

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

GEORGE DUNN,

Plaintiff,

v.

Civil Action No. 5:12CV55
(STAMP)

TIMOTHY STEWART, Warden,

Defendant.

MEMORANDUM OPINION AND ORDER
AFFIRMING AND ADOPTING IN PART AND
DECLINING TO ADOPT IN PART REPORT AND RECOMMENDATION
AND REMANDING MOTION FOR INJUNCTIVE RELIEF TO
MAGISTRATE JUDGE FOR FURTHER CONSIDERATION

I. Background

On April 13, 2012, the pro se¹ plaintiff, a federal prisoner incarcerated at FCI Morgantown, filed this civil rights action pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). The complaint asserts that the plaintiff was physically assaulted by another inmate at FCI Morgantown, resulting in damage to his teeth which was insufficiently handled by the defendant. Presently before this Court is a motion filed by the plaintiff requesting an injunction directing the Federal Bureau of Prisons ("BOP") to refrain from taking any retaliatory action against him and to refrain from transferring him to another institution in retaliation for his

¹"Pro se" describes a person who represents himself in a court proceeding without the assistance of a lawyer. Black's Law Dictionary 1341 (9th ed. 2009).

filing of this civil action. Following the filing of this motion, James E. Seibert, United States Magistrate Judge, entered a report and recommendation recommending that this Court deny the plaintiff's motion for injunctive relief, as it is not the position of this Court to interfere with the BOP's determinations regarding place and type of incarceration of inmates within its custody. The magistrate judge also informed the plaintiff that he could file any objections to the report and recommendation within fourteen days of the entry thereof.

The plaintiff filed timely objections, which he styled "motion for reconsideration." In that motion, the plaintiff does not offer objections to the finding of the magistrate judge that federal court's are not in the position to interfere with BOP determinations regarding possible transfers. However, within the motion for reconsideration, the plaintiff asserts that Magistrate Judge Seibert failed to address his request for an injunction directing the BOP to refrain from any retaliation against the defendant.

II. Legal Standard

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court must conduct a de novo review of any portion of the magistrate judge's recommendation to which objection is timely made. Because the plaintiff filed objections to the report and recommendation, the issues to which the plaintiff has objected will be reviewed de

novus. Any portions of the magistrate judge's report and recommendation to which the plaintiff has failed to object will be upheld unless they are "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A).

III. Discussion

Initially, this Court agrees with Magistrate Judge Seibert that this Court is not in the position to interfere with the BOP's execution of its own procedures and policies, and its determinations regarding place and type of incarceration for inmates in its custody. Bell v. Wolfish, 441 U.S. 520 (1979). Thus, this Court adopts and affirms that magistrate judge's report and recommendation in this regard.

However, as the plaintiff points out, the magistrate judge did not address the plaintiff's second request for an injunction directing the BOP to refrain from any retaliation against the plaintiff. As Magistrate Judge Seibert did not provide this Court with a recommendation in this regard, this Court declines to adopt the report and recommendation to the extent that it recommends that the plaintiff's entire motion for injunctive relief be denied. Accordingly, the plaintiff's motion to reconsider is granted to allow the magistrate judge to consider his request for an injunction directing the BOP to refrain from any retaliation against the plaintiff.

IV. Conclusion

In accordance with the foregoing, this Court hereby AFFIRMS and ADOPTS the report and recommendation (ECF No. 24) insofar as it recommends denial of the plaintiff's request for an injunction directing the Bureau of Prisons to refrain from transferring the plaintiff in retaliation for the filing of this lawsuit. However, this Court DECLINES TO ADOPT the report and recommendation (ECF No. 24) insofar as it recommends the complete denial of the plaintiff's motion for injunctive relief (ECF No. 21). The plaintiff's motion for reconsideration is GRANTED to allow the magistrate judge to reconsider the remaining aspects of the plaintiff's motion for injunctive relief. The plaintiff's motion for injunctive relief is REMANDED to James E. Seibert, United States Magistrate Judge, for reconsideration of the plaintiff's motion for injunctive relief to the extent that it requests an injunction directing the Bureau of Prisons to refrain from any retaliation against the plaintiff for the filing of this civil action.

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit a copy of this memorandum opinion and order to the pro se plaintiff by certified mail and to counsel of record herein.

DATED: November 14, 2012

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE