

extensions of time to respond, to this date he has not filed a brief in opposition to the Defendants' motion to dismiss.

On June 8, 2000, after not receiving any brief in opposition from Ray, Magistrate Judge Durkin issued a report recommending it be granted. The Magistrate Judge reviewed the merits of the motion despite the fact that Ray has not filed any document in opposition to the motion. The time allowed for the parties to file objections to that report and recommendation expired on June 26, 2000, and none were filed. The matter is ripe for disposition.

When no objections are filed to the report of a Magistrate Judge, we need only review that report as we in our discretion deem appropriate. *Thomas vs. Arn*, 474 U.S. 145, 151-52 (1985). Our review of Ray's complaint and the Defendants' motion convinces us that Ray has failed to state a claim upon which relief can be granted. He can prove no set of facts supporting his allegations which would entitle him to relief.

We find no error in the Magistrate Judge's report and we agree with his recommendations. Therefore, we will adopt the report and recommendation of Magistrate Judge Durkin *in toto*.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The Report and recommendation of Magistrate Judge Durkin (Document 23) is adopted *in toto*.
2. Defendants' motion to dismiss Ray's complaint (Document

- 12) is granted.
3. The Clerk of Court shall send a copy of this order to Magistrate Judge Durkin.
 4. The Clerk of Court shall close this file.



MUIR, U.S. District Judge

MM:ga

Victoria Sellitto Freimuth, Esq
Office of Chief Counsel
PA Dept of Corrections
55 Utley Drive
Camp Hill, PA 17011

Re: 4:00-cv-00087

Please file all pleadings directly with the Clerk's Office in which the assigned Judge is located. Do not file any courtesy copies with the Judge's Chambers.

JUDICIAL OFFICERS:

Judge Sylvia H. Rambo
Judge Yvette Kane
Judge William W. Caldwell
Magistrate Judge J. Andrew Smyser

CLERK'S OFFICE ADDRESS:

U.S. District Court
228 Walnut Street
P.O. Box 983
Harrisburg, PA 17108

Chief Judge Thomas I. Vanaskie
Judge A. Richard Caputo
Judge James M. Munley
Judge William J. Nealon
Judge Richard P. Conaboy
Judge Edwin M. Kosik
Magistrate Judge Raymond J. Durkin
Magistrate Judge Thomas M. Blewitt

U.S. District Court
235 N. Washington Ave
P.O. Box 1148
Scranton, PA 18501

Judge James F. McClure
Judge Malcolm Muir

U.S. District Court
240 West Third Street
Suite 218
Williamsport, PA 17701

OFFICE OF THE CLERK

UNITED STATES DISTRICT COURT
for the
MIDDLE DISTRICT OF PENNSYLVANIA
(570) 323-6380 Fax (570) 323-0636

* Notice of Change of Address *

U.S. District Court Clerk's Office
Suite 218
240 West Third Street
Williamsport, PA 17701-6460

Effective close of business Friday, May 26, 2000

(Until further notice, the Clerk's Office is still located on the fourth floor of the Federal Building for filings and other service to the public.)

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

FREDERICK T. RAY,

Plaintiff

v.

DIANA G. BANEY, et al.,

Defendants

: CIVIL ACTION NO. 00-0087

: (MUIR, J.)

: (DURKIN, M.J.)

23
6/8/00

FILED
SCRIPPS

JUN - 8 2000
PER [Signature]
DEPUTY CLERK

REPORT AND RECOMMENDATION

Presently pending before the court is the defendants' motion to dismiss the plaintiff's complaint. (Doc. No. 12).

The plaintiff, a former inmate at the State Correctional Institution at Greene, ("SCI-Greene"), Waynesburg, Pennsylvania¹, filed this civil rights action pursuant to 42 U.S.C. § 1983, in which he alleges a violation of his constitutional rights while incarcerated at the State Correctional Institution at Huntingdon, ("SCI-Huntingdon"). (Doc. No. 1).

Named as defendants to this action are Diana G. Baney, Grievance Coordinator and Frederick K. Frank, Superintendent.

On January 13, 2000, the plaintiff filed the appropriate application to proceed in forma pauperis and authorization forms. (Doc. Nos. 2 & 3). An administrative order was issued on January 20, 2000. (Doc. No. 5).

By order dated January 24, 2000, it was directed that process issue. (Doc. No. 6).

¹By letter dated May 4, 2000, the plaintiff informed the court that he has been released from incarceration and is currently residing at 80 Meadowlake Drive, Downingtown, Pennsylvania 19335. (Doc. No. 20).

On March 24, 2000, the defendants filed a motion to dismiss the plaintiff's complaint. (Doc. No. 12). On April 4, 2000, the defendants filed a brief in support of their motion, along with the declaration of Robert S. Bitner, Chief Hearing Officer, SCI-Huntingdon. (Doc. Nos. 13 & 14). Although the plaintiff requested and was granted two (2) extensions of time within which to do so, the last extension to May 22, 2000, (See Doc. Nos. 19 & 22), as of the date of this report, the plaintiff has failed to file a brief in opposition to the defendants' motion to dismiss. Thus, the plaintiff has failed to properly oppose the motion.

It is noted, however, that the defendants' motion is well-taken. The plaintiff alleges in his complaint that he was placed on grievance restriction by defendant Frank pursuant to a recommendation made by defendant Baney. As a result of the grievance restriction, the plaintiff alleges that he had a civil rights action filed in this district dismissed for failure to exhaust administrative remedies, (i.e., Ray v. Baney, Civil Action No. 4:99-0379). The plaintiff alleges that his placement on grievance restriction, which resulted in the dismissal of his action, violated his right to access to the courts.

Moreover, the plaintiff alleges that he was not afforded any due process safeguards prior to being placed on grievance restriction.

Finally, the plaintiff alleges that the defendants' actions in placing him on grievance restriction were in retaliation for the plaintiff filing grievances and assisting others in doing so.

Based upon the above allegations, the plaintiff is seeking compensatory and punitive damages.²

Pursuant to the recently enacted amendment to 42 U.S.C. § 1997(e), specifically, Section 7(a) of the Prison Litigation Reform Act of 1995, prisoners are required to exhaust applicable administrative remedies prior to filing an action in the federal courts. Although the plaintiff is seeking only monetary damages³, the Act makes no distinction between actions for damages, injunctive relief, or both. See Booth v. Churner, 206 F.3d 289 (3d Cir. 2000) (pursuant to § 1997e, an inmate must exhaust administrative remedies prior to bringing § 1983 excessive force action in federal court); Nyhuis v. Reno, 204 F.3d 65 (3d Cir. 2000) (§ 1997e(a) requires an inmate to exhaust administrative remedies prior to bringing a Bivens action regardless of the relief requested).

In that connection, DC-ADM 804, the Policy Statement which sets forth the various steps to be taken by a state prisoner in exhausting his administrative remedies, was amended on May 1, 1998,

²The complaint also contains a "boilerplate" request for declaratory relief which is remedial in nature, that is, a request that defendants actions as alleged in the complaint violated his civil rights. However, where the constitutional violation is alleged to have already occurred, as in the instant case, and there is no threat of future harm, declaratory relief is inappropriate. See Sawm v. Widnall, 912 F. Supp. 1384 (Dist. Colo. 1996); See also Friedman v. Geller, 925 F. Supp. 611 (E.D. Wisc. 1996) (It is inappropriate to use the declaratory judgment statute in what would otherwise be a run-of-the-mill negligence action.

³See n.2.

to permit inmates to grieve issues that involve the seeking of compensatory damages. See Booth, supra.; Nyhuis, supra.; Roach v. Romine, Civil Action No. 99-0460, M.D.Pa., Order dated June 2, 1999, (Vanaskie, J.), (adopting report and recommendation of the magistrate judge and finding the line of authority requiring exhaustion of administrative remedies even where a prisoner seeks only monetary damages to be persuasive).

Pursuant to DC-ADM 804, the plaintiff would first be required to attempt to resolve his complaint informally. If his complaint could not be resolved informally, he would then need to file for initial review with the grievance coordinator. Any adverse decision from the grievance coordinator would have to then be appealed to the Facility Manager or Community Corrections Regional Director. Finally, any appeal from the decision of the Facility Regional Director would have to be filed with the Chief Hearing Officer.

One of the main claims in the plaintiff's complaint is that he was placed on grievance restriction and was not allowed to file any grievances, which resulted in the dismissal of a civil rights action filed in this court. However, in order to meet the prerequisite to filing the instant action, the plaintiff alleges that he exhausted his administrative remedies with respect to the claims which he now attempts to raise in this action by filing a grievance and appealing that grievance to final review. Along that line, the plaintiff alleges that he filed a formal grievance with defendant Baney regarding being placed on grievance restriction. According

to the plaintiff, defendant Baney returned his grievance unprocessed, noting that placement on grievance restriction was not a grievable issue. The plaintiff alleges that he appealed defendant Baney's decision to defendant Frank, who agreed with defendant Baney and denied the plaintiff's appeal. Finally, the plaintiff alleges that he appealed defendant Frank's decision to the Central Office, which denied his final appeal.

Initially, pursuant to the procedures set forth in DC-ADM 804, despite the plaintiff's claims, he has not followed the proper procedure to exhaust his administrative remedies. Although he "alleges" that he appealed as far as the Central Office, the defendants have submitted the affidavit of Bitner that he did not do so, and by failing to respond to the motion he has failed to controvert that affidavit either with his own affidavit or otherwise.

In that connection, the declaration of defendant Bitner⁴, as

⁴When a court considers materials outside of the pleadings in conjunction with a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the motion is more properly construed as one for summary judgment, and the parties are entitled to reasonable opportunity to respond to the motion as such. See Fed.R.Civ.P. 12; Laughlin v. Metropolitan Washington Airports, 149 F.3d 253, 260-61 (4th Cir. 1998) (when matters outside pleadings are presented to and not excluded by the court, motion to dismiss must be treated as one for summary judgment); Alioto v. Marshall Field's & Co., 77 F.3d 934, 936 (7th Cir. 1996) (when converting motion to dismiss to one for summary judgment parties must be provided with notice and opportunity to respond). Moreover, a dismissal under Rule 12(b)(6) is a dismissal on the merits, and would have a preclusive effect on future litigation of the claims dismissed. See 2 Moore's Federal Practice, § 12.03[11].

Conversely, a dismissal because a plaintiff has failed to comply with some prerequisite to filing suit, such as exhaustion of administrative remedies, is not a decision on the merits and

submitted by the defendants, and not disputed by the plaintiff, indicates that institution records reveal that the plaintiff did not appeal his grievance to final review. Thus, the plaintiff failed to properly exhaust his administrative remedies, and his action should be dismissed.

has no preclusive effect. In 18 Moore's Federal Practice, § 131.30[3][b], at 131-103 (3d ed. 1999), it is noted that the defendant may sometimes prevail because the court determines that it has no subject matter jurisdiction, that personal jurisdiction of defendants or of indispensable parties is lacking, that venue is improper, or that plaintiff has failed to comply with some prerequisite to filing suit, such as exhaustion of administrative remedies. Plaintiff may thereafter pursue the underlying claim in an appropriate forum where the preconditions have been met. Id. (emphasis added). In such cases, the resulting judgment of dismissal is not a determination of the merits of the claim, but rather a refusal to hear it. See Fed.R.Civ.P. 41(b); Costello v. United States, 365 U.S. 265, 285 (1961) (dismissal for failure to satisfy prerequisite to determination of matter on merits was to be considered as dismissal for lack of jurisdiction under Fed.R.Civ.P. 41(b)). As a result, in those cases, the court need not confine its evaluation to the face of the pleadings, but may review or accept evidence, such as affidavits, without converting the motion to one for summary judgment. See e.g., Deuser v. Vecera, 139 F.3d 1190, 1191 n.3 (8th Cir. 1998) (district court may consider matters outside pleadings on motion brought pursuant to Fed.R.Civ.P. 12 challenging subject matter jurisdiction). See also 2 Moore's Federal Practice, § 12.30[3].

Thus, in this case, since the defendants' motion to dismiss is based, at least in part, on the plaintiff's failure to meet a prerequisite to filing this action, the court may consider the unopposed declaration of Robert Bitner, without converting the motion to one for summary judgment.

On the basis of the foregoing,

IT IS RESPECTFULLY RECOMMENDED THAT:

the defendants' motion to dismiss the plaintiff's complaint, (Doc. No. 12), be granted to the extent that the plaintiff's complaint be dismissed for his failure to exhaust administrative remedies.



RAYMOND J. DURKIN
United States Magistrate Judge

Dated: June 7, 2000

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

FREDERICK T. RAY, : CIVIL ACTION NO. 00-0087

Plaintiff : (MUIR, J.)

v. : (DURKIN, M.J.)

DIANA G. BANEY, et al.,

Defendants

FILED
SCRANTON

N O T I C E

JUN - 8 2000

PER _____
DEPUTY CLERK

TO: Frederick T. Ray
80 Meadowlake Drive
Downingtown, NY 19335

Victoria Sellitto Freimuth, Esquire
OFFICE OF CHIEF COUNSEL
PA DEPT. OF CORRECTIONS
55 Utley Drive
Camp Hill, PA 17011

NOTICE IS HEREBY GIVEN that the undersigned has entered
the following: Report and Recommendation of Magistrate
Judge Durkin dated 06/07/00.

Any party may obtain a review of the magistrate judge's above
proposed determination pursuant to Rule 72.3, M.D.PA, which
provides: 72.3 REVIEW OF REPORTS AND RECOMMENDATIONS OF
MAGISTRATE JUDGES ADDRESSING CASE DISPOSITIVE
MOTIONS

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636(b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within ten (10) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need not conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.


RAYMOND J. DURKIN
United States Magistrate Judge

Dated: June 7, 2000

Victoria Sellitto Freimuth, Esq.
Office of Chief Counsel
PA Dept of Corrections
55 Utley Drive
Camp Hill, PA 17011

Re: 4:00-cv-00087

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