

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

DONALD D. PARKELL,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 17-157 (LPS)
)	
DAVID PIERCE, <i>et al.</i> ,)	
)	
Defendants.)	

**DEFENDANTS DAVID PIERCE, PHILLIP PARKER,
PERRY PHELPS, AND ROBERT COUPE’S MOTION
TO DISMISS FOURTH AMENDED COMPLAINT**

Defendants David Pierce, Phillip Parker, Perry Phelps, and Robert Coupe (collectively, “Defendants”),¹ pursuant to Rule 8 and Rule 12(b)(6) of the Federal Rules of Civil Procedure, hereby move to dismiss the Fourth Amended Complaint (D.I. 56, the “FAC”) for the reasons set forth in: (1) the previous briefing (D.I. 43, 47) seeking dismissal of the Third Amended Complaint (D.I. 41, the “TAC”); (2) the pending Motion for Reargument (D.I. 54), which seeks reconsideration of the Court’s ruling on Defendants’ immunity as to the only claim remaining after the Court’s June 22, 2018 decision (D.I. 50, 51); and (3) the reasons set forth herein which address Plaintiff’s attempts to cure, by the FAC, the pleading deficiencies noted by the Court regarding the TAC.

¹ Former Governor Jack Markell and Warden Dana Metzger were dismissed and Plaintiff did not attempt to state a claim against them in the Fourth Amended Complaint.

BACKGROUND

1. Defendants will not repeat the procedural history of this case, but only provide the following highlights for purposes of this Motion. Capitalized terms have the meanings provided in previous briefing (D.I. 43, 47).

2. Plaintiff filed the case *pro se* on February 14, 2017. He amended once *pro se* and then again after counsel was appointed. (D.I. 35). Defendants moved to dismiss the Second Amended Complaint, and Plaintiff responded by filing a third. The parties thereafter engaged in extensive briefing on whether the TAC stated a claim against Defendants that survived qualified immunity. As noted above, the Court issued its decision on June 22, 2018. (D.I. 50).

3. The Court made several rulings in its Opinion. First, the Court held that former Governor Markell was immune from suit. (D.I. 50 at p. 6). The FAC does not challenge this ruling by including him as a defendant.

4. Second, the Court held that Plaintiff lacked standing to press a claim that Defendants ordered C-Building inmates to be beaten because Plaintiff expressly alleged he was not beaten. (D.I. 50 at p. 9). The Court likewise held that Plaintiff lacked standing for his claims relating to falsification of medical records and abusive retributive shakedowns. (D.I. 50 at p. 9)

5. Third, the Court held Plaintiff failed to allege sufficient personal involvement of Defendants regarding the claim that medical care was denied to inmates in retaliation for the riot. (D.I. 50 at pp. 10-11). The Court similarly recognized the lack of factual allegations of personal involvement of Defendants for the various conditions-of-confinement claims asserted in the TAC. (D.I. 50 at pp. 11-13).

6. Fourth, the Court rejected Plaintiff's failure-to-train/supervise claim because Plaintiff failed to "identify any particular policy or training" that Defendants "should have

provided that could have prevented Parkell from being taken hostage and subsequently injured.” (D.I. 50 at pp. 13-14). The Court observed that Plaintiff did not allege that any Defendant was aware of alleged abusive practices of “certain correctional officers and allowed them to continue.” (D.I. 50. at p. 14). The Court held Plaintiff’s allegations on this claim to be too general.

7. Fifth, the Court held a “failure-to-protect” claim was adequately stated. (D.I. 50 at pp. 14-18). This ruling, with the Court’s concomitant decision to defer a ruling on Defendants’ qualified immunity, is the subject of Defendants’ pending Motion for Reargument. Defendants incorporate their arguments from that motion rather than repeat them herein.

8. Sixth, the Court rejected Plaintiff’s due process claims for deprivation of personal property and housing decisions. (D.I. 50 at pp. 18-19).

9. Finally, the Court dismissed the claim that Defendants also violated the state constitution. (D.I. at p. 22). The Court granted leave to amend so that Plaintiff could file his fifth complaint in this action.

ARGUMENT

10. Again, Defendants will not repeat arguments previously made in this case. Plaintiff’s changes in the FAC, however, do not merit reconsideration of the Court’s June 22 decision with respect to the TAC. Many of the changes involve simply deleting prior named defendants and allegations called into question in the Court’s decision. For instance, Plaintiff deletes Warden Metzger and former Governor Markell as defendants. Plaintiff also deletes the Eighth Amendment claims relating to alleged retaliation by unnamed officers (John and Jane Doe parties are now removed) in the months following the riot. (*See* FAC at pp. 39-40.)² It removes due process claims relating to personal property. (FAC at p. 41). The FAC’s Count One based

² Citations herein to the FAC are to the red-lined version at D.I. 56-1.

on the Eighth Amendment is unclear as to whom it is directed. Paragraph 119 references only Pierce and Parker, while Paragraph 121 references Pierce, Parker, Phelps and Coupe.

11. The gravamen of the new factual allegations relate to Pierce's directive that inmates should not be prevented from having out-of-cell recreational time, as required by the CLASI Order. (See FAC at p. 13).³ In other words, Pierce allegedly directed officers to comply with an Order of this Court. Pierce allegedly "exacerbated" this directive by instructing a sergeant to interpret the "policy change" to require that inmates participate in recreation at the same time. (FAC at p. 13). And, finally, Pierce allegedly denied a request by Sergeant Floyd to remove certain inmates from C-Building "for security reasons."⁴

12. These allegations were known and publicly available when the TAC was filed in December 2017 (and do not pertain to all Defendants). While they may appear significant in hindsight, they still fail to state a claim against any of the Defendants for failure to protect, certainly a claim that overcomes qualified immunity. A request that certain inmates be removed "for security reasons" does not indicate that Pierce had reason to believe a riot of the magnitude that ensued was likely. (FAC ¶ 54). Further, there are no plausible facts alleged to support Plaintiff's conclusory allegation that that state officials, including Coupe and Pierce, purposefully sought to undermine the provisions in the CLASI Order. (TAC ¶ 50). The additional astounding allegation

³ The Court can take judicial notice that the CLASI Order *did not* pertain to C-Building. See C.A. No. 15-688 (D.I. 38) at Ex. D, § 1.A.1 (defining Restrictive Housing as including particular buildings or areas in Delaware's prisons).

⁴ Other factual allegations (TAC ¶¶ 59-62) leveled at non-defendant Delaware governors and the Delaware General Assembly, do not bear on the issues before the Court and moreover, suggest that this is a disguised suit against the State. These allegations recognize that none of the remaining individual defendants were responsible for decisions regarding corrections officer starting salaries. It strains credulity to hold individual officials Coupe, Pierce, and Phelps responsible for constitutional violations for merely "implementing and carrying out" salary decisions made at a much higher level. (TAC ¶ 124).

that Pierce's and Coupe's reasonable interpretation and implementation of the CLASI Order was intended to "jeopardize the safety and security of the staff and inmates" is simply not supported by plausible factual allegations. (FAC ¶ 55). The foreseeability of the riot in connection with the implementation of the CLASI Order is especially questionable *because the CLASI order did not pertain to C-Building*, where the riot occurred. *See* Footnote 3. The FAC, like the TAC, on these claims must be dismissed.⁵

13. To the extent the Court determines Plaintiff states a claim in the FAC against at least one of the Defendants for failure to protect, Plaintiff still has not cited clearly established law that the particular conduct of the Defendant was illegal. Defendants incorporate their previously-submitted qualified immunity arguments, which apply with equal force to the claims that Pierce and the other Defendants violated the Eighth Amendment for failing to prevent the February 2017 riot. Plaintiff must point to established law making it clear that each Defendants' *conduct* violates federal law. The Third Circuit recently revisited the importance of doing so, and reversed the denial of qualified immunity where the plaintiff failed to make such a showing. *See Bland v. City of Newark*, ___ F.3d ___, 2018 WL 3863378 (3d Cir. Aug. 15, 2018). In a failure-to-protect claim, the "key is whether prison officials acted reasonably." *Bistrain v. Levi*, 696 F.3d 352, 372 (3d Cir. 2012). Plaintiff alleges no facts demonstrating that Pierce's denial of Sergeant Floyd's request to relocate certain prisoners was not reasonable. The fact that a riot later occurred does not, in itself, make the denial unreasonable. Finally, as the Court already recognized, Parkell was not injured by rioting inmates or the rescue team. His injuries are far more attenuated. The facts added in the FAC do not directly pertain the alleged harms suffered by Parkell. Parkell has not cited any

⁵ Indeed, the Court previously held that Plaintiff failed to explain how Defendants alleged noncompliance caused the alleged constitutional violations. *See* D.I. 50 at note 5. Plaintiff's amendment provides no further explanation.

case law remotely on point overcoming qualified immunity as to the claims for which he has standing. *See White v. Pauly*, 137 S.Ct. 548, 551-52 (2017) (summarily reversing denial of qualified immunity, noting that in the last five years the Court had issued a “number of opinions reversing federal courts in qualified immunity cases” and that this has been necessary both because qualified immunity is important to society as a whole and because qualified immunity is an immunity from suit).

WHEREFORE, for the reasons set forth above and in the previous motions and briefs cited herein, Defendants respectfully request that the Court dismiss the FAC and grant them such further relief that justice requires.

**STATE OF DELAWARE
DEPARTMENT OF JUSTICE**

/s/ Joseph C. Handlon
Joseph C. Handlon (#3952)
Adria B. Martinelli (#4056)
Deputy Attorneys General
Carvel State Office Building
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 577-8400

Dated: August 24, 2018

Attorneys for Defendants