

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

MICHAEL PLANTE, )  
 )  
 Plaintiff )  
 )  
 v. ) Civil No. 97-281-P-C  
 )  
 JAMES CLEMONS, )  
 )  
 Defendant )

RECOMMENDED DECISION

Plaintiff in this Section 1983 action is a prisoner who was housed at the Maine Correctional Center, Windham, Maine, at the time his Complaint was filed and was transferred on November 20, 1997, to the Bolduc Correctional Facility, Thomaston, Maine, where he is now an inmate.

Plaintiff in his Complaint alleges a violation of his constitutional rights by James Clemons, the Superintendent of the Maine Correctional Center in Windham.

Pending before the Court is the defendants' motion for a summary judgment. The plaintiff did not respond to the motion. In this District, a party's failure to timely respond to a motion is generally construed to waive objection to the motion. D. Me. R. 19(c). The Federal Rules of Civil Procedure require, however, that the court examine the merits of a motion for a summary judgment regardless of the opposing party's failure to object. *FDIC v. Bandon Assoc.*, 780 F. Supp. 60, 62 (D. Me. 1991). Accordingly, the Court will examine the merits of the defendants' motion for a summary judgment based on the defendants' statement of material facts, which are as follows:

1. The plaintiff is no longer a prisoner at the Maine Correctional Center, having been transferred to the Bolduc Correctional Facility on November 20, 1997. However, the facts relevant at the time of the plaintiff's confinement at that facility still exist.

2. Female prisoners are not classified any quicker than male prisoners. Prisoners are classified in approximately six to eight weeks, with each prisoner coming up for classification in chronological order of reception into the facility. Prior to classification, no prisoner is allowed to have a job and earn good time.

3. Prior to classification, male prisoners are housed in a separate housing unit that contains approximately ninety prisoners. As unknown security risks, these prisoners need to have contact with each other minimized, and in order to do that, it is necessary that they be allowed out of their cells (in shifts ) for only four hours a day. It would not be feasible for staff to properly supervise these prisoners if they were allowed to mix more. For the same reason, these prisoners need to be kept away from contact with the general population prisoners. Thus, these prisoners are not ordinarily allowed physical access to other parts of the facility. However, to the extent possible, privileges (such as canteen items) are brought to them.

4. Because there are far fewer female prisoners in the State, at any one time, there are only one or two who have not been classified. Because it would not be feasible to operate a separate housing unit just for one or two prisoners, they are housed with the remainder of the female population. It is possible for housing unit staff to keep an extra watch on the one or two female prisoners who, because they have not been classified, are unknown security risks. Thus, while an unclassified female prisoner is allowed outside of her housing unit, she is never allowed out by herself but is always escorted by a staff member, something which would not be practical for male prisoners.

5. Male prisoners sometimes have to stay in the reception housing unit for a period of time after they are classified while waiting for an opening in another housing unit or correctional facility. Depending on how quickly another, suitable bed becomes free, the stay might last a day or several weeks. During that time, they are treated the same as other prisoners in the reception housing unit (most of whom are unclassified) as it would create a security problem to give them more privileges. The one exception is that, once classified, they are allowed to have jobs within the housing unit and earn good time. A prisoner who has been classified cannot be permitted to have physical access to other parts of the facility in case, for example, even accidentally, he brings back into the unit something that might be used as a weapon by another prisoner who is a high security risk.

## Summary Judgment

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is genuine, for these purposes, if "the evidence is such that a reasonable jury could return a verdict for the moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1<sup>st</sup> Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1<sup>st</sup> Cir. 1993)). The Court views the record in the light most favorable to the nonmovant. *McCarthy v. Northwest Airlines, Inc.*, 56 F. 3d 313, 315 (1<sup>st</sup> Cir. 1995).

Defendant first argues that Plaintiff's allegation that the temperature of his food is often below 180 degrees fails to state a claim upon which relief can be granted. The Court agrees wholeheartedly. The Eighth Amendment does not guarantee that a prison will be comfortable. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (citing *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)). Plaintiff's Complaint, to state an Eighth Amendment claim, must at a minimum present a claim that the deprivations, either alone or in combination, resulted in the "deprivation of a single, identifiable human need such as food, warmth, or exercise." *Id.* at 304. His claim regarding the temperature of his food simply does not do so.

Defendant also asserts that he is entitled to qualified immunity with respect to Plaintiff's claim that male prisoners receive treatment inferior to female prisoners during the time they await classification. Qualified immunity shields government officers "'from civil damages

liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.'" *Hegarty v. Somerset County*, 53 F.3d 1367, 1373 (1st Cir. 1995) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). This doctrine provides for the "inevitable reality that 'law enforcement officials will in some cases reasonably but mistakenly conclude that [their conduct] is [constitutional], and . . . that . . . those officials -- like other officials who act in ways they reasonably believe to be lawful -- should not be held personally liable.'" *Id.* (quoting *Anderson*, 483 U.S. at 641). The inquiry regarding qualified immunity "takes place prior to trial, on motion for summary judgment . . . and requires no fact finding, only a ruling of law strictly for resolution by the court." *Id.* at 1373-74.

The qualified immunity inquiry has two prongs. First, the Court must determine whether the right asserted by Plaintiffs was clearly established at the time of the contested events. *Id.* at 1373. Second, the Court must determine whether the specific contours of the right were sufficiently established such that the officer could understand how the law would be applied to his or her actions *in this case*. *Anderson*, 483 U.S. at 640.

The Court concludes that the law regarding disparate treatment within a prison system on the basis of gender, particularly as it relates to housing prior to classification, was not clearly established at the time of the events giving rise to Plaintiff's Complaint. Nor, in fact, is the law clearly established now.

In a case from the District of Columbia Circuit Court of Appeals, cited by Defendant, the court engaged in a rather in-depth analysis in an effort simply to determine what level of scrutiny should be applied in equal protection cases based on gender in the prison context. *Pitts v. Thornburgh*, 866 F.2d 1450, 1453-55 (D.C. Cir. 1989). The analysis involves a balancing

between the higher level of scrutiny traditionally applied to gender-based equal protection claims, and the deference traditionally afforded prison officials when institutional policies are challenged. *Id.* at 1453. The analysis has not to date occurred within the First Circuit.

Further, even if it were well-settled that Plaintiff's claims would subject Defendant's policies to heightened scrutiny, as the D.C. Circuit Court ultimately concluded, the First Circuit Court has certainly not addressed whether the different treatment afforded male inmates at the Maine Correctional Center would satisfy that standard. In the absence of clearly established law prohibiting the treatment at issue in this case, Defendant is entitled to qualified immunity on Plaintiff's claims.

To the extent Plaintiff asserts that the policies under which he was awaiting classification violated constitutional rights other than his right to equal protection under the law, the claim is without merit.<sup>1</sup> The conditions Plaintiff describes do not amount to an Eighth Amendment violation for the reasons stated in connection with Plaintiff's claim regarding his food. Nor are they conditions that implicate a due process liberty interest by "impose[ing] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 115 S. Ct. 2293, 2300 (1995). Further, to the extent Plaintiff seeks compensation for his inability to earn "good time" while awaiting classification, he does not state a claim for relief under section 1983. Plaintiff may not seek damages for allegedly unconstitutional imprisonment until he can prove that the imprisonment has been declared unlawful, whether through state

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<sup>1</sup> Defendant need not have raised this argument in his Motion for Summary Judgment. Because Plaintiff is proceeding in this case in forma pauperis, the Court is obligated to dismiss the matter at any time if it determines that Plaintiff has failed to state a claim upon which relief can be granted. 28 U.S.C. § 1915(e)(2).

processes or a federal *habeas* action. *Heck v. Humphrey*, 114 S. Ct. 2364, 2372 (1994).

### **Conclusion**

Accordingly, I recommend that Defendant's Motion for Summary Judgment be GRANTED in its entirety; that Plaintiff's claim regarding the temperature of his food be DISMISSED for Plaintiff's failure to state a claim, and that Defendant be granted Summary Judgment on the basis of qualified immunity on Plaintiff's equal protection claim. I further recommend Plaintiff's Complaint be DISMISSED to the extent he claims a constitutional violation other than equal protection as a result of the conditions imposed upon him at the Maine Correctional Center during the time he waited to be classified.

### **NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu  
United States Magistrate Judge

Dated on March 3, 2000.