UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LARRY DEAN ROLLINS,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 03-82-B-W
	)	
MARTIN A. MAGNUSSON,	)	
et al.,	)	
	)	
Defendants	)	

RECOMMENDED DECISION

This matter is before the court on a motion for summary judgment filed by the remaining defendants in the case. (Docket No. 187.) I recommend that the court **GRANT** the motion and direct that judgment enter on behalf of defendants Andrew Beaupre, Dale Emerson, John Doe Engstfeld, Eric Jura, John Doe Nichols, Rogers,[1] Gary Sanderson, and Sam Walton.

Procedural Background

There have been, at one time or another, over twenty-five named defendants in this action. Of those, fifteen have been recommended to receive summary judgment on the entire complaint and seven have been recommended to receive summary judgment except with respect to the plaintiff's "independent conduct" claims. Others have fallen by the wayside for other reasons. The seven defendants against whom "independent

[1] The claim against defendant Rogers, relating to a claim of interference with plaintiff's access to the courts was not a claim that survived my prior recommendation. Defendants previously requested that I clarify whether affirmance of my prior recommendation would result in judgment in favor of Rogers. I granted their request and clarified my prior recommendation. (See Docket No. 196.)

conduct" claims clearly remain, defendants Beaupre, Emerson, Engstfeld, Jura, Nichols, Sanderson, and Walton, have now moved for summary judgment.

In his original complaint, filed on May 9, 2003, Rollins claimed that the seven correctional officer defendants had violated his Eighth Amendment right to receive adequate medical care by overruling medical orders and interfering with prescribed medical treatment. (Compl. Counts 25, 26, 27, & 28.)[2] The timeframe for these events appeared to be between January 12, 2003, and January 28, 2003. Later, in opposing a summary judgment motion filed on behalf of other defendants, Rollins elaborated on these general allegations by specifically alleging that the correctional officer defendants had obstructed his access to his insulin and had locked him trapped between automatic doors until he passed out. (Resp. Mot. Summ. J. at 4.) As I said, in his complaint Rollins alleged that these incidents occurred in 2003, although in his later filing there is some indication that his allegations could extend as far back as late 2002. Because the Prison Health Services defendants did not address these allegations in their motion and because of the serious nature of the allegations, I declined to recommend that the court grant summary judgment to these seven defendants.

Instead, I did allow the seven defendants leave to file their own motion for summary judgment in an attempt to develop a factual record of the who, where, why, and when of these alleged events. These defendants have now filed a motion for summary judgment supported by affidavits. Rollins has again failed to follow District of Maine Local Rule 56, in that he merely denies the defendants' statements of fact and fails to give record citations in explanation of his denial. Rollins then files numerous exhibits, none of which are supported by affidavit or otherwise made properly admissible.

[2] The final count incorporates four defendants.

However, it is fairly easy to piece together the areas where he disputes the defendants' statements of material facts.

Unfortunately, much of the paper in this round of summary judgment pleadings is spent in a squabble over whether or not Rollins exhausted prison grievance procedure.[3] The events to be grieved occurred in January 2003 and Rollins's right to file grievances was temporarily suspended for a ninety-day period on February 21, 2003, by the Commissioner of Corrections because of Rollins's excessive use of the grievance procedure. (Resp. SMF Ex. 15.) The defendants do not make mention of this fact in their initial pleadings. In his letter suspending the ability to file grievances, the Commissioner notes that during the period from January 21 through 23, 2003, Rollins had filed no fewer than eleven grievances. While I am sure that the Commissioner had a valid basis for calling a halt to Rollins's excessive filings (a procedure not unlike the one I was forced to take at Docket No. 143, wherein I barred Rollins from further amendment or supplementation of his pleading in this court), the timing of that order barring further grievances makes it difficult to assess whether Rollins's suit is barred by 42 U.S.C. §1997e(a). That statutory provision simply provides that a lawsuit cannot be brought with respect to prison conditions "until such administrative remedies as are available are exhausted." Id. In their reply memorandum the defendants argue that Rollins's plaints should be treated as unexhausted and this complaint dismissed, even if there were no

