

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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

**RECOMMENDED DECISION ON MOTION FOR SUMMARY JUDGMENT
AND ORDER ON MOTION TO STRIKE**

Jeffrey Libby has brought a 42 U.S.C. § 1983 complaint against Jeffrey Merrill, the Warden of the Maine State Prison, alleging 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.”¹ Earlier I recommended denial, in part, of Merrill’s motion to dismiss because I concluded that Libby had sufficiently alleged in his amended complaint exhaustion of his administrative remedies as required by 42 U.S.C. § 1997e(a). In this motion for summary judgment (Docket Nos. 16 & 17) Merrill reasserts the non-exhaustion argument, supported by a statement of material facts and an affidavit. Libby does not contest that he has not exhausted his remedies, but argues only that his claim is of a strain that does not require § 1997e(a) exhaustion. As this assertion runs counter to governing United States Supreme Court precedent interpreting § 1997e(a), I now recommend that the Court

¹ A more thoroughgoing description of the factual underpinnings of Libby’s complaint can be found in my recommended decision on Merrill’s motion to dismiss. *Libby v. Merrill*, 2003 WL 21756830, *1 (D. Me. July 29, 2003) (recommended decision), 2003 WL 22669017 (Nov. 7, 2003) (affirming recommended decision).

GRANT Merrill's motion for summary judgment and **DISMISS** the complaint for failure to exhaust. I also **GRANT** Merrill's motion to strike.

Legal Standards

Merrill is entitled to summary judgment 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 [Merrill] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," id. I view the record in the light most favorable to Libby, the opponent of summary judgment, and I indulge all reasonable inferences in his favor. See Feliciano De La Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000).

Merrill moves for summary judgment solely on the ground that Libby has not fully exhausted his 42 U.S.C. § 1983 claims as required by 42 U.S.C. § 1997e(a). This provision provides:

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).

Undisputed Material Facts

Libby was a prisoner in the custody of the Department of Corrections when he filed this lawsuit and remains a prisoner in the Department's custody. (DSMF ¶¶ 1 & 2.) The grievance policy in effect at the time of the incident giving rise to Libby's lawsuit --

the alleged April 30, 2001, cancellation of a visit between him and the Bishop of Maine -- was Policy 14.5, which has since been superseded by Policy 29.1 (Id. ¶¶ 3 & 4.) Under both grievance policies, there is a formal grievance process that has three levels of review. (Id. ¶ 5.) The third and final level of review provided for under both grievance policies is review by the Commissioner of Corrections. (Id. ¶ 6.) There is no grievance from Libby concerning the cancellation of a visit between him and the Bishop of Maine that has been forwarded for the Commissioner’s review. (Id. ¶ 7.)

Libby admits this recitation of facts. (Pl.’s Resp. DSMF ¶¶ 1-7.) He argues only that the exhaustion requirement does not apply to his claim because it is one for which there is no administrative remedy available because no outcome of the grievance process could have remedied the loss of his once in a lifetime opportunity to visit with the Bishop of Maine.

Discussion

The United States Supreme Court has made it clear that § 1997e(a)’s “exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” Porter v. Nussle, 534 U.S. 516, 532 (2002). The Court has also concluded “that an inmate must exhaust irrespective of the forms of relief sought and offered through administrative avenues.” Booth v. Churner, 532 U.S. 731, 741 n.6 (2001). See also Medina-Claudio v. Rodriguez-Mateo, 292 F.3d 31, 36 (1st Cir. 2002) (following Booth and observing that there is no “futility exception” to the § 1997e(a) exhaustion requirement).

This unequivocal precedent dictates that Merrill be granted the relief he seeks, and that Libby's complaint against Merrill be dismissed for failure to exhaust. My recommendation is that the remainder of Libby's action against Merrill should be dismissed without prejudice because this § 1997e(a) analysis does not touch upon the merits of the § 1983 claim but rests only on a determination that his action against Merrill is an "action [that cannot] be brought," 42 U.S.C. § 1997e(a), because of a failure to exhaust. However, this 'non-prejudicial' treatment does mean that Libby cannot return to this Court with these claims against Merrill in their unexhausted state and I do recommend that the complaint be dismissed with prejudice as to the question of whether Libby has failed to exhaust his remedies before filing this civil action. See *Lebron-Rios v. U.S. Marshal Service*, 341 F.3d 7, 13-15 (1st Cir. 2003) (addressing this question in the context of dismissal for failure to exhaust prior to bringing a Title VII action). In the present case it appears that Libby is now time barred under the applicable grievance procedure, and therefore he will not be able to exhaust his claims and return to this court.

Porter and Booth also demonstrate the futility of Libby's additional material facts that are the subject of Merrill's motion to strike (Docket No. 23). As Merrill argues, the three additional material facts are not cognizable as material facts in this dispute, but are, rather, regurgitations of Libby's legal argument that his is the type of claim that does not fall under the § 1997e(a) exhaustion requirement. They are not facts, properly supported by citations to the record. Because I have already explained that Libby is utterly misguided on this score, I now **GRANT** the motion to strike, although it is an action of little moment because even if the "facts" were part of the record, they would add nothing.

Conclusion

For the reasons stated above I **GRANT** the motion to strike. I recommend that the Court **DISMISS** the single remaining count against Merrill in his individual capacity because of Libby's admitted failure to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a).

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.

December 31, 2003.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

**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

JEFFREY LIBBY

represented by **ANDREWS B. CAMPBELL**
CAMPBELL LAW OFFICES
45 KALER CORNER
WALDOBORO, ME 04572
207/832-7212
Email: Blackwat@Midcoast.com
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

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
Email: diane.sleek@maine.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED