

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

ROY IRWIN ABBOTT, )  
 )  
 Plaintiff )  
 )  
 v. ) Civil No. 03-07-B-S  
 )  
 CELIA ENGLANDER, et al )  
 )  
 Defendants )

**RECOMMENDED DECISION ON MOTION FOR SUMMARY JUDGMENT**

This action was filed by Roy Abbott complaining that he had been denied adequate medical treatment, medication, and clothing at the Maine State Prison. (Docket Nos. 2, 10 & 12.) Jeffery Merrill has filed a motion for summary judgment. (Docket No. 18.)<sup>1</sup> He argues that Abbott did not fully pursue his administrative remedies prior to filing this complaint and, therefore, cannot bring this 42 U.S.C. § 1983 action because of noncompliance with the 42 U.S.C. § 1997e(a) exhaustion requirement. Abbott has not responded to this motion. Because the undisputed material facts establish that Abbott did not complete the administrative exhaustion process at the prison, I recommend that the Court **GRANT** Merrill’s motion for summary judgment and **DISMISS** the complaint against Merrill for failure to exhaust.

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<sup>1</sup> In his first amended complaint (Docket No. 5), filed after the initial complaint, Abbott named as a defendant only Celia Englander, the doctor who treated Abbott at the prison. Subsequently, Abbott filed another amended complaint naming Merrill, and alleging that Merrill, as warden, condoned Englander’s inadequate treatment of Abbott. Englander has not answered or otherwise formally responded to Abbott’s complaint. Because the 42 U.S.C. 1997e(a) exhaustion requirement is waiveable, Wright v. Hollingsworth, 260 F.3d 357, 358 n.2 (5th Cir. 2001) (“The 42 U.S.C. § 1997e exhaustion requirement is not jurisdictional and may be subject to certain defenses such as waiver, estoppel or equitable tolling.”), and Englander has been mute, I do not address the complaint as it pertains to her.

### *Complaint Allegations*

In his complaint Abbott alleges several separate incidents involving responses of Celia Englander, a doctor at the prison, to his health and hygiene concerns, and claims that Merrill, as warden, condoned Englander's Eighth Amendment violative conduct. First Abbott complains that after he saw an arthritis specialist in May of 2001, Englander would not do any of the things that the specialist asked. Also, in August of 2001 Englander took away medication that Abbott needed, including acid reflux and memory loss medication, and she prescribed Zantac knowing that it made Abbott sick. In November 2002, after Abbott was not able to see well for twenty-two months, Abbott was taken to an eye specialist who indicated Abbott needed new glasses and eye drops. As of April 26, 2003, Abbott had not received either, and, as a consequence, Abbott continues to suffer from bad headaches and blurred vision. Abbott also has a bladder problem and is not provided with sufficient clothing. Consequently he must wear urine stained and smelly clothing. Furthermore, (due to poor circulation) he is cold twenty-four/seven and he has trouble hearing. He alleges that he has great pain and bone damage because of improper medical treatment. Abbott complains that Englander "is not qualified to treat people with so called old people's problems."

By way of relief Abbott wants not to be called a liar by Englander and her staff just because they are ignorant of his medical needs. He wants to be treated by doctors at the prison who appreciate the implications of arthritis and poor circulation. He wants to get the treatment recommended by specialists. He asks for reinstatement of his memory medications and the provision of sufficient clothing. He also wants "to be put on self place placement" because of his knees and back. Finally, he would

like some compensation for the needless pain, suffering, and embarrassment deliberately inflicted upon him.

### *Legal Standard*

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 Abbott, the (silent) 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). However, the fact that Abbott has failed to place Merrill’s facts in dispute means that I deem the properly supported facts as admitted, see Faas v. Washington County, 260 F. Supp. 2d 198, 201 (D. Me. 2003).<sup>2</sup>

Merrill moves for summary judgment solely on the ground that Abbott has not sufficiently exhausted his § 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).

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<sup>2</sup> Abbott’s pro se status does not relieve him of his duty to respond, 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”), nor does it mitigate this Court’s obligation to fairly apply the rules governing summary judgment proceedings, see Fed. R. Civ. P. 56; Dist. Me. Loc. R. Civ. P. 56.

### ***Facts Material to Exhaustion Inquiry***

Prisoners in the custody of the Maine Department of Corrections may file grievances on essentially any matter, including issues pertaining to their medical needs. (SMF ¶ 16, Docket No. 19.) The Grievance Policy requires a prisoner to first attempt to informally resolve his complaint. (Id. ¶ 19.) If the matter is not resolved informally the prisoner is entitled to file a formal written grievance on the form provided by the Department of Corrections. (Id. ¶ 20.) There are three levels of review in the formal grievance process (Id. ¶ 21.) At the first level the grievance is reviewed and responded to by the Grievance Review Officer. (Id. ¶ 22.) If the prisoner is unsatisfied with that officer's response the prisoner may appeal the response to the Chief Administrative Officer or a designee by indicating on the form his reason for dissatisfaction with the first-level review. (Id. ¶ 23.) The prisoner returns the form to the Grievance Review Officer who then forwards the grievance to the Chief Administrative Officer or a designee for the second level of review. (Id. ¶¶ 23-24.) If the prisoner is unsatisfied with the written response of the Chief Administrative Officer or designee the prisoner is entitled to a third and final level of review by the Commissioner of Corrections. (Id. ¶ 25.) To initiate this final stage of review the prisoner returns the grievance form to the Grievance Review Officer within three days and this officer forwards the grievance to the commissioner. (Id.)

Between January 1, 2001, and June of 2003, Abbott filed three grievances with the prison's Grievance Review Officer on issues pertaining to his health, medical needs, or treatment. (Id. ¶ 17.) Abbott never appealed any of these grievances beyond the first level of review. (Id. ¶ 26.) Not one of the grievances mentioned Englander's prescription of Zantac, the denial of eye glasses and eye drops, the occurrence of pain and bone damage attributable to improper treatment, or his discontent with his

stained and smelly clothes stemming from his bladder problems. (Id. ¶¶ 27-30.)<sup>3</sup> The deadlines under the Grievance Policy for appealing these grievances have passed. (Id. ¶ 31.)

### *Discussion*

I agree with Merrill that the undisputed facts material to the 42 U.S.C. § 1997e(a) exhaustion inquiry demonstrate that Abbott failed to adequately exhaust the administrative remedies available to him before bringing these claims in this 42 U.S.C. § 1983 action. 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).

Merrill has demonstrated that there were administrative remedies available to Abbott. And, the record before me shows that Abbott did not even invoke the review process as to some of his § 1983 claims, see Lyon v. Vande Krol, 305 F.3d 806, 809 (8th Cir. 2002), and initiated but did not pursue the three-step process as to others, see Jernigan v. Stuchell, 304 F.3d 1030, 1032 (10th Cir. 2002) ("An inmate who begins the grievance process but does not complete it is barred from pursuing a § 1983 claim ... for failure to exhaust his administrative remedies," citing Wright v. Hollingsworth, 260 F.3d 357, 358 (5th Cir. 2001).); Wright v. Hollingsworth, 260 F.3d 357, 358 (5th Cir. 2001)

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<sup>3</sup> Based on my conclusion below it is unnecessary to delve into the question of whether the text of these three grievances could be construed as raising the claims Merrill argues were entirely not grieved.

(rejecting argument that plaintiff had substantially complied with § 1997e(a) by taking the first step in the grievance process, noting that it was not for judges, “by creative interpretation of the exhaustion doctrine, to prescribe or oversee prison grievance systems,” and concluding that the plaintiff subject to § 1997e(a) had to “exhaust ‘available’ ‘remedies’, whatever they may be”). Although other § 1997e(a) disputes raise thornier issues, this is not a difficult call; drawing all reasonable inferences in Abbott’s favor, this record only supports the conclusion that these claims do not pass the § 1997e(a) exhaustion litmus test for pursuing § 1983 actions.

One concern lingers. Citing Jernigan, Merrill argues that because Abbott can no longer file a timely administrative grievance or pursue further review of his step-one grievance denials, the complaint should be dismissed with prejudice. However, in Jernigan it was the plaintiff who unsuccessfully argued that his claims were “exhausted by default” because he was time barred under the prison’s grievance procedure. 304 F.3d at 1033. The plaintiff was denied the right to proceed with the complaint with a § 1997e(a) infirmity on his default argument. This disposition certainly is not precedent for dismissing a complaint with prejudice because of this Court’s perception that the prison authorities would not consider the defaulted claims. Indeed, in Jernigan the Tenth Circuit affirmed the District Court’s dismissal without prejudice, even though the Court was faced with a record revealing that exhaustion of the administrative remedies was facially out-of-reach due to timeliness concerns. See id. at 1031, 1033. My recommendation is that Abbott’s action against Merrill should be dismissed without prejudice because this § 1997e(a) analysis in no way reaches the merits of Abbott’s § 1983 claims 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. Such a ‘non-prejudicial’ treatment vis-à-vis the

complaint provides little benefit to Abbott as he cannot return to this Court with these claims against Merrill in their unexhausted state; that is, I do recommend that the complaint be dismissed with prejudice as to the question of whether Abbot has failed to exhaust his remedies before filing this civil action. See Lebron-Rios v. U.S. Marshal Service, \_\_\_ F.3d \_\_\_, 2003 WL 21960407, \*4 (1st Cir. Aug. 14, 2003) (addressing this question in the context of dismissal for failure to exhaust prior to bringing a Title VII action).

### *Conclusion*

For the reasons stated above I recommend that the Court **GRANT** the motion for summary judgment and **DISMISS** the complaint as to Merrill without prejudice.

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.

August 20, 2003.

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Margaret J. Kravchuk

**PRISONER CIVIL RIGHTS**

U.S. Magistrate Judge

**U.S. District Court  
District of Maine (Bangor)  
CIVIL DOCKET FOR CASE #: 1:03-cv-00007-JAW  
Internal Use Only**

ABBOTT v. ENGLANDER, et al

Assigned to: JUDGE JOHN A. WOODCOCK JR

Referred to: MAG. JUDGE MARGARET J. KRAVCHUK      Date Filed: 01/07/03

Demand: \$0

Jury Demand: None

Lead Docket: None

Nature of Suit: 550 Prisoner: Civil Rights

Related Cases: None

Jurisdiction: Federal Question

Case in other court: None

Cause: 42:1983 Prisoner Civil Rights

**Plaintiff**  
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*TERMINATED: 03/14/2003*

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