UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ARRELLO BARNES,

Plaintiff,

Civ. No. 04-CV-0391

vs.

(FJS)(DEP)

THOMAS RICKS, et. al.,

Defendants.

DEFENDANTS' TRIAL BRIEF

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Preliminary Statement

Defendants Brown, Riley, Schule and McGaw respectfully submit this Trial Brief to aid the court at trial. Plaintiff, Arrello Barnes ("Barnes" or "Plaintiff"), *pro se* and presently incarcerated by the New York State Department of Correctional Services (DOCS), brought this action pursuant to 42 U.S.C. § 1983 alleging that defendants violated various constitutionally protected rights while he was an inmate at the Upstate Correctional Facility (Upstate). Generally, plaintiff alleges that defendants failed to protect plaintiff and exposed him to cruel and unusual punishment in violation of his Eighth Amendment rights.

Statement of the Case

Plaintiff, Arrello Barnes, is an inmate serving an indeterminate sentence at Upstate Correctional Facility during the relevant period. On September 18, 2002, plaintiff received a Kosher meal consisting of "1 can of tuna fish, 4 slices of wheat bread, 4 individual margarine reddies, 2 individual mayonnaise packets, 1 tomato, 1 orange, [and] 1 tea packet with 2 packets of individual sugar." The individual mayonnaise packets, tea and sugar were prepackaged and placed in the Styrofoam lunch container along with the tuna fish "scoop" prepared at the facility kitchen facility.

Defendant Schule served the lunch to plaintiff at approximately 11:30 a.m after Schule had inspected the lunch container and checked for a spork (a combination spoon and fork). At no time did defendant Schule see any foreign object to suggest that the tray had been tampered with prior to service to plaintiff.

After receiving the tray, plaintiff prepared his own tuna fish sandwich. Plaintiff first spread the mayonnaise on the bread provided. Plaintiff then placed portions of the tuna fish on the bread and spread the tuna fish around, mixing it with the mayonnaise. Plaintiff alleges that

at no time during the preparation of the sandwich and manipulation of the tuna fish did the plaintiff see the nearly one inch piece of green glass later discovered. Plaintiff alleges that he began to eat the sandwich and after one or two bites he felt something solid in the tuna fish. Plaintiff alleges that he then spit out the food and observed blood on his tray. The plaintiff alleges he had chewed on a green piece of glass several inches in length. At approximately 11:50 a.m., plaintiff's cell mate called for Sgt. Zerniak, who reported directly to the cell to investigate. Sgt. Zerniak arrived, observed plaintiff, and requested that plaintiff give the food tray to Sgt. Zerniak. Upon seeing blood on plaintiff's mouth, Sgt. Zerniak immediately called for the nurse to examine plaintiff. At 12:05 p.m., the plaintiff was taken to the medical facility to receive treatment where a cut was discovered on the plaintiff's tongue. By the time plaintiff arrived in the medical facility the bleeding had stopped. An x-ray conducted that day revealed no evidence of swallowed glass.

Sgt. Zerniak examined the food tray given to him by plaintiff and observed a large piece of green glass under the tuna fish. An extensive investigation was undertaken by the facility administration to ascertain the source of the glass. The kitchen staff, both civilian and inmate, responsible for preparing the meal and placing the scoop of tuna in the tray were interviewed. All inmates working in the kitchen were frisked and their cells searched, however no glass was found. The mess hall and the garbage area were searched, also proving fruitless. Plaintiff and his cell mate were both searched, along with their cell; however, no glass was found.

Ultimately, the glass was determined to match a type of bottle used to store the laxative Citrona in Upstate's medical facility. The investigation further revealed that none of the inmates working in the kitchen had ever received the medication. It was also confirmed that neither plaintiff nor his cell mate had ever received the medication.

A new policy regarding the disposal of glass medicine bottles was enacted as a result of the investigation.

Plaintiff admits he is unsure how the glass got into his tuna fish and states that he named the defendants only because he made a Freedom of Information Law request for the log book and determined that they were on duty in the relevant location.

Plaintiff's civil rights complaint also makes reference to several complaints regarding the timeliness of the hot water served with his Kosher meals. Plaintiff alleges that throughout the summer of 2002, hot water failed to be served on time with his Kosher meals. (Barnes Deposition p. 24, 54-55; Exhibits M, P, and R). Each complaint was investigated (Exhibits N, O, Q, S, and T), and each time the plaintiff indicated to the investigating officer that the water was being served on time and the problem was resolved. (Exhibits O and T). None of the complaints named any of the defendants. (Exhibits M, P, and R). No grievances regarding the timeliness of the hot water were ever filed. (Gregory Affidavit; Eagen Affidavit).

Plaintiff alleges that defendant Schule served lunch to him and stated "I hope you like your lunch." With regard to defendant Schule, plaintiff has failed to even provide an allegation that defendant Schule placed the glass in the sandwich before serving it. Plaintiff alleges that Schule must have done something because Schule inspected the meal. However, plaintiff himself manipulated the tuna and spread it on bread after he received it from Schule and failed to see any glass or foreign objects. Clearly, if the person sporking and spreading the tuna fish did not notice any glass, the conclusory statement that defendant Schule should have done something to prevent the plaintiff from biting the glass is silly. If defendant did not see or feel the glass while making a sandwich, defendant Schule, certainly was in no position to see any alleged glass in the fish by visual inspection of the meal. Mystically, plaintiff alleges that after he received the tray

and made his sandwich, plaintiff managed to fail to see a two inch piece of green glass in his tuna fish but insists that defendant Schule should have discovered what plaintiff himself could not and that plaintiff is therefore liable for failure to protect.

With regard to the remaining defendants, Brown, Riley and, McGaw, plaintiff alleges that they stated, "We told you, we would get you," following his injury. (Amended Complaint ¶ 8). However, no facts are presented to allow any inference that such statements, if even made at all, were in response to plaintiff's injury. In fact, plaintiff candidly refrains from identifying who even made the remarks and states only that the statement was made. Further, plaintiff admits that he did not see the defendants do anything but that defendants Brown, Riley, and McGaw are named only because they were working in the relevant area on the date in question.

POINT I.
PLAINTIFF HAS FAILED TO ALLEGE AND PROVE ANY PERSONAL INVOLVEMENT ON THE PART OF DEFENDANTS

A defendant must have some personal involvement in the alleged unlawful conduct to be held liable under section 1983. *Williams v. Smith*, 781 F.2d 319, 323-324 (2d Cir. 1986). Prison supervisors and personnel are not liable simply by virtue of the actions of subordinates or others. *See generally Gill v. Mooney*, 824 F.2d 192, 196 (2d Cir. 1987); *Williams*, 781 F.2d at 323-324; *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978); *Hernandez v. Keane*, 341 F.3d 137, 144-145 (2d Cir. 2003). A supervisor may be personally involved only through direct participation, failure to remedy a wrong after learning of it, or creation or continued allowance of a policy or practice of unconstitutional activities. *Williams v. Smith*, *supra*, 781 F.2d at 323-4; *Colon v. Coughlin*, 58 F.3d 865, 873-874 (2d Cir. 1995). Thus, where an inmate does no more than allege, for example, that a supervisor is liable

because he is in charge of an area of the prison, dismissal is proper. *Gill v. Mooney, supra*, 824 F. 2d at 196; *see also Williams v. Vincent*, 508 F.2d 541, 546 (2d Cir. 1974). In order to prevail on a section 1983 cause of action against an individual, a plaintiff must show some tangible connection between the constitutional violation alleged and that particular defendant. *Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir. 1986).

In the instant action, defendant Schule is named solely due his having served the plaintiff lunch on the date in question. The remaining defendants, Brown, Riley, and McGaw, are named solely because they were on duty on the relevant date.

Clearly, as the plaintiff has not even made an allegation of wrongdoing concerning defendants Brown, Riley, or McGaw, the plaintiff cannot prove that they were personally involved. Even plaintiff's complaint fails to allege any theory of personal involvement on the part of these defendants. Plaintiff named the defendants only because they were on duty in the relevant location. Plaintiff appears to base defendants' involvement on an alleged statement by an unknown correction officer to the effect of "We told you, we would get you". This claim is wholly insufficient to establish personal involvement on the part of defendant Brown, Riley, or McGaw.

Finally, plaintiff lists defendant Schule, because he served lunch on the date in question and allegedly stated, "I hope you like your lunch." Defendant Schule inspected the plaintiff's tray and at no time did he see green glass or anything else to suggest that the tray was tampered with. Plaintiff then manipulated his own tuna fish and made the sandwich without seeing any glass. Merely serving lunch does not rise to the level of personal involvement in violation of defendant's constitutional rights.

Conclusion

For the foregoing reasons, defendants respectfully request an Order granting summary judgment in favor of the defendants, dismissing plaintiff's complaint in its entirety, together with such other and further relief as the Court deems just and proper.

Dated: Albany, New York
May 31, 2006

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