

CASE CLOSED

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

TRACY L. TODD,)
Plaintiffs,)
)
vs.)
)
L.P. BENNING, Warden, et al.,)
Defendants.)

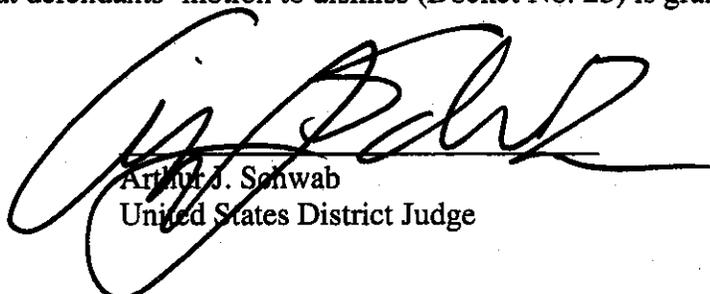
Civil Action No. 03-1060

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ORDER

AND NOW, this ^{9th} day of February, 2004, after the plaintiff, Tracy L. Todd, filed an action in the above-captioned case, and after a motion to dismiss was submitted by the defendants, and after a Report and Recommendation was filed by the United States Magistrate Judge granting the parties ten days after being served with a copy to file written objections thereto, and upon consideration of the objections filed by plaintiff, and upon independent review of the motion and the record, and upon consideration of the Magistrate Judge's Report and Recommendation, which is adopted as the opinion of this Court,

IT IS ORDERED that defendants' motion to dismiss (Docket No. 23) is granted.


Arthur J. Schwab
United States District Judge

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

TRACY L. TODD, AM-9118,
Plaintiff,

v.

L.P. BENNING, et al.,
Defendants.

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Civil Action No. 03-1060

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Report and Recommendation

I. Recommendation:

It is respectfully recommended that the defendants' Motion to Dismiss (Docket No.23) be granted for failure to state a claim upon which relief may be granted.

II. Report:

Presently before the Court for disposition is the defendants' motion to dismiss.

Tracy L. Todd, an inmate at the State Correctional Institution at Huntingdon has presented a civil rights complaint which he has been granted leave to prosecute in forma pauperis. In his complaint, Todd contends that on March 24, 2003, while incarcerated at State Correctional Institution - Greensburg he was directed to be handcuffed so that a routine cell check could be conducted; that he refused to do so until a supervisor was present; that when he extended his hands to be cuffed he was assaulted by officers Hampton and Lilley and that his requests for medical treatment were ignored. These facts are said to state a cause of action pursuant to 42 U.S.C. 1983, and the plaintiff invokes this court's jurisdiction pursuant to Section 1443 of Title 28, United States Code. Named as defendants are officers Hampton and

Lilley as well as the institution's warden and the Secretary of the Department of Corrections, all of whom now move to dismiss.

It is provided in 42 U.S.C. §1983 that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In reviewing a motion to dismiss, all well pleaded allegations of the complaint must be accepted as true. Estelle v. Gamble, 429 U.S. 97 (1976); Schrob v. Catterson, 948 F. 2d 1402 (3d Cir. 1991). Coupled with this requirement is the greater leniency with which pro se complaint are construed. Haines v. Kerner, 404 U.S. 519 (1972).

In support of their motion to dismiss, the defendants argue that this action is barred as a result of the plaintiff's failure to exhaust the available administrative remedies. Specifically, they refer to ¶ V of the complaint in which the plaintiff states that as a result of this incident, he filed grievance number 47563 on March 24, 2003 and that the warden dismissed his complaint. He does not set forth that any administrative appeals were pursued.

The Prison Litigation Reform Act provides in 42 U.S.C. § 1997(e)(a) that:

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.

See: Santana v. United States, 98 F.3d 752 (3d Cir. 1996). Pennsylvania provides such a mechanism.¹ In addition, in Ray v. Kertes, 285 F.3d 287, 293 n.5 (3d Cir.2002) the Court

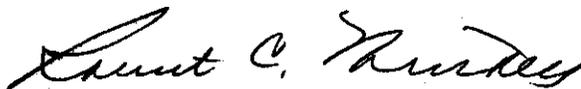
¹ See: Administrative Directive 804.

recognized the inherent power of the district court to sua sponte dismiss a suit which is facially barred. Thus, on the basis of the complaint alone, the defendants' motion should be granted.²

Accordingly, it is recommended that the defendants' motion to dismiss be granted for failure to state a claim upon which relief may be granted.

Within ten (10) days after being served, any party may serve and file written objections to the Report and Recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

Respectfully submitted,



Robert C. Mitchell,
United States Magistrate Judge

Dated: January 5, 2004

² We also observe that appended to its brief the movants have also supplied the declaration of the inmate records custodian who also discloses that the record is devoid of any showing that the plaintiff exhausted the available administrative records. Since this is simply additional support for the matters alleged in the complaint, it would appear that there is no reason to convert the instant motion to one for summary judgment.