IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JACOB ANTHONY, Plaintiff, v. CORPORAL ESTHER SCHACKMANN, CORPORAL KENNETH STEPP, Defendants.	No. CV-07-698-HU FINDINGS & RECOMMENDATION

Jacob Anthony
10146552
Two Rivers Correctional Institution
Umatilla, Oregon 97882

Plaintiff Pro se

Hardy Myers
ATTORNEY GENERAL
Leonard W. Williamson
ATTORNEY-IN-CHARGE
Department of Justice
1162 Court Street NE
Salem, Oregon 97301-4096

Attorney for Defendants

HUBEL, Magistrate Judge:

Pro se plaintiff Jacob Anthony, an inmate at Two Rivers Correctional Institution, brings this 42 U.S.C. § 1983 action

against defendants Corporal Esther Schackmann and Corporal Kenneth Stepp. Plaintiff brings claims under the Eighth Amendment, First Amendment, and Fourteenth Amendment, arising out of an incident in November 2005 between plaintiff and Schackmann which occurred at the Oregon State Penitentiary (OSP).

Defendants move for summary judgment on all claims. I recommend that the motion be granted.

BACKGROUND

Plaintiff, an inmate in the custody of the Oregon Department of Corrections (ODOC), was housed at OSP during the time the events at issue took place. Schackmann and Stepp are employed as Corporals at OSP and were so employed at all times alleged in the Complaint.

The parties agree that on November 25, 2005, Schackmann and plaintiff were working in the dining room at OSP. The parties further agree that plaintiff requested a pair of rubber gloves from Schackmann and that she told plaintiff she had none.

At this point, Schackmann contends that plaintiff followed her around the dining hall, repeatedly asking for a pair of rubber gloves. Schackmann Affid. at ¶ 3. She allegedly told plaintiff to go away. Id. at ¶ 4. Schackmann states that instead of leaving her alone, plaintiff forcefully reached across her body and grabbed for her waist at pocket level. Id. She instinctively raised her arm to deflect plaintiff's hand and arm away from her body. Id. In doing so, she inadvertently struck plaintiff's head with her open hand. Id.

Plaintiff left the dining room to return to his cell. Id. at ¶ 5. Schackmann reported the events to Captain Andrews, the

officer-in-charge at the time. Id. at ¶ 6. Plaintiff was subsequently taken to the Disciplinary Segregation Unit (DSU), without incident. Id.

Both a misconduct and unusual incident report were completed regarding the incident. Attmts 1 & 2 to Schackmann Affid. The misconduct report recites the facts according to Schackmann's version of the incident. Attmt 1 to Schackmann Affid. It also cites plaintiff with three separate disciplinary violations: Attempted Assault I, Disrespect, and Disobedience of an Order I. Id. Both Schackmann and Andrews signed the misconduct report. Id.

The unusual incident report notes an attempted staff assault by plaintiff with a reactive physical force used by Schackmann. Attmt 2 to Schackmann Affid. It also recites the facts according to Schackmann's version of the incident. Id. It is signed by Andrews. Id.

Plaintiff agrees that he requested gloves from Schackmann, as he had done on numerous previous occasions. Pltf Affid. at ¶ 5. He contends that Schackmann responded that she had none in the closet. Id. at ¶ 6. Plaintiff states that he then asked if she had an extra in her pants leg pocket, as he had also done on past occasions. Id. at ¶ 7. While asking, he pointed to Schackmann's right leg pants pocket with his right index finger while standing directly in front of her, which he had been doing for the entire conversation they had been having. Id. at ¶ 8. At this point, plaintiff alleges that Schackmann unexpectedly slapped him in the left temple with her open and unimpeded right hand. Id. Plaintiff stepped back and told Schackmann never to put her hands on him. Id.

Plaintiff contends that he complained to Corporal Flemming who was apparently standing nearby. Id. at ¶¶ 11, 13. He also approached Sergeant Alvis in the dining hall and complained about being slapped by Schackmann without provocation. Id. at ¶ 14.

