

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

ADIB EDDIE RAMEZ)	
MAKDESSI,)	
Plaintiff,)	Civil Action No.: 7:13cv00079
)	
)	
v.)	
)	<u>REPORT AND RECOMMENDATION</u>
AYERS, et al.,)	By: PAMELA MEADE SARGENT
Defendants.)	United States Magistrate Judge
)	

The plaintiff, Adib Eddie Ramez Makdessi, an inmate proceeding pro se and formerly housed at Red Onion State Prison, (“Red Onion”), and Keen Mountain Correctional Center, (“Keen Mountain”),¹ filed this action for monetary damages and injunctive relief under 42 U.S.C. § 1983. This case is before the undersigned magistrate judge on referral, pursuant to 28 U.S.C. § 636(b)(1)(B). In his Amended Complaint, Makdessi raised claims against numerous defendants employed by the Virginia Department of Corrections, (“VDOC”), alleging that the defendants acted with deliberate indifference to a risk that handcuffing him behind his back would aggravate his documented shoulder problem and cause him significant pain, and that this action was done in retaliation for his filing a prior § 1983 action against other prison officials. (Docket Item Nos. 19, 19-2).

Following the court’s ruling on a prior motion for summary judgment, the following claims and defendants remained: Makdessi’s First Amendment and Eighth Amendment claims against Officers Ayers, Johnson and Pope and Major

¹ Makdessi currently is housed at River North Correctional Center in Independence, Virginia.

Kelly. An evidentiary hearing was held before the undersigned on December 10, 2014. Based on the evidence presented at this hearing, I find that the defendants did not violate Makdessi's First Amendment rights or his Eighth Amendment rights. Therefore, I recommend that the court enter judgment in favor of all of the defendants on Makdessi's § 1983 claims.

I. Facts²

In November 2012, Makdessi was incarcerated in the protective custody unit at Keen Mountain. At that time, Makdessi was pursuing a separate § 1983 action, alleging that in December 2010, while an inmate at Wallens Ridge State Prison, ("Wallens Ridge"), he was raped by his cell mate and attacked by other gang members and that the defendant officers either solicited the attacks or deliberately failed to intervene to protect him. *See Makdessi v. Fields, et al.*, Case No. 7:11cv00262.

Makdessi has alleged that during a shakedown of Keen Mountain on November 29, 2012, four prison officials, Major Gallihar, Lt. Fields, Lt. McQueen and Assistant Warden Kiser, all of whom were "connected to the old lawsuit," retaliated against him by sending Officers Ayers, Pope and Johnson to "threaten[] [him] to drop the old ongoing lawsuit" by (a) shaking down his cell; (b) intentionally reinjuring his shoulder by cuffing his hands behind his back, although other inmates were cuffed to the front, and (c) throwing away documents and legal supplies from the lawsuit. (Docket Item No. 19-2). Makdessi alleges that these

² A large portion of the undisputed facts are taken from Chief Judge Conrad's September 22, 2014, Memorandum Opinion, granting in part and denying in part the defendants' Motion for Summary Judgment. (Docket Item No. 78).

actions were supervised by Major Kelly, Chief of Security at Keen Mountain, who did not intervene.

Testimony at the December 10 hearing established that Keen Mountain was on institutional lockdown on November 29, 2012, after the Warden received anonymous information that a zip gun with ammunition was present on the grounds. A Strike Force composed of specially trained officers from regional DOC facilities was formed to conduct a “shakedown” or search of all inmates and cells at Keen Mountain. This shakedown occurred over a three-day period beginning on November 26, 2012. Multiple witnesses testified that the Strike Force was comprised of officers from varying DOC institutions who are chosen by their individual institution. The members of the Strike Force did not choose which cells or inmates they searched, and there was no identifying information or medical orders posted outside of inmates’ cells at Keen Mountain during this shakedown. Lieutenant Shreve, the Strike Force Supervisor of the November 2012 shakedown at issue, testified that it would not be possible for an officer from another institution to request to search a particular inmate.

Testimony from several witnesses established the procedure followed during this shakedown. First, a strip search of each inmate was conducted inside of his cell. Next, the inmate redressed and was cuffed with his hands to the front in order to carry his mattress to an x-ray machine to be checked for contraband. He then would sit on a body orifice security scanner, (“BOSS”), chair to be screened for contraband, before placing his head on a special plate for the same purpose. The inmate then was returned to his cell area, where the handcuffs were moved from

the front to the back of the inmate's body.³ Upon being returned to his cell area, an inmate would oversee the search of his cell, answering any questions the searching officers might have, while a property inventory was completed. Multiple DOC employees testified that, if an inmate had a medical order requiring him to be cuffed to the front or double cuffed, such orders would be followed. Multiple DOC employees also testified that, without such medical orders, officers have discretion as to whether to cuff an inmate's hands to the front or the back.

In his testimony, Makdessi admitted that he did not have a medical order requiring that his hands be cuffed to the front on November 29, 2012. Instead, he claimed that he showed medical records to the officers, demonstrating that he was receiving treatment for shoulder pain. Makdessi did not, however, testify regarding which officer was shown these medical records. Nor did Makdessi testify as to which officer moved his handcuffs from the front to the back. Makdessi did testify that when his hands were cuffed to the back, he "screamed" from the pain and asked the officers to cuff his hands in front. None of the officers who testified recalled being shown any such record by Makdessi.⁴ Makdessi testified that, prior to, and since, November 29, 2012, officers have "been nice" to him and cuffed him to the front.

Multiple DOC employees who were present in Makdessi's pod during the November 2012 shakedown, testified that they did not recall any type of

³ Multiple witnesses, including Warden Leslie Fleming and Major Kelly, the Chief of Security, testified that the practice of moving the handcuffs to the back was implemented after an inmate was able to assault an officer while handcuffed to the front during a previous shakedown.

⁴ Officer Shawn Pope testified that he did remember an inmate "who might have been Makdessi," showing him a medical paper during a shakedown, but after viewing a video recording taken of Makdessi's pod during the shakedown, he determined that it was not Makdessi. In fact, Pope testified that he could not be sure this even occurred at Keen Mountain.

disruption, including an inmate screaming in pain, as Makdessi contends he was. For instance, Officer Pope, a correctional officer from Bland Correctional Center who participated in the shakedown of Makdessi's cell, testified that there was nothing memorable about the shakedown, such as an inmate screaming in pain. Likewise, Ryan Yates, a correctional officer trainee at the time of the shakedown, testified that he did not hear Makdessi screaming in pain. Major Ronald Kelly testified that there was no disruption during the shakedown of which he was aware and, as Chief of Security, he would have immediately known of such. Lieutenant Horton, who also took part in the shakedown at Keen Mountain, did not recall any inmate screaming or any disruption in Makdessi's pod. According to Lt. Horton, if there had been a disruption, officers would have made note of it. Officer William Johnson, another member of the Strike Force, testified that there was nothing memorable about the shakedown of Makdessi's building and stated that if an inmate were screaming after being cuffed, he would remember it. Jeremy Ayers, a K-9 Officer from Pocahontas State Correctional Center who participated in the shakedown of Makdessi's cell, testified that he did not remember any inmate screaming, which would stand out.

Additionally, a review of a video recording of Makdessi's pod during the shakedown revealed no indications of any type of disturbance occurring during the shakedown of Makdessi's cell. (Plaintiff's Exhibit No. 6). The inmates appear to be walking their mattresses to be x-rayed and standing outside of their cells while they are being searched. Makdessi can be seen on the video, and he does not appear to be in any distress. No commotion can be seen around him, no officers appear to be tending to any complaints that he may be expressing to them, and no other inmates are looking in his direction as if he is screaming in pain or otherwise creating a disturbance. Further, testimony was offered that a patrol dog was present

on Makdessi's floor during the shakedown. However, the video does not show this patrol dog alerting to any disruptive behavior. Lieutenant Horton testified that the dog would have gotten "amped up" if an inmate were screaming or causing a disruption, but the dog never became excited. Likewise, Warden Fleming testified that the patrol dog was very relaxed and sitting in the corner. He stated that the dog would have alerted if anything disruptive were occurring, and this would be noticeable on the video.

Lastly, Lt. Shreve and Officers Pope, Johnson and Ayers testified that they did not know Makdessi prior to November 29, 2012, nor were they aware of his prior lawsuit on that date. They also testified that they did not know Major Gallihar, Lt. Fields, Lt. McQueen or Assistant Warden Kiser, nor had they had any communications with them regarding the treatment of any inmate, including Makdessi.

II. Analysis

Makdessi alleges that the defendants' actions on November 29, 2012, during the institutional shakedown, constituted retaliation against him for his filing the previous lawsuit. Prison officials may not punish an inmate for exercising his constitutional right to access the court. *See Hudspeth v. Figgins*, 584 F.2d 1345, 1347 (4th Cir. 1978). However, retaliation claims by prisoners against prison officials "must ... be regarded with skepticism, lest federal courts embroil themselves in every disciplinary act that occurs in state penal institutions." *Adams v. Rice*, 40 F.3d 72, 74 (4th Cir. 1994). An inmate must allege specific facts to support his allegation that adverse actions were retaliatory and not merely "naked allegations of reprisal." *Adams*, 40 F.3d at 74. He must state specific facts to

establish that (a) in response to his exercise of a constitutionally protected right, (b) the defendant took some action that (c) adversely impacted or injured him and his ability to exercise his constitutional right. *See Adams*, 40 F.3d at 74. He must demonstrate that his exercise of his constitutional right was a “substantial” or “motivating” factor behind the allegedly retaliatory action. *Wagner v. Wheeler*, 13 F.3d 86, 90-91 (4th Cir. 1993) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (requiring plaintiff to show “a causal relationship between the protected expression and the retaliatory action”).

I find that Makdessi has presented the court with nothing more than the type of “naked allegations of reprisal” insufficient to support a First Amendment retaliation claim. First, Makdessi never testified as to which officer placed him in the handcuffs behind his back. Also, Makdessi has completely failed to show that his filing of the prior § 1983 action was a substantial or motivating factor for the officers’ actions in cuffing him to the back. All of the defendant officers testified that they did not know Makdessi prior to November 29, 2012, nor were they aware of his prior lawsuit. They also testified that they did not know the defendants in the prior lawsuit, and they had received no communications from any of them. Therefore, I find that Makdessi has failed to show that any of the defendants violated his First Amendment rights by retaliating against him for filing his prior § 1983 action, and I recommend that the court grant judgment in favor of all of the defendants on this claim.

Likewise, I find that Makdessi has failed to show that the defendants’ actions constituted deliberate indifference to his shoulder pain in violation of the Eighth Amendment. To amount to deliberate indifference, a public official must have been personally aware of facts indicating a substantial risk of serious harm,

and the official must actually have recognized the existence of such a risk. *See Farmer v. Brennan*, 511 U.S. at 825, 837 (1994). “[T]he evidence must show that the official in question subjectively recognized that his actions were ‘inappropriate in light of that risk.’” *Parrish ex rel. Lee v. Cleveland*, 372 F.3d 294, 303 (4th Cir. 2004) (quoting *Rich v. Bruce*, 129 F.3d 336, 340 n.2 (4th Cir. 1997)); *see also Farmer*, 511 U.S. at 837. Here, Makdessi has failed to present the court with evidence that the defendants personally knew that cuffing his hands to the back created a substantial risk of serious harm to him and that they actually recognized this risk. Even giving Makdessi the benefit of the doubt, that he presented the medical report at the time of the shakedown, he does not allege to which officer or officers this report was presented. Additionally, the specific medical report states only that Makdessi was complaining of constant shoulder pain, among other things, in March 2012, eight months prior to the shakedown. (Plaintiff’s Exhibit 7). Medical notes from March 2012 show that Makdessi was taking Motrin. (Plaintiff’s Exhibit 7). No restrictions were placed on Makdessi in the report, and no medical order with regard to cuffing was included therein. (Plaintiff’s Exhibit 7). Furthermore, for reasons already stated, I find Makdessi’s claim that he began screaming in pain once his hands were cuffed to the back incredible. Therefore, the officers would not have known of a substantial risk of harm based on any such vigorous protestations by Makdessi. Additionally, testimony at the hearing revealed that the officers followed policy in cuffing Makdessi to the back in the absence of a medical order stating otherwise.

For these reasons, I find that Makdessi has failed to show that any of the defendants’ actions constituted deliberate indifference to his shoulder pain.

For all of the above-stated reasons, I find that Makdessi has not shown that the defendants' actions in cuffing him behind his back during the November 29, 2012, shakedown at Keen Mountain, constituted either retaliation or deliberate indifference, in violation of the First or the Eighth Amendment. Therefore, I recommend that the court enter judgment in favor of all of the defendants on Makdessi's § 1983 claims.

PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. Makdessi was handcuffed to the back while his cell was searched during an institutional lockdown at Keen Mountain on November 29, 2012;
2. Officers Johnson, Pope and Ayers conducted the shakedown of Makdessi's cell, and Major Kelly was present on Makdessi's floor for at least some part of the shakedown;
3. Makdessi failed to prove that his filing of the prior § 1983 action was a substantial or motivating factor for the officers' actions in handcuffing him to the back;
4. Therefore, the defendants did not retaliate against Makdessi for his filing of the prior § 1983 action, in violation of the First Amendment;
5. Makdessi had no active medical order on November 29, 2012, requiring handcuffing to the front;
6. In the absence of such medical order, officers have discretion to cuff to the front or the back;
7. Officers Johnson, Pope and Ayers and Major Kelly were not aware of a substantial risk of harm to Makdessi caused by cuffing his hands to the back;
8. Therefore, the defendants were not deliberately indifferent to a substantial risk of harm to Makdessi, and they did not violate his Eighth Amendment rights.

RECOMMENDED DISPOSITION

Based on the above-stated reasons, I recommend that the court grant judgment in the defendants' favor on Makdessi's § 1983 claims.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed finding or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence to recommit the matter to the magistrate judge with instructions.

Failure to file written objection to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14-day period, the Clerk is directed to transmit the record in this matter to the Honorable Glen E. Conrad, Chief United States District Judge.

The Clerk is directed to send copies of this Report and Recommendation to all counsel of record.

DATED: January 5, 2015.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE