

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GEORGE PAUL, )  
 )  
 Plaintiff )  
 )  
 v. ) CIVIL NO. 88-0209 P  
 )  
 MARTIN MAGNUSSON, et al., )  
 )  
 Defendants )

**ORDER ON PLAINTIFF'S MOTION TO AMEND COMPLAINT  
AND RECOMMENDED DECISION ON DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT**

The plaintiff in this ' 1983 civil rights action is a state prisoner who appears pro se. He alleges that Martin Magnusson, Warden of the Maine State Prison ("MSP"); Donald Allen, Commissioner of the Maine Department of Corrections; Nelson Riley, head of security at MSP; and James O'Farrell, in charge of housing assignments at MSP, deprived him of his civil rights by placing him for nine days in the MSP segregation unit which lacked running hot water and adequate ventilation; and by double celling him for seven days of that period. Before the court are the plaintiff's January 27, 1989 motion to amend his complaint and the defendants' January 11, 1989 motion for summary judgment.<sup>1</sup>

**Motion to Amend**

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<sup>1</sup> The defendants had filed an earlier motion for summary judgment which the court denied without prejudice to permit completion of discovery. Docket Item #5. The defendants have also filed a motion to dismiss for failure to comply with this court's September 22, 1988 Scheduling Order. This motion was mooted when the court subsequently granted the plaintiff's motion for enlargement of time to comply with that order. On renewal of the motion for summary judgment, the defendants have indicated that discovery is now complete. See letter to the clerk of the court (Jan. 11, 1989); Memorandum of Law in Support of Defendants' Motion for Summary Judgment p. 1 (Jan. 11, 1989).

I first address the plaintiff's motion to amend his complaint. The proposed amended complaint differs from the original complaint in that it adds a due process claim based on the lack of a hearing before placement in segregation, and an equal protection claim based on the placement of other reception status inmates in the general population housing area with access to running hot water and with outside recreation privileges. The proposed amended complaint seeks declaratory and injunctive relief, together with damages. I find that amendment does not prejudice the defendants.<sup>2</sup> Accordingly, the motion to amend is hereby GRANTED.

#### Motion for Summary Judgment

Under Fed. R. Civ. P. 56(c), the court shall grant summary judgment if there remains "no genuine issue as to any material fact" and if "the moving party is entitled to a judgment as a matter of law." Pursuant to Local Rule 19(b)(1), the defendants have submitted a statement of material fact and affidavits supporting their motion for summary judgment. All properly supported material facts set forth by the moving party "will be deemed to be admitted unless properly controverted by the statement required to be served by the opposing party." Id; see also McDermott v. Lehman, 594 F. Supp. 1315, 1321 (D. Me. 1984).

At the same time, however, the court must look at the record in the light most favorable to the opposing party and indulge all inferences favorable to that party. Voutour v. Vitale, 761 F.2d 812, 817 (1st Cir. 1985), cert. denied, 474

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<sup>2</sup> I am aware that the court granted to the defendants an enlargement of time to respond to the plaintiff's first motion to amend in the event that their pending motion for summary judgment is denied. That motion to amend was denied without prejudice and the defendants did not seek an enlargement of time to respond to the plaintiff's second motion to amend. In any event, I conclude that the motion for summary judgment should be granted even as to the amended complaint.

U.S. 1100 (1986). In opposition to the defendants' first motion for summary judgment, the plaintiff had filed a memorandum, a statement of material facts and an affidavit; because he has not filed any additional statement of material facts or affidavit in response to the second motion for summary judgment, I consider those already filed, to the extent applicable, as part of his opposition to the pending motion.

The plaintiff's pro se status entitles him to a liberal reading of his ' 1983 pleadings. Haines v. Kerner, 404 U.S. 519, 520 (1972); Simmons v. Dickhaut, 804 F.2d 182, 184 (1st Cir. 1986). Construing the complaint and the plaintiff's other filings liberally, it appears that he relies on two theories regarding the alleged deprivation of his civil rights. First, he argues that the conditions of his confinement (lack of running hot water in his cell, inadequate ventilation and double celling) violated his right under the Eighth Amendment to be free from cruel and unusual punishment. The plaintiff also argues that his assignment to segregation while he was on reception status and in the absence of any disciplinary action against him was a violation of his due process and equal protection rights under the Fourteenth Amendment.

The parties agree that the plaintiff was a reception status prisoner during the period between June 8 and June 17, 1988 when he was housed in segregation, Paul Affidavit & 2; Kinney Affidavit & 3; that from June 11 to June 17 the plaintiff and another inmate were double celled, Paul Affidavit & 3; Kinney Affidavit & 4; that during that time the plaintiff slept on a mattress on the floor, Paul Affidavit & 3; Memorandum of Law in Support of Defendants' Motion for Summary Judgment p. 8; and that there is no running hot water in the cells in the segregation unit, Memorandum of Law in Support of the Plaintiff's Objection to Defendants' Motion for Summary Judgment p. 1; Defendants' Answer & 9.

In addition, I find for purposes of this motion that, during the time the plaintiff was double celled in segregation, he was permitted to be outside his cell for six hours a day due to his reception status, Kinney Affidavit & 5; that prison authorities brought hot water to the plaintiff's cell in sufficient

quantities and sufficiently often for washing and other legitimate purposes and permitted him to go to the shower area daily for a hot shower, Kinney Affidavit & 6; that each cell in the segregation unit has intake and outtake vents connected to a forced air ventilation system which includes an air handler, Olson Affidavit & 3 and attached exhibit; and that prisoners sometimes stuff these vents, thereby decreasing ventilation until prison authorities discover and remove the stuffing, Kinney Affidavit & 7. There is no evidence, however, that the ventilation system was working during the relevant time period.<sup>3</sup>

I first address the plaintiff's claim that the conditions in the segregation unit constituted cruel and unusual punishment. In defining the point at which prison conditions become constitutionally impermissible, the Supreme Court has allowed conditions which are "restrictive and even harsh" but has proscribed those which "involve the wanton and unnecessary infliction of pain," are "grossly disproportionate to the severity of the crime," or "deprive inmates

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<sup>3</sup> The plaintiff's affidavit asserts that he was forced "to live under the restrictions of punitive status inmates by being double celled in the segregation unit." I read this assertion to mean that the plaintiff is challenging double celling as a punitive restriction. This assertion does not controvert the defendants' sworn assertions that the plaintiff was accorded the reception status privilege of being outside his cell for six hours a day. Likewise, the plaintiff's assertion that "[t]here was no hot water in the cells" does not controvert the defendants' assertion that hot water was brought in for certain purposes. In support of their second motion for summary judgment, the defendants have submitted additional affidavits which set forth information regarding the ventilation system and access to hot showers; the plaintiff has not submitted any additional sworn testimony in response, and thus this more recent evidence is deemed admitted. Fed. R. Civ. P. 56(c); McDermott v. Lehman, 594 F. Supp. at 1321.

of the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). The specific condition at issue in Rhodes was double celling. The Supreme Court noted that this condition had led neither to deprivations or essential food, medical care or sanitation, nor to an increase of violence. Id. at 348. In spite of the facts that double celling was imposed on prisoners with long terms of imprisonment and was not a temporary arrangement, that the facility was overcrowded, that the prisoners had less space than studies recommended, and that inmates spent most of their time in their cells, the Court determined that "[t]hese general considerations fall far short in themselves of proving cruel and unusual punishment, for there is no evidence that double celling under these circumstances either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment." Id.

In this case the plaintiff has alleged that the segregation unit lacked running hot water and adequate ventilation and that the double celling arrangement deprived him of his peace of mind. The facts show, however, that the plaintiff did have access to adequate amounts of hot water in his cell on a regular basis and to the shower area on a daily basis and that he was permitted to be outside the cell for six hours a day.<sup>4</sup> Furthermore, the plaintiff has

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<sup>4</sup> The amended complaint alleges that the plaintiff was not allowed "outside recreation" during the time he was in the segregation unit. This allegation does not controvert the defendants' sworn assertion that the plaintiff was permitted to be outside his cell for six hours a day. See also Lovell v. Brennan, 566 F. Supp. 672, 687-89 (D. Me. 1983), in which this court found that the prison's ventilation system and the system of providing hot water to segregation unit inmates passed constitutional muster. The defendants have stated that the only condition which has changed since Lovell was decided is the practice of double celling. Kiskila Affidavit & 4. The plaintiff has not controverted this assertion.

alleged no physical harm from the asserted ventilation problem. Moreover, unlike the Rhodes plaintiffs, this plaintiff was in segregation for only nine days and double celled for only six days. Thus, I find that these conditions, although uncomfortable, at most constitute conditions which are "restrictive and even harsh," Rhodes, 452 U.S. at 347, but not constitutionally impermissible.

The plaintiff also claims that placement in the segregation unit violated his due process rights because he was on reception status at the time and because he was accorded no hearing prior to his placement in segregation. He further claims that this placement violated his equal protection rights because he was treated differently from other reception status inmates who were placed in the general population cellblocks and were not subjected to the same conditions. It is clear, however, that a prisoner has no right to procedural due process in connection with assignment to housing within a state prison system unless the state has created by statute or regulation a protected interest in the housing classification. Hewitt v. Helms, 459 U.S. 460, 468-69 (1983). The Maine Supreme Judicial Court has previously held that Maine statutes and regulations create no such interest. Clark v. Commissioner of Corrections, 512 A.2d 327, 329 (Me. 1986).<sup>5</sup> As a result, the plaintiff was not entitled to procedural protections in connection with changes or assignments in housing and his placement in a segregation unit cell for nine days was not a violation of his constitutional rights. Moreover, the plaintiff's reception status does not make him a member of a protected class and he cannot, therefore, prevail on an equal protection claim. See Lee v. Washington, 390 U.S. 333 (1968); Pitts v. Meese, 684 F. Supp. 303,

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<sup>5</sup> The Maine statutory provision for "Transfer to correctional facilities" provides:

The commissioner may transfer any committed offender from one correctional facility or program, including prerelease centers, work release centers, halfway houses or specialized treatment facilities, to another, provided that no juvenile may be transferred to another facility or program for adult offenders.

311-14 (D.D.C. 1987).

Accordingly, I conclude that the defendants are entitled to summary judgment and I recommend that their motion for summary judgment be GRANTED.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after 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.

Dated at Portland, Maine this 19th day of June, 1989.

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David M. Cohen  
United States Magistrate