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

FRANKIE ADAMS,	**)**	
Plaintiff,	**)**	
	)	
v.	**)**	**Case No. 7:04-CV-00258**
	)	
B.G. COMPTON, et al.,	**)**	**By: Michael F. Urbanski**
Defendants.	**)**	**United States Magistrate Judge**

REPORT AND RECOMMENDATION

Plaintiff Frankie Adams, a federal inmate currently housed at the United States Penitentiary located in Coleman, Florida, filed this civil rights action pursuant to the doctrine announced in Bivins v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). Plaintiff alleges that numerous officials affiliated with the United States Penitentiary, Lee County Virginia ("USP-Lee"), violated a number of his constitutional rights. The case is before the undersigned for report and recommendation on defendants' motion for summary judgment.

Specifically, plaintiff has accused persons of assault and battery; use of excessive force; falsification of government documents; denial of due process rights; provision of inadequate medical care; violation of Bureau of Prisons Program Statement 552.23 which discusses use of force, including use of pepper spray, on inmates; and violation of the Torture Victim Protection Act of 1991. For the reasons discussed below, it is the recommendation of the undersigned that defendants' motion for summary judgment be granted regarding all of these claims and this case stricken from the active docket of the court. Additionally, it is the recommendation of the undersigned that defendant K.M.White be stricken from this case because the court lacks personal jurisdiction over her, that defendants be dismissed from this case insofar as they are

sued in their official capacities, and that defendants White, Jones, Compton, Bondurant, Johnson, and Hatfield be dismissed from this case as the claims against them are premised on respondeat superior liability.

I

In his complaint, plaintiff alleges that he is a Sunni Muslim who attended Friday prayer services along with other Muslim inmates. (Compl. at 4.) Plaintiff states that he told another inmate that a guard had been staring at him, that the inmate approached the guard, and asked the guard if he had a problem. Id.

As a result of this incident, plaintiff was taken to a lieutenant's office where he was read an incident report for inciting a guard against the staff. Id. Plaintiff states that he was asked what happened, but that when he began recounting his version of events, one of the officers present, Lt. Trees, told plaintiff that he had heard enough and called to other prison staff on his radio. Id. Once other staff members had arrived, plaintiff was told that he was being placed in a special housing unit ("SHU") for the incident report. Id. at 5. Plaintiff states that he again tried to explain what had happened to the guards, but that they responded by spraying him with pepper spray. Id. Plaintiff alleges that a female prison officer then began videotaping what was happening. Id.

Plaintiff states that he attempted to retreat into a file room to protect himself from the pepper spray and that he attempted to shield himself from the spray through use of a coffee pot. Id. Once plaintiff realized that the coffee pot was of no use as a shield, plaintiff dropped it, turned to the wall, and placed his hands behind his back. Id.

Once plaintiff had turned to the wall, he was handcuffed and prison staff took him to the ground. Id. Plaintiff alleges that at least four different staff members kicked him when he was on the ground and another staff member had him in a choke hold. Id. Plaintiff states that he was then hog-tied and taken to the SHU. Id.

Once in the SHU, plaintiff states that he was placed in four-point restraints and that he heard the female officer who was videotaping the incident state "the tape stop." Id. at 6. Lt. Lopez, one of the defendants named in the complaint, then took the tape from the officer and placed it into one of his pockets. Id. Plaintiff indicates that staff officers attempted to use the tape to get the F.B.I. to prosecute him for this incident, but that once they viewed the tape, they declined the opportunity to do so. Id.

From the assault, plaintiff alleges that he suffered a large knot on his head and many bruises on his head, neck, back, and sides. Id. Plaintiff alleges that no prison official treated him for his injuries for an hour following his assault until medical authorities arrived to flush out his eyes with water. Id. at 6, 9. When they saw him, plaintiff notes that although he had clearly visible injuries and was naked, prison officials refused to document plaintiff's injuries or even to treat him. Id. at 9.

Plaintiff alleges that one of the charges of which he was found guilty was fabricated by prison authorities in an attempt to cover up their assault of plaintiff. Id. at 7. Plaintiff states that it is common practice at USP-Lee for staff to fabricate incidents and then destroy evidence in order to cover up violations of inmates' rights. Id. at 8. Here, plaintiff contends that defendant Davis-Crum found plaintiff guilty of the actions alleged in the incident report when there was clear evidence that plaintiff was not guilty of the events charged therein. Id.

Plaintiff also alleges that defendants Johnson and Hatfield fabricated reports against him regarding this incident, and that Dr. Lohman, who performed a psychological report on plaintiff prior to his placement in the United States Penitentiary - Marion ("USP-Marion") fabricated reports as well. Id. at 9. Specifically, plaintiff alleges that Dr. Lohman labeled plaintiff as a stalker. Id.

In their motion for summary judgment, defendants provide a moderately different version of events. For instance, defendants state that when plaintiff was informed that he was being moved to the SHU, defendants state that plaintiff rose abruptly, ripped off his buttoned shirt, and began to challenge the staff. (Trees Aff. ¶ 5.) Once this had occurred, prison officials began a process of confrontation avoidance, and then moved to give plaintiff the opportunity to submit to being handcuffed. Id. at ¶¶ 6-8. Plaintiff then became more hostile, tore off his t-shirt, and continued to challenge prison officials. Id. ¶ 9. The prison officials then present in the lieutenant's office then requested assistance of additional staff and that pepper spray be brought to the office. Id. ¶ 10.

When additional staff had responded to the office, defendant Trees again reached forward in an attempt to handcuff plaintiff. Id. ¶ 11. When this happened, plaintiff, who had been previously standing in a fighting stance with clenched fists, physically tightened up and lunged toward defendant Trees. Id. ¶ 12. In an effort to subdue plaintiff, defendant Lopez disbursed a two-second burst of pepper spray, striking plaintiff in the chest and neck. Id. ¶ 13. Plaintiff then retreated to a file room behind him, picked up a coffee pot filled with hot coffee, and held it in a manner that suggested that he was going to use it as a weapon. Id. ¶ 14. Defendant Trees ordered plaintiff to drop the hot coffee but he refused. Id. ¶ 15. Because it appeared imminent

that plaintiff was going to use the coffee and the glass pot containing it as a weapon, defendant Lopez disbursed a second two-second burst of pepper spray, striking plaintiff in the chest and face. Id. ¶ 16. Plaintiff then dropped the coffee pot, turned away from staff, and submitted to hand restraints. Id. ¶ 17.

Once in hand restraints, plaintiff again became assaultive and combative, tightened his body and turned away from staff. Id. ¶ 19. Defendant Trees ordered staff to place plaintiff on the floor and to apply leg restraints in order to regain control over him. Id. ¶ 20. When plaintiff was secured, prison staff lifted him and he was carried to the SHU. Id. ¶ 22. Defendant Trees denies that plaintiff was ever hogtied and dragged to the SHU. Id. ¶ 23.

Once plaintiff had been placed in an SHU cell, prison health services was notified that pepper spray had been used, and defendant Trees sought information from plaintiff's medical file to see if plaintiff had any medical condition that could be exacerbated by the use of pepper spray. Id. ¶ 24. Defendant Trees was informed that there was no information in plaintiff's file that would cause concerns with the use of chemical agents. Id. ¶ 25. Defendant Trees indicates that a registered nurse reported to the SHU to examine plaintiff and decontaminate him by flushing his eyes. Id. ¶ 26. After this assessment was completed, staff determined that it was appropriate to place plaintiff in four-point soft restraints. Id. ¶ 27. The restraints were applied without incident. Id. ¶ 28.

Defendant Trees indicates that at some point he became aware that the video camera which had been used since the beginning of the incident did not have a videotape in it. Id. ¶ 29. Defendant Trees instructed the video camera operator to find a videotape and to start taping. Id. ¶ 30. Because the videotape was not in the camera as believed, defendant Trees reassembled the

staff and repeated the debriefing process, including calling the registered nurse back to examine plaintiff for a second time. Id. ¶¶ 31-32.

Defendant Trees states that because of plaintiff's failure to submit to staff ordered and his aggressive behavior, the use of force, including the use of pepper spray, was necessary. Id. ¶ 33. Trees states that the force used on plaintiff was appropriate given his aggressive and disruptive behavior and in order to protect the safety and security staff at USP-Lee. Id. ¶ 34. Trees states that he did not use force maliciously or sadistically, that he did not use unnecessary force on plaintiff, and that he did not kick, punch, or place plaintiff in a choke hold. Id. ¶¶ 35, 36. Defendant Trees testimony is corroborated in its entirety by the testimony of defendants Lopez and Vialpando. (Lopez Aff. ¶¶ 1-29; Vialpando Aff. ¶¶ 1-20.)

In an affidavit, Kim Mitchell, a registered nurse at USP-Lee, states that she examined plaintiff after the incident. (Mitchell Aff. ¶¶ 1-3, 6.) She states that when she examined him, plaintiff reported that his eyes were slightly blurred and burning. Id. ¶ 7. Plaintiff's speech was clear and he was in no respiratory distress. Id. ¶ 8. Mitchell states that plaintiff's eyes, face, and neck were decontaminated with sterile saline. Id. ¶ 9. Further, a complete head-to-toe examination was conducted to determine if plaintiff had suffered injuries due to the use of force against him, and that no injuries were noted. Id. ¶ 10. Mitchell states that she documented her findings on an Inmate Injury Assessment form.[1] Id. ¶ 11.

Following the first assessment, Mitchell states that defendant Trees informed her that it had been discovered that a videotape had not been in the camera during the first medical

[1] The form, completed by Mitchell following her examination of plaintiff, has been filed with the court under seal. Review of the document indicates that it says what Mitchell claims it says.

assessment. Id. ¶ 12. Mitchell reexamined plaintiff and the assessment was captured on tape. Id. ¶ 13. Mitchell noted that plaintiff did not have a knot on his head and abrasions to his head, neck, back, and sides as he alleges. Id. ¶ 14. Mitchell states that had plaintiff suffered such injuries, they would be considered minor with no long-term effects. Id. ¶ 15. Mitchell states that as soon as it was safe to do so, she decontaminated and medically assessed plaintiff and that he received timely and proper treatment following the use of force. Id. ¶ 18.

Regarding plaintiff's claim against the disciplinary officer, Connie Crum, the disciplinary hearing officer ("DHO") at USP-Lee, via affidavit, asserts that plaintiff received a fair and impartial hearing. (Crum Aff. ¶ 1.) She testifies that following a May 1, 2003 disciplinary hearing, she dismissed the attempted assault charge against plaintiff and found him guilty of threatening another with bodily harm. Id. ¶ 4. She denies finding plaintiff guilty for personal reasons and directing or allowing staff to destroy a videotape involving the March 25, 2003 use of force incident involving plaintiff. Id. ¶ 6. She indicates that as a result of the hearing, plaintiff was sanctioned to the forfeiture of 21 days of Good Conduct Time, 30 days disciplinary segregation, and a disciplinary transfer was recommended. Id. ¶ 7. She notes that the disciplinary hearing charge remains valid and is a part of plaintiff's institutional record. Id. ¶ 8.

II

As a matter of law, summary judgment is appropriate when there are no genuine issues as to any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 232 (1986). Summary judgment is appropriate when the nonmoving party has "failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Id. A genuine issue of

material fact exists if a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

A prisoner proceeding pro se in a § 1983 action may normally rely on detailed factual allegations in his verified pleadings to withstand a summary judgment motion against defendant's motion supported by affidavits. Davis v. Zahradnick, 600 F.3d 458, 460 (4th Cir. 1979). However, although the court may construe factual allegations in a light most favorable to the plaintiff, the court does not have to accept as true "footless conclusions of law" or "unwarranted deductions." Custer v. Sweeney, 89 F.3d 1156, 1163 (4th Cir. 1996) (internal citations omitted).

III

A. Lack of Personal Jurisdiction over Defendant White.

Defendant K.M. White has moved to be dismissed from this case stating that she does not have sufficient contacts with the state of Virginia to defend this action here. In order for a court to exercise personal jurisdiction over a non-resident defendant, a statute must authorize service of process on the non-resident defendant and service must comport with the Due Process Clause of the United States Constitution. In re Celotex Corp., 124 F.3d 619, 627 (4th Cir. 1997). As Virginia's long-arm statute extends personal jurisdiction to the full extent allowed by the Due Process Clause, "the statutory inquiry necessarily merges with the constitutional inquiry, and the two inquiries essentially become one." Young v. New Haven Advocate, 315 F.3d 256, 261 (4th Cir. 2002) (citing Stover v. O'Connell Assocs., Inc., 84 F.3d 132, 135-36 (4th Cir. 1996)); see also English & Smith v. Metzger, 901 F.2d 36, 38 (4th Cir. 1990).

To determine minimum contacts, the question "is whether the defendant has sufficient 'minimum contacts with [the forum] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice.'" Young, 315 F.3d at 261 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). Defendant White, the Regional Director for the Bureau of Prisons' Mid-Atlantic Regional Office, lives in Annapolis Junction, Maryland. (White Aff. ¶ 1.) White is a Maryland resident and works in Maryland. Id. ¶ 3. On March 25, 2003 and on May 1, 2003, White's duty station was FCI Fairton, New Jersey. Id. ¶ 4. White testifies that her only involvement with this case was to respond to an administrative grievance filed by plaintiff, and that she was not at USP-Lee when any of the events involved in this complaint took place. Id. ¶¶ 5-9.

In Laupot v. Berley, the Fourth Circuit held that a lower court did not have personal jurisdiction over a defendant whose only contact with Virginia was mailing several documents into the state. 1988 WL 131819, at *2 (4th Cir. Dec. 8, 1989). "Minuscule contacts such as telephone conversations, telex messages, and letters negotiating a business transaction have been held insufficient to form a basis for in personam jurisdiction." Barry v. Whalen, 796 F. Supp. 885, 890 (E.D. Va. 1992). Courts that have examined the issue of whether mailing responses to administrative grievances constitutes the necessary basis for personal jurisdiction have concluded that it does not. See Cuoco v. Hurley, 2000 WL 1375273, at *1 (D. Colo. Sept. 22, 2000) (holding that court lacks personal jurisdiction over defendants who sign reviews of inmates' appeals outside of state and who occasionally advise senior staff of prison within state); Johnson v. Rardin, 1992 WL 9019, at *1 (10th Cir. Jan. 17, 1992) (same).

Because the court lacks personal jurisdiction over plaintiff's claims against defendant White, it is the recommendation of the undersigned that all claims against her be dismissed.

B. Claims Against All Defendants Acting in Official Capacities Are Barred by Sovereign Immunity.

A Bivens action against federal agents in their official capacities for money damages based on allegations of constitutional violations is barred by the doctrine of sovereign immunity. See Funches v. Wright, 1986 WL 17980, at *1 (4th Cir. Nov. 6, 1986) (holding that in a Bivens action, plaintiffs must sue federal officials in their individual, and not official, capacities); Berger v. Pierce, 933 F.2d 393, 397 (6th Cir. 1991) (same). To the extent that defendants are named in their official capacities, plaintiff's suit is becomes a suit against the United States and is barred by the doctrine of sovereign immunity. Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d 1994); see also Deutsch v. U.S. Dep't of Justice, 881 F. Supp. 49, 55 (D.C. Cir. 1995) (holding that sovereign immunity bars claims against the Department of Justice, the Federal Bureau of Prisons, and individual defends in their official capacities). As such, to the extent defendants are sued in their official capacities, it is the recommendation of the undersigned that the claims against them be dismissed.

C. Discussion of Claims on the Merits.

1. Plaintiff's Excessive Force Claim.

Plaintiff alleges that defendants Trees, Lopez, and Vialpando violated his rights to be free from cruel and unusual punishment by assaulting plaintiff under color of state law, specifically by assaulting him both with blows and with pepper spray, by hog tying him, and by placing him in four point restraints. (Compl. at 10.)

Neither Bivins nor Section 1983 creates any substantive rights, rather they merely provide a method for vindicating federal rights elsewhere conferred. See Graham v. Connor, 490 U.S. 386, 393-94 (1989) (discussing § 1983). Thus, analysis must begin by identifying the specific constitutional right allegedly infringed by the challenged application of force. Id. at 394. Here, plaintiff has alleged violations of his Eighth Amendment right to be free from cruel and unusual punishment. The Eighth Amendment prohibits the "unnecessary and wanton infliction of pain" by a prison guard on an inmate. See Whitley v. Albers, 475 U.S. 312, 320 (1986).

To prove a claim that prison officials used excessive force, an inmate must satisfy both a subjective and objective requirement Stanley v. Hejirika, 134 F.3d 629, 634 (4th Cir.1998). The subjective requirement asks whether a prison guard applied force in a "good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). The objective element requires him to show that corrections officers' actions, taken contextually, were objectively harmful enough to offend contemporary standards of decency. Stanley, 134 F.3d at 634.

Evidence is sufficient to satisfy the subjective requirement, and will allow the case to proceed to a jury trial, if it supports a reliable inference of wantonness in the infliction of pain. Id. Federal courts afford corrections officers great deference in quelling disturbances and retaining control over prisoners. See id. at 635-36. Corrections officers cross this line, however, when they punish an inmate for verbal abuse, or no reason at all. Id. Inmates cannot satisfy this element if, for instance, they kick guards when guards have responded in a good faith effort to

restore order. If, however, a particular beating was motivated by racial hatred or for verbal abuse to the guards, however, then the inmate can satisfy this element.

If the inmate can meet the subjective element, he must then show that the corrections officers' actions, taken contextually, were objectively harmful enough to offend contemporary standards of decency. Id. Here, the force applied and the seriousness of the resulting injury must be weighed against the need for the use of force and the context in which that need arose. Id. For example, the infliction of pain in the course of a prison security measure is not cruel and unusual simply because the degree of force applied was unreasonable in retrospect. Id. When, for example, a placid prisoner is held and beaten by guards in response to a verbal altercation, the objective element is met more easily. Id. The resolution of this objective element depends on the facts and circumstances of the actual incident, including what precipitated it.

Here, plaintiff contends that his injuries were the result of prison guards assaulting him for no apparent reason and in a manner that was inconsistent with prison procedures. In turn, defendants indicate that their actions resulted from plaintiff behaving aggressively toward them including wielding a pot of hot coffee as a weapon. Such factual disputes would typically prohibit the court from granting defendant's motion for summary judgment.

However, in this case, the extent to which plaintiff was injured is minor, not in dispute, and falls into the de minimis exception to claims under the Eighth Amendment. Although plaintiff contends that he suffered minor bruising and abrasions across the whole of his body and a knot on his head, he has provided nothing to support this contention other than his blanket assertion. In turn, defendants have produced affidavits and testimony from the nurse who treated plaintiff immediately after the alleged assault documenting their version of events. Although

plaintiff suggests that he had more serious injuries, he has not provided even the slightest hint of what these additional injuries were.

De minimis injuries are not actionable relative to Eighth Amendment claims. When injuries are de minimis, excessive force claims fail except in extraordinary circumstances. Norman v. Taylor, 25 F.3d 1259, 1263 (4th Cir. 1994). Mere swelling, tenderness, bruising, and mild abrasions are considered de minimis in this circuit. See, e.g., Taylor v. McDuffie, 155 F.3d 479, 484 (4th Cir. 1998) (finding swelling in the jaw, abrasions to wrists and ankles, and tenderness over some ribs to be de minimis). Here, plaintiff has alleged specifically only minor injuries: a knot on his head, minor bruising, and abrasions located across his body, and all of the alleged injuries are de minimis. As a result, there is no genuine issue of material fact in dispute that plaintiff's injuries are anything other than de minimis.

However, even if a prisoner's injuries are de minimis, he may still recover if "extraordinary circumstances" are present. See Norman, 25 F.3d at 1263. Extraordinary circumstances are present when the force used is "diabolic," "inhuman," or repugnant to the conscience of mankind, or the pain itself constitutes more than de minimis injury. Id., at 1263, and n.4 (citing Hudson, 503 U.S. at 8). Under such circumstances, even relatively minor injuries could constitute excessive force in violation of the Eighth Amendment. In this case, plaintiff's allegations, do not, in any respect, reach the level of "diabolic,"or "inhuman" conduct, or that which is repugnant to the conscience of mankind. Plaintiff alleges that guards assaulted him with pepper spray following a dispute with them that had arisen out of a disciplinary report. Even taking all of plaintiff's allegations as true, what plaintiff alleges is a minor physical assault

by guards on a prisoner that resulted in de minimis injuries. As such, plaintiff's allegations do not rise to the level of "extraordinary circumstances."

Therefore, it is appropriate to grant defendants' motion for summary judgment. Plaintiff's injuries were de minimis, and as such, are not actionable under Bivens. As such, it is recommended that defendant's motion for summary judgment be granted.

2. Plaintiff's Claim under 28 C.F.R. § 552.23.

Plaintiff alleges that defendants violated procedures outlined in federal regulations when they chose to use pepper spray against him. (Compl. at 10.) 28 C.F.R. § 552.23. provides that

> Prior to any calculated use of force, the ranking custodial official (ordinarily the Captain or shift Lieutenant), a designated mental health professional, and others shall confer and gather pertinent information about the inmate and the immediate situation. Based on their assessment of that information, they shall identify a staff member to attempt to obtain the inmate's voluntary cooperation and, using the knowledge they have gained about the inmate and the incident, determine if use of force is necessary.

Id.

This section addresses calculated, as opposed to immediate, use of force situations. As defined in 28 U.S.C. § 552.21(b), a calculated use of force "occurs in situations where an inmate is in an area that can be isolated (e.g. a locked cell, a range) and where there is no immediate, direct threat to the inmate or others." "Immediate use of force," in turn, is justified when an inmate's behavior "constitutes an immediate, serious threat to the inmate, staff, others, property, or to institution security and good order." 28 U.S.C. § 552.21(a).

This case involved an immediate, and not calculated, use of force. The situation occurred in a lieutenant's office and not in an area that could be isolated. Plaintiff's behavior, including,

as he has admitted, picking up a pot of coffee and retreating into a file room, constituted an immediate threat, in contrast to the sort of threat envisioned in situations where a "calculated" use of force would be appropriate. Further, testimony in defendant Trees and Lopez's affidavits indicated that they sought to get plaintiff's cooperation before pepper spray was introduced into this situation. (See generally Trees Aff.; Lopez Aff.) Because, even by plaintiff's allegations, an immediate use of force was required, it is appropriate to grant defendants' motion for summary judgment regarding this claim.

3. Plaintiff's False Incident Report Claims.

Plaintiff alleges that defendant Lopez violated his right to due process by filing a false disciplinary report against him and that numerous other defendants deprived him of a fair and impartial hearing by ignoring and destroying evidence that exonerated him. (Compl. at 10.) Specifically, plaintiff alleges a violation of due process rights, contending that he was issued a false incident report to cover up the fact that prison guards had assaulted him and to make it appear that he had assaulted staff. Further, plaintiff contends that defendant Crum should have dismissed the incident report when a videotape which plaintiff alleges once existed disappeared, and that Crum was biased and found him guilty for personal reasons.

The Supreme Court provided that inmates facing disciplinary hearings are to be afforded (1) written notice of the charged violation; (2) disclosure of the evidence against them; (3) the right to confront and cross-examine witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (4) a neutral and detached hearing body; and (5) a written statement by the fact finders as to evidence relied on and reasons for any disciplinary action. Wolff v. McDonnell, 418 U.S. 539, 564 (1974); see also Segarra v. McDade, 706 F.2d 1301,

1304 (4th Cir. 1983). Additionally, there must be "some evidence" to support the disciplinary board's conclusions. Superintendent v. Hill, 472 U.S. 445 (1985).

Further, a claim seeking restoration of good conduct time and expungement of a disciplinary action cannot be brought as a civil rights action under Bivens or 42 U.S.C. § 1983, but must instead be brought under 28 U.S.C. § 2241. See Wilkinson v. Dotson, 125 S. Ct. 1242, 1245-46 (2005) (holding that a prisoner cannot use § 1983, but instead must file a habeas action, to challenge the fact, as opposed to a condition, of confinement); Preiser v. Rodriguez, 411 U.S. 475, 485-87 (1973); Muhammad v. Finley, 74 Fed. Appx. 847, 849 (10th Cir. 2003) (dismissing an inmate's Bivens action seeking restoration of good conduct time); Heck v. Humphry, 512 U.S. 477, 487 (1994) (holding that an inmate's claim for damages is not cognizable under § 1983 if judgment in favor of the plaintiff would necessarily imply the invalidity of the conviction or sentence unless the prisoner demonstrates that the conviction has already been invalidated).

Here, because plaintiff has not sought habeas relief under 28 U.S.C. § 2241 from the disciplinary action taken against him from the March 25, 2003 incident report, that report remains valid and is a part of plaintiff's institutional record. Thus, plaintiff's claims regarding his due process rights, his request to have his good conduct time reinstated, and his request to have the incident report expunged as incorporated into this Bivens action must be dismissed.

4. Plaintiff's Inadequate Medical Care Claim.

Plaintiff alleges that defendants Trees and Lopez violated his rights under the Eighth Amendment of the United States Constitution by showing deliberate indifference to his medical needs. (Compl. at 11.) It is clearly established that prisoners are entitled to reasonable medical care and can sue prisoners under 42 U.S.C. § 1983 or in Bivens actions for violations of the

Eighth Amendment if such care is inadequate. However, prisoners are not entitled to "unqualified access to health care," Hudson v. McMillan, 503 U.S. 1, 9 (1992); "the right to treatment is...limited to that which may be provided upon a reasonable cost and time basis and the essential test is one of medical necessity and not simply that which may be considered merely desirable." Bowring v. Godwin, 551 F.2d 44, 47-48 (4th Cir. 1977).

To prove a constitutionally significant deprivation of medical care, the inmate must first show that, "objectively assessed," he had a "sufficiently serious" need which required medical treatment. Brice v. Virginia Beach Correctional Center, 58 F.3d 101, 104 (4th Cir. 1995). A medical need serious enough to give rise to a constitutional claim involves a condition that places the inmate at substantial risk of serious harm, usually loss of life or permanent disability; a condition for which lack of treatment perpetuates severe pain also presents a serious medical need. Farmer v. Brennan, 511 U.S. 825 (1994); Sosebee v. Murphy, 797 F.2d 179 (4th Cir. 1986); Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978).

Second, the inmate must demonstrate that each defendant was subjectively aware of plaintiff's need and its seriousness. See Johnson v. Quinones, 145 F.3d 164, 168-69 (4th Cir. 1998) (because evidence did not show that doctors knew inmate had pituitary gland tumor, failure to diagnose and treat tumor did not state Eighth Amendment claim even though inmate ultimately went blind). The inmate must show that the official was aware of objective evidence from which he could draw an inference that a substantial risk of harm existed, that he drew that inference, and that he failed to respond reasonably to the risk. Farmer, 511 U.S. at 844.

Thus, officials show deliberate indifference to a known, serious medical need by completely failing to consider an inmate's complaints or by acting intentionally and unreasonably

to delay or deny the prisoner access to adequate medical care. Estelle v. Gamble, 429 U.S. 97, 104 (1976); but see Belcher v. Oliver, 898 F.2d 32, 34 (4th Cir. 1990) (constitution does not require jail officials to screen pretrial detainee for suicidal tendencies without objective evidence of serious psychiatric need). Inadvertent failure to provide treatment, negligent diagnosis, and medical malpractice do not present constitutional deprivations. Estelle, 429 U.S. at 105-06. Therefore, the Fourth Circuit has expressed great reluctance in § 1983 cases to focus judicial scrutiny on medical judgments about the appropriateness of a specific course of medical treatment provided to an inmate:

> [W]e disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment. Along with all other aspects of health care, this remains a question of sound professional judgment. The courts will not intervene upon allegations of mere negligence, mistake or difference of opinion.

Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir. 1977); Russell v. Sheffer, 528 F.2d 318, 318 (4th Cir. 1975).

Here, it is proper to grant defendant's motion for summary judgment because defendants have produced documents showing that plaintiff was assessed twice and treated by a registered nurse and additionally because plaintiff has not demonstrated a "sufficiently serious" medical condition. For a medical condition to be "sufficiently serious," a plaintiff must show that he suffered from a condition that placed the inmate at substantial risk of serious harm, usually loss of life or permanent disability; a condition for which lack of treatment perpetuates severe pain also presents a serious medical need. Farmer v. Brennan, 511 U.S. 825 (1994); Sosebee v. Murphy, 797 F.2d 179 (4th Cir. 1986); Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978). Plaintiff here only alleges that he suffered from various bruises, abrasions, and a knot on his

head. These, as a matter of law, are not "sufficiently serious" as described in the case law. Because they are not sufficiently serious, plaintiff's claim regarding the prison's alleged one-hour delay in treating him must also fail.

Further, defendants have produced evidence in the form of affidavits and medical records illustrating that plaintiff was treated. Indeed, plaintiff himself admits that a nurse evaluated him and flushed out his eyes following the application of pepper spray. (Compl. at 6, 9.) Plaintiff's complaint revolves around the fact that the medical records do not indicate that he had more serious injuries; what these injuries may be he does not allege. As such, plaintiff's claim regarding officials' deliberate indifference to his serious medical needs must be dismissed because it is essentially nothing more than a disagreement as to the manner in which he was treated. It is the recommendation of the undersigned that defendant's motion for summary judgment regarding this claim be granted.

5. Plaintiff's Claim under the Torture Victim Protection Act of 1991.

The Torture Victim Protection Act of 1991 established a federal civil cause of action against an individual who, under actual or apparent authority of any foreign nation, tortures or kills another. See Pub. L. 102-256, Mar. 12, 1992, 106 Stat. 73. Plaintiff here does not allege that any official acted under the actual or apparent authority of any foreign nation. As such, it is the recommendation of the undersigned that defendants' motion for summary judgment be granted regarding this claim.

6. Plaintiff's Privacy Act Claims.

Plaintiff's final claim is that defendants Johnson, Hatfield, and Dr. Lohman violated plaintiff's rights under the Privacy Act by placing false and inaccurate information into plaintiff's file. (Compl. at 11.) In pertinent part, the Privacy Act provides that

> [e]ach agency that maintains a system of records shall . . . maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination.

5 U.S.C. § 552a(e)(5). Subsection (g) of the Privacy Act Act allows an individual to file a civil action against an agency when the agency refuses to amend its records upon request or fails to maintain its records with the requisite level of accuracy and completeness required. Id. § 552a(g)(1)(A), (C). When an agency's violation of (e)(5) results in a determination that is unfavorable to an individual, the Privacy Act permits suit for damages pursuant to § 552a(g)(1)(C). See Perex v. Bureau of Prisons, 1998 WL 1749285, at *4 (D.D.C. Jan. 30, 1998).

a. Plaintiff's Privacy Act Claims Must Be Brought Against the Bureau of Prisons.

Plaintiff attempts to bring claims under the Privacy Act against defendants Johnson, Hatfield, and Dr. Lohman must fail because such actions can only be brought against agencies. See 5 U.S.C. § 552a(g)(1). Because the proper defendant in a Privacy Act action is an agency and not individual employees, see Armstrong v. Bureau of Prisons, 976 F. Supp. 17, 23 (D.D.C. 1997); Seba v. Digenova, 1987 WL 9231, at *4 (D.D.C. Mar. 24, 1987), plaintiff's Privacy Act claims against individual defendants must be dismissed.

b. Plaintiff Has Not Sufficiently Alleged Injury Such that He Can Collect Damages for Either Claim.

Further, plaintiff has not adequately described injury regarding either of his Privacy Act claims. "To state a claim for money damages under the Privacy Act, a plaintiff must assert that an agency failed to maintain accurate records, that it did so intentionally or willfully, and consequently, that an 'adverse determination [was] made' respecting the plaintiff." Tollasprashad v. Bureau of Prisons, 286 F.3d 576, 583 (D.C. Cir. 2002) (discussing 5 U.S.C. § 552a(g)(1)(c)).

Plaintiff only offers conclusory allegations that he has suffered adverse consequences based on these false documents. To maintain an action for damages, plaintiff must show the allegedly false documents proximately caused the adverse consequences. Wirth v. Soc. Sec. Admin., 1988 WL 138483 (4th Cir. Dec. 15, 1988). Plaintiff has entirely failed to make such a showing and as such has failed to state a claim for monetary damages. See Fagot v. Fed. Deposit Ins. Corp., 584 F. Supp. 1168, 1176 (D.C.P.R. 1984) (holding that where no concrete adverse determination was ever taken, a vague reference to some possible future trouble is inadequate to meet the adversity requirement.

Because plaintiff has not alleged any concrete adverse determination, and because, as discussed below plaintiff cannot show that an agency failed to maintain accurate records, plaintiff has failed to state a claim for monetary damages under the Privacy Act. As such, it is the recommendation of the undersigned that plaintiff's claim for damages under the Privacy Act be dismissed.

c. Claim Against Defendants Johnson and Hatfield.

Plaintiff's complaint against defendants Johnson and Hatfield is premised on the notion that they placed an investigative report containing false an inaccurate information into his file. (Compl. at 9.) The document that defendants Johnson and Hatfield prepared, by their account, is a memorandum indicating the closure of the review of the immediate use of force against plaintiff. (See Def.'s Mem., Exh. T.) Given that no investigative report was prepared, it follows that no such report is contained in plaintiff's file. (See also Johnson Aff.; Hatfield Aff.)

While defendant Hatfield completed a memorandum indicating the closure of the review of the immediate use of force, the closing memorandum noted the officials' opinion that the immediate use of force against plaintiff was conducted in accordance with policy with no discrepancies noted. Because the Privacy Act incorporates a distinction between 'records' and 'decisions,' plaintiff cannot challenge the accuracy of this memorandum. See McCready v. Principi, 297 F. Supp. 2d 178, 190 (D.D.C. 2003); see also Reinbold v. Evers, 187 F.3d 348, 360 (4th Cir. 1999) (stating that the "Privacy Act does not allow a court to alter records that accurately reflect an administrative decision, nor the opinions behind that administrative decision, no matter how contestable the conclusions may be.")

The memorandum prepared by Johnson and Hatfield concluded that the immediate use of force in this case was conducted in accordance with policy with no discrepancies noted is not subject to amendment. Reinbold, 187 F.3d at 360. As such, it is the recommendation of the undersigned that plaintiff's Privacy Act claims against defendants Johnson and Hatfield be dismissed.

d. Claim Against Defendant Dr. Lohman.

Plaintiff's claim against Dr. Lohman alleges that Dr. Lohman labeled him a stalker in a psychological referral to USP-Marion. The referral to USP-Marion assessment was not completed by Dr. Lohman and does not address whether plaintiff is a stalker. (Def.'s Mem., Exh. U, Attach. B.) Assuming that plaintiff takes issue with a Sexual Predator Risk Assessment conducted by Dr. Lohman in June, 2002, although it, too, does not label plaintiff a stalker, it, too, cannot be challenged.

Plaintiff's psychological assessment is a part of plaintiff's mental health records. Insofar as plaintiff seeks under 5 U.S.C. § 552(d) to amend or expunge this record contained in the Bureau of Prisons' mental health record system, such relief is unavailable under 5 U.S.C. § 552a(g). See Risley v. Hawk, 108 F.3d 1396, 1397 (D.C. Cir. 1997) (denying injunctive relief on the ground that regulations exempt B.O.P. records from the amendment provision of the Privacy Act).

Further, any determination contained in this Risk Assessment that plaintiff is, or is not, a stalker is an opinion of one doctor and not subject to amendment. Reinbold, 187 F.3d at 361 (holding that where doctor deemed plaintiff paranoid and delusional, agency did not err in recording that conclusion. Although opinions are subject to debate, they are not subject to alteration under the Privacy Act do long as the opinions are recorded accurately); Phillips v. Widnall, 1997 WL 176394 (10th Cir. Apr. 14, 1997) (holding that plaintiff was not entitled to court amendment of record where physician had noted in plaintiff's medical file that plaintiff was probably dependant on prescription medication and that judgment reflected physician's

medical conclusion). As such, it is the recommendation of the undersigned that this claim be dismissed.

D. The Doctrine of Respondeat Superior Is Inapplicable to Bivens Actions.

Plaintiff's complaints against defendants White, Jones, Compton, Bondurant, Johnson and Hatfield also must be dismissed because they are premised on liability through a theory of respondeat superior. It is well-settled that the doctrine of respondeat superior cannot form the basis of a claim for violations of a constitutional right in a Bivens action. In a Bivens action, plaintiff must specify the acts taken by each defendant which violate his constitutional rights. Willis v. Ashcroft, 92 Fed. Appx. 959, 960 (4th Cir. 2004); see also Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994). "Diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct." Ostrer v. Aronwald, 567 F.2d 551, 553 (2d Cir. 1977). Plaintiff must allege both personal involvement on the part of the defendant and a causal connection to the involved harm. See Zatler v. Wainwright, 802 F.2d 397, 401 (11th Cir. 1986).

Here, plaintiff alleges that defendants White, Jones, Compton, Bondurant, Johnson and Hatfield denied him due process by denying him a fair and impartial hearing by allowing staff to destroy the videotape of the alleged assault. Setting aside the fact that there is no evidence that the videotape existed other than plaintiff's blanket assertion, none of these defendants was directly involved in the disciplinary process, and none of them allowed staff members to destroy any videotape. Rather, these defendants are included in plaintiff's complaint based on their supervisory positions. Excepting as may be addressed above, plaintiff details no actions taken by these defendants that violate his constitutional rights. Instead, plaintiff alleges that these defendants permitted others to destroy a videotape and deny him a fair and impartial hearing.

Because plaintiff's theories of recovery against defendants White, Jones, Compton, Bondurant, Johnson and Hatfield are premised on a theory of respondeat superior liability, it is the recommendation of the undersigned that the claims against these defendants be dismissed.

IV

Having reviewed the record and applicable case law, it is the recommendation of the undersigned that this case be dismissed in its entirety and stricken from the active docket of the court.

The Clerk is directed to immediately transmit the record in this case to the Honorable Glen E. Conrad, United States District Judge. Both sides are reminded that pursuant to Rule 72(b), they are entitled to note objections, if they have any, to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by the reviewing court as a waiver of such objection.

Further, the Clerk is directed to send a certified copy of this Report and Recommendation to all counsel of record.

ENTER: This 17th day of August, 2005.

/s/ Michael F. Urbanski
UNITED STATES MAGISTRATE JUDGE