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

LONNIE SPELLMAN,	:	4:10-cv-2334
	:	
Plaintiff	:	
	:	
vs.	:	Hon. John E. Jones III
	:	
JEFFREY BEARD, et al.,	:	
	:	
Defendants	:	

MEMORANDUM

April 4, 2017

Plaintiff Lonnie Spellman ("Spellman" or "Plaintiff"), a Pennsylvania state inmate, incarcerated at the State Correctional Institution, Frackville, ("SCI-Frackville"), Pennsylvania, commenced this civil rights action on December 3, 2010. The named Defendants are the former Department of Corrections Secretary Jeffrey Beard and the following SCI-Frackville employees: Deputy Superintendent Robert Collins; Superintendent Michael Wenerowicz; Unit Manager George Evans; Grievance Officer Peter Damiter; Assistant Coordinators Joseph Lukashewski and Victor Mirarchi; Unit Manager Joanne Miranda; Major Michael Lorady; Correctional Officers Michael Throway, Ralph Johnson, and Kenneth Stutzman; the entire medical department; Thomas Derfler; and Anthony Kovalchik. Plaintiff complains that he is a non-smoker and that he would prefer

not to share his cell with someone who smokes. (Doc. 1). On March 14, 2011, Plaintiff filed an amended complaint. (Doc. 13).

By Memorandum and Order dated October 30, 2015, all Defendants and claims were dismissed, except for Defendants Johnson and Evans, and Plaintiff's Eighth Amendment claim based on Environmental Tobacco Smoke ("ETS"). Doc. 59). Presently pending is a motion filed by Defendants Johnson and Evans, seeking summary judgment pursuant to Federal Rule of Civil Procedure 56. (Doc. 73). For the reasons set forth below, Defendants' motion for summary judgment will be granted.

I. STANDARD OF REVIEW

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 340 (3d Cir. 1990). "[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 (1986) (emphasis in original); *Brown v. Grabowski*, 922 F.2d 1097, 1111 (3d Cir. 1990). A disputed fact is "material" if proof of its existence or nonexistence would affect

the outcome of the case under applicable substantive law. *Id.*; *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1078 (3d Cir. 1992). An issue of material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 257; *Brenner v. Local 514, United Brotherhood of Carpenters and Joiners of America*, 927 F.2d 1283, 1287-88 (3d Cir. 1991).

The party moving for summary judgment bears the burden of showing the absence of a genuine issue as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1366 (3d Cir. 1996). Once such a showing has been made, the non-moving party must go beyond the pleadings with affidavits, depositions, answers to interrogatories or the like in order to demonstrate specific material facts which give rise to a genuine issue. FED. R. CIV. P. 56; *Celotex*, 477 U.S. at 324; *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986) (stating that the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts"); *Wooler v. Citizens Bank*, 274 F. App'x 177, 179 (3d Cir. 2008). The party opposing the motion must produce evidence to show the existence of every element essential to its case, which it bears the burden of proving at trial, because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex.* at 323; *see*

also Harter v. G.A.F. Corp., 967 F.2d 846, 851 (3d Cir. 1992). "[T]he non-moving party 'may not rely merely on allegations or denials in its own pleadings; rather, its response must . . . set out specific facts showing a genuine issue for trial.'" *Picozzi v. Haulderman*, 2011 WL 830331, *2 (M.D. Pa. 2011) (quoting FED. R. CIV. P. 56(e)(2)). "Inferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." *Big Apple BMW, Inc. v. BMW of North America. Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992).

II. STATEMENT OF MATERIAL FACTS [1]

Plaintiff was transferred from SCI-Graterford to SCI-Frackville, where he arrived on or about March 22, 2010. (Doc. 1, p. 3). Upon his arrival, Spellman notified the reception committee that he is "not a problem providing [he] was not celled with a smoker." *Id*. Plaintiff was told that SCI-Frackville is a non-smoking facility. *Id*. The Department of Corrections ("DOC") has a policy prohibiting smoking inside its buildings. (Doc. 77-4 at 2). Inmates who smoke in their cells

[1] **Error! Main Document Only.**Middle District of Pennsylvania Local Rules of Court provide that in addition to filing a brief in response to the moving party's brief in support, "[t]he papers opposing a motion for summary judgment shall include a separate, short and concise statement of material facts responding to the numbered paragraphs set forth in the statement [of material facts filed by the moving party] ..., as to which it is contended that there exists a genuine issue to be tried." *See* M.D. Pa. LR 56. 1. The rule further states that the statement of material facts required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party. *See id.* Because Plaintiff has failed to file a separate statement of material facts controverting the statement filed by Defendants, all material facts set forth in Defendants' statement (Doc. 76) will be deemed admitted.

are reprimanded or disciplined when their identity is disclosed. (Doc. 77-2 at 9) (*See also* Doc. 82, Inmate Misconducts).

Plaintiff's medical intake screening on March 22, 2010, revealed no allergies, physical disabilities or limitations or chronic medical conditions. (Doc. 77-6 at 7). Plaintiff's only complaint of a current condition was of shortness of breath "since December – mostly with walking far distances to dining hall." *Id*. Plaintiff was taking Prozac and Trazodone for depression. *Id*.

On March 24, 2010, Plaintiff was seen by the medical department for chest pain. (Doc. 77-6 at 8). The medical department scheduled him for an electrocardiogram ("EKG") and blood work. *Id*. The EKG and lab work were completed on March 31, 2010. *Id*. Plaintiff was diagnosed with gastroesophageal reflux disease ("GERD"). *Id*. His blood work was negative for the human immunodeficiency virus ("HIV"), but did reveal a low white blood count. *Id*. When asked about the low white blood count, Plaintiff responded that he "always has low WBC's" and that he was "told [he has] sickle cell trait." *Id*.

From March 25, 2010 to April 5, 2010, Plaintiff was housed in B building, A Block, cell 1004. (Doc. 77-3 at 2). Plaintiff was celled with an inmate who smoked in the cell. (Doc. 1 at 5). On March 22, 2010, Plaintiff complained to CO Johnson and Unit Manager Evans. *Id*. On April 5, 2010, Plaintiff was moved to another cell and told to find a non-smoker cellmate by Unit Manager Evans. *Id*.

From April 5, 2010 to April 21, 2010, Plaintiff was housed in B Building, A block, cell 1005. (Doc. 77-3 at 2). On April 17, 2010, Plaintiff filed a grievance regarding being celled with a smoker. (Doc. 77-4 at 2). The cellmate denied smoking in the cell. *Id*. Unit Manager Evans moved Plaintiff to another cell to avoid conflict. *Id*.

From April 21, 2010 to September 15, 2010, Plaintiff was housed in B Building, C block, cell 2049. (Doc. 77-3 at 2). On July 1, 2010, Plaintiff filed a grievance regarding being celled with a smoker. (Doc. 77-4 at 4). The cellmate denied smoking in the cell. *Id*.

On July 6, 2010, Plaintiff was seen by the medical department for complaints of "epigastric pain that radiates up center of chest." (Doc. 77-6 at 9). He stated that he had been "off Zantac" for approximately six weeks. *Id*. The medical department assessed his condition as GERD, and increased his medication for acid reflux. *Id*.

On August 3, 2010, Ventilation/Light/Sound/Temperature Testing was conducted on Housing Units B and C. (Doc. 82-3 at 2).

From September 15, 2010 to November 16, 2012, Plaintiff was housed in B Building, C block, cell 1007. (Doc. 77-3 at 2).

On December 3, 2010, Plaintiff filed the instant action and an amended complaint on March 14, 2011, in which he claims that Defendants have "directly or

peripherally endangered his health and well-being by celling him with inmates who smoked cigarettes in the cell; either in his presence and when Plaintiff was not in the cell." (Docs. 1, 11).

On August 10, 2011, Ventilation/Light/Sound/Temperature Testing was conducted on Housing Units A and B. (Doc. 82-3 at 3).

Plaintiff's medical record reveals that Plaintiff was seen by the medical department approximately seventeen times between March 22, 2010 and June 17, 2016. (Doc. 77-6 at 1-30). Within that time frame, there is one complaint, on December 30, 2015, in which Plaintiff was seen by the medical department, complaining of a "smoking cellie". (Doc. 77-6 at 28). Plaintiff noted that he has a "history of asthma," however; he was "on no meds for asthma" and reported "no recent attacks or illness." *Id.* Plaintiff reported that he "was told by unit manager is he wants a cellie who doesn't smoke to come to medical." *Id.* Medical reported that "at this time there will be no change to restrictions since the facility is smoke free in the housing units" and "explained he needs to address with security." *Id.* There are no other complaints in Plaintiff's medical record of sinus problems, infections, allergies, asthma or any other illness or diseases associated or cause by second hand smoke. (Doc. 77-6 at 1-30).

III. DISCUSSION

Plaintiff invokes the Eighth Amendment's proscription against the imposition of cruel and unusual punishment. The Eighth Amendment "requires that inmates be furnished with the basic human needs, one of which is 'reasonable safety.' " *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (quoting *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 200 (1989)). "Liability based on exposure to ETS requires proof of (1) exposure to unreasonably high levels of ETS contrary to contemporary standards of decency; and (2) deliberate indifference by the authorities to the exposure to ETS." *[Demetrius] Brown v. U.S. Justice Dep't*, 271 F. App'x 142, 144 (3d Cir.2008) (citing *Helling*, 509 U.S. at 35). The Supreme Court has observed that the adoption by a prison of an anti-smoking policy "will bear heavily on the inquiry into deliberate indifference." *Helling*, 509 U.S. at 36.

The United States Court of Appeals for the Third Circuit has explained that ETS claims come in two varieties, present injury and future injury. With respect to future injury, *Helling* sets forth the following two-part inquiry for ETS claims:

> The Court explained that the first prong of the *Helling* test is an objective one: "[The prisoner] must show that he himself is being exposed to unreasonably high levels of ETS." *Id.* at 35, 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22. With respect to the objective factor, the Court noted that beyond a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused by exposure to ETS, the Eighth Amendment requires "a court to assess whether society considers the risk that the prisoner complains of to be so grave that it

> violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Id.* at 36, 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (emphasis in original). The Court stated: "In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate." *Id.*
>
> The second prong of the *Helling* test is a subjective one: whether prison officials were deliberately indifferent to a serious risk of harm. *Id.* at 36, 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22. The Supreme Court has held that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement 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. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

Atkinson v. Taylor, 316 F.3d 257, 262 (3d Cir.2003). A present injury claim based on exposure to ETS requires proof of: 1) a sufficiently serious medical need related to ETS exposure; and 2) deliberate indifference by the prison authorities to that need. *Id.* at 266 (citing *Estelle v. Gamble,* 429 U.S. 97, 104 (1976)).

Thus, both present and future injury claims require an objective component, either that the prisoner be subjected to an unreasonably high level of ETS or that the prisoner suffer from a sufficiently serious medical need; and both require as a subjective component that the prison authorities be deliberately indifferent. Defendants argue that Plaintiffs cannot satisfy either prong. The Court agrees.

Initially, the Court notes that there is no record evidence that Plaintiff suffers from any type of medical need or illness related to ETS exposure. In fact, the

record shows that prior to filing the instant action, Plaintiff never sought medical treatment due to ETS exposure. On December 30, 2015, five years subsequent to the filing of the above captioned action, Plaintiff complained that his cellmate's smoking was having an impact on his asthma, but the medical record revealed that Plaintiff did not have a history of asthma, was not taking any asthma medications, nor had he had a recent asthmatic event. Thus, Plaintiff fails to meet the objective element of either a present or future injury claim, as he has failed to link any symptom to ETS exposure. *See Abhouran v. United States,* 389 F. App'x 179, 183–84 (3d Cir.2010) (prisoner presented no evidence that smoke came through ventilation system); *Goode v. Nash,* 2007 WL 201007 (M.D. Pa. Jan.23, 2007) (despite opportunity to develop a record, the plaintiff relied on only his only speculations that ETS exposure resulted in his nasal discomfort, coughing and other maladies), *aff'd,* 241 F. App'x 868 (3d Cir.2007); *[Abdul] Brown v. Varner,* 2013 WL 4591817, at *18–19 (M.D. Pa. Aug.28, 2013) (when prisoner filed grievances of ETS but did not have any injuries and was informed that the prison had a no-smoking policy that was enforced, his claims failed); *Keyes v. Chamberlin,* 2011 WL 113445, at *5 (W.D. Pa. Jan.13, 2011) (Lenihan, M.J.) (when prisoner claimed ETS exposure at SCI–Graterford but prison proffered evidence of a no-smoking policy that was enforced, his claims failed); *Belland v. Matachiski,* 2009 WL 1585811, at *5–6 (M.D. Pa. June 3, 2009) (inmate with

asthma failed to show that he was injured by ETS or that he was exposed to it at a level that society is unwilling to accept); *Buchanan v. United States*, 2007 WL 983312, at *8 (M.D. Pa. Mar.27, 2007) (no evidence other than prisoner's own speculation that ETS exposure caused his eye irritation, nausea, headaches and breathing problems); *Meo v. Wall*, 2003 WL 22358649, at *3–4 (D.R.I. Sep.11, 2003) (plaintiffs failed to demonstrate that the ETS that they were exposed to caused them to suffer "serious" current health problems where they had no reported medical condition which could have been aggravated by ETS, but rather shortness of breath, wheezing, tearing of eyes and pains in the chest).

Additionally, Plaintiff has failed to prove that prison officials were deliberately indifferent to a serious risk of harm. The record demonstrates that the DOC has a policy prohibiting smoking inside its buildings. Plaintiff was told SCI-Frackville is a non-smoking facility, which reprimands or disciplines inmates who smoke in their cell, when their identity is disclosed. When Plaintiff did complain about being celled with a smoker, he was moved. Finally, the record reflects that the DOC staff test ventilation to insure adequate airflow. Thus, given the responsiveness displayed by prison officials and their adherence to the DOC no-smoking policy, Plaintiff's ETS claim fails. *See Slaughter v.* Rogers, 408 Fed. Appx. 510 (3d Cir. 2010) (Summary judgment affirmed where Defendants showed evidence of a smoking policy, citations for violations of the policy and

acknowledging receipt and consideration of Slaughter's complaints); *Panton v. Nash*, 317 Fed. Appx. 257 (3d Cir. 2009) (holding that a prison official cannot be deliberately indifferent to a serious medical need is there is insufficient documentation to put the official on notice of that need); *Brown v. Varner*, No. 3:11-cv-1258, 2013 WL 4591817, at *15 (M.D. Pa. Aug. 28, 2013) (finding Defendants entitled to summary judgment in an ETS case for three reasons: First, Brown does not identify any personally culpable defendants. Second, Brown does not present proof of any present injury as a result of ETS exposure. Third, Brown does not show deliberate indifference to his needs given the responsiveness displayed by prison officials, and their adherence to the Department of Corrections no-smoking policies).

IV. CONCLUSION

For the reasons stated above, Defendants' motion for summary judgment on Plaintiff's Eighth Amendment ETS claim will be granted. A separate order will enter.