

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

DAVID C. HARMON,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 01-2-B-S
	)	
AROOSTOOK COUNTY	)	
SHERIFF'S DEPARTMENT,	)	
et al.,	)	
	)	
Defendants	)	

***RECOMMENDED DECISION***

Pending before the court are three motions to dismiss this civil rights complaint brought by David Harmon, a prisoner at Maine Correctional Center in South Windham and a former inmate of the Aroostook County Jail. (Docket Nos. 12, 13, and 14). Each defendant maintains that Harmon's complaint should be dismissed for two identical reasons. I now recommend that the court **GRANT** the motions to dismiss.

**Rule 12(b)(6) and Prisoner Litigation**

Congress has provided that it is appropriate to review these prisoners' § 1983 complaints at this stage to "identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief can be granted," or "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b) (Supp. 2001); see also id. § 1915(e)(2)(B) (Supp. 2001) (court "shall" dismiss an in forma pauperis case at anytime it determines that it is frivolous, malicious, fails to state a claim, or seeks money damages from a defendant immune from suit).

In considering a motion to dismiss under Rule 12(b)(6), the Court must accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences in the plaintiff's favor, and determine whether the complaint, when taken in the light most favorable to the non-movant, sets forth sufficient facts to support the claims for relief. Clorox Co. P.R. v. Proctor & Gamble Commercial Co., 228 F.3d 24, 30 (1st Cir. 2000); LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (1st Cir. 1998).

## **Discussion**

### **1. Pleadings Before the Court**

Before undertaking an analysis of the legal issues raised by the defendants in their motions to dismiss, it is necessary to review and re-examine the pleadings on file before the court. The First Circuit has acknowledged that some judicial tolerance is appropriate when a court construes a pro se party's pleading. See Gilday v. Boone, 657 F.2d 1, 2 (1st Cir. 1981) (addressing a pro se prisoner's complaint that failed to mention 42 U.S.C. § 1983, deciphering sufficient allegations of deprivations of federal rights, observing, "It is clear that ... a pro se litigant ... [is] entitled to have his pleadings liberally construed"). See cf. Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam) (reviewing and reversing a Rule 12(b)(6) dismissal of a pro se prisoner's § 1983 complaint, concluding that the allegations of injuries and deprivation of rights "however inartfully pleaded, [were] sufficient to call for the opportunity to offer supporting evidence," stating that it holds the allegations in a pro se complaint "to less stringent standards than formal pleadings drafted by lawyers").

In the present case Harmon first filed his complaint on January 5, 2001, naming as defendants the Aroostook County Sheriff's Department/Jail, Sergeant Bell, James

Foss, Wanda Folsom, and Nurse “Merry.” At that time he availed himself of the form to be used in prisoner complaints under 42 U.S.C. § 1983. The form has a section which asks whether the plaintiff pursued a prisoner grievance procedure. Harmon responded affirmatively indicating that he had filed a grievance with the jail administrator and had received no response.

Four months after the original complaint was filed the court issued an order to show cause why the action should not be dismissed because our file indicated that service had not been accomplished. Harmon responded with an explanation of his dilatory conduct and an amended complaint. I granted him leave to proceed to serve his lawsuit. The amended complaint added Sergeant Right, Carmon “Leabitt,” and Shawn Little as defendants and deleted the Aroostook Sheriff’s Department, the Aroostook Jail, and James Foss from the caption of the complaint. While the amended complaint was written on plain paper rather than the form provided by the court, it contained essentially the same substance regarding the claim, but did not reference the grievance procedure. It is clear in both complaints that the relief sought by Harmon is monetary damages, both compensatory and punitive. He seeks no injunctive or other remedial relief.

All of the original defendants, plus the supplemental defendants, have responded with motions to dismiss (Docket No. 12, Aroostook County Sheriff’s Department, James Foss, Sergeant Bell, and Wanda Folsom; Docket No. 13, Mary Neureither, R.N., and Docket No. 14, Shawn Little, Carmon Leavitt, and Sergeant Right). The defendants have raised identical arguments that the complaint should be dismissed because it fails to allege two critical elements under 42 U.S.C. § 1997e, the Prison Litigation Reform Act (PLRA): Harmon did not allege that he had exhausted such administrative remedies as

are available to him under § 1997e(a) and he failed to allege that he suffered any physical injury cognizable under § 1997e(e). It is unclear from the record before me whether the defendants were served with both the original complaint and the amended complaint, but apparently their counsel at least received copies of both because all of the defendants have answered.

In order to accord the pro se plaintiff the liberality in construing his pleadings that I believe the law requires, I will consider both documents in my analysis of the defendants' motions. I do not believe the defendants will be prejudiced by this approach because even if "proper" service did not occur, clearly counsel for the Aroostook County defendants, at least, was on notice of the existence of both the original and the amended complaint. (See letter of Michael Saucier dated July 19, 2001).

## **2. Exhaustion of administrative remedies**

Section 1997e(a), of title 42 requires a prisoner to exhaust "such administrative remedies as are available" before suing over prison conditions. Last term the Supreme Court definitively stated that a plaintiff who seeks monetary damages in a prison conditions suit must first exhaust administrative remedies, Booth v. Churner, 531 U.S. 956, 121 S. Ct. 1819 (2001), but it has not yet spoken to the actual definition of "prison conditions." It is true that lower courts are split on the issue of whether isolated acts taken by prison officials against prisoners are "prison condition" suits. In this case Harmon alleges one incident occurring on July 18, 2000, when he asked to use his inhaler due to an asthmatic attack and was denied access to it by various jail personnel. As such, it appears this case is a classic example of the type of case that at least some circuits have said do not fall under the "prison conditions" rubric. See Nussle v. Willette, 224 F.3d 95

(2nd Cir. 2000). However, the weight of authority supports application of the statute to this type of situation. See Smith v. Zachary, 255 F.3d 446, 447-52 (7th Cir. 2001); Higginbottom v. Carter, 223 F.3d 1259, 1260-61 (11th Cir. 2000); Freeman v. Fancis, 196 F.3d 641, 643-44 (6th Cir. 1999); Wendell v. Asher, 162 F.3d 887, 890-92 (5th Cir. 1998); but see Smith, 255 F.3d at 453-54(Williams, J. dissenting) (concluding that a “random, violent assault” is not a “prison condition” within the meaning of § 1997e(a)). However, I do not need to take a position on this particular issue at this juncture, because defendants’ argument over exhaustion fails for another reason.

Harmon alleges in his original complaint that he filed a grievance with James Foss, the jail administrator, and that he also referred it to the office of John Hinkley. Without a summary judgment record to refute that those steps amounted to exhaustion of the available administrative procedures, I would be loath to recommend dismissal for failure to exhaust. Harmon alleges that he never received any response to his grievance. If the jail officials do not respond to administrative grievances, the plaintiff can hardly be penalized for failure to exhaust an “available” administrative remedy. The complaint alleges sufficient facts to get by the Rule 12(b)(6) standard in this regard.

### **3. Failure to Allege Physical Injury**

The PLRA’s 42 U.S.C. § 1997e(e) requires that a prisoner must first prove a physical injury before he can recover for his mental and emotional distress suffered while in custody. Harmon has alleged deliberate indifference by individual guards and prison health workers such as would in some circumstances give rise to civil rights liability. Harmon’s claim rises to the level of a constitutional violation only if the defendants exhibited ““deliberate indifference to serious medical needs.”” Watson v. Caton, 984

F.2d 537, 540 (1st Cir. 1993) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)). “The courts have consistently refused to create constitutional claims out of disagreements between prisoners and doctors about the proper course of a prisoner’s medical treatment, or to conclude that simple medical malpractice rises to the level of cruel and unusual punishment.” Id. Withholding an inhaler from an asthmatic undergoing a serious asthma attack could presumably rise to this level of deliberate indifference. However, before Harmon could recover any monetary damages under the PLRA he would have to prove physical injury. His complaint does not allege that he could meet this burden.

Congress’s general purpose in passing the PLRA was to discourage the filing of claims that are unlikely to succeed. Crawford-El v. Britton, 523 U.S. 574, 596-97 (1998). Adding the requirement of physical injury prevents prisoners from turning every psychic trauma, no matter how deliberately inflicted, into a cause of action for monetary damages. Harmon claims that he experienced difficulty breathing and feared he would die because the guard and/or the nurse would not allow him access to his inhaler. He does not allege that this one brief incident during the early morning hours of July 18, 2000, produced any significant or prolonged physical injury. In fact he suffered no apparent physical injury and indeed did receive use of his inhaler later that morning. The gist of his complaint is that he became distraught because he did not get to use his inhaler precisely at the moment he thought he needed it. Even when alerted of the need for a specific allegation of physical injury by the memorandum filed by defendants, Harmon filed a responsive brief which does not allude to any new or different facts that would support even an inference of physical injury. In the absence of physical injury prisoners have seen their lawsuits fail when they alleged far more egregious conduct. See, e.g.,

Evans v. Allen, 981 F.Supp.1102, 1107, 1109 (N.D. Ill. 1997) (bodily fluids thrown at prisoner insufficient). Harmon's lawsuit for monetary damages should be dismissed at this juncture because he has not alleged any facts to support an allegation of physical injury.

### **Conclusion**

Because plaintiff has not alleged that he suffered any physical injury as a result of the defendants' conduct, I recommend that the court **GRANT** the defendants' motions to dismiss (Docket Nos. 12, 13, and 14) and **DISMISS** the complaint for failure to state a claim for monetary damages as required by 42 U.S.C. § 1997e(e).

### 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) 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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Margaret J. Kravchuk  
U.S. Magistrate Judge

October 2, 2001

PR1983

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 01-CV-2

HARMON v. AROOSTOOK COUNTY SHE, et al

Filed: 01/05/01

Assigned to: Judge GEORGE Z. SINGAL

Demand: \$0,000

Nature of Suit: 550

Lead Docket: None

Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 42:1983 Prisoner Civil Rights

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DAVID CURTIS HARMON

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[term 07/10/01]

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defendant

(See above)

JAMES FOSS

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defendant

[term 07/10/01]

[term 07/10/01]

(See above)

WANDA FOLSOM

MICHAEL E. SAUCIER, ESQ.

defendant

(See above)

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