On the date of the incident, plaintiff completed a medical appointment form, complaining of a "tension headache" after having been slapped by Schackmann. Exh. F to Pltf Opp. Mem. at p. 1. The written response stated that the sick call nurse would see plaintiff the following week and if need be, the doctor would also see plaintiff the following week. Id. The written response also states that plaintiff should take 800 milligrams of ibuprofen, three to four times per day, or Tylenol, before seeing the doctor. Id. The signature is illegible and the response is dated November 26, 2005, the day after the request. Id.

On December 5, 2005, plaintiff completed a grievance form in which he stated that he was "not seen by medical after being intentionally slapped" by Schackmann. Id. at p. 2. However, in the section where he is asked to list any actions he had already taken to resolve the grievance, he states that he spoke to the sick call nurse and sent a kyte, and that he also requested to speak to "psyche." Id.

Plaintiff's medical progress notes from the time period show a "no show" for the "MD clinic" on November 30, 2005. Defts' Exh. 102. The progress notes contain no record of later complaints of headache. Id.

An investigation of the incident was conducted by Inspector Elwood L. Fogleman of the ODOC Investigations Unit. Attmt 3 to Schackmann Affid. Fogleman interviewed plaintiff, Schackmann, and

at least three other inmates and three other ODOC employees. Exh. A to Pltf Opp. Mem. He forwarded his report to Hearings Officer Coleen Clemente for disposition. Attmt 3 to Schackmann Affid. at p. 3.

A hearing was held on January 9, 2005. Attmt 4 to Schackmann Affid. All three misconduct charges against plaintiff were dismissed due to insufficient evidence. Id. Plaintiff was apparently released from DSU at that point.

STANDARDS

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56©. The moving party bears the initial responsibility of informing the court of the basis of its motion, and identifying those portions of "'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56©).

"If the moving party meets its initial burden of showing 'the absence of a material and triable issue of fact,' 'the burden then moves to the opposing party, who must present significant probative evidence tending to support its claim or defense.'" Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991) (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987)). The nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. Celotex, 477 U.S. at 322-23.

The substantive law governing a claim determines whether a

fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as to the existence of a genuine issue of fact must be resolved against the moving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986). The court should view inferences drawn from the facts in the light most favorable to the nonmoving party. T.W. Elec. Serv., 809 F.2d at 630-31.

If the factual context makes the nonmoving party's claim as to the existence of a material issue of fact implausible, that party must come forward with more persuasive evidence to support his claim than would otherwise be necessary. Id.; In re Agricultural Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990); California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

DISCUSSION

Plaintiff claims that Schackmann's slap violated the Eighth Amendment. He further claims that, in violation of the First Amendment, he was placed in the DSU in retaliation for complaining about the incident to Flemming and Alvis. Finally, he contends that his placement in the DSU violated the Due Process Clause of the Fourteenth Amendment. I address the claims in turn.

I. Eighth Amendment

For the purposes of this motion, I assume the facts in plaintiff's favor. Accordingly, I assume that Schackmann's slap to plaintiff's head was unprovoked and was not, as Schackmann states, a reflexive reaction to plaintiff's attempts to physically touch her.

"[W]henever prison officials stand accused of using excessive

physical force in violation of the Cruel and Unusual Punishment Clause, the core judicial inquiry is . . . whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 6-7 (1992); see also Whitley v. Albers, 475 U.S. 312 (1986).

It is widely accepted that not "every malevolent touch by a prison guard gives rise to a federal cause of action." Hudson, 503 U.S. at 9 (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973) ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights.")). "The Eighth Amendment's prohibition of cruel and unusual punishments necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind." Hudson, 503 U.S. at 9-10 (internal quotations omitted).

Eighth Amendment cases from courts across the country have usually held that a single incident typically is insufficient to support an Eighth Amendment claim. For example, in Swift v. Iramina, No. 08-00100 JMS-KSC, 2008 WL 1912470, at *3 (D. Haw. Apr. 29, 2008), the court dismissed a claim by a prisoner against a guard who allegedly pushed him in response to a question by plaintiff. Similarly, in Meza v. Director of California Department of Corrections, No. 1:05-CV-01180-OWW-LJO-P, 2006 WL 1328220, at *3 (E.D. Cal. May 15, 2006), the court dismissed allegations that a prison guard allegedly slammed the plaintiff's head into a wall, resulting in a bruise, as insufficient to state an Eighth Amendment

claim.

As the Meza court noted, the Ninth Circuit recognizes that in an Eighth Amendment claim, the inquiry focuses on the use of force, not the nature of the injury. Meza, 2006 WL 1328200, at *3 (citing Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002) for the proposition that "Eighth Amendment excessive force standard examines de minimis uses of force, not de minimis injuries")). The court in Oliver explained that the more well reasoned cases reject an interpretation of Hudson which requires a de minimis injury requirement. Oliver, 289 F.3d at 628. Rather, the Ninth Circuit explained, the Hudson Court held that "'de minimis uses of physical force' are not constitutional violations, focusing on the amount of force used, not the nature or severity of the injury inflicted." Id.

Here, I agree with defendants that, as a matter of law, Schackmann's single open-handed blow to plaintiff's temple during a single incident is a de minimis use of force, incapable of supporting plaintiff's Eighth Amendment claim. See, e.g., Norman v. Taylor, 25 F.3d 1259, 1262-64 (4th Cir. 1994) (keys swung at inmate's face which struck his thumb was de minimis force); White v. Holmes, 21 F.3d 277, 280-81 (8th Cir. 1994) (keys swung at inmate which slashed his ear was de minimis force); Black Spotted Horse v. Else, 767 F.2d 516, 517 (8th Cir. 1985) (corrections officer's pushing a cubicle wall so as to strike plaintiff's legs, brusque order to inmate, and poking inmate in the back was de minimis force); Roberts v. Samardvich, 909 F. Supp. 594, 604 (N.D. Ind. 1995) (grabbing inmate, pushing him up the stairs toward his cell, and placing him in cell cuffed, shackled, and secured to the

door was de minimis force under the circumstances); Crow v. Leach, No. C 93-20199 WAI, 1995 WL 456357, at *2-3 (N.D. Cal. July 28, 1995) (corrections officer's pushing inmate into chair causing his shoulder to break window behind him was de minimis force); Jackson v. Hurley, No. C 91-2170 BAC, 1993 WL 515688, at *2 (N.D. Cal. Nov. 23, 1993) (blow to back of neck with forearm and kick to the ankle of inmate were de minimis force); Olson v. Coleman, 804 F. Supp. 148, 150 (D. Kan. 1992) (single blow to head of handcuffed inmate was de minimis force); Neal v. Miller, 778 F. Supp. 378, 384 (W.D. Mich. 1991) (backhand blow with fist to the groin of inmate was de minimis force).

I recommend that defendants' motion for summary judgment on the Eighth Amendment claim, be granted.

II. First Amendment

Defendants' argument against plaintiff's First Amendment claim is noticeably off the mark. In their opening memorandum in support of their motion, defendants state that plaintiff's First Amendment claim should be dismissed because there was no attempt to silence him. Defts' Mem. at p. 9. According to defendants, "[plaintiff] was able to say whatever he wanted to the hearings officer and the investigator assigned to investigate his side of the events. In the end the disciplinary system worked to his advantage and the charges against him were dismissed." Id.

The problem here is that plaintiff's First Amendment claim is not grounded in a deprivation of the opportunity to speak once he was confined to DSU. Rather, it is a classic retaliation claim in which he contends that in retaliation for the exercise of his First Amendment right to complain to Flemming and Alvis about the slap

from Schackmann, he was transferred to DSU.

The assertion of a viable First Amendment retaliation claim requires five elements: (1) an assertion that a state actor took some adverse action against an inmate (2) because of (3) that inmate's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal. Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005).

While defendants fail to put forth an argument on each of these elements, my review of the record indicates that defendants are nonetheless entitled to summary judgment based on the first element articulated in Rhodes. Plaintiff names only Schackmann and Stepp as defendants. The record fails to support that either of them were responsible for plaintiff's transfer to DSU. Rather, the misconduct report shows that Andrews is the state actor who initiated the transfer which is the alleged retaliatory act.

In a section entitled "Placed in Holding Status," which appears at the end of the misconduct report, the following appears:

> As officer-in-charge, I have reviewed the foregoing Report of Misconduct and find that the rule violation(s) is/are of such a serious nature that the good order and security of the facility require immediate removal of the inmate and placement in segregation status because: This inmate engaged in an activity that challenges the rules of the institution. He is placed in Segregation for restricted confinement, because he is a direct threat to staff and inmates.

Attmt 1 to Schackmann Affid. This is followed by the printed name and signature of Andrews, who is identified as the person having placed plaintiff in segregation. Id.

To state a civil rights claim against an individual defendant, plaintiff must allege facts showing a defendant's "personal

involvement" in the alleged constitutional deprivation or a "causal connection" between a defendant's wrongful conduct and the alleged constitutional deprivation. Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998); Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989). Here, plaintiff fails to allege that either of the named defendants had a personal involvement in the decision to transfer plaintiff to DSU. He fails to show that either of the named defendants has any causal connection to the alleged constitutional deprivation at issue in the First Amendment claim. His failure to name Andrews as a defendant is fatal to the claim.

I recommend that defendants' motion for summary judgment as to the First Amendment claim, be granted.

III. Due Process - Fourteenth Amendment

Finally, as to the Due Process claim, plaintiff contends that his allegedly unfounded placement in DSU violated his Fourteenth Amendment right to due process of law. I agree with defendants that plaintiff cannot sustain this claim.

In Sandin v. Conner, the Supreme Court rejected plaintiff's position that "any state action taken for a punitive reason encroaches upon a liberty interest under the Due Process Clause even in the absence of any state regulation." Sandin v. Conner, 515 U.S. 472, 484 (1995). While "prisoners do not shed all constitutional rights at the prison gate," state-created liberty interests protected by the Due Process Clause and arising in the prison context, "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." Id. at 484, 485 (citations omitted).

Following this standard, the Court concluded that the case before it, where the plaintiff had been placed in disciplinary segregation for thirty days, "though concededly punitive," "did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest." Id. at 486.

Moreover, plaintiff here received all of the "process" he was constitutionally due. Wolff v. McDonnell, 418 U.S. 539, 563-72 (1974) outlines the basic due process guarantees required in the prison disciplinary context. As the Ninth Circuit summarized in a 1994 case, Wolff prescribes five key procedural requirements: (1) written notice of the charges; (2) a brief period of time given to the inmate to prepare for an appearance before a committee or hearing; (3) written statement by the factfinders as to the evidence relied on and the reasons for the disciplinary action; (4) the ability of the inmate to call witnesses and present documentary evidence; and (5) if the inmate is illiterate or unable to collect and present evidence necessary for an adequate comprehension of the case, the provision to the inmate of a fellow inmate as an aide or a substitute staff aide. Walker v. Sumner, 14 F.3d 1415, 1420 (9th Cir. 1994), overruled on other grounds by Sandin.

Here, plaintiff received a written misconduct report and was given the opportunity to appear before a hearing several days after the charges were presented to him. The initial hearing was postponed when plaintiff requested an investigation, which included interviews with inmate witnesses identified by plaintiff and staff, and a review of documentary evidence. Plaintiff was exonerated of the charges following a hearing at the completion of the investigation. Plaintiff received all constitutionally required

procedural guarantees.

I recommend that defendants' summary judgment motion as to the due process claim, be granted.

CONCLUSION

Defendants' motion for summary judgment (#32) should be granted.

SCHEDULING ORDER

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due February 10, 2009. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date.

If objections are filed, a response to the objections is due February 24, 2009, and the review of the Findings and Recommendation will go under advisement on that date.

IT IS SO ORDERED.

Dated this 26th day of January, 2009.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge