UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN, et al.,	:	
Plaintiffs,	:	
v.	:	02 CV 2307 (JG)(SMG)
JOHN ASHCROFT, Attorney General of the United States; et al.,	:	
Defendants.	:	

DEFENDANT WARDEN MICHAEL ZENK'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF HIS MOTION TO DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT

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DEFENDANT MICHAEL ZENK'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF HIS MOTION TO DISMISS THE FOURTH AMENDED COMPLAINT

Defendant Michael Zenk ("Zenk" or "Warden Zenk") respectfully submits this reply memorandum of law in further support of his motion to dismiss each and every claim for relief in the Fourth Amended Complaint (the "Complaint") for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[1]

PRELIMINARY STATEMENT

Plaintiffs concede that only a single factual allegation is pled against Warden Zenk in the Fourth Amended Complaint (the "Complaint"). This lone allegation is simply insufficient -- under any standard -- to state a claim that is plausible on its face. Plaintiffs' failure to particularize any factual allegations regarding the MDC ADMAX SHU after April 22, 2002 -- the acknowledged date Warden Zenk assumed his role as Warden of the MDC -- is fatal to the viability of their Complaint as against Warden Zenk. Indeed, plaintiffs fail to allege any basis for inferring Warden Zenk's personal involvement with the two plaintiffs held in the ADMAX SHU during Warden Zenk's tenure, one of whom was released a mere eight days following Warden Zenk's arrival at the MDC, the other, a month and a half later.

Plaintiffs cannot -- and do not -- contest the lack of factual allegations against Warden Zenk. Instead, plaintiffs resort to arguing that it is not necessary for them to plead specific facts, in contravention of the pleading requirements articulated by the Supreme

[1] Capitalized terms in this reply memorandum have the meanings set forth in Defendant Warden Zenk's Memorandum of Law in Support of His Motion to Dismiss Plaintiffs' Fourth Amended Complaint, dated November 12, 2010 (the "Opening Memorandum"). Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss the Fourth Amended Complaint is referred to herein as the "Opposition" or "Opp'n."

Court in Ashcroft v. Iqbal. Ultimately, plaintiffs' failure to demonstrate Warden Zenk's personal involvement in the purportedly unlawful conduct renders their claims against him unsustainable.

Similarly, because the Complaint fails to allege Warden Zenk's involvement in any conspiracy or agreement to violate plaintiffs' constitutional rights, plaintiffs' claim for conspiracy pursuant to U.S.C. § 1985 should be dismissed.[2]

ARGUMENT

I. ALL CLAIMS ASSERTED BY THOSE PLAINTIFFS NOT HELD IN THE ADMAX SHU AFTER APRIL 22, 2002 SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

In the Opposition, plaintiffs concede that plaintiffs Abbasi, Mehmood, Khalifa, Bajracharya, Turkmen, Sachdeva and all similarly situated class members cannot state a claim against Warden Zenk because these plaintiffs were not housed at the ADMAX SHU when Warden Zenk assumed his role as Warden on April 22, 2002. Opp'n at 39 ("Plaintiffs agree that only those Plaintiffs who were held in the ADMAX SHU during Zenk's tenure have claims against Zenk."). Despite this concession, plaintiffs fail to address the fact that the claims in the Complaint asserted against Warden Zenk are brought on behalf of either all MDC plaintiffs (claims one, four, five and six), all plaintiffs (claims two and seven), or plaintiffs Turkmen, Abbasi, Mehmood, Benatta, Khalifa and Hammouda (claim three). Compl. ¶¶ 277, 289, 293, 298, 281, 304, 285. Additionally, plaintiffs create unnecessary confusion by arguing that Warden Zenk's motion to dismiss "should be denied in its entirety." Opp'n at 1.

[2] Warden Zenk incorporates by reference the arguments made in the other motions to dismiss.

For the avoidance of doubt, all claims brought by plaintiffs Abbasi, Mehmood, Khalifa, Bajracharya, Turkmen, Sachdeva and all similarly situated class members must be dismissed because "[Warden] Zenk cannot, of course, be held liable for acts that occurred prior to his becoming warden." Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *17 n.15 (E.D.N.Y. Sept. 27, 2005).

II. PLAINTIFFS BENATTA AND HAMMOUDA'S CONSTITUTIONAL CLAIMS SHOULD BE DISMISSED FOR FAILURE TO PLEAD WARDEN ZENK'S DIRECT PERSONAL INVOLVEMENT

Plaintiffs' sole allegation against Warden Zenk is patently insufficient to demonstrate Warden Zenk's personal involvement in any of the alleged violations of plaintiffs' constitutional rights.[3] Benatta was released from the ADMAX SHU a mere eight days after Warden Zenk began his tenure at the MDC on April 22, 2002. Hammouda was released approximately a month and a half after Warden Zenk's arrival. The Complaint and the Opposition are devoid of any specific factual allegations arising after April 22, 2002 that implicate Warden Zenk in the alleged violations of Benatta or Hammouda's constitutional rights.

A. Iqbal Requires Claims For Constitutional Violations To Be Supported By Specific Facts Of Direct Personal Involvement

"It is well-settled in this Circuit that 'personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under [section] 1983.'"

[3] Plaintiffs constitutional claims are: Fifth Amendment: Due Process - Conditions of Confinement (First Claim for Relief); Fifth Amendment: Equal Protection - Conditions of Confinement (Second Claim for Relief); First Amendment: Free Exercise of Religion (Third Claim for Relief); First Amendment: Communications Blackout and Interference with Counsel (Fourth Claim for Relief); Fifth Amendment: Due Process - Blackout and Interference with Counsel (Fifth Claim for Relief); Fourth and Fifth Amendments: Excessive, Unreasonable, and Deliberately Humiliating and Punitive Strip-searches (Sixth Claim for Relief).

Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994) (citation omitted). Prior to the Supreme Court's decision in Iqbal, personal involvement could be shown by alleging one of five categories of conduct. See Colon v. Coughlin, 58 F.3d 865 (2d Cir. 1995).[4] In Iqbal, however, the Supreme Court held that in order to maintain a claim against a government official "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." Iqbal, 129 S. Ct. 1937, 1948 (2009) (emphasis added).

Iqbal's effect on the supervisory liability standard was best articulated by the district court in Bellamy v. Mount Vernon Hospital, which concluded that Iqbal "abrogates several of the categories of supervisory liability enumerated in Colon v. Coughlin." Bellamy v. Mount Vernon Hosp., No. 07 Civ. 1801(SAS), 2009 WL 1835939, at *6 (S.D.N.Y. June 26, 2009) (Scheindlin, J.). Bellamy explains that post-Iqbal, "a supervisor is only held liable if that supervisor participates directly in the alleged constitutional violation or if that supervisor creates a policy or custom under which unconstitutional practices occurred." Id.[5] In their Opposition, plaintiffs concede that Warden Zenk was not involved in the creation of the allegedly unlawful policies and merely inherited them when he began his tenure as Warden

[4] The five categories are: (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring. Colon, 58 F.3d at 873.

[5] The remaining Colon factors "impose the exact types of supervisory liability that Iqbal eliminated - situations where the supervisor knew of and acquiesced to a constitutional violation committed by a subordinate." Bellamy, 2009 WL 183539, at *6 (S.D.N.Y. June 26, 2009).

on April 22, 2002 -- after the vast majority of plaintiffs had been released from the ADMAX SHU. See Opp'n at 39.

Bellamy's description of the interplay between Iqbal and Colon is consistent with the analysis employed by other district courts in this Circuit. See, e.g., McNair v. Kirby Forensic Psychiatric Ctr., No. 09 Civ. 6660 (SAS), 2010 WL 4446772, at *2 (S.D.N.Y. Nov. 5, 2010) ("Only two Colon categories survive after Iqbal."); Morpurgo v. Village of Sag Harbor, 697 F. Supp. 2d 309, 328 (E.D.N.Y. 2010) ("'Iqbal's 'active conduct' standard only imposes liability on a supervisor through section 1983 if that supervisor actively had a hand in the alleged constitutional violation.") (quoting Bellamy, 2009 WL 1835939, at *6) (emphasis added); Diaz-Bernal v. Myers, No. 3:09 cv 1734 (SRU), 2010 WL 5211494, at *18 n.16 (D. Conn. Dec. 16, 2010) (observing that courts have held that "some of the Colon factors are no longer good law" while "[o]ther courts have recognized that the Colon factors may have been called into question").

The Opposition simply ignores the authorities in this Circuit which conclude that several of the Colon factors do not survive post-Iqbal. Plaintiffs argue that, notwithstanding the numerous district court opinions to the contrary, "[t]here is nothing in Iqbal to suggest revisiting Colon v. Coughlin." Opp'n at 17. Plaintiffs' argument is improper in light of the authorities discussed above.

B. Plaintiffs Fail To Allege Direct Involvement Or Conduct By Warden Zenk

Regardless of whether this Court follows Bellamy in concluding that Iqbal abrogated the Colon factors of supervisory liability, plaintiffs have failed to plead sufficient facts to justify an inference that Warden Zenk violated plaintiffs' constitutional rights.

In their attempt to justify their claim that restrictive conditions of confinement were a matter of policy in the ADMAX, plaintiffs make the disingenuous assertion that "factual allegations [in the Complaint] tie each Defendant to each policy." Opp'n at 34. This is simply untrue -- instead, the Complaint is devoid of any factual allegations tying Warden Zenk to the allegedly unconstitutional policies.

Moreover, plaintiffs fail to even refer to Warden Zenk in those sections of the Complaint which otherwise describe the allegedly unlawful policies, including policies regarding: restraints and abuse, Compl. ¶¶ 104-10, arbitrary and abusive strip searches, id. at ¶¶ 111-18, lack of hygiene items and inadequate or unhealthy food, id. at ¶¶ 128-30, or deliberate interference with religious rights, id. at ¶¶ 131-39. In addition, the allegations in the Complaint demonstrate that Warden Zenk had no connection to the policies concerning sleep deprivation, as those were implemented only "[u]ntil March 2002" -- one month before Warden Zenk's arrival at the MDC on April 22, 2002. Id. at ¶ 119. Similarly, because Warden Zenk arrived at the MDC in the spring of 2002, he could not possibly have been personally involved in any alleged denial of recreation or exposure to the elements which occurred during "the fall and winter." Id. at ¶¶ 123, 127.

Further, plaintiffs' claim that Warden Zenk did not take corrective measures when confronted with purportedly unlawful conditions, Opp'n at 39, does not provide a basis for inferring Warden Zenk's liability. Plaintiffs fail to allege any facts which would support the notion that Warden Zenk was actually aware of a constitutional violation. See Fernandez v. Callens, No. 06-CV-0506 (Sr), 2010 WL 4320362 (W.D.N.Y. Oct. 29, 2010) (holding that plaintiff had failed to establish personal involvement under the Colon factors because defendants had no knowledge of unconstitutional conduct).

The Complaint is devoid of any factual allegations indicating that Warden Zenk was in fact aware that the conditions instituted as a matter of policy were unconstitutional.[6] The crux of plaintiffs' argument is that their conditions of confinement in the ADMAX were unlawful because plaintiffs were merely immigration detainees. Opp'n at 24, 39. Plaintiffs concede that some of the allegedly unlawful "conditions might lawfully be imposed in other situations upon other [types of] prisoners." See id. at 24 (emphasis added).

Plaintiffs fail to allege that Warden Zenk had knowledge of plaintiff Benatta and Hammouda's status as "mere" immigration detainees. Although the Complaint and the Opposition broadly allege that all defendants knew that there was no information tying plaintiffs to terrorism, only defendants Hasty, Sherman and Lopresti -- not Warden Zenk -- are specifically alleged to have received such information. Opp'n at 7-8; Compl. ¶ 69-74. As acknowledged by plaintiffs, Warden Zenk could have reasonably understood that Benatta's and Hammouda's segregation was related to matters of national security.

Plaintiffs also assert that Warden Zenk must have known that plaintiffs' confinement was unconstitutional because plaintiffs were "extremely high-profile 9/11 detainees, by then the source of a class-action lawsuit, countless newspaper articles, public protests and internal investigations." Opp'n at 39. However, the Complaint does not describe any of the allegations in the class-action lawsuit or the contents of the newspaper articles, and does not even allege that Warden Zenk was provided copies of these documents. Plaintiffs also ignore the fact that at the start of Warden Zenk's tenure at the MDC, only two detainees -- Hammouda and Benatta -- remained housed in the ADMAX SHU. Moreover, Benatta was

[6] Plaintiffs explain that they "do not seek to hold Defendant Zenk responsible for the abuses that occurred on the ADMAX beyond those imposed as a matter of policy." Opp'n at 41 n.1.

released from the ADMAX a mere eight days after Warden Zenk assumed his role as Warden. Compl. ¶ 188. Consequently, plaintiffs have alleged nothing that could possibly "serve as proper notice to [Warden Zenk] of prior constitutional violations." Diaz-Bernal, 2010 WL 5211494, at *21 (D. Conn. Dec. 16, 2010).

C. There Are No Facts To Suggest Any Discriminatory Purpose

Plaintiffs' First and Fifth Amendment claims for violations of their equal protection and free exercise rights fail for the additional reason that plaintiffs have failed to allege any facts suggesting that Warden Zenk acted with a discriminatory purpose. It is undisputed that following Iqbal, allegations of "knowledge [of] and acquiescence in" a subordinate's unconstitutional acts are insufficient to impose liability on a supervisor for intent-based constitutional claims "involv[ing] invidious discrimination in contravention of the First and Fifth Amendments." Sash v. United States, 674 F. Supp. 2d 531, 544 (S.D.N.Y. 2009) (quoting Iqbal, 129 S. Ct. at 1942). Rather, a plaintiff's factual allegations must establish that the supervisor's own acts contributed to the alleged constitutional violation and "that the [supervisor] acted with discriminatory purpose." Iqbal, 129 S. Ct. at 1942.

Plaintiffs contend that their allegation that Warden Zenk ordered plaintiffs Benatta and Hammouda's continued confinement is, in and of itself, sufficient to show that Warden Zenk acted with a discriminatory purpose. See Opp'n at 42-44. Plaintiffs' argument is based on a false premise -- that Warden Zenk "continued this restrictive confinement after learning that the FBI could find no information to connect Plaintiffs to terrorism or raise a concern that they might be dangerous." Opp'n at 43. As discussed *supra*, the Complaint does not plausibly demonstrate that Warden Zenk ever received such information.

Accordingly, Warden Zenk's conduct in ordering plaintiffs Benatta and Hammouda's continued confinement can be explained by his perception that these plaintiffs had "potential connections to those who committed terrorist acts." Opp'n at 14 (quoting Iqbal, 129 S. Ct. at 1951). Notably -- unlike a number of the other plaintiffs -- both Benatta and Hammouda were placed in restrictive confinement only after a determination that they were of "high interest" to the terrorism investigation. See Opp'n at 31. In such circumstances, there is "no basis for inferring that defendants were motivated by prejudice." Opp'n at 14.

Because plaintiffs have failed to show that Warden Zenk's own acts contributed to the alleged constitutional violations or that he acted with the requisite discriminatory purpose, plaintiff Benatta and Hammouda's constitutional claims must be dismissed.

III. PLAINTIFFS' CONSPIRACY CLAIM SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE FAILED TO ALLEGE THAT WARDEN ZENK CONSPIRED TO VIOLATE PLAINTIFFS' RIGHTS

Plaintiffs' sole conclusory allegation of a conspiracy is plainly insufficient to state a claim for conspiracy under § 1985(3). As the Supreme Court has repeatedly held, a complaint must contain more than unsupported conclusory allegations of the existence of some unlawful agreement. See, e.g., Iqbal 129 S. Ct. at 1950 ("[P]laintiffs' assertion of an unlawful agreement was a 'legal conclusion' and, as such, was not entitled to the assumption of truth.") (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 565-66 (2007)).

In order to state a claim for conspiracy, the complaint "'must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end.'" Arar v. Ashcroft, 585 F.3d 559, 569 (2d Cir. 2009) (citation omitted). Further, a plaintiff must "'make allegations that plausibly suggest

that each Defendant participated in the alleged conspiracy.'" Hinds County v. Wachovia Bank, N.A., 620 F. Supp. 2d 499, 513 (S.D.N.Y. 2009) (emphasis added).

In their opposition, plaintiffs do not -- because they cannot -- point to any factual basis supporting a meeting of the minds between Warden Zenk and any of the other defendants. Moreover, plaintiffs do not dispute that they have failed to allege any overt acts engaged in by Warden Zenk in the promotion of the conspiracy.

Accordingly, the § 1985 conspiracy claim must be dismissed.

CONCLUSION

For all the reasons set forth above, Warden Zenk's Motion to Dismiss the Fourth Amended Complaint should be granted.

Dated: New York, New York
January 12, 2011

Respectfully submitted,

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