

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 02-3734

FRANK T. SZYMANSKI,
Appellant

v.

SCI-WAYMART; MILTON FRIEDMAN; ROBERT LONG; JAMES WELBY;
EMANUEL PATTERSON; GARY D. ADOLFSON; JASON OBELINUS; RAYMOND
COLLERAN; RONALD RICHARDS; J. T. BURK; CHIPEGO;
FRECHEN; MOSHER; KRANICK; BOWMAN; HUGHES; NISH; FISK; BITNER

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 99-cv-02081)
District Judge: Honorable Christopher C. Conner

Submitted For Possible Dismissal Under 28 U.S.C. § 1915(e)(2)(B)

May 30, 2003

Before: BARRY, AMBRO AND ALDISERT, CIRCUIT JUDGES

(Filed: June 6, 2003)

OPINION

PER CURIAM

Frank Szymanski, an inmate currently incarcerated at SCI-Smithfield in Pennsylvania, appeals the dismissal of this action at summary judgment by the District Court for the Middle District of Pennsylvania. Szymanski filed a civil rights complaint,

which he amended in 2001, claiming that the defendants moved him from a non-smoking housing unit to a housing unit that permitted smoking, thereby endangering his physical health by placing him in close proximity to second-hand smoke in violation of his Eighth Amendment rights. He claimed that the defendants had to relocate him for his own protection after Robert Long, Szymanski's counselor, spread a rumor among African-American inmates that Szymanski was in prison for burning down an African-American church. He alleged that Milton Friedman, the unit manager, retaliated against Szymanski by relocating him to a smoking cell block in SCI-Waymart, re-classifying Szymanski to a more secure level of custody, and transferring him from SCI-Waymart to a high security facility. Finally, Szymanski claimed that the defendants wrongly disciplined him based on a false misconduct charge of forgery, in violation of his constitutional rights of due process and equal protection. He sought damages.

The defendants moved to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(6), arguing, among other things, that Szymanski failed to exhaust administrative remedies prior to filing suit, as required by 42 U.S.C. § 1997e(a). In December, 2001, the District Court granted the defendants' motion and dismissed without prejudice for nonexhaustion all of Szymanski's claims except the retaliation claim against Friedman and the false misconduct claim. After discovery was completed, the defendants moved for summary judgment in April, 2002, asserting that Szymanski failed to demonstrate retaliation under Rausser v. Horn, 241 F.3d 330, 333 (3d Cir. 2001), the defendants did not violate Szymanski's Eighth Amendment rights by placing him in a smoking cell block,

and the forgery misconduct claim did not constitute a violation of due process. The District Court granted summary judgment, concluding that Szymanski's forgery misconduct did not result in a deprivation of due process and that Szymanski failed to show an Eighth Amendment violation for second-hand smoke exposure under Helling v. McKinney, 509 U.S. 25 (1993), because he failed to establish that he was exposed to unreasonably high levels of Environmental Tobacco Smoke (ETS) or that the defendants demonstrated deliberate indifference. The District Court did not address Szymanski's retaliation claim. Szymanski filed this timely appeal.

We have jurisdiction pursuant to 28 U.S.C. § 1291. Szymanski has been granted leave to proceed in forma pauperis on appeal. Because all of Szymanski's claims lack arguable merit, we will dismiss this appeal pursuant to § 1915(e)(2)(B)(ii). See Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000).

Although the District Court did not address the retaliation claim, the record is clear that the claim is without legal merit. In Rauser v. Horn, 241 F.3d 330 (3d Cir. 2001), we held that in order to prevail on a retaliation claim, a prisoner must prove that the conduct giving rise to the alleged retaliation was constitutionally protected, that he suffered some "adverse action" at the hands of prison officials, and that exercise of the constitutional right was a substantial or motivating factor in the challenged action. See id. at 333-34. Prison officials may still prevail by proving that they would have made the same decision absent the protected conduct for reasons reasonably related to a legitimate penological interest. Id. at 334.

Assuming arguendo that Szymanski met his initial burden under Rauser regarding his retaliation claim against Friedman, the defendants have shown that legitimate penological reasons existed for moving Szymanski temporarily to a smoking cell block, re-classifying him to more restrictive custody within SCI-Waymart, and ultimately transferring Szymanski to another facility. In early June, 1998, while housed in M2, the only non-smoking block at Waymart, Szymanski and another inmate submitted request slips and grievances to Friedman regarding inmate threats to their physical safety, which Szymanski claimed were instigated by counselor Long and other staff. For safety reasons, Friedman relocated Szymanski to E1 block, a dormitory style housing unit far from M2 that only permitted smoking in the day-room, but not in the cell area. Szymanski stayed in E1 block for about one and one-half months before he was placed in disciplinary custody for misconduct. Thereafter, in August, 1998, Szymanski moved to the M1 housing unit which was targeted to be “smoke-free” by October, 1998. At the time, seventy-percent (70%) of the inmates in M1 were non-smoking. About four days after he arrived, however, Szymanski was assaulted by another inmate. Further investigation revealed that the inmate assaulted Szymanski because Szymanski allegedly had made unwanted sexual advances to him. Friedman, aware of prior reports of incidents of aberrant sexual behavior on Szymanski’s part during his incarceration at SCI-Waymart, re-classified Szymanski to a higher level of security and placed him in C1, the only block besides the Restricted Housing Unit (“RHU”) that had non-dormitory style living quarters. Because SCI-Waymart was a minimum security facility providing

dormitory style housing and only one non-smoking unit, the defendants recommended that Szymanski be transferred to a high security facility that would accommodate Szymanski's safety and non-smoking needs. Given this record, we find no evidence to suggest that Szymanski's relocations within SCI-Waymart and his transfer to another higher security facility were not reasonably related to the legitimate penological interest of inmate safety. For these reasons, the retaliation claim against Friedman lacks merit.

Szymanski next claims that involuntary exposure to second-hand smoke violated his Eighth Amendment rights. We find nothing in the record to support the conclusion that Szymanski was exposed to unreasonably high levels of ETS. See Atkinson v. Taylor, 316 F.3d 257, 262 (3d Cir. 2003). At most, Szymanski has shown only occasional exposure to secondhand smoke in a dormitory setting. Szymanski's main complaint about his relocation to E1 block was that his room was close to the day-room, the only place where smoking was allowed. Szymanski lived in E1 block for not more than one and one-half months. After he completed a disciplinary term in the RHU, he was placed in C1, the step-down unit. In August, 1998, Szymanski was placed in M1, a housing unit similar to E1 in that smoking was prohibited anywhere except in the day-room. At the time Szymanski was in M1, seventy-percent (70%) of his fellow inmates were non-smokers and the unit itself was scheduled to become totally smoke-free by October, 1998. Szymanski lived in M1 for four days. Thereafter, he was back in C1 awaiting transfer to another facility. Notably, Szymanski did not claim that his stays in C1 exposed him to ETS at all. Nor did Szymanski complain of being forced to share a cell with a smoking

inmate in any housing unit at SCI-Waymart. Use of the day-rooms in E1 and M1 was entirely voluntary and both rooms were ventilated. Moreover, we have held that Helling v. McKinney did not recognize a federal cause of action seeking damages for the risk or fear of injury absent present physical harm. See Fontroy v. Owens, 150 F.3d 239, 243 (3d Cir. 1998). Szymanski's complaints of smoke irritation to his eyes and throat fall far short of establishing present physical harm.

Finally, with respect to the false misconduct claim, state-created liberty interests protected by the Due Process Clause are limited to freedom from restraint that imposes an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. Sandin v. Conner, 515 U.S. 472, 484 (1995). The record indicates that the forgery misconduct charge was dismissed without prejudice and the charge has not since been refiled. Szymanski suffered no atypical and significant hardship in relation to the ordinary incidents of prison life. His claim lacks merit as it does not rise to the level of a constitutional due process violation. See Smith v. Mensinger, 293 F.3d 641, 652-53 (3d Cir. 2002).

For these reasons, the appeal will be dismissed.