IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DAVID A. MACK,	:	
	:	
Plaintiff	:	
	:	**CIVIL NO. 3:CV-13-2192**
v.	:	
	:	**(Judge Caputo)**
ROBERT BILGER, SAFETY MANAGER, *et al.*,	:	
	:	
	:	
Defendants	:	

M E M O R A N D U M

I. Introduction

David Mack, a former state prisoner housed at the State Correctional Institution at Huntingdon (SCI-Huntingdon), in Huntingdon, Pennsylvania, filed this *pro se* civil action pursuant to 42 U.S.C. § 1983 on August 20, 2013 while still incarcerated. He filed an Amended Complaint on August 13, 2014. (ECF No. 37, Am. Compl.) Presently before the Court is a Motion for Summary Judgment (ECF No. 66) filed by the Pennsylvania Department of Corrections (DOC) Defendants.[1] Defendants seek summary judgment on the basis that Mr. Mack failed to exhaust his available administrative remedies as to several claims, failed to state a claim against several Defendants, and failed to state an Eighth Amendment conditions of confinement or medical claim. (*Id.*) Mr. Mack has failed to respond to Defendants' motion for summary

[1] The BOP Defendants are: Safety Manager Robert Bilger, Deputy Superintendent James A. Eckard, Sergeant (Sgt.) Emeigh, Corrections Officer (CO) Forshey and Nurse Andrew Spaid.

judgment or otherwise communicate with the Court since his June 1, 2015 release on parole.

For the reasons set forth below, the Court will grant Defendants' motion for summary judgment.

II. Summary Judgment Standard of Review

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court must determine "whether the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue of material fact and whether the moving party is therefore entitled to judgment as a matter of law." *MacFarlan v. Ivy Hill SNF, LLC*, 675 F.3d 266, 271 (3d Cir. 2012)(citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)). "[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 - 48, 106 S.Ct. 2505, 2509 - 10, 91 L.Ed.2d 202 (1986). In reviewing a motion for summary judgment, the court must view all facts and draw all reasonable inferences "in the light most favorable to the party opposing the motion." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 (3d Cir. 2014)(internal quotation marks omitted).

To prevail on summary judgment, the moving party must affirmatively identify those portions of the record which demonstrate the absence of a genuine issue of material fact. *Santini v. Fuentes*, 795 F.3d 410 (3d Cir. 2015) (citing *Celotex,* 477 U.S. at 323, 106 S.Ct. 2553). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record ... or showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A) - (B). To withstand summary judgment, the non-moving party must "go beyond the pleadings" and "designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553 (citation omitted). The non-moving party "may not rest on speculation and conjecture in opposing a motion for summary judgment." *Ramara, Inc. V. Westfield Ins. Co.*, 814 F.3d 660, 666 (3d Cir. 2016). Where contradictory facts exist, the court may not make credibility determinations or weigh the evidence. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 - 51, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000) (internal quotation marks and citations omitted); *Paradisis v. Englewood Hosp. Med. Ctr.*, No. 16-3616, 2017 WL 728688, at *3 (3d Cir. Feb. 24, 2017).

III. Statement of Material Facts

From the pleadings, declarations and exhibits submitted therewith, the following facts are ascertained as undisputed or, where disputed, reflect Mr. Mack's version of

the facts, pursuant to this Court's duty to view all facts and reasonable inferences in the light most favorable to the nonmoving party.[2] *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2510.

David Mack was housed at SCI-Huntingdon during the relevant time period, September 2011 through November 22, 2011. (ECF No. 69, Defs.' Statement of Undisputed Facts (DSMF) ¶ 2.) He was transferred to SCI-Frackville on November 22, 2011. (DSMF ¶ 19.) Mr. Mack was paroled on June 1, 2015. (DSMF ¶ 1.)

A. Protective Custody

On September 2, 2011, Mr. Mack informed Lt. Johnson that he feared for his life. (DSMF ¶ 3; ECF No. 69-1, Defs.' Exhs. Summ. J., p. 2.) Mr. Mack was placed in protective custody pending a hearing with the Program Review Committee (PRC). (*Id*.) On September 7, 2011, the PRC (consisting of J. Keller, M. Garman and J. Eckard), after listening to Mr. Mack, ordered him back to general population. (DSMF ¶ 4 and ECF No. 69-1, p. 4.) From September 7 through September 9, 2011, Mr. Mack was housed on the third tier of D-Block. (DSMF ¶ 5.) On September 9, 2011, Mr. Mack told Deputy Supt. Eckard that he did not feel safe on D-Block. (DSMF ¶ 6.) Mr. Mack was then moved from D-Block to C-Block. (*Id*.)

[2] In support of their summary judgment motion, Defendants submit a statement of material facts. (ECF No. 69.) Because Mr. Mack fails to properly oppose Defendants' statement of material facts as required by Middle District Local Rule 56.1, facts submitted by Defendants are deemed admitted.

B. September 13, 2011 Fall in C-Block

On September 9, 2011, Mr. Mack was assigned to the top bunk of cell #3030 on the third tier of C-Block. (DSMF ¶ 7.) The bunkbed in the cell was installed with the ladder and security rail against the wall. (DSMF ¶ 8.) On Saturday, September 10, 2011, Mr. Mack advised Sgt. Emeigh that the bunkbed was improperly installed. (DSMF ¶ 9.) On Monday, September 12, 2011, work order #3295 was filed to have the bunk in Mr. Mack's cell turned. (DSMF ¶ 10.) From September 9 through September 13, 2011, Mr. Mack was able to climb into the top bunk to sleep. (DSMF ¶ 11.)

On September 13, 2011, Mr. Mack fell after "plac[ing] [his] left foot on the table, while jumping onto [the] bed". (ECF No. 71, p . 31, Grievance No. 381160; DSMF ¶ 12.) Mr. Mack received immediate attention from prison staff and was taken to the Emergency Room at the J.C. Blair Hospital. All x-rays and CT scans were normal. Mr. Mack suffered from some contusions and sprains/strains. (DSMF ¶¶ 13 - 14.) He admits he was not fully paying attention when he attempted to jump into the bunk and fell. (DSMF ¶ 15.) He described the event as "freak accident." (ECF No. 71, pp. 47 - 48.)

C. Nurse Spaid

On September 22, 2011, Mr. Mack called Nurse Spaid to his Restricted Housing Unit (RHU) cell. As he approached, Mr. Mack held up his blood stained boxers in an attempt to show him blood seeping from his penis. (ECF No. 71, p. 55.) He also asked

about his recent urinalysis test results. (DSMF ¶ 16.) Nurse Spaid advised that his test results did show blood in his urine and that the physician had ordered additional tests. (DSMF ¶ 18 and ECF No. 71, p. 55.)

D. DOC Grievance Process

The DOC has an Inmate Grievance System policy to ensure that inmates in its custody have a procedure to resolve problems or other issues arising during the course of their confinement. (DSMF ¶ 20.) Pursuant to DC-ADM 804, any inmate personally affected by a Department or institutional action or policy or by the actions of a DOC employee may file a grievance. (DSMF ¶ 21.) The grievance must be submitted in writing to the Facility Grievance Coordinator, at the facility where the grievance event occurred, using the grievance form which is available on all housing units or blocks. It must be submitted within fifteen (15) working days after the event upon which the grievance is based. (DSMF ¶¶ 21 - 22.) The grievance must include a statement of the facts relevant to the claim and shall identify individuals directly involved in the events complained of. (DSMF ¶ 23.) The inmate must specify any claims he wishes to make concerning violations of DOC directives, regulations, court orders, or other law. (DSMF ¶ 23.) Upon receipt, the Facility Grievance Coordinator will assign a properly submitted grievance to a grievance officer not involved in the case to make a written response to the inmate. The response is reviewed by the Facility Grievance Coordinator before it is given to the inmate. (DSMF ¶ 24.) If dissatisfied with the initial

response, the inmate may appeal the decision to the Facility Manager (Superintendent). Only issues raised in the initial grievance may be appealed. (DSMF ¶ 25.) The Facility Manager provides a written response to the inmate. The Facility Manager may uphold the response, uphold the inmate, dismiss, dismiss as untimely, or uphold in part/deny in part. The Facility Manager may also remand the initial response to the Grievance Officer for further investigation and/or reconsideration. (DSMF ¶ 27.) An inmate who is not satisfied with the Facility Manager's decision may submit an appeal to Final Review to the Secretary's Office of Inmate Grievances and Appeals (SOIGA) within fifteen (15) working days from the date of the Facility Manager's decision. Only issues appealed to the Facility Manager may be appealed at this level. (DSMF ¶ 27.) SOIGA issues a decision which may uphold the response, uphold the inmate, dismiss, dismiss as untimely, or uphold in part/deny in part. A copy of he decision is provided to the inmate and to the Facility Manager and a copy is maintained at SOIGA. (DSMF ¶ 29.) An inmate has not properly completed the grievance procedure unless he properly appeals his grievance to SOIGA. (DSMF ¶ 29.)

