposed upon him by state law. Lozano v. Smith, supra. In the instant case, the plaintiff does not allege that these named defendants had any direct involvement in the events complained of and does not allege the existence of any wrongful policy for which these defendants are responsible. Accordingly, these defendants are entitled to judgment as a matter of law, dismissing the plaintiff's claim against them as legally frivolous.

RECOMMENDATION

It is recommended that the plaintiff's claims be dismissed, with

prejudice, as legally frivolous within the meaning of 28 U.S.C. § 1915(e), and that this action be dismissed.

Signed in chambers in Baton Rouge, Louisiana, February 25, 2010.

MAGISTRATE JUDGE CHRISTINE NOLAND