UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ANDRES R. SOSA	:	
	:	PRISONER
v.	:	Case No. 3:03cv1707(DJS)(TPS)
	:	
D.H.O. CLEAVER	:	
BRIAN K. MURPHY	:	
JOHN J. ARMSTRONG	:	

RULING AND ORDER

Plaintiff Andres R. Sosa ("Sosa") currently is confined at the MacDougall-Walker Correctional Institution in Suffield, Connecticut. He brings this civil rights action pro se, pursuant to 28 U.S.C. § 1915. The operative complaint is the amended complaint filed on June 2, 2004. Sosa alleges that defendant Cleaver did not move him to a different cell after Sosa told him that he did not get along with his cellmate. Two days later, Sosa was involved in an altercation with his cellmate and received disciplinary sanctions. Pending is defendants' motion to dismiss. For the reasons that follow, defendants' motion is granted.

I. Standard of Review

When considering a Rule 12(b) motion to dismiss, the court

accepts as true all factual allegations in the complaint and draws inferences from these allegations in the light most favorable to the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Flores v. Southern Peru Copper Corp., 343 F.3d 140, 143 (2d Cir. 2003). Dismissal is inappropriate unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 654 (1999); Sweet v. Sheahan, 235 F.3d 80, 83 (2d Cir. 2000). "'[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" York v. Association of Bar of City of New York, 286 F.3d 122, 125 (2d Cir.) (quoting Scheuer, 416 U.S. at 236), cert. denied, 537 U.S. 1089 (2002). In other words, "'the office of a motion to dismiss is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of New York, 375 F.3d 168, 176 (2d Cir. 2004) (quoting Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980)). "Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss" from being granted. Smith v. Local 819 I.B.T. Pension Plan, 291 F.3d 236, 240 (2d Cir. 2002) (internal

quotation marks and citation omitted).

II. Facts

For the purposes of deciding this motion, the court assumes that the following allegations, taken from the amended complaint, are true.

The incident giving rise to this action took place while Sosa was confined in the restrictive housing unit at MacDougall-Walker Correctional Institution. On November 14, 2001, Sosa told defendant Cleaver that he had a problem with his cellmate, inmate Santiago, since both inmates were confined in general population and that he was afraid because inmate Santiago was HIV-positive. Sosa asked to be moved to a different cell.

Defendant Cleaver did not immediately transfer Sosa to another cell and was off-duty the following day. On November 16, 2001, Sosa had an altercation with inmate Santiago and received a disciplinary report for fighting. Sosa pled guilty and was sanctioned with confinement in restrictive housing for an additional seven days and loss of contact visits for two years. Sosa blamed defendant Cleaver for the altercation and expressed this opinion to defendants Cleaver and Murphy.

Upon his release from restrictive housing, Sosa was confined in general population in the same unit as inmate Santiago. Sosa does not allege that he had any other encounters with inmate

Santiago.

III. Discussion

Defendants[1] move to dismiss the amended complaint on seven grounds: (1) Sosa has not exhausted his administrative remedies; (2) Sosa fails to allege facts demonstrating the personal involvement of defendants Armstrong and Murphy; (3) Sosa fails to allege facts suggesting that defendant Cleaver violated his constitutionally protected rights; (4) Sosa cannot challenge the propriety of a disciplinary report to which he pled guilty; (5) Sosa has no liberty interest in confinement out of restrictive housing or in contact visits; (6) Sosa did not suffer a physical injury; and (7) defendants are protected by qualified immunity.

A. Exhaustion of Administrative Remedies

Defendants first argue that the case should be dismissed because Sosa concedes that he did not exhaust his administrative remedies.

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a),

[1] In the original complaint, Sosa named each defendant in his individual and official capacity. He does not indicate in the amended complaint the capacity in which each defendant is named. Because the only relief requested is damages, the court concluded that Sosa named defendants in their individual capacities only and ordered only individual capacity service. See Kentucky v. Graham, 473 U.S. 159 (1985) (Eleventh Amendment immunity which protects the state from suits for monetary relief also protects state officials sued for damages in their official capacity).

requires an inmate to exhaust "administrative remedies as are available" before bringing an "action . . . with respect to prison conditions." The Supreme Court has held that this provision requires an inmate to exhaust administrative remedies before filing any type of action in federal court, see Porter v. Nussle, 534 U.S. 516, 532 (2002), regardless of whether the inmate may obtain the specific relief he desires through the administrative process. See Booth v. Churner, 532 U.S. 731, 741 (2001).

In reviewing a claim of failure to exhaust administrative remedies, the court considers four questions: (1) were administrative remedies available to the inmate; (2) did defendants forfeit their affirmative defense of failure to exhaust administrative remedies by failing to raise or preserve that claim; (3) whether any defendant is estopped from raising this claim because, by his actions, he inhibited the inmate's attempts to exhaust his administrative remedies; and (4) if administrative remedies were available to the inmate and defendants neither forfeited their defense nor inhibited the inmate from exhausting his remedies, whether special circumstances have been alleged that would justify the inmate's failure to comply with the exhaustion requirement. See Hemphill v. New York, 380 F.3d 680, 686 (2d Cir. 2004).

The administrative remedies for the Connecticut Department of Correction are set forth in Administrative Directive 9.6, entitled Inmate Grievances. During the relevant time period, section 6(A) provided that the following matters were grievable:

> 1. The interpretation and application of policies, rules and procedures of the unit, division and Department.
> 2. The existence or substance of policies, rules and procedure of the unit, division and Department . . . .
> 3. Individual employee and inmate actions including any denial of access of inmates to the Inmate Grievance Procedure other than as provided herein.
> 4. Formal or informal reprisal for use of or participation in the Inmate Grievance Procedure.
> 5. Any other matter relating to access to privileges, programs and services, conditions of care or supervision and living unit conditions within the authority of the Department of Correction, to include rights under the Americans with Disabilities Act, except as noted herein.
> 6. Property loss or damage.

Sosa's claim that he was confined with a cellmate who was HIV-positive and with whom he did not get along is included within the list of grievable matters at items 3 and 5.

Defendants have moved to dismiss on the ground that Sosa failed to exhaust administrative remedies. Thus, they have not forfeited their right to assert this defense.

The third question the court must consider is whether, by their actions, the defendants inhibited Sosa from filing

grievances and exhausting his administrative remedies. The Second Circuit has held that defendants' threats or intimidating conduct can estop them from asserting the affirmative defense of failure to exhaust administrative remedies. See Ziemba v. Wezner, 366 F.3d 161, 163 (2d Cir. 2004). There, the prisoner was threatened, beaten, denied grievance forms and writing implements and transferred to another correctional facility. See id. at 162. Sosa states that he was afraid to file a grievance and that unspecified "defendant(s)" blackmailed him not to file a grievance.

Exhaustion of administrative remedies is an affirmative defense. Thus, defendants bear the burden of demonstrating that Sosa failed to exhaust his administrative remedies. Here, defendants rely on Sosa's statement in his original complaint that he did not exhaust his administrative remedies. Sosa stated that he believed that a civil action was the only remedy and indicated that he unsuccessfully sought assistance from Inmates' Legal Assistance Program. In the amended complaint, Sosa states that he "exhausted available remedies sufficient for pleading purposes." (Am. Compl. at 6, ¶ E.3.) He argues that the grievance procedure is not an available remedy because he cannot obtain damages. As indicated above, however, the Supreme Court requires inmates to exhaust administrative remedies even if they

cannot obtain the relief they seek through that process. Sosa does not allege that he filed a grievance.

Finally, the court must consider whether there are any special circumstances that would justify Sosa's failure to exhaust available administrative remedies. See Johnson v. Testman, 380 F.3d 691, 698 (2d Cir. 2004) (remanding case to enable district court to determine, inter alia, whether inmate was justified in raising complaint in appeal of disciplinary finding rather than by filing separate institutional grievance). Sosa states that he could not use the grievance procedure because he did not receive a copy of the inmate handbook in Spanish. He also states, however, that he has filed many grievances in the past. In addition, all of the pleadings in this case have been submitted in English. Thus, the court concludes that the lack of a Spanish version of the inmate handbook is not a special circumstance in this case that would justify Sosa's failure to file a grievance. Sosa also states that he was afraid to file a grievance and that his conversation with defendant Murphy about the incident satisfied the exhaustion requirement.

Because the other grounds raised by defendant, which are discussed below, warrant dismissal of this action, the court need not determine whether Sosa's conversation with defendant Murphy satisfied the exhaustion requirement or evaluate the merits of

Sosa's claim that he was threatened or blackmailed.

B. Defendant Armstrong

In November 2001, defendant Armstrong was the Commissioner of the Connecticut Department of Correction. "A supervisor may not be held liable under section 1983 merely because his subordinate committed a constitutional tort." Leonard v. Poe, 282 F.3d 123, 140 (2d Cir. 2002). Section 1983 imposes liability only on the official causing the violation. Thus, the doctrine of respondeat superior is inapplicable in section 1983 cases. See Blyden v. Mancusi, 186 F.3d 252, 264 (2d Cir. 1999); Prince v. Edwards, No. 99 Civ. 8650(DC), 2000 WL 633382, at *6 (S.D.N.Y. May 17, 2000) ("Liability may not be premised on the respondeat superior or vicarious liability doctrines, . . . nor may a defendant be liable merely by his connection to the events through links in the chain of command.")(internal quotations and citation omitted).

Sosa may show supervisory liability by demonstrating one or more of the following criteria: (1) defendant actually and directly participated in the alleged acts; (2) defendant failed to remedy a wrong after being informed of the wrong through a report or appeal; (3) defendant created or approved a policy or custom that sanctioned objectionable conduct which rose to the level of a constitutional violation or allowed such a policy or

custom to continue; (4) defendant was grossly negligent in his supervision of the correctional officers who committed the constitutional violation; and (5) defendant failed to act in response to information that unconstitutional acts were occurring. See Hernandez v. Keane, 341 F.3d 137, 144 (2d Cir. 2003). In addition, Sosa must demonstrate "an affirmative causal link between the supervisor's inaction and [his] injury." Leonard, 282 F.3d at 140.

Sosa does not refer to defendant Armstrong in the statement of his claims in the amended complaint. In the original complaint he states only that defendant Armstrong is in charge of all correctional staff. Defendant Armstrong did not participate in the underlying incident and Sosa has alleged no facts that would support a claim of supervisory liability against him. Thus, defendants' motion to dismiss is granted as to the claims against defendant Armstrong.

C. Violation of Constitutionally Protected Rights

Sosa alleges that defendant Cleaver violated his Eighth Amendments right to be free from cruel and unusual punishment and to protect him from harm caused by other inmates when he assigned Sosa to a cell with inmate Santiago, an HIV-positive inmate, and did not immediately transfer Sosa to another cell upon request.

The Eighth Amendment's proscription against cruel and

unusual punishment imposes a duty on prison officials to "'take reasonable measures to guarantee safety of the inmates.'" Farmer v. Brennan, 511 U.S. 825, 832 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 526-27 (1984)). This duty includes protecting inmates from harm at the hands of other inmates. See id.; Fischl v. Armitage, 128 F.3d 50, 55 (2d Cir. 1997).

To establish a constitutional violation, a prisoner must show that he was "incarcerated under conditions posing a substantial risk of serious harm," Farmer, 511 U.S. at 834, and that the prison official showed "deliberate indifference" to the prisoner's health or safety. Deliberate indifference exists where "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of fact from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 837. See Hayes v. New York City Dep't Of Corrections, 84 F.3d 614, 620 (2d Cir. 1996) (holding that prison official possesses culpable intent to support a claim of deliberate indifference where he "has knowledge that an inmate faces a substantial risk of serious harm and he disregards that risk by failing to take reasonable measures to abate the harm.").

The Supreme Court has recognized that exposure to contagious diseases may violate the Eighth Amendment if prison officials,

acting with deliberate indifference, expose a prisoner to a sufficiently substantial "risk of serious damage to his future health." Helling v. McKinney, 509 U.S. 25, 35 (1993) (holding that exposure to environmental tobacco smoke states an Eighth Amendment cause of action even though inmate was asymptomatic because the health risk posed by involuntary exposure to second hand smoke was "sufficiently imminent"). The Supreme Court also noted that inmates were entitled to relief under the Eighth Amendment where they proved threats to personal safety from the mingling of inmates with serious contagious diseases. See id. at 33.

Courts interpreting this language have held that inmates can state an Eighth Amendment claim for confinement in a cell with an inmate who has a serious contagious disease that is spread by airborne particles, such as tuberculosis. See Bolton v. Goord, 992 F. Supp. 604, 628 (S.D.N.Y. 1998)(acknowledging that prisoner could state Eighth Amendment claim for confinement in same cell as inmate with serious contagious disease, such as tuberculosis, but rejecting claim in this case because prisoner had not shown that inmates with active infectious tuberculosis were double-celled).

Courts consistently have held, however, that confinement in the same cell as an HIV-positive inmate does not violate the

Eighth Amendment. See Bolton, 992 F. Supp. at 628 (finding that inmate was not injured by exposure to HIV-positive inmate in double cell because HIV is not airborne or spread by casual contact); see also, e.g., Glick v. Henderson, 855 F.2d 536, 539 (8th Cir. 1998) (holding that prison's failure to segregate inmates with HIV/AIDS did not violate Eighth Amendment); Oladipupo v. Austin, 104 F. Supp. 2d 626, 635 (W.D. La. 2000) (same); Deutsch v. Federal Bureau of Prisons, 737 F. Supp. 261, 267 (S.D.N.Y. 1990)(same); but see, Massick v. North Central Correctional Facility, 136 F.3d 580 (8th Cir. 1998) (holding that sharing cell with HIV-positive inmate who was bleeding could subject healthy inmate to substantial risk of harm).

Complaints that allege only a generalized fear of contracting AIDS from an allegedly aggressive HIV-positive inmate and contain conclusory allegations that prison officials were or are aware of such intentions but have done nothing to intervene, are insufficient to state a claim that conditions of confinement violate the Eighth Amendment or demonstrate the culpable state of mind required to state a claim for deliberate indifference. See Goss v. Sullivan, 839 F. Supp. 1532, 1537 (D. Wyo. 1993) (dismissing complaint alleging generalized fear of contracting AIDS from aggressive HIV-positive inmate but containing no evidence that infected inmate had specifically threatened

plaintiff or that correctional staff was aware of specific threat to plaintiff).

Sosa alleges only that he told defendant Cleaver that he was afraid to be in a cell with an HIV-positive inmate and that he and inmate Santiago had had problems in the past. There are no allegations suggesting that Sosa told defendant Cleaver that inmate Santiago had threatened to infect him or had made any recent specific threats of violence. The court concludes that there are no allegations that would put defendant Cleaver on notice that if he did not move Sosa to another cell immediately, he would be disregarding a serious threat to Sosa's safety. Sosa fails to allege facts suggesting that defendant Cleaver was deliberately indifferent to his safety and, thus, fails state a claim against defendant Cleaver for failure to protect or for unconstitutional conditions of confinement. Defendants' motion to dismiss is granted as to the claims against defendant Cleaver.

D. Challenge to Disciplinary Report

Sosa alleges that, when Sosa spoke with defendant Murphy in his cell, defendant Murphy wanted to talk about a previous disciplinary report Sosa had received for public indecency. Sosa told defendant Murphy that he did not want to return to the Chronic Discipline Unit because his sister was going to visit him for Christmas. Sosa alleges that defendant Murphy told him that

someone would talk with Sosa. When this did not happen, Sosa wrote to defendant Murphy. Subsequently, Captain Frey, the correctional officer in charge of internal investigations met with Sosa. At this time, Sosa agreed to become an informant.[2]

Liberally construing these allegations, the court assumes that Sosa asserts a claim against defendant Murphy for improper handling of his complaints. After hearing Sosa's concerns, defendant Murphy sent the correctional officer in charge of internal investigations to speak with Sosa. The court agrees with defendants' contention that this action was a reasonable response to Sosa's claim that a correctional officer was responsible for the altercation and that Sosa was improperly assigned to share a cell with an HIV-positive inmate. Accordingly, defendants' motion to dismiss also is granted as to any claim against defendant Murphy regarding Sosa's cell assignment.

Sosa also alleges that inmate Santiago did not receive a disciplinary report for fighting. Defendants argue that Sosa cannot now challenge the propriety of the disciplinary report.

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[2] Captain Frey is not a defendant in this case. Thus, the court concludes that any references to Captain Frey's solicitation of Sosa as an informant are included only to demonstrate Sosa's dissatisfaction with defendant Murphy's handling of his complaints.

By pleading guilty, a criminal defendant admits his guilt and waives all non-jurisdictional challenges to his conviction. See, e.g., United States v. Sykes, 697 F.2d 87, 89 (2d Cir. 1983). Prisoners have fewer rights with regard to prison disciplinary proceedings than are available in a criminal prosecution. See Wolff v. McDonnell, 418 U.S. 539, 556 (1974). Thus, courts considering this issue have rejected claims regarding disciplinary proceedings or charges where the inmate has pled guilty. See Perry v. Davies, 757 F. Supp. 1223, 1224 (D. Kan. 1991) (dismissing claim for denial of due process at disciplinary hearing because inmate had pled guilty); see also Jolly v. Robuski, 100 F.3d 942, 1996 WL 20522 (2d Cir. Jan. 19, 1996) (holding, in an unpublished opinion, that guilty plea is complete answer to Connecticut prisoner's challenge to procedures at disciplinary hearing).

Sosa admits that he was involved in an altercation with inmate Santiago. He alleges that he pled guilty on the advice of the correctional officer in charge of investigating the disciplinary report. Research has revealed no cases permitting an inmate who has pled guilty to disciplinary charges to challenge the propriety of the issuance of the disciplinary report. Thus, defendants' motion to dismiss is granted as to any claim challenging the propriety of the disciplinary report.

IV. Conclusion

Defendants' motion to dismiss [**doc. # 24**] is **GRANTED.** The Clerk is directed to enter judgment in favor of defendants and close this case.

SO ORDERED this 18th day of May, 2005, at Hartford, Connecticut.

/s/DJS

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Dominic J. Squatrito
United States District Judge