

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

LUIS M. RODRIGUEZ )  
 )  
 Plaintiff )  
 )  
 v. ) Civil No. 01-72-P-C  
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 RICHARD LEEMAN, et al., )  
 )  
 Defendants )

***RECOMMENDED DECISION ON MOTION TO DISMISS  
42 U.S.C. § 1983 COMPLAINT***

Luis M. Rodriguez is currently a prisoner at the South Windham Correctional Facility. He has filed this civil action pursuant to 42 U.S.C. § 1983, complaining about treatment he received at the Cumberland County Jail when incarcerated there in early January 2001. (Docket Nos. 2, 4 & 6, complaint and amendments.) Defendants Richard Leeman and the Cumberland County Sheriff's Department have filed a motion to dismiss (Docket No. 11). Rodriguez has responded to the motion dismiss (Docket No. 17) and has also offered further statement of his case to the court in a letter dated October 10, 2001. After consideration of the entire record I recommend that the court **GRANT** the motion to dismiss because the complaint fails to state a claim upon which relief can be granted.

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

Congress has provided that it is appropriate to review prisoners' 42 U.S.C. § 1983 complaints 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). One of the Prisoner Litigation Reform Act’s (PLRA) provisions, 42 U.S.C. § 1997e(e), requires that a prisoner must make a prior showing of physical injury before he can bring an action for his mental and emotional distress suffered while in custody.

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. v. Proctor & Gamble Commercial Co., 228 F.3d 24, 30 (1st Cir. 2000); LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (1<sup>st</sup> Cir. 1998).<sup>1</sup>

#### **Factual Allegations**

Rodriguez complains of an incident occurring at the Cumberland County Jail on January 3, 2001, while he resided there as a pretrial detainee. According to Rodriguez a correctional officer instructed him to exit his cell and proceed to the food cart where he was to pick up his lunch tray and return with it to his cell. When Rodriguez attempted to comply with that directive he encountered Officer Richard Leeman who violently slammed his own hand down on the food tray preventing Rodriguez from proceeding as

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<sup>1</sup> In his letter of October 10, 2001, Rodriguez urges that he has three witnesses to back-up his complaint and that the court should not heed the case law cited by the defendants because it is “totally unrelated to the present matter at hand.” He demands a jury trial.

For the purposes of this motion to dismiss I have taken each of Rodriguez’s factual allegations as true, and, therefore, even if he had no corroborating witnesses my disposition would be no different than if he had a legion of witnesses. Additionally, I have conducted an independent survey of the relevant law and have relied on no cases that are unrelated. Contrary to Rodriguez’s apparent perception that this is a dispute that turns on facts alone, it is only by measuring the facts by the governing law that I can determine if his complaint states a claim for relief.

he had been instructed to do. Leeman told Rodriguez that he had better “shut his f----- mouth” or that he (Leeman) “would come pay me a visit to my cell and show me who the boss really was.”

Rodriguez found Leeman’s behavior shocking and alleges that it caused him serious psychological pain. He claims to have detected the odor of alcohol on Leeman’s breath, a perception that contributed to Rodriguez’s moral outrage about the incident. Rodriguez notes that since he was housed in “protective custody” at the time this verbal abuse and threatening of physical violence by a guard added to his emotional distress. Rodriguez further claims that he exhausted all grievance procedures at the jail and did not receive a timely response to any of his complaints. He asserts that the Cumberland County Jail has a personnel policy that ignores such obvious “anger management” problems as those exhibited by Leeman thereby subjecting prisoners such as Rodriguez to unconstitutional treatment at the hands of correctional personnel. Rodriguez claims a violation of his constitutional right to equal protection under the law, his First Amendment right to free expression, his “due process” rights, and his right to be free from cruel and unusual punishment under the Eighth Amendment.

### **Discussion**

Every affront by a state actor, even if egregious when measured by common standards of decency, does not a civil rights violation make.<sup>2</sup> Rodriguez does not allege that he suffered any physical injury as the result of Leeman’s conduct nor does he allege

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<sup>2</sup> In his amended complaint Rodriguez asserts that if he, as a prisoner, had acted as Leeman had the retribution would have been swift. Though there might be a practical logic to this point, the federal courts in enforcing the federal civil rights statute and the United States Constitution operate, for better or worse, according to legal standards that do not always mirror those that govern, say, playgrounds and office environments. The threshold showing of misconduct required before prison officials can issue punishment is simply not equivalent to the threshold showing required to sustain a civil rights complaint against state actors pursuant to 42 U.S.C. § 1983.

that Leeman engaged in repeated acts of threatened violence toward him. He describes only the one incident involving the food tray in January 2001. Rodriguez's complaint, as amended (Docket Nos. 4 & 6), does not specify whether he seeks monetary damages or injunctive relief or both, though he clearly and often states his objective of seeing that justice is done. One interpretation of his complaint could be that he only wants this court to order that the Cumberland County Jail officials take action to improve their supervision over Leeman and other correctional personnel. To the extent that Rodriguez seeks declaratory or injunctive relief, his claims are moot because he is no longer at the Cumberland County Jail and he no longer needs to contend with Leeman. See Herman v. Holiday, 238 F.3d 660, 665 (5<sup>th</sup> Cir. 2001). If his complaint is construed as one for monetary damages it fails to state a claim for numerous reasons.

***A. Claims Against Richard Leeman Individually***

The only claim that Rodriguez asserts against Leeman individually appears to be related to the tray slamming incident. There are no allegations that Leeman was involved in the alleged due process violations or free speech infringement arising out of Rodriguez's frustrated attempts to use the jail grievance procedure. Rodriguez claims that Leeman violated his constitutional rights by subjecting him to cruel and unusual punishment in the form of verbal abuse and by denying him equal protection under the laws. Again, he does not allege that this one-time incident caused him any physical injury; he complains that the incident inflicted serious psychological pain.

For that reason alone the claim must fail. 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 42 U.S.C. § 1997e(e)

requirement of physical injury prevents prisoners from turning every psychic trauma, no matter how deliberately inflicted, into a cause of action. The First Circuit has not had occasion to mention 42 U.S.C. § 1997e(e). However, elsewhere prisoners have seen their lawsuits fail when they alleged far more egregious conduct than does Rodriguez because of a want of physical injury. See, e.g., Evans v. Allen, 981 F.Supp.1102, 1107, 1109 (N.D. Ill. 1997) (bodily fluids thrown at prisoner insufficient). Rodriguez’s failure to allege physical injury is fatal to any claim for damages.

However, even if Rodriguez had alleged a sufficient physical injury, his claims against Leeman would fail on the merits. Indeed, the physical injury requirement of 42 U.S.C. § 1997e(e) dovetails into the showing necessary to demonstrate a constitutional violation. Prior to the PLRA, and still true today, a claim for cruel and unusual punishments under the Eighth Amendment requires more than a de minimis use of physical force. Hudson v. McMillian, 503 U.S. 1, 9-10 (1992); Singlar v. Hightower, 112 F.3d 191, 193 (5<sup>th</sup> Cir. 1997) (post-PLRA case defining 42 U.S.C. § 1997e(e)’s “physical injury” threshold in reference to the Hudson standard for de minimis use of force).<sup>3</sup> See also Bell v. Wolfish, 441 U.S. 520 (1979)(discussing the circumscribed due process rights of pre-trial detainees). With respect to the level of conduct necessary vis-à-vis an Eighth Amendment claim (as opposed to injury), this court has previously stated that verbal threats, name-calling, and threatening language are not actionable under § 1983. Ellis v. Meade, 887 F.Supp. 324, 329-30 (D. Me. 1995). Guided by these standards I

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<sup>3</sup> In Singlar the Fifth Circuit analyzed a similar prison incident. It concluded that an officer’s unprovoked twisting of an arm behind the plaintiff’s back and a twisting of his ear that resulted in the bruising of the ear and three-days of soreness did not “have the requisite physical injury to support a claim for emotional and mental suffering.” 112 F.3d at 193-94. The First Circuit has yet to issue a published decision applying Hudson in the context of this type of excessive force Eighth Amendment claim.

conclude that Leeman's use of force was de minimis and that, accordingly, the incident that Rodriguez describes is not actionable under 42 U.S.C. § 1983.

With respect to his skeletal equal protection claim against Leeman, Rodriguez would have to allege that he was "the victim of intentional discrimination." Judge v. City of Lowell, 160 F.3d 67, 75 (1st Cir. 1998). All facts are construed in the light most favorable to Rodriguez although the Court need not credit conclusory allegations or indulge unreasonably attenuated inferences. See Aybar v. Crispin-Reyes, 118 F.3d 10, 13 (1st Cir. 1997); Ticketmaster-NY, Inc. v. Alioto, 26 F.3d 201, 203 (1st Cir. 1994). Unfortunately for Rodriguez he pleads no facts that would suggest that Leeman had an improper motive based upon racial animus or discriminatory intent. And this "element of illegal motive must be pleaded by alleging specific non-conclusory facts from which such a motive may reasonably be inferred, not merely by generalized asseveration alone." Judge, 160 F.3d at 72. He simply does not state an equal protection claim.

Finally, in his response to the motion to dismiss Rodriguez suggests that Leeman's conduct was a violation of his First Amendment rights, apparently because Leeman's threatening conduct somehow "chilled" Rodriguez's freedom of expression. Other than stating in a conclusory fashion that Leeman "suppressed" him, Rodriguez has alleged no facts to support this claim. Indeed he has alleged facts that support the conclusion that he has been able to exercise speech rights in that he filed a grievance with the jail administration and he, obviously, filed this lawsuit. There are simply no facts in the complaint to support a finding that Rodriguez was prevented from exercising First Amendment rights or that he was retaliated against because of his free exercise of his right to speak. Even if Leeman's conduct were viewed as an attempt to prevent

Rodriguez from exercising his First Amendment rights, a “mere attempt to deprive a person of his First Amendment rights is not actionable under § 1983.” Berard v. Town of Millville, 113 F. Supp.2d 197, 202-03 (D. Mass. 2000)(citing Andree v. Ashland County, 818 F.2d 1306, 1311 (7<sup>th</sup> Cir. 1987)).

***B. Claims against Cumberland County***

Rodriguez alleges two claims against Cumberland County. First he contends that the failure to provide him with a prompt response to his grievance deprived him of his constitutional right to due process. He also contends that the County’s failure to properly supervise and control Leeman means that they are responsible for Leeman’s deprivation of his constitutional rights.

Rodriguez’s complaint with the grievance process appears to be two-fold: he did not get a prompt response and the response he finally got was unsatisfactory.<sup>4</sup> Rodriguez asserts that he filed a grievance through the inmate grievance system at the jail and did not receive “any sort of reasonable response within the established 10 day period which is plainly stated on the grievance form itself.” (Docket No. 17.) The incident involving Leeman and Rodriguez occurred on January 3, 2001. Rodriguez filed a grievance the same day. (Id.) He received a response on his grievance on February 21, 2001. (Id.) Rodriguez filed this suit on March 14, 2001. He describes the jail as being deliberately indifferent to his efforts to file the grievance against Leeman. (Id.)

Even if I assume that the jail regulations contain time limits that were not met, the defendant’s failure to meet time limits set forth in jail regulations do not establish a de

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<sup>4</sup> In his October 10, 2001, letter arguing the merits of his complaint, Rodriguez notes that exhaustion of the grievance procedure is a prerequisite for bringing his 42 U.S.C. § 1983 complaint. This is true and I conclude that Rodriguez has complied with 42 U.S.C. § 1997e(a) for the purposes of asserting his claims against Leeman in this action. This conclusion is unrelated, however, to my determination about the legal merits of his claim that the grievance procedure he was afforded violated the constitution.

facto due process violation. In Sandin v. Conner, 515 U.S. 472 (1995) the Supreme Court articulated, in rather broad outline, the due process standard for prisoners:

[W]e recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

515 U.S. at 483-84.<sup>5</sup> While the due process stakes might be higher if Rodriguez's beef was with the procedural protections afforded him in a disciplinary process, see Collazo-Leon v. United States Bureau Prisons, 51 F.3d 315 (1<sup>st</sup> Cir. 1995) (addressing due process claims of pre-trial detainee vis-à-vis disciplinary segregation and revocation of privileges), I can find no authority that comes near to supporting the proposition that a delay in responding to a prisoner grievance is a sufficiently "atypical" hardship for a pretrial detainee "in relation to the ordinary incidents" of jail life.<sup>6</sup> The fact that Rodriguez was unhappy with the nature of the response he eventually received does not create an additional constitutional violation; I have addressed the constitutional merits of Rodriguez's Eighth Amendment claim concerning Leeman's behavior above.

Lastly, Rodriguez also complains that Cumberland County is responsible for a policy, custom, or practice that promotes the type of behavior exhibited by Leeman

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<sup>5</sup> The defendants cite to Smith v. Massachusetts Dep't. of Corrections, 936 F.2d 1390, 1397 n. 11 (1st Cir. 1991) for the proposition that the procedural time-limits set forth in jail regulation do not "create" the necessary liberty interests to form the basis for a due process claim. Smith relied on Parenti v. Ponte, 727 F.2d 21 (1<sup>st</sup> Cir. 1984) for this proposition. Parenti, in turn relied on Hewitt v. Helms, 459 U.S. 460 (1983). Hewitt was one in a line of Supreme Court cases that the Sandin Court took pains to pull back from in stating its revised due process standard. 515 U.S. at 477-84 & n.5 (announcing its "abandonment of Hewitt's methodology," stating "that the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause.")

<sup>6</sup> This claim falls so far off the mark that I need not delve into a discussion of whether or not a pre-trial detainee's due process protection would differ in any measurable way from that of a convicted prisoner when it comes to the process afforded for grievances concerning prison conditions. See Bell v. Wolfish, 441 U.S. 520 (1979).

toward inmates. If this lawsuit is indeed a quest for injunctive relief grounded upon an unconstitutional municipal<sup>7</sup> custom or practice, Rodriguez would have to allege that the policymaking officials had either actual or constructive knowledge of a well-settled and widespread policy and did nothing to end the practice and, further, that this custom or policy was the moving force behind the deprivation of constitutional rights. See, e.g., Miller v. Kennebec County, 219 F.3d 8, 12 (1st Cir. 2000) (discussing § 1983 custom or practice claim against Knox County for allegedly unreasonable search conducted at Knox County Jail). Rodriguez's amended complaints fails to meet these requirements on a number of scores, first and foremost being, as discussed above, that he has failed to allege any constitutional deprivation. Furthermore, as to the County's liability he has failed to identify any widespread custom or policy that tolerates alcohol consumption by jail guards or does not properly address "anger management" issues with the staff. In fact all Rodriguez does is identify one random incident by Leeman and allude to other officers ignoring the problem because of Leeman's seniority. Even if this claim was not mooted by Rodriguez's departure from the jail, these allegations are insufficient to state a claim that the custom or policy was so widespread that municipal policy makers should have known of it.

### **Conclusion**

Based upon the foregoing, I recommend that the court **GRANT** the defendants' motion to dismiss for failure to state a claim upon which relief can be granted.

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<sup>7</sup> Counties are included within the term municipality. Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 399 (1997). See also Black's Law Dictionary 1037 (7th ed. 1999) (defining municipal corporation as "[a] city, town, or other local political entity formed by charter from the state and having the autonomous authority to administer the state's local affairs.").

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 29, 2001

BANGOR PR1983

U.S. District Court

District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 01-CV-72

RODRIGUEZ v. LEEMAN, et al

Filed: 03/14/01

Assigned to: JUDGE GENE CARTER

Jury demand: Plaintiff

Demand: \$0,000

Nature of Suit: 550

Lead Docket: None

Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 42:1983 Prisoner Civil Rights

LUIS M RODRIGUEZ

LUIS M RODRIGUEZ

plaintiff

[COR LD NTC pse] [PRO SE]

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v.

RICHARD LEEMAN, OFFICER,

JOHN J. WALL, III, Esq.

CUMBERLAND COUNTY SHERIFF'S

[COR LD NTC]

DEPARTMENT

MONAGHAN, LEAHY, HOCHADEL & LIBBY

defendant

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DEPARTMENT (See above)  
defendant [COR LD NTC]

CUMBERLAND COUNTY JAIL  
defendant  
[term 03/23/01]