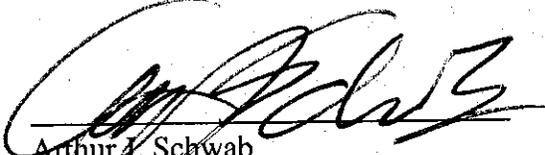


IT IS FURTHER ORDERED that pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure if the plaintiff desires to appeal from this Order he must do so within thirty (30) days by filing a notice of appeal as provided in Rule 3, Fed. R. App. P.



Arthur J. Schwab
United States District Judge

cc: Tracy L. Todd
AM-9118
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Honorable Robert C. Mitchell
United States Magistrate 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. 03-986

Report and Recommendation

I. Recommendation:

It is respectfully recommended that the Motion to Dismiss submitted on behalf of defendants Benning, Lohr, Beard, White, Hampton, Lilley, Prinkey, Cairns, Buchsbaum, Kwisnek, Pulkownik, Novak, and Buss (Docket No.39) be granted, and that the complaint in the above captioned case be dismissed as to all defendants, without prejudice.

II. Report:

Presently before the Court for disposition is a motion to dismiss submitted on behalf of defendants Benning, Lohr, Beard, White, Hampton, Lilley, Prinkey, Cairns, Buchsbaum, Kwisnek, Pulkownik, Novak and Buss.¹

Tracy L. Todd, an inmate at the State Correctional Institution-Huntingdon has presented a civil rights complaint which he has been granted leave to prosecute in forma pauperis. In his complaint, the plaintiff alleges that on April 28, 2003, Troy Lohr, a guard at the State

¹ In a Report and Recommendation filed on December 3, 2003, it was recommended that the complaint be dismissed in part as to defendant Conforti. Defendant Nolan was not added until the filing of the amended complaint on December 4, 2003 and has not yet responded.

Correctional Institution-Greensburg hit him in the face with a bag of food loaf which caused him to fall backwards and injure himself; that he had to go to the prison hospital where he was treated for a lip contusion and a welt on the back of his head; that he reinjured his neck and back and loosened a tooth because of the assault; that he was given pain medication and photographs were taken of his injury; that he was again assaulted on May 4, 2003 by Lohr who hit him in the chest with a food loaf; that both assaults were unprovoked and he told Lohr that he was on a hunger strike and refused to eat; that he believes these actions were taken as a result of his having been a witness in another civil rights suit; that defendant Hampton called him a "bitch" and a "low life Jew" and said that Hitler had the right idea about Jews and