

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

KEITH AYOTTE,)	
)	
<i>Plaintiff</i>)	
)	
v.)	No. 1:11-cv-331-JHR
)	
DAVID CUTLER, et al.,)	
)	
<i>Defendants</i>)	

ORDER ON PENDING MOTIONS¹

Pending before me are three motions *in limine*, filed one each by the three remaining parties in this case, as well as a motion by defendant Curtiss Doyle and nonparties Maine Department of Corrections and Joseph Fagone to quash a subpoena *duces tecum* served on Fagone by the plaintiff Keith Ayotte, and a motion by Ayotte for the issuance of writs of habeas corpus *ad testificandum* for two Maine State Prison witnesses. See Plaintiff’s Motion in Limine (“Ayotte Motion”) (ECF No. 104); Motion in Limine of Defendant Curtiss Doyle (“Doyle Motion”) (ECF No. 105); Defendant David Cutler’s Motion in Limine (“Cutler Motion”); Motion To Quash (ECF No. 123); Motion for Writs of Habeas Corpus Ad Testificandum for Witnesses from Maine State Prison (“Motion for Writs”) (ECF No. 125). I rule as follows:

1. **Ayotte Motion.** Ayotte seeks to preclude the admission at trial of evidence of his criminal history and to introduce evidence of defendant David Cutler’s asserted similar mistreatment of another inmate, which led to the termination of Cutler’s employment at Maine

¹ Pursuant to 28 U.S.C. § 636(c), the parties have consented to have me conduct all proceedings in this case, including trial, and to order the entry of judgment.

State Prison (the “Other Inmate Incident”). *See* Ayotte Motion at 2-7. The defendants oppose precluding the plaintiff’s criminal history, contending that it is admissible impeachment evidence under Federal Rule of Evidence 609. Cutler opposes the introduction of evidence of the Other Inmate Incident, arguing that it is inadmissible pursuant to Federal Rule of Evidence 404(b). *See* Opposition to Plaintiff’s Motion in Limine (“Doyle Opposition”) (ECF No. 107) at 1-2; Defendant David Cutler’s Objection to Plaintiff’s Motion in Limine (“Cutler Opposition”) (ECF No. 110) at 1-4; *see also* Cutler Motion.

To the extent that Ayotte seeks to preclude the admission of evidence of his criminal history, the motion is **DENIED** without prejudice to its renewal at trial. The defendants seek to introduce evidence of Ayotte’s conviction of two crimes, aggravated assault and criminal threatening with a dangerous weapon, for the purpose of impeaching his credibility. *See* Doyle Opposition at 2; Cutler Opposition at 1. Both crimes are punishable by a term of imprisonment of more than one year, *see* 17-A M.R.S.A. §§ 208, 209, 1252(2)(B)-(C) & (4), and the defendants represent that both occurred within 10 years of Ayotte’s release from prison, *see* Doyle Opposition at 2; Cutler Opposition at 1. Accordingly, pursuant to Rule 609, the evidence is admissible for the purpose of impeachment unless the court determines that its probative value is substantially outweighed by, *inter alia*, a danger of unfair prejudice. *See* Fed. R. Evid. 403, 609(a)(1)(A) & (b). It would be premature to rule on that question outside of the trial context.

To the extent that Ayotte seeks to introduce evidence of the Other Inmate Incident, the motion is **DENIED**. “Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” Fed. R. Evid. 404(b)(1). However, such evidence “may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity,

absence of mistake, or lack of accident.” *Id.* 404(b)(2). The First Circuit employs a two-part test in assessing the admissibility of evidence pursuant to Rule 404(b)(2): whether the evidence is “specially probative of an issue in the case – such as intent or knowledge – without including bad character or propensity as a necessary link in the inferential chain[,]” and whether “the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, potential confusion of the issues, or the possibility that the jury would be misled.” *United States v. Rodríguez*, 215 F.3d 110, 118 (1st Cir. 2000) (citations and internal quotation marks omitted). *See also Huddleston v. United States*, 485 U.S. 681, 686 (1988) (“The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character.”).

Ayotte fails to show that evidence bearing on the Other Inmate Incident is specially probative of an issue in his case. Ayotte’s sole remaining claim for trial is that Cutler and Doyle harassed and threatened him in violation of his First Amendment rights. *See* Report of Final Pretrial Conference and Order (“FPTC Report”) (ECF No. 89) at 1-2. He alleges that, on or about March 15, 2011, in retaliation for his complaints to prison officials about his treatment at the Maine State Prison, Cutler, Doyle, and a third corrections officer, Nova Hirsch, appeared at his cell, threw him against the wall, handcuffed him, and brought him to a unit manager’s office, where they forced him to strip off all of his clothes and made him sit in the middle of the room while they threatened him that he needed to keep his mouth shut about things that were going on or they would bury him. Complaint & Demand for Jury Trial (“Complaint”) (ECF No. 1) ¶¶ 23-24; *see also* Recommended Decision (ECF No. 67) at 8-9, 18-20; Order Affirming the Recommended Decision of the Magistrate Judge (ECF No. 79). He seeks to introduce evidence at trial regarding an incident that Cutler says happened almost two years later, in which Cutler allegedly brought

another Maine State Prison inmate to an office, ordered him to sit, and pulled his legs out from under him when he refused to do so, causing him to fall on his back. *See* Ayotte Motion at 6-7; Cutler Opposition at 1.

Ayotte argues that the Other Inmate Incident is probative of Cutler's intent to use threatening, intimidating, and even assaultive behavior to strike fear in the minds of inmates to attempt to control their behavior and to act maliciously to cause harm to an inmate. *See* Ayotte Motion at 6. He cites *O'Neill v. Krzeminski*, 839 F.2d 9, 11 (2d Cir. 1988), and *Eng v. Scully*, 146 F.R.D. 74 (S.D.N.Y. 1993), for the proposition that a civil rights plaintiff is entitled to prove by extrinsic evidence other instances in which a defendant officer acted maliciously and sadistically for the very purpose of causing harm. *See id.* at 5-6. However, in both *Krzeminski* and *Scully*, evidence of prior excessive force incidents was admitted to show that the defendant officer had the intent to use excessive force when he struck the plaintiff. *See Krzeminski*, 839 F.2d at 10-11; *Eng*, 146 F.R.D. at 80. In this case, a different question of intent is presented: whether Cutler harbored an intent to retaliate against Ayotte for his exercise of his First Amendment rights. *See Hannon v. Beard*, 645 F.3d 45, 48 (1st Cir. 2011) (“[T]o survive summary judgment on a retaliation claim, a prisoner must make out a prima facie case by adducing facts sufficient to show that he engaged in a protected activity, that the state took an adverse action against him, and that there is a causal link between the former and the latter.”).

Furthermore, the Other Inmate Incident took place almost two years *after* the one involving Ayotte. While the mere fact that it was a subsequent incident does not make it inadmissible under Rule 404(b), *see, e.g., United States v. Bergrin*, 682 F.3d 261, 281 n.25 (3d Cir. 2012), the two-year gap is another factor weighing against a finding of its relevance.

Under the circumstances, the Other Inmate Incident cannot fairly be described as specially probative of Cutler's intent to retaliate against Ayotte two years earlier for exercising his First Amendment rights. It bears generally on Cutler's animus against, and propensity to harm, inmates. As a result, drawing an inference from that incident as to Cutler's intent to retaliate against Ayotte for the exercise of his free speech rights requires "including bad character or propensity as a necessary link in the inferential chain." *Rodríguez*, 215 F.3d at 118 (citation and internal quotation marks omitted). As noted above, this renders the evidence inadmissible.²

2. **Doyle Motion.** Doyle seeks to exclude any claim for, or evidence of, compensatory damages for mental and emotional distress allegedly sustained by Ayotte on the ground that the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(e), precludes such a damages award in the absence of evidence that Ayotte sustained a physical injury. *See* Doyle Motion at 1. Ayotte opposes the motion, arguing that the court should deny this request as it did on summary judgment and that section 1997e(e) does not require a showing of physical injury in order to recover compensatory damages for violation of a prisoner's constitutional rights. *See* Plaintiff's Reply to Defendant Doyle's Motion in Limine ("Ayotte Opposition/Doyle") (ECF No. 109) at 1-2.³

The motion is **GRANTED**. Section 1997e(e) 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 or the

² I need not reach the question of whether, pursuant to Rule 403, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, potential confusion of the issues, or the possibility that the jury would be misled. However, I note that, on that prong, as well, I would reach the same result, given the marginal relevance of the Other Inmate Incident to Ayotte's claim and the strong negative reaction against Cutler that the incident likely would elicit in jurors.

³ Doyle also takes the position that punitive damages are precluded by the PLRA but notes that the court indicated in its pretrial order that it would address this issue if necessary in a post-verdict motion. *See* Doyle Motion at 2 n.2; FPTC Report at 2.

commission of a sexual act (as defined in section 2246 of Title 18).” 42 U.S.C. § 1997e(e).⁴ While it is true, as Ayotte notes, *see* Ayotte Opposition/Doyle at 1, that this court denied the defendants’ request for summary judgment on that issue, it did so because it did not need to decide the issue at the summary judgment stage of the litigation, *see* Recommended Decision at 17-18. However, trial is imminent, and the issue is ripe for decision.

As both sides acknowledge, *see* Doyle Motion at 2; Ayotte Opposition/Doyle at 3, the circuit courts of appeals are split on the question of whether section 1997e(e) bars compensatory damages in the absence of physical injury when an inmate raises a constitutional claim, *see, e.g., Cryer v. Spencer*, 934 F. Supp.2d 323, 336-38 (D. Mass. 2013). The First Circuit has yet to decide the point. The issue has been presented in two cases pending on appeal, *Ford v. Bender*, No. 12-1622 (1st Cir. 2012), and *Ford v. St. Amand*, No. 12-2142 (1st Cir. 2012). *See id.* at 338. However, as of this writing, no decision has issued. In the absence of First Circuit authority, I hew to the position that this court has previously taken, which is in line with that of the majority of circuit courts of appeals deciding the issue, that section 1997e(e) bars the recovery of compensatory damages for emotional injury even with respect to a First Amendment claim. *See Libby v. Merrill*, No. Civ. 03-35-B-S, 2003 WL 21756830, at *3-*4 (D. Me. July 29, 2003) (rec. dec., *aff’d* Nov. 7, 2003); *see also Cryer*, 934 F. Supp.2d at 336-38.

3. **Cutler Motion.** Cutler seeks to bar Ayotte from (i) introducing, at trial, evidence regarding the Other Inmate Incident, including his employment termination from the Maine State Prison and the pendency of an assault charge against him on which he is awaiting trial, and (ii) recovering compensatory damages for mental and emotional injuries associated with the March

⁴ Doyle points out that section 1997e(e) was amended on March 7, 2013, to include the commission of a sexual act in addition to physical injury. *See* Doyle Motion at 2 n.1. He asserts, and Ayotte does not dispute, that the amendment is neither applicable nor relevant to Ayotte’s claim in this case. *See id;* *see generally* Ayotte Opposition/Doyle.

2011 incident. *See* Cutler Motion at 2-3. Ayotte opposes the motion for the reasons set forth in his own motion *in limine*. *See* Plaintiff's Reply to Defendant Cutler's Motion in Limine (ECF No. 108). The motion is **GRANTED** for the reasons discussed above in the context of the Ayotte and Doyle motions.

4. **Motion To Quash.** Doyle, Fagone, and the Maine Department of Corrections move to quash a subpoena *duces tecum* served on Fagone on April 1, 2014, seeking documents related to Fagone's investigation into the Other Inmate Incident. *See* Motion To Quash at 1. They argue, *inter alia*, that the information sought is irrelevant and unfairly prejudicial and inadmissible on those bases. Ayotte opposes the motion for the reasons set forth in his motion *in limine*. *See* Plaintiff's Response to Defendant's Motion To Quash Subpoena (ECF No. 124) at 2. For the reasons discussed above in the context of that motion, I agree with the movants that the information sought is inadmissible. The Motion, accordingly, is **GRANTED**.

5. **Motion for Writs.** Ayotte seeks the issuance of writs of habeas corpus *ad testificandum* to secure the testimony of two Maine State Prison inmates at trial regarding the availability of its grievance procedure to inmates. *See* Motion for Writs. The defendants oppose the grant of the motion on the bases that the testimony (i) is irrelevant, (ii) if relevant, is outweighed by the propensity for unfair prejudice and waste of time, (iii) is cumulative, and (iv) is insufficient to establish "routine practice" pursuant to Federal Rule of Evidence 406. *See* Opposition of Defendant Curtiss Doyle to Motion for Issuance of Writs (ECF No. 129) at 1; Opposition of Defendant David Cutler to Motion for Issuance of Writs (ECF No. 130).

The plaintiff intends to offer this testimony to bolster his own testimony that any filing of a grievance about the subject matter of this case would have been an empty exercise because the prison grievance system was effectively unavailable to him, making it unnecessary for him to

exhaust administrative remedies before bringing this action. As Judge Gleeson of the Eastern District of New York noted in 2010, the Fifth, Seventh and Eight Circuits have deemed administrative remedies to be exhausted when prison officials fail to respond to inmate grievances. *Awan v. Lapin*, No. 09-CV-126 (JG), 2010 WL 963916, at *8 n.9 (E.D.N.Y. Mar. 17, 2010). However, when the allegation is that a past practice of failing to respond to grievances caused administrative remedies to be practically unavailable for future grievances, the plaintiff inmate must at least allege that he was somehow prevented from filing an initial grievance in the matter at issue. *Id.* Here, the plaintiff has made no such showing.

In addition, presentation of testimony from only two other inmates would not suffice to establish a routine practice under Fed. R. Evid. 406:

[T]he conduct to be characterized as “routine practice” must be such that it is fairly easy to prove. This means the number of instances of such behavior must be large enough that doubt about a single instance does not destroy the inference that the practice existed. If there are only a handful of instances, the opponent may enter into a dispute about the existence of each so that the trial becomes an inquiry into a host of collateral incidents[.]

23 C. Wright & K. Graham, *Federal Practice and Procedure* § 5274 (1980) (citations omitted).

A trial on this issue within the trial of the case is not appropriate on the showing made.

The Motion, accordingly, is **DENIED**.

SO ORDERED.

Dated this 25th day of April, 2014.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

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