

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DAVID DAHLER,

Plaintiff,

v.

MEMORANDUM and ORDER
06-C-528-S

DARYL KOSIAK and
SCOTT JOHNSON,

Defendants.

Plaintiff David Dahler was allowed to proceed on his due process claim that defendants Daryl Kosiak and Scott Johnson failed to properly investigate his federal tort claim and also failed to follow proper procedures in searching his room and taking his property.

On April 30, 2007 defendants filed a motion to dismiss or in the alternative a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendants' motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff David Dahler is an inmate at the Federal Correctional Institution, Oxford, Wisconsin (FCI-Oxford). Defendant Daryl Kosiak is employed by the United States Bureau of Prisons as Regional Counsel with offices in Kansas City, Kansas. Defendant Scott Johnson is a correctional officer at the Federal Correctional Institution, Oxford, Wisconsin (FCI-Oxford).

On February 23, 2005 a general "shake-down" inspection was conducted at FCI-Oxford pursuant to Program Statement 5521.05. The inspection included plaintiff's cell. He was not present when the inspection took place.

On February 24, 2005 plaintiff filed a claim under the Federal Tort Claims act claiming that after the inspection he was missing two pairs of tennis shoes, three gray t-shirts and one grey sweatshirt. His claim was referred to FCI-Oxford for investigation according to 28 C.F.R. § 543.32(c). Defendant Johnson was designated to investigate the claim and prepare a report pursuant to Program Statement 1320.06 and FCI-Oxford Supplement 1320.06A.

Defendant Johnson reviewed commissary receipts provided by plaintiff. On May 13, 2005 defendant Johnson submitted his investigative report to the FCI-Oxford legal department. The legal department prepared a final investigative report for the warden's signature.

On June 6, 2005 Attorney Advisor Hansford on behalf of defendant Kosiak executed a final denial of plaintiff's claim.

Plaintiff was never told who searched his cell on February 23, 2005. He did not receive any type of confiscation notice. The "shakedown" log did not indicate which cells were searched or what items were confiscated.

MEMORANDUM

Plaintiff claims that he was deprived of his property without due process in violation of the Fourteenth Amendment. Defendants contend that they were not personally involved in the deprivation of his property. Plaintiff agrees that defendant Kosiak was not personally involved.

Plaintiff argues that John and Jane Doe are the ones who actually deprived him of his property. He contends he is being prejudiced because he has not been provided their names in discovery. Had plaintiff been able to obtain the names of these two individuals who searched his cell, he would still not be able to prevail on his claim.

An action for a federal claim for a denial of procedural due process will not lie if the officer's conduct was random and unauthorized and an adequate state post-deprivation remedy exists. Zinermon v. Burch, 494 U.S. 113, 132 (1990); Hudson v. Palmer, 468 U.S. 517, 534 (1984). Since plaintiff contends that the officers did not follow proper procedures during and after the search, the deprivation of plaintiff's property was unauthorized.

Plaintiff had adequate post deprivation remedies including the grievance procedure which he utilized. The fact that he could not get monetary relief from the grievance procedure does not make it inadequate. See Booth v. Charter, 532 U.S. 631 (2001). Accordingly, plaintiff has not been deprived of his Fourteenth

Amendment due process rights by the two officers who searched his cell.

Plaintiff may also be claiming that defendant Johnson deprived him of due process by not following the proper procedures for investigating his claim under the Federal Tort Claims Act. Such a failure to follow procedures would also be random and unauthorized. Plaintiff had adequate post deprivation remedies including the grievance procedure which he utilized. Plaintiff was not deprived of his Fourteenth Amendment due process rights by defendant Johnson. Defendants motion for summary judgment will be granted.

Plaintiff is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his claim must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

ORDER

IT IS ORDERED that defendant's motion for summary judgment is is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendant against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 17th day of May, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge