

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KENNETH FORTUNE,
Plaintiff,

vs.

R. MARSHALL, et al.,
Defendants.

CIVIL ACTION NO. 3:99cv831

(JUDGE CONABOY)

(Magistrate Judge Durkin)

FILED

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MEMORANDUM AND ORDER

OR
DEPUTY CLERK

Presently before the Court is Magistrate Judge Raymond J. Durkin's Report and Recommendation (Doc. 26) regarding Plaintiff's above captioned civil rights complaint filed pursuant to 42 U.S.C. § 1983. Plaintiff filed the instant complaint on May 21, 1999. (Doc. 1). Named as Defendants are R. Marshall; R. Norris; W. Couch; and Frederick K. Frank. Id. On April 4, 2000, the Defendants filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). On August 28, 2000, Magistrate Judge Durkin issued a report and recommendation recommending that the Defendants' motion to dismiss (Doc. 14) the Plaintiff's complaint be granted. (Doc. 26). As the Plaintiff has filed objections to the Magistrate Judge's recommended disposition (Doc. 27) we shall review the matter *de novo*. See Cipollone v. Liggett Group, Inc., 822 F.2d 335, 340 (3d Cir. 1987), cert. denied, 484 U.S. 976 (1987).

In his objections Plaintiff claims that he was unable to demonstrate exhaustion because the Defendants allegedly destroyed

his legal materials. (Doc. 28). He further argues in a conclusory manner that the Magistrate Judge erred when he failed to allow the Plaintiff to amend his complaint.

After a thorough reexamination of the record and carefully reviewing the matter *de novo*, we shall adopt the disposition set forth in the Report and Recommendation.

BACKGROUND

Plaintiff is currently incarcerated at SCI-Huntingdon, Huntingdon, Pennsylvania. Plaintiff alleges on April 27, 1999 he was issued a misconduct (#A184911) by Defendant Marshall for yelling. Plaintiff further alleges that the misconduct was issued in retaliation for giving legal advice to another inmate. (Doc. 1, ¶ 5-8). Plaintiff claims he was then given a misconduct hearing on April 29, 1999, which was conducted by Defendant Norris. He claims that he was denied his constitutional rights because he is black. Plaintiff also claims that the punishment was carried out because Defendant Norris is part of "the retaliation initiated by Defendant Marshall". (Doc. 1, ¶ 9-10).

Plaintiff alleges that the conspiracy by members of staff to racially discriminate against him emanates somehow from his incarceration at SCI-Huntingdon in 1989 and 1990. Plaintiff claims some scheme was initiated by his attorney and followed by officers at SCI-Huntingdon. Specifically, Plaintiff claims that officers at the prison told him "he could not be released until [he] picked out and married one of the female staff members." (Doc. 1, ¶ 12-13). He further avers that his refusal resulted in staff labeling him as

mentally ill. Plaintiff also sets forth general allegations concerning other unrelated incidents involving other cases, which he attempts to relate to the alleged interference by staff with his constitutional rights. (Doc. 1, ¶ 14-16). Specifically, Plaintiff claims that "another source" initiated a conspiracy to interfere with Plaintiff's right to direct review from his criminal conviction. Id.

In furtherance of the alleged conspiracy, Plaintiff contends that the following took place: (1) he was placed in a Restricted Housing Unit on March 6, 1998 and then given all of his legal materials on March 16, 1998; (2) after filing a separate civil action¹ Defendant Couch ordered Plaintiff to place his legal materials in storage with limited access²; (3) on two occasions when Plaintiff sought materials which related to two other legal actions, he discovered they were confiscated. (Doc. 1, ¶ 17-19). Plaintiff generally claims that the conspiracy is also evidenced by the alleged confiscation of his legal materials by the defendants on February 10, 1999.

Plaintiff sets forth a general claim against Defendant Frank which involves the alleged "racially motivated conspiracy" to discriminate against Plaintiff. He also claims that "the

¹ Plaintiff refers to another case he had pending before this Court, Fortune v. Horn, No. 98cv1724 (M.D.Pa. October 25, 2000) (Conaboy, J.).

² Plaintiff maintains that he may only access his legal materials by order from the Court and that he must provide the description of the item prior to being given access to his property.

punishment imposed³. . . was done to surpress [sic] Plaintiff in the freedom of speech." (Doc. 1, ¶ 23-24).

On June 18, 1999, Magistrate Judge Durkin issued a report and recommendation, recommending that the complaint be dismissed for failure to exhaust. (Doc. 7). This Court subsequently issued an order on December 6, 1999, giving Plaintiff twenty (20) days to demonstrate that he had in fact exhausted his administrative remedies. (Doc. 9). On December 15, 1999, Plaintiff submitted a Declaration in which he stated that his inability to prove exhaustion was due to the alleged confiscation of his property by Restricted Housing Unit Officers. (Doc. 10). Therefore, this Court declined to adopt the Magistrate Judge's recommendation and the matter was remanded to the Magistrate Judge. (Doc. 11).⁴

On April 4, 2000, Defendants filed a motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6). (Doc. 14). Plaintiff then filed a motion for leave to file an amended complaint on April 10, 2000.⁵ Plaintiff's motion was filed approximately eleven (11) months after the filing of his complaint.

³ Plaintiff appears to be referring to the alleged exclusion of his written version of facts at his disciplinary proceeding. (Doc. 1, ¶ 23-24).

⁴ In our order dated January 27, 2000, we indicated "this Court remands this case with severe trepidation... [and that] it is the hope of this Court that the Defendants may supply the missing information relating to Plaintiff's allegations that he has exhausted his administrative remedies pursuant to 42 U.S.C. § 1997(e)." (Doc. 11).

⁵ The Magistrate Judge construed the motion as a motion to file a supplemental complaint which he then denied. (Docs. 15, 16, 20).

DISCUSSION

A court considering a motion to dismiss under Federal Rule of Civil Procedure 12 (b) (6) must accept the veracity of a plaintiff's allegations. White v. Napoleon, 897 F.2d 103, 106 (3d Cir. 1990). Dismissal under the Rule is appropriate only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

A. Misconduct Exhaustion

In support of their motion to dismiss, Defendants argue that Fortune has failed to exhaust his administrative remedies regarding his misconduct claim. Specifically, Defendants point to Plaintiff's complaint in which he states that while there is a grievance procedure in place at the prison, he has not pursued any remedy through that system. Thus, Plaintiff's admitted failure to comply with 42 U.S.C. § 1997e(a), as amended, warrants the dismissal of his complaint.

Plaintiff argues in filings subsequent to May 21, 1999, the filing date of the instant complaint, that he cannot provide the dates of his alleged appeal of the misconduct because his legal materials were confiscated on May 22, 1999.⁶ However, Plaintiff also claims that his legal materials were confiscated on December

⁶ Plaintiff claims he discovered the legal materials were confiscated and destroyed via the filing of another grievance No. 0169-99. (Doc. 10). Plaintiff fails to submit any evidence of grievance No. 0169-99, however, he has managed to submit documentary evidence of grievances No. 0021-00 and No. 0277-99.

3, 1999. He alleges that many of the items confiscated were legal materials and some related to another case, Fortune v. Horn, et al., No. 98cv1724 (M.D.Pa. October 25, 2000) (Conaboy, J.).⁷ (Docs. 10, 24).

With regard to the exhaustion of administrative remedies, Section 1997(e) (a) as amended by the Prison Litigation Reform Act of 1996 ("PLRA"), states in relevant part:

"[n]o 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).

"This provision makes no distinction between an action for damages, injunctive relief, or both. Thus, prisoners are required to exhaust available administrative remedies prior to initiating a prison conditions case brought pursuant to 42 U.S.C. § 1983 or any other federal law." Fortes v. Harding, 19 F.Supp.2d 323, 325 (M.D.Pa. 1998); See Nyhuis v. Reno, 204 F.3d 65, 67 (3d Cir. 2000) (the PLRA "amended § 1997e(a) in such a way as to make exhaustion of all administrative remedies mandatory - whether or not they provide the inmate-plaintiff with the relief he says he

⁷ It should be noted that Plaintiff's case Fortune v. Horn, et al., was resolved by a jury trial before this Court on October 25, 2000. The sole issue at trial was whether the officers at SCI-Huntingdon used excessive force when they extracted Plaintiff from his cell. After several days of trial, the jury returned a verdict in favor of the Defendants and against the Plaintiff. Therefore, any claim regarding the interference with Plaintiff's action Fortune v. Horn, is wholly without merit. Specifically, Plaintiff was able to successfully produce documents and sufficient legal arguments to sustain his claim until the subsequent resolution of his case at trial.

desires in his federal action."); Freeman v. Francis, 196 F.3d 641, 643 (6th Cir. 1999) (same).

With respect to prison misconducts the Pennsylvania Department of Corrections has a review process set forth in DC-ADM 801. (Doc. 18, Exhibit - J) (Inmate Disciplinary and Restricted Housing Procedures - effective September 20, 1994). Section VI.I. ("Appeals") of DC-ADM 801 provides that after an inmate has been found guilty of a misconduct charge(s), he may appeal to the Program Review Committee (PRC) within fifteen (15) days of the hearing; an appeal from the PRC may be made to the Superintendent within five (5) days of the PRC decision; and a final appeal from the Superintendent may be made to the Chief Hearing Examiner (as of November 1, 1997, pursuant to DC-ADM 801-4, the appeal process was modified so that final appeals of misconducts were reviewed by the Chief Hearing Examiner).⁸

Here, on April 29, 1999, Plaintiff was found guilty of refusing to obey an order. (Doc. 18 - Exhibit H).⁹ The PRC then upheld the hearing examiner's decision (Doc. 18 - Exhibit C) regarding misconduct No. A184911. On May 19, 1999, the Defendant Superintendent Frank upheld the examiner's decision regarding misconduct No. A184911. (Doc. 18 - Exhibit A).¹⁰ However, it is

⁸ It should be noted that this amendment was in place when Plaintiff filed his complaint on May 21, 1999.

⁹ Contrary to Plaintiff's allegation in his complaint, it is DC-ADM 801 that pertains to the appeal of misconduct charges. (Doc. 18 - Exhibit J).

¹⁰ It is apparent to the Court that Plaintiff signed and dated his complaint on May 14, 1999 and subsequently filed it with this

apparent that Plaintiff has failed to appeal the decision to the Chief Hearing Examiner. (See Doc. 18, Exhibits - A through H; Attachment Robert S. Bitner's declaration).¹¹

It is interesting to note that in one filing Plaintiff alleges that he did not avail himself of the necessary administrative review process regarding his misconduct related claims. Specifically, Plaintiff indicates in his complaint that he did not file a grievance because "misconduct related incident is barred from grievance procedure pursuant to DC-ADM 804 VI. (E)." (Doc. 1, ¶ II A-C). However, in a subsequent filing entitled "Declaration" Plaintiff later claims that evidence of exhaustion of misconduct No. 184911 was destroyed. (Doc. 10). Thus, it appears the Plaintiff is modifying his claims and the facts for the purpose of sustaining his action.

Accordingly, Plaintiff's claim regarding the April 27, 1999 misconduct shall be dismissed for failure to exhaust his administrative remedies.¹²

Court on May 21, 1999. Further, it is also apparent that the Superintendent rejected Plaintiff's appeal five days after Plaintiff signed his complaint.

¹¹ Mr. Bitner (the Chief Hearing Examiner) states in his Declaration to the Court that Plaintiff did not appeal or seek a final review of misconduct No. A184911 to the Chief Hearing Examiner. (Doc. 18, Exhibit - I). As the Magistrate Judge pointed out, Plaintiff was aware of the administrative review process under DC-ADM 801 as evidenced by his incomplete appeal.

¹² Although Plaintiff claims the motion for dismissal should be construed as one for summary judgment, we agree with the reasoning of the Magistrate Judge and shall not reiterate the Magistrate Judge's justification for dismissing the action under Fed.R.Civ.P. 12 (b)(6). Specifically, Plaintiff's claim concerning the handling of his misconduct is not being dismissed on the merits, rather, it

B. Legal Materials

Plaintiff also alleges that his legal materials were confiscated on December 3, 1999. He alleges that many items were confiscated, some of which were legal materials relating to his case Fortune v. Horn, et al., No. 98-cv1724 (M.D.Pa. October 25, 2000) (Docs. 10, 24).¹³

After review of Plaintiff's attached exhibit (Doc. 10 - Exhibit 1) it is apparent to the Court that only two bags of personal and legal mail were in fact confiscated on December 3, 1999.¹⁴ Furthermore, the confiscation slip reveals that no misconduct report was prepared and the items were placed in the inmate's property. Id. (emphasis added).

Plaintiff attempts to argue that the alleged confiscation of materials on December 3, 1999, has prevented him from being able to move for summary judgment in this current action concerning the exhaustion of his misconduct and has rendered him unable to oppose

is being dismissed for Plaintiff's failure to exhaust his administrative remedies. Because there exists a factual challenge regarding exhaustion, the Court may consider the evidence outside the pleadings without construing the motion as one for summary judgment. (Doc. 26; Gould Electronics, Inc. v. United States, No. 99cv1893 (3d Cir., July 31, 2000).

¹³ See Footnote 7.

¹⁴ Plaintiff's exhibits attached to his "appendix in support of [his] motion for leave to file an amended complaint" (Doc. 16) reveal that he has in fact exhausted his administrative remedies regarding the alleged confiscation of his legal materials back in December of 1999. However, it should be noted that Plaintiff has cited to three different dates regarding the alleged "confiscation and destruction" of his legal property. Moreover, as noted by the Plaintiff's complaint, the complaint relates to a misconduct related incident and the partial appeal of that misconduct which occurred in April and May of 1999.

summary judgment in Fortune v. Horn.¹⁵ Specifically, Plaintiff claims this is due "to all of Plaintiff legal materials being in the possession of Defendants." (Doc. 16, Exhibit - Declaration"). However, there has been nothing presented which would suggest these materials are no longer in the possession of the Defendants and have been destroyed, or that they have been stored elsewhere as Plaintiff's property.

Plaintiff submits documents which relate to his appeal of the alleged confiscation of his property on December 3, 1999, in his grievance No. 0277-99. It is clear that the property was removed from Plaintiff's cell because he had more property in his cell than is permitted under DC-ADM 801. In addition, the responses throughout Plaintiff's appeal of grievance No. 0277-99 indicate his claims of retaliation for the filing of previous grievances are repetitious and without merit. (Doc. 16, Exhibit - 1).

It is apparent to the Court that the Plaintiff has in fact exhausted the required administrative remedies regarding the alleged confiscation of his property on December 3, 1999. However, the Court is also cognizant of the fact that Plaintiff continuously files grievances and general claims of retaliation and conspiracy. Here, the documents indicate a purpose for the confiscation of

¹⁵ It is interesting to note that Plaintiff submits complete exhibits regarding certain grievance appeals, e.g. No. 0277-99, while at other times he alleges confiscation of other grievances. Further, he is somehow able to provide specific grievance numbers for the grievances that have allegedly been confiscated. (Doc. 16, "Declaration").

Plaintiff's legal property, specifically, an inmate is permitted a limited amount of legal materials in his/her cell. Thus, the enforcement of the rules by staff at the prison does not necessarily implicate constitutional violations. Accordingly, the Court finds that Plaintiff's claim regarding the confiscation of his legal materials is without merit.

With respect to Plaintiff's additional grievance No. 0021-00 filed on January 21, 2000, which relates to another alleged confiscation of personal and legal property on December 28, 1999, it appears Plaintiff has not completely exhausted the claim pursuant to DC-ADM 804. Although we shall not address this claim, it is apparent Plaintiff is setting forth repetitious argument. Further, as indicated by the initial staff member's response, the grievance was to be settled by the return of specific articles, specifically, three bars of soap, one shampoo, and one toothpaste. (Doc. 18, Exhibit - 3).¹⁶

Consequently, it is clear to the Court that Plaintiff has not demonstrated any purposeful action by staff which has infringed upon any of Plaintiff's constitutional rights, nor has he completed the requisite administrative steps prior to bringing a claim before this Court.

Exemplary of the Court's efforts to give Plaintiff a trial,

¹⁶ As the Magistrate Judge noted, the December 28, 1999 incident appears unrelated to Plaintiff's ability to demonstrate exhaustion.

Plaintiff also alleges that property was confiscated on February 10, 1999. (Docs. 1, 19). However, Plaintiff fails to provide any evidence to substantiate his allegation, nor can he prove he exhausted his remedies under DC-ADM 804.

in Fortune v. Horn a jury found his claim devoid of merit. Following the trial, Plaintiff was given an opportunity to discuss his various concerns and claims regarding his imprisonment at SCI-Huntingdon. However, the discussion proved fruitless as Plaintiff was unable to convey any justiciable claim, nor did he appear to comprehend the advice of the Court. It also became evident to the Court that Plaintiff ultimately seeks a transfer from SCI-Huntingdon, however, this Court is without the authority to implement such a transfer.¹⁷

Plaintiff appears to be fixated on the concept that staff at SCI-Huntingdon are conspiring to deprive him of his constitutional rights, while at other times asserting they are retaliating against him for filing lawsuits. Amidst his prolix filings Plaintiff attempts to attribute every action or inaction by the prison staff to these general claims of conspiracy and retaliation. However, it should be noted that Plaintiff's claims regarding his access to court and his legal materials are clearly without merit. Because Plaintiff was afforded a jury trial, which included representation by appointed counsel, and because he has filed numerous filings with the court in several actions, we conclude there has never been any evidence presented which would sustain a finding that Plaintiff's access to court or to his legal materials has been infringed under the Constitution. Rather, Plaintiff fails to comprehend his position as an inmate, a position which requires him

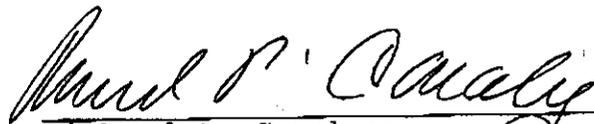
¹⁷ The Court specifically made Plaintiff aware of our lack of authority concerning prison transfers.

to adhere to rules and policies which specify the restriction of legal materials. Consequently, Plaintiff's unsubstantiated claims regarding the alleged "confiscation and destruction" of legal materials is simply without merit.

With respect to the Magistrate Judge's order dated May 4, 2000, we do not find that the Magistrate Judge erred when he construed Plaintiff's motion as a motion to file a supplemental complaint. Moreover, we agree with the Magistrate Judge's disposition in said order where Plaintiff's motion was deemed withdrawn for failure to file a supporting brief pursuant to Local Rule 7.5. (Doc. 20).¹⁸

CONCLUSION

Based on the aforementioned discussion, we shall grant the Defendants' motion and dismiss Plaintiff's case.


Richard P. Conaboy
United States District Judge

DATE *October 20, 2000*

¹⁸ A review of the filing by Plaintiff reveals that even if we were to grant Plaintiff leave to supplement his complaint, the disposition of his case would not be any different. Further, we did consider the exhibits and argument set forth in Plaintiff's filings relating to his ability to supplement his complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

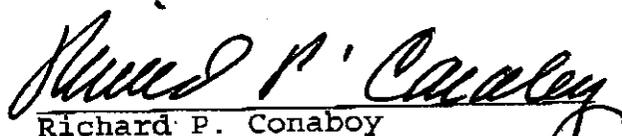
KENNETH FORTUNE, :
Plaintiff, : CIVIL ACTION NO. 3:99cv831
vs. :
R. MARSHALL, et al., : (JUDGE CONABOY)
Defendants. : (Magistrate Judge Durkin)

ORDER

NOW, this 30th Day of October, 2000, it is hereby ORDERED

that:

1. The Magistrate Judge's Report and Recommendation (Doc. 26) is ADOPTED;
2. Defendants' motion to dismiss (Doc. 14) is GRANTED;
3. The Clerk of Court is directed to close this case.
4. Any appeal from this Order will be deemed frivolous, without probable cause and not taken in good faith.


Richard P. Conaboy
United States District Judge

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