E. Mr. Mack's Grievances

Between September 1 and December 31, 2011, Mr. Mack filed three (3) grievances to final review to SOIGA. (DSMF ¶ 30.) Grievance numbers 380769, 381160 and 382350 were appealed to SOIGA. (DSMF ¶ 31; ECF No. 71, pp. 31, 43, and 55.) In each instance, SOIGA upheld the Facility Manager's grievance denial.

(DSMF ¶ 32.) None of the grievances filed to final review identify James Eckard or Robert Bilger's involvement. (DSMF ¶ 33; ECF No. 71, pp. 31, 43 and 55.) Only grievances 381160 and 382350 concern claims raised in the Complaint. Grievance 381160 addresses Mr. Mack's fall while attempting to get into his bunk. (DSMF ¶ 35, ECF No. 71, p. 43.) Mr. Mack filed grievance 382350 concerning Nurse Spaid's discussion with him concerning his medical test results at his RHU celldoor. (DSMF 41; ECF No. 71, p. 55.)

Grievance 381160 was filed on September 14, 2011, after Mr. Mack fell while attempting to jump into his bunkbed. (DSMF ¶ 35, ECF No. 71, p. 43.) It was denied by B. Hollibaugh on October 5, 2011. (DSMF ¶ 36.) In the response it was noted that a work order had been placed on September 12, 2011 to have the bunkbed turned. (DSMF ¶ 36.) Mr. Mack appealed the matter to the Facility Manager and to SOIGA. (DSMF ¶¶ 38 - 39.) Chief Grievance Officer Dorina Varner upheld the Facility Manager's response. Ms. Varner noted that while it was unfortunate that Mr. Mack fell, he did admit he was jumping from the table to the bed and not paying attention. (DSMF ¶ 39.) She also noted that a work order was submitted on September 12, 2011 to have the bunk turned. (DSMF ¶ 40.)

Mr. Mack submitted grievance 382350 on September 22, 2011 alleging that he called Nurse Spaid to his cell and showed him his bloody boxers, and that Nurse Spaid informed him that Dr. Araneda had to order tests because they found blood in Plaintiff's urine. (DSMF ¶ 41.) Mr. Mack alleged that Nurse Spaid spoke loudy on the quiet RHU

block and that other inmates heard, causing a violation of his confidentiality. (DSMF ¶ 42.) On October 4, 2011, Corrections Health Care Administrator Showalter denied Mr. Mack's grievance finding it without merit. She noted that Nurse Spaid was consulted and confirmed the conversation, but Ms. Showalter stated that Nurse Spaid was simply advising Mr. Mack of his test results. (DSMF ¶ 43.) Mr. Mack filed an appeal to the Facility manager on October 5, 2011. (DSMF ¶ 44.) Facility Manager Bickell upheld the response noting that "Mr. Spaid had no intent to discuss your medical condition so that others could hear; however, [Mack] initiated the conversation and he responded to [Mack's] concern." (DSMF ¶45.) On January 4, 2012, SOIGA upheld the initial response to the grievance. (DSMF ¶46.)

IV. Discussion

A. Mr. Mack Failed to Exhaust his Retaliation Claims or Claims against Eckard or Bilger.

Under the Prison Litigation Reform Act (PLRA), before a prisoner may bring a civil rights action pursuant to 42 U.S.C. § 1983, or any other federal law, he must exhaust all available administrative remedies. *See* 42 U.S.C. § 1997e; *Porter v. Nussle*, 534 U.S. 516, 524, 122 S.C. 983, 988, 152 L.Ed.2d 12 (2002). There is no "futility" exception to the administrative exhaustion requirement. *Ahmed v. Dragovich*, 297 F.3d 201, 206 (3d Cir. 2002)(citing *Nyhuis v. Reno*, 204 F.3d 65, 78 (3d Cir. 2000)). The exhaustion requirement of the PLRA is one of "proper exhaustion." *Woodford v. Ngo*, 548 U.S. 81, 84, 126 S.Ct. 2378, 2383, 165 L.Ed.2d 368 (2006). Failure to

substantially comply with procedural requirements of the applicable prison's grievance system will result in the procedural default of a claim. *Spruill v. Gillis*, 372 F.3d 218, 227-32 (3d Cir. 2004). Dismissal of an inmate's claim is appropriate when the prisoner has failed to exhaust his available administrative remedies before bringing a civil-rights action. *Oriakhi v. United States*, 165 F. App'x 991, 993 (3d Cir. 2006) (per curiam) (nonprecedential) (citing *Ahmed v. Dragovich*, 297 F.3d 201, 209 & n. 9 (3d Cir. 2002)).

In his Amended Complaint (ECF No. 37) Mr. Mack claims CO Plummer strip searched him in retaliation for his filing of a grievance against Sgt. Plummer, CO Plummer's uncle. (*Id*., p. 2.) He also claims that Sgt. Emeigh and CO Forshey refused to move him to a different cell, ostensibly with ladders on the bunks, in "retribution" for him filing a grievance against Sgt. Plummer and his request for protective custody due to his fear of CO Plummer. (*Id*., p. 5.) The PLRA's exhaustion requirement applies to retaliation claims. *Mitchell v. Horn*, 318 F.3d 523, 531 (3d Cir. 2003)(citing *Porter v. Nussle*, 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002)). Defendants have affirmatively demonstrated that Mr. Mack only exhausted three grievances to final review (SOIGA) between September 1, 2011 through December 31, 2011. None of the grievance that reached final review included a claim of retaliation or name CO Plummer. While Mr. Mack did exhaust his administrative remedies concerning his fall from him bunk on September 13, 2011, that grievance is void of any claims of retaliation by either Sgt. Emeigh or CO Forshey. Accordingly, Defendants are entitled to summary judgment as to Mr. Mack's retaliation claims.

As noted above, in order to properly exhaust a claim, a prisoner must comply with the administrative review process set forth by the relevant prison's grievance process. *Spruill*, 372 F.3d at 231. "The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that defines the boundaries of proper exhaustion." *Jones v. Bock*, 549 U.S. 199, 218, 127 S.Ct. 910, 922, 166 L.Ed.2d 798 (2007). The purpose of the regulation "is to put the prison officials on notice of the persons claimed to be guilty of wrongdoing." *Spruill*, 372 F.3d at 234. The DOC's administrative remedy process requires an inmate to identify individuals directly involved in the events complained of. (ECF No. 71, p. 15.) Defendants seeks dismissal of all claims against Deputy Superintendent Eckard and Safety Manager Bilger based on Mr. Mack's failure to include them in any of the initial grievances filed to final review between September 1, 2011 and December 31, 2011. Given the undisputed summary judgment record, Defendants are entitled to summary judgment as to Mr. Mack's claims against Deputy Superintendent Eckard and Safety Manager Bilger due to his failure to exhaust his administrative remedies as to any claims against them.

B. Mr. Mack's Eighth Amendment claim Concerning his Improperly Installed Bunkbed.

The Eighth Amendment prohibits cruel and unusual punishment, which includes the unnecessary and wanton infliction of pain by prison officials. U.S. Const. amend.

VIII; *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). However, not all deficiencies and inadequacies in prison conditions amount to a violation of an inmate's constitutional rights.

To prevail on a "conditions of confinement" claim under the Eighth Amendment, an inmate must establish that (1) the condition complained of is "'sufficiently serious'" to implicate constitutional protection, and (2) prison officials acted with "'deliberate indifference' to inmate health or safety." *Farmer*, 511 U.S. 834, 114 S.Ct. at 1978 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298-303, 111 S.Ct. 2321, 2323-2326, 115 L.Ed.2d 271 (1991)). In order to satisfy the first requirement, "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Id*. With regard to the second requirement, the Supreme Court has explained that "deliberate indifference entails something more than mere negligence ... [but] something less than acts or omissions for the very purpose of causing harm or with the knowledge that harm will result." *Id*. at 835, 114 S.Ct. at 1978. The Supreme Court defined this "deliberate indifference" standard as equal to "recklessness," in which "a person disregards a risk of harm of which he is aware." *Id*. at 836 - 37, 114 S.Ct. at 1978 - 79. This is the standard the Court will apply to the improperly installed bunk bed as described by Mr. Mack.

Mr. Mack's claim concerning his assignment to an upper bunk without a properly installed ladder fails to satisfy the objective component necessary to establish an Eighth Amendment conditions of confinement claim. It is not disputed that on Friday,

September 9, 2011, Mr. Mack was transferred to cell #3030. At that time, the bunk's safety rail and ladder faced the wall. On Saturday, September 10, 2011, Mr. Mack reported this situation to Sgt. Emeigh. Sgt. Emeigh advised he would put in a work order to have the bunk turned. On Monday, September 12, 2011, a maintenance request slip was submitted to have the bunk reinstalled. The same day CO Forshey advised Mr. Mack he would have him moved. Unfortunately, on Tuesday, September 13, 2011, in what Mr. Mack described as a "freak accident," his foot slipped and he fell while attempting to jump onto the bed. (ECF No. 71, pp. 43 - 48.) Mr. Mack argues that prison officials were "negligent" in assigning him to the top bunk of bunkbed that was improperly installed. (*Id*., p. 48.) Mere negligence or inadvertence, however, will not satisfy the deliberate indifference standard and cannot constitute an Eighth Amendment violation. *See Estelle v. Gamble*, 429 U.S. 97, 105 - 06, 97 S.Ct. 285, 291 - 92, 50 L.Ed.2d 251 (1976)).

There is nothing in the Amended Complaint or the record to demonstrate that the incident, while unfortunate, was anything more than an accident and "[a]n accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain." *See Id*. at 105 - 06, 97 S.Ct. at 291 - 92. To the extent Mr. Mack alleges that Sgt. Emeigh or CO Forshey did not act fast enough to have him assigned to a different cell, or the bunk reinstalled, he does not suggest any facts that would show that they were aware that he faced a substantial risk of serious harm because his bunk did not have a ladder. Here, once alerted to Mr. Mack's

concerns, on a weekend, a work order was submitted the following Monday to have the bunk reinstalled. Allowing him to remain in the cell, where he and others, had successfully used the top bunk to sleep without incident, does not rise to a constitutional violation. Courts faced with similar allegations have held that the absence of a ladder or railing to access the top bunk does not create an objectively serious condition threatening inmate safety or reflect deliberate indifference on behalf of prison staff. *See, e.g., Jones v. County Jail, C.F.C.F.*, 610 F. App'x 167, 169 (3d Cir. 2015) (district court properly dismissed complaint for failure to state a claim where prisoner fell while trying to exit top bunk that did not have a ladder); *Franco-Calzada v. United States*, 375 F. App'x 217 (3d Cir. 2010) (per curiam) (prison officials' failure to inspect and correct faulty ladder on bunk bed, which caused Plaintiff's fall and injury, was negligence that does not rise to an Eighth Amendment violation); *Vercusky v. Purdue*, Civ. No. 3:15-cv-2461, 2016 WL 7330589 (M.D. Pa. Dec. 16, 2016) (federal inmate injured due to fall from upper bunk that did not have ladder to access top bunk did not rise to level of Eighth Amendment violation) (collecting cases). Accordingly, although it is unfortunate that Mr. Mack fell while trying to access his top bunk, he cannot state a plausible constitutional claim based on the absence of a ladder or Sgt. Emeigh or CO Forshey's failure to install a ladder or remove him from the cell before his accident. Defendants are entitled to summary judgment on this claim.

C. Mr. Mack's Medical Privacy Claim against Nurse Spaid

Although individuals have a Fourteenth Amendment right to medical privacy, "a prisoner does not enjoy a right of privacy in his medical information to the same extent as a free citizen." *Doe v. Delie*, 257 F.3d 309, 317 (3d Cir. 2001). A prisoner's right to the confidentiality of his medical information is "subject to legitimate penological interests" such as "safety and practicability of accommodation." *Id.* at 323 and *Smith v. Hayman*, 489 F. App'x 544, 549 (3d Cir. 2012).

Here the summary judgment record establishes that Mr. Mack called Nurse Spaid to his RHU cell, and as Nurse Spaid approached, Mr. Mack "held up [his] boxers trying to show him blood that was seeping from [his] penis." (ECF No. 71, p. 55.) It is undisputed that Mr. Mack initiated the interaction with Nurse Spaid. Once questioned, Nurse Spaid in an attempt to address Mr. Mack's concerns, responded that blood was found in his urine. No further medical information was disclosed as Mr. Mack "cut [Nurse Spaid] off." (*Id*., p. 57.) Although Mr. Mack's releases that he suffers from a chronic disease in prison grievances and his Amended Complaint, this information was not mentioned or repeated by Nurse Spaid at his RHU cell door. Defendants argue that in this context, where Nurse Spaid was called by Mr. Mack's RHU cell, to discuss Mr. Mack's bloody boxers, and where Mr. Mack fails to point to any fact within the record by which a jury could reasonably find that his medical privacy rights had been violated, Plaintiff's claim must fail. The Court agrees. Nurse Spaid is entitled to summary judgment on this issue.

V. Conclusion

For the above stated reasons, Defendants' Motion for Summary Judgment will be granted. An appropriate order follows.

/s/ A. Richard Caputo
A. RICHARD CAPUTO
United States District Judge

Dated: April 7, 2017