

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

JEFFREY LIBBY,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 03-35-B-S
	)	
JEFFREY MERRILL,	)	
	)	
Defendant	)	

**ORDER ON MOTION TO AMEND AND  
RECOMMENDED DECISION ON MOTION TO DISMISS**

Jeffrey Libby has filed, through counsel, a 42 U.S.C. § 1983 complaint against Jeffrey Merrill, the Warden of the Maine State Prison. (Docket No. 1.) Libby alleges that Merrill violated his right to the free exercise of religion when he cancelled a pre-arranged personal visit to Libby by Maine’s Catholic Archbishop, thereby depriving Libby of “a once in a lifetime opportunity.” Merrill has filed a motion to dismiss arguing, only, that the complaint should be dismissed because Libby has not sufficiently alleged exhaustion of his administrative remedies as required by 42 U.S.C. § 1997e(a) and because he cannot recover damages of any ilk because he did not suffer physical injury within the meaning of 42 U.S.C. § 1997e(e). (Docket No. 4.) Libby has filed a motion to amend his complaint, which among other things alleges exhaustion, includes an independent claim for injunctive relief against Merrill and adds a claim under the Maine Constitution that also seeks, solely, injunctive relief. (Docket No. 7.) Merrill objects to the amendment. (Docket No. 9). I now **GRANT** Libby leave to file the amended complaint, recommend that the Court dismiss Count I of the amended complaint to the extent it is against Merrill

in his official capacity and dismiss Counts II and III in their entirety. I recommend that the Court **DENY** Merrill's motion seeking dismissal of the complaint in its entirety.

*Allegations in Amended Complaint*

*Count I*

In April of 2001 Libby was an inmate at the former site of the state prison in Thomaston, Maine. Merrill was the warden of the prison at the time.

During Libby's several-year stay at the prison Libby had become strongly reacquainted with his religious roots in Roman Catholicism. From early in 2001, Libby frequently met with Father Robert Bouchard, a Roman Catholic priest who ministered to inmates in the prison since June of 2000. Over the course of months Libby developed a strong spiritual bond with Bouchard. Bouchard took a special interest in Libby because Libby had a strong desire to grow spiritually and sought to remove himself from his past and the crime that had led to his imprisonment.

In April of 2001, Libby was in protective custody at the prison due to threats of harm from other inmates, threats stemming from Libby's history of cooperation with the authorities. On April 25, 2001, Bouchard met Libby in the afternoon in the protective custody unit. Bouchard told Libby that Bishop Joseph Gerry, the Roman Catholic Bishop for the Dioceses of Maine, would be visiting the Maine State Prison on April 30, 2001, to conduct mass. Bouchard told Libby that the Bishop would be meeting with Libby personally and indicated that the meeting had been planned in advance. Bouchard revealed that at this meeting Bishop Gerry would personally bless Libby. Bouchard also made specific recommendations as to how Libby should arrange his cell to reflect proper respect for the Bishop.

On April 30<sup>1</sup> Libby waived his rights to outdoor recreation so that he could prepare for his meeting with Bishop Gerry. He put on his best clothes, finished preparing the cell, and waited. The Bishop never arrived. Libby was never informed that the visit had been canceled and only became aware that it was not going to transpire when a guard informed Libby around 3:30 p.m. that the Bishop had left the building.

Under normal prison procedures a visit could have proceeded without specific authorization by the warden and could have been directly scheduled by a priest in the role of chaplain. Bouchard had in fact scheduled other such non-Bishop visits on other occasions. The guard overseeing the protective custody visits was aware and approved of the Bishop Gerry visit.

The visit had been cancelled by Merrill's specific order. Merrill had no valid security concern or reason, but blocked the visit because of Merrill's personal spite towards Libby. Prior to this incident, Libby had been a tireless advocate for mentally ill inmates, advocacy that brought embarrassing attention to the prison's inadequacies in this area. Because of Libby's insistence on the exercise of his legal rights and because Libby was a target of other inmates, Libby was an inconvenience to Merrill. To punish Libby, Merrill intentionally deprived Libby of this once in a lifetime opportunity to be blessed by the highest ranking official in his faith in the State of Maine. Merrill chose to punish Libby for the exercise of his First Amendment free speech rights by interfering with Libby's free expression of religion rights. His actions were knowing, willful, and malicious.

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<sup>1</sup> The amended complaint reads October 30, but this is apparently nothing more than a typographical error.

As a consequence of the cancelled visit, Libby was devastated. Merrill discouraged Bouchard from talking to or explaining the situation to Libby; consequently, Libby endured a number of days of doubt as to whether the visit had actually been scheduled or whether his spiritual advisor had promised Libby something that he could not deliver. Furthermore, Libby had told other inmates of the coming visit and he was humiliated when it did not take place.

Libby's history with the church had been distant and even painful at some points in his past. The unexplained cancellation raked-up old memories and endangered Libby's newfound faith. As Libby is a long-term prisoner -- in contrast to shorter term inmates -- Libby's faith is much more precious to him because it is all that he has. His distress was exacerbated by the fact that counseling was largely unavailable and that his relationship with Bouchard was severely compromised by the cancellation.

On this count Libby seeks compensation for his anguish, punitive damages from Merrill in his personal and official capacity, and reasonable attorney fees and costs.

***42 U.S.C. § 1997e(a)***

Section 1997e(a) of title 42 provides that:

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). Merrill argues that the fact that Libby did not allege exhaustion in his initial complaint means that the action must be dismissed as barred by § 1997e(a) as the court has no jurisdiction absent the allegation of pre-filing exhaustion.

Merrill's position on the reach of § 1997e(a) is based on the conclusion of the

Sixth Circuit's in its per curiam Brown v. Toombs, 139 F.3d 1102 (6th Cir. 1998). However Merrill ignores the fact that the First Circuit has held that exhaustion is an affirmative defense and "that [§ 1997e(a) of] the PLRA does not mandate dismissal for failure to exhaust, at least not at th[e] prefatory stage of litigation." Casanova v. Dubois, 304 F.3d 75, 77-78 (1st Cir. 2002). See also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999) (concluding that "[f]ailure to exhaust administrative remedies does not deprive a court of jurisdiction," while agreeing with Brown that suits filed by a prisoner before administrative remedies have been exhausted must be dismissed, as the exhaustion requirement must be respected by the court if and when it is successfully invoked by the defendant); accord Wyatt v. Terhune, 315 F.3d 1108, 1117 (9th Cir. 2003); Ray v. Kertes, 285 F.3d 287, 295 (3d Cir. 2002); Foulk v. Charrier, 262 F.3d 687, 697 (8th Cir.2001).

Merrill has not yet answered the initial complaint and has not in that fashion raised the issue of a § 1997e(a) deficiency. In the amended complaint Libby alleges that he has exhausted the remedies that were available. While Merrill may still pursue the § 1997e(a) defense, I do not recommend granting Merrill dismissal on this ground at this time. See Casanova, 304 F.3d at 78 (rejecting sua sponte § 1997e(a) dismissal but noting that nothing in its opinion was "intended to preclude the appellees from appropriately presenting this affirmative defense in any further proceedings").

***42 U.S.C. § 1997e(e)***

Section 1997e(e) of title 42 provides: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C.

§ 1997e(e).

As with the § 1997e(a) concern, I have already expressed my opinion on this question: “the foreclosure of compensatory damages vis- à-vis § 1997e(e) does not ineluctably lead to the conclusion that the plaintiff cannot be awarded nominal and punitive damages.” Mitchell v. Newryder, 245 F.Supp.2d 200, 205 n.4 (D. Me. 2003). A recent Seventh Circuit case offers an intelligent discussion of the question vis-à-vis First Amendment claims and summarizes the emerging view that the availability of nominal and punitive damages is unaffected by § 1997e(e):

Indeed, in the context of First Amendment claims, we have held explicitly that prisoners need not allege a physical injury to recover damages because the deprivation of the constitutional right is itself a cognizable injury, regardless of any resulting mental or emotional injury. Rowe v. Shake, 196 F.3d 778, 781-82 (7th Cir.1999); see also Searles v. Van Bebber, 251 F.3d 869, 879-81 (10th Cir.2001) (nominal and punitive damages for First Amendment violation not barred); Allah v. Al- Hafeez, 226 F.3d 247, 252 (3d Cir.2000) (same); Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir.1998) (any form of relief for First Amendment violations available, if not for mental or emotional injury). Using a similar rationale, several of our sister circuits have concluded that § 1997e(e) does not bar all recovery for violations of due process or the right to privacy. See Thompson v. Carter, 284 F.3d 411, 418 (2d Cir.2002) (nominal and punitive damages available for deprivation-of-property claim); Oliver v. Keller, 289 F.3d 623, 630 (9th Cir.2002) (compensatory, nominal, or punitive damages available if premised on alleged unconstitutional conditions of pretrial confinement, and not emotional or mental distress suffered); Doe v. Delie, 257 F.3d 309, 314 n. 3 & 323 (3d Cir. 2001) (nominal and punitive damages available for violation of inmates' newly recognized right to medical privacy); but cf. Harris v. Garner, 190 F.3d 1279, 1282, 1287-88 & n. 9 (§ 1997e(e) precludes compensatory and punitive damages for alleged violations of Fourth, Eighth, and Fourteenth Amendments, but expressing no view on nominal damages), vacated & reh'g en banc granted, 197 F.3d 1059 (11th Cir.1999), reinstated in pertinent part, 216 F.3d 970 (11th Cir.2000); Davis [v. District of Columbia], 158 F.3d [1342,] 1348-49 [(D.C. Cir. 1998)](compensatory and punitive damages for violations of constitutional right to privacy barred, but expressing no view on nominal damages). These decisions reflect an emerging view that § 1997e(e), as the plain language of the statute would suggest, limits recovery "for mental and emotional injury,"

but leaves unaffected claims for nominal and punitive damages, which seek to remedy a different type of injury. See Robinson [v. Page], 170 F.3d [747,]748 [(7th Cir. 1999)].

Calhoun v. DeTella, 319 F.3d 936, 940-41 (7th Cir. 2003). I recommend following this emerging view and denying Merrill's motion to dismiss on § 1997e(e) grounds, although Libby cannot recover compensatory damages for his emotional injury.

***Count I and Merrill in his Official Capacity***

Libby captions his complaint as being against Merrill personally and in his official capacity. The United States Supreme Court has concluded that § 1983 claims against public servants in their official capacities are the same as suits against the government entity itself. Brandon v. Holt, 469 U.S. 464, 472-73 (1985). It has further held that punitive damages may not be recovered against a municipal defendant. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271(1981). Therefore, the only damages available against Merrill would be nominal damages, and that claim does not survive my 42 U.S.C. § 1997e(c)(1) scrutiny because in official-capacity actions § 1983 liability only inheres when the entity is the force that drives the deprivation and only when “the entity's ‘policy or custom’ ... played a part in the violation of federal law.” Kentucky v. Graham, 473 U.S. 159, 166 (1985); see also Figueroa-Serrano v. Ramos-Alverio, 221 F.3d 1, 5 (1st Cir. 2000) (explaining that in an official capacity action under § 1983, alleging violations of their First and Fourteenth Amendment rights, liability attaches for constitutional violations resulting from the individual official's policies and customs). Libby's allegations are that Merrill acted against the prison's standing custom and policy in blocking Libby's personal visit with the Bishop. Therefore, I conclude that Libby has failed to state a claim against Merrill in his official capacity.

### ***Counts II & III***

Count II seeks declaratory and injunctive relief vis-à-vis Libby's claims under the United States Constitution. He states that "the policy, rule or regulation pursuant to which the Defendant has refused to allow him contact with his Bishop for blessing, and the application by Defendant of any such policy, rule of regulation against him to justify any future refusal under similar circumstance, is in violation of Plaintiff's rights secured and guaranteed under the Due Process Clause of the Fourteenth Amendment of the United States Constitution." In Count III, Libby asks this Court to "preliminarily enjoin Defendant Warden Merrill and Department of Corrections from continued discriminatory refusal and squelching of Plaintiff's exercise of his Article One rights" under the Maine Constitution.

These two counts cannot go forward. First, as with the official capacity claim against Merrill, Libby's own allegations (on which this relief is premised) are that under normal prison procedures a visit could have proceeded with direct scheduling by a priest in the role of chaplain and without specific authorization by Merrill. He alleges that Merrill's action, taken against this policy or custom, was animated by a personal vendetta. These factual allegations blatantly contradict Libby's bald assertion in Count II that Merrill was acting pursuant to a policy or regulation that would likely be enforced against Libby again. Thus, the only facts Libby had plead concerning the allegedly First Amendment violative custom and policy, see Campagna v. Mass. Dep't of Env'tl. Prot., \_\_\_ F.3d \_\_\_, 2003 WL 21512247, \* \_ (1st Cir. July 3, 2003), entirely undermine his claim for injunctive relief.

Furthermore, Libby is alleging that Merrill intentionally deprived Libby of this “once in a lifetime opportunity” to be blessed by the highest ranking official in his faith in the State of Maine. On its face, this complaint does not support a conclusion that there could be a recurrence of the conduct attributed to Merrill. More importantly, even if Libby had alleged that he anticipated getting a second in a lifetime opportunity to meet with the Bishop while serving his sentence (or some equally important exercise of religion opportunity) such hypothetical averments would not suffice to confer jurisdiction over these injunctive counts.<sup>2</sup> The United States Supreme Court has stated that “[a]bstract injury is not enough” to sustain a claim for injunctive relief. City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983). A plaintiff seeking injunctive relief must demonstrate that “the injury or threat of injury must be both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’” Id. at 102. Furthermore, in Lyons the Court approved of the dismissal of a count seeking injunctive relief for want of jurisdiction on the grounds that this “equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again--a ‘likelihood of substantial and immediate irreparable injury.’” Lyons, 461 U.S. at 111 (quoting O’Shea v. Littleton, 414 U.S. 488, 502 (1974)); see also id. at 105 (“That Lyons may have been illegally choked by the police on October 6, 1976, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into

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<sup>2</sup> Indeed, it appears that Libby has been transferred from Merrill’s institution to a different facility in the State over which Merrill has no authority.

unconsciousness without any provocation or resistance on his part.”); see e.g., Comfort v. Lynn School Comm., 150 F.Supp.2d 285, 288 (D. Mass. 2001) (“[T]he mere possibility of future harm, without some compelling evidence of susceptibility or inevitability, does not satisfy Article III standing requirements for injunctive relief to issue.”).<sup>3</sup>

### *Conclusion*

For the reasons stated above I **GRANT** the motion to amend. I recommend that the Court deny Merrill’s motion to dismiss the complaint in its entirety. However, I do recommend that the Court **DISMISS Counts II and III** because they do not state a claim for injunctive relief, as well as **DISMISS the official capacity claim**, leaving Count I against Merrill in his individual capacity.<sup>4</sup>

### 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.

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<sup>3</sup> Thus, I need not reach the question of whether injunctive relief for the violation of the United States Constitution would be available against Merrill in his official capacity in this case if Libby sufficiently alleged the prospect of irreparable injury. See, e.g., Ford v. Reynolds, 316 F.3d 351, 354-55 (2d Cir. 2003). I also need not answer whether the federal courts can confer injunctive relief for a violation of the Maine Constitution for conduct that does not appear to fall within the proscription of 5 M.R.S.A. § 4682. See McDermott v. Town of Windham, 204 F.Supp.2d 54, 59 n.8 (D. Me. 2002); Learnard v. Inhabitants of Van Buren, 164 F.Supp.2d 35, 44-45 (D. Me. 2001); Caldwell v. Federal Exp. Corp., 908 F.Supp. 29, 32 (D. Me. 1995); Pelletier v. State of Maine, 2000 WL 1900287, \*2 (D. Me. 2000).

<sup>4</sup> Even if I were in that business, it is too early to predict the longevity of Count I. Merrill has moved only on the grounds of sections 1997e(a) and (e) and has not argued that it fails to state a claim for a violation of the free exercise of religion. My brief § 1997e(c)(1) survey of cases on point suggests that some similar disputes require necessitated evidentiary production by defendants proffered through a motion for summary judgment. See, e.g., Freeman v. Arpaio, 125 F.3d 732, 736-37 (9th Cir. 1997). Merrill has not yet answered and/or asserted the defense of qualified immunity, an inquiry that might require Merrill to contravene Libby’s facts and/or involve an analysis of the basis of Merrill’s decisions, if any, with respect to the visit by the Bishop. See, e.g., Salahuddin v. Mead, 2000 WL 335552 (S.D.N.Y. 2000) (analyzing a similar claim in view of an argument that it failed to state a claim and dismissing the claim on the grounds of qualified immunity).

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.

July 29, 2003.

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Margaret J. Kravchuk  
U.S. Magistrate Judge

**STANDARD**

**U.S. District Court  
District of Maine (Bangor)  
CIVIL DOCKET FOR CASE #: 1:03-cv-00035-JAW  
Internal Use Only**

LIBBY v. MERRILL

Assigned to: JUDGE JOHN A. WOODCOCK JR

Referred to: MAG. JUDGE MARGARET J.

KRAVCHUK

Demand: \$

Lead Docket: None

Related Cases: None

Case in other court: None

Cause: 42:1983 Prisoner Civil Rights

Date Filed: 03/14/03

Jury Demand: None

Nature of Suit: 550 Prisoner: Civil  
Rights

Jurisdiction: Federal Question

**Plaintiff**

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**JEFFREY LIBBY**

represented by **ANDREW B. CAMPBELL**  
CAMPBELL LAW OFFICES  
45 KALER CORNER  
WALDOBORO, ME 04572  
207/832-7212  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**SCHUYLER G. STEELE**  
P.O. DRAWER F  
PITTSFIELD ROAD

NEWPORT, ME 04953  
368-5022/18002875222  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

V.

**Defendant**

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**JEFFREY MERRILL,**  
*Individually and in his official  
capacity as Warden*

represented by **DIANE SLEEK**  
ASSISTANT ATTORNEY  
GENERAL  
STATE HOUSE STATION 6  
AUGUSTA, ME 04333-0006  
626-8800  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*