[3] The defendants' facts relating to the grievance are as follows. The grievance policy in effect throughout 2002 and until January 13, 2003, was Policy 14.5. (Defs.' SMF ¶ 3.) On January 13, 2003, Policies 29.1 and 29.2 went into effect. (Id. ¶ 4) Policy 14.5 encompassed all grievable issues, while Policies 29.1 and 29.2 separate medical and mental health care issues (covered by Policy 29.2) from other grievable issues (covered by Policy 29.1). (Id. ¶ 5.) Under all three grievance policies, there is a formal grievance process that has three levels of review. (Id. ¶ 6.) The third level of review provided for under all three grievance policies, review by the Commissioner of Corrections, is the final administrative level of review. (Id. ¶ 7.) All three policies provide that a grievance appeal to the third level is to be filed with the grievance review officer for forwarding to the Commissioner. (Id. ¶ 8.) There was no grievance appeal to the third level by the plaintiff in either 2002 or 2003. (Id. ¶ 9.)

grievance procedure available to him, because the suspension of his right to file grievances resulted from his own misconduct. They do not cite any authority for that proposition and I could find none. Without engaging in a "mini-trial" to weigh the precise circumstances of Rollins's various attempts to file grievances and the actual information conveyed to the Commissioner prior to reaching his decision regarding the suspension, I do not think that this case is an appropriate one to dismiss at this juncture (after 204 docket entries) for failure to exhaust a prison grievance process. I therefore turn to the merits of Rollins's attempt to make a claim against these seven correctional officers.

A. The Defendants' Statement of Undisputed Facts

Rollins was a prisoner at the Maine State Prison at the time of filing this lawsuit. (DSMF ¶ 1.) He remains a prisoner there. (Id. ¶ 2.) Defendants Emerson, Engstfeld, Jura, Nichols, Rogers, and Walton never overruled medical orders relating to Rollins. (Id. ¶ 10.) Emerson, Engstfeld, Jura, Nichols, Rogers, and Walton never interfered with medical treatment prescribed for the plaintiff. (Id. ¶ 11.) Emerson, Engstfeld, Jura, Nichols, Rogers, and Walton never obstructed Rollins's access to his insulin. (Id. ¶ 12.) Emerson, Engstfeld, Jura, Nichols, Rogers, and Walton never locked Rollins between automatic doors until he passed-out. (Id. ¶ 13.) Rogers never did anything to impede or obstruct Rollins's lawsuit. (Id. ¶ 14.) Rogers never tried to intimidate or influence Rogers in connection with his lawsuit. (Id. ¶ 15.)

B. Rollins's Attempt to Dispute Certain Facts

I reiterate that Rollins utterly failed to comply with District of Maine Local Rule 56. All of the facts provided by the defendants and recited above are supported by record

citation and therefore deemed admitted. Rather than provide any record citation in opposition, Rollins has filed a series of exhibits that purport to tell his side of the story. The exhibits consist of what are presumed to be copies of grievances he previously attempted to file. The documents, found at Docket No. 204, are not authenticated and there is no explanation given for them, but reviewing them leads to the following potential chronology:

> 1. December 12, 2002: Rollins complained that Jura and Engstfeld refused to open his cell door and thereby deprived him of his medication. They also allegedly used racial slurs in referring to him. (Resp. SMF Ex. 8.)
> 2. January 12, 2003: Beaupre refused to allow Rollins to have his insulin and laughed at him while standing with a group of white inmates. (Id. Ex. 14.)
> 3. January 15, 2003: Beaupre refused to get a medical pass for Rollins. (Id. Ex. 10.)
> 4. January 19, 2003: Beaupre refused to call for medical assistance when requested by Rollins. (Id. Ex. 11.)
> 5. January 21, 2003: Unnamed officers refused to allow Rollins to go to get his insulin. (Id. Ex. 2.)
> 6. January 23, 2003: Walton refused to get Rollins's insulin and used racial slurs in speaking with him. (Id. Ex. 9.)
> 7. January 28, 2003: Nichols refused to allow Rollins to get his insulin and told him diabetes was not a serious condition. (Id. Ex. 7.)
> 8. February 15, 2003: Sanderson refused to allow Rollins to get his insulin. (Id. Ex. 12.)
> 9. October 18, 2003: Officer Cox (not a defendant) and Emerson refused to allow Rollins to get his medication unless he dropped his lawsuit against them.

None of the exhibits tells a tale of being locked between glass doors and held there until forced to pass out, the allegation made in the prior round of summary judgment papers. However, the pattern of grievances filed in January 2003 does support the allegation in the complaint that correctional officers were actively interfering with Rollins's treatment during that time period. None of these purported grievances are filed under oath or in a form that even begins to comply with Local Rule 56. All of the defendants, except for Beaupre and Sanderson, who are no longer employed as correctional officers and were

not located by the assistant attorney general, have filed affidavits under oath denying these allegations.

Discussion

I discussed in my prior recommended decision the Eighth Amendment principles applicable to Rollins's case and I will not repeat them here. Suffice it to say that I did conclude that Rollins's diabetes is a serious medical condition and he has a constitutional right to receive medical treatment for that condition, including medications such as insulin. If correctional officers were actively interfering with Rollins's receipt of his medications and other health care treatment while berating him with racial slurs, a factfinder could well conclude that those correctional officers were subjectively "deliberately indifferent" to Rollins's serious medical needs.

The problem with Rollins's case stems not from the allegations he makes, but from the proof he offers in support of those allegations. In general, Local Rule 56 contemplates the Court will discount any statement of material fact or a response containing irrelevant argument or factual assertions unsupported by appropriate record citation. See Dist. Me. Loc. R. 56(e); Toomey v. UNUM Life Ins. Co. of Am., 324 F.Supp.2d 220, 222 (D. Me 2004). "[E]vidence illustrating the factual controversy cannot be conjectural or problematic," see Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 181 (1st Cir.1989); accord Cadle Co. v. Hayes, 116 F.3d 957, 960 (1st Cir. 1997), and "effusive rhetoric and optimistic surmise" is not enough to establish a genuine issue of material fact, see Cadle Co., 166 F.3d at 960. In accordance with these principles, I am constrained to disregard unsupported or argumentative portions of Rollins's Statement of Fact with Attachments. Once those portions are excised from the statement,

there is nothing left but Rollins's admissions to the first eight paragraphs of defendants' statement of undisputed facts.

The fact that Rollins is a pro se plaintiff does not free him from the pleading burden set forth in Rule 56. See Parkinson v. Goord, 116 F.Supp.2d 390, 393 (W.D.N.Y.2000) ("[P]roceeding pro se does not otherwise relieve a litigant of the usual requirements of summary judgment, and a pro se party's bald assertions, unsupported by evidence, are insufficient to overcome a motion for summary judgment."); see also Sirois v. Prison Health Servs., 233 F.Supp.2d 52, 53-55 (D. Me. 2002). "[W]e should seek to interpret the rules neither liberally nor stingily, but only, as best we can, according to their apparent intent." Smith v. Barry, 502 U.S. 244, 250 (1992)(Scalia, J., concurring in judgment, quoting Torres v. Oakland Scavenger Co., 487 U.S. 312, 319 (1988) (Scalia, J., concurring in judgment)). While Rollins's complaint may be held to a less stringent pleading standard under Haines v. Kerner, 404 U.S. 519, 520 (1972) his pro se status does not shield him from Rule 56's operative provision under subsection(e) requiring the pleader to "set forth such facts as would be admissible in evidence."

Rollins knows what an affidavit based on personal knowledge is because he has filed many in this case. For whatever reason, his response to this motion for summary judgment does not contain any admissible evidence. The summary judgment stage of the proceedings is the time wherein the nonmovant is called upon to present his evidence of the claim. Rollins has failed to come forward.

Conclusion

Based upon the foregoing I recommend that the court **GRANT** defendants' motion and that judgment be entered for the seven correctional officer defendants named

herein on all counts of the complaint. I also recommend that judgment be entered for defendant Anne Marie Halco who has never been served in this case and who has never appeared. (See Docket No. 99.) Rollins has been unable to locate Halco or provide the court with an address for service.

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.

Dated: December 28, 2004

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

ROLLINS v. MAGNUSSON et al
Assigned to: JUDGE JOHN A. WOODCOCK, JR
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 05/09/2003
Jury Demand: Both
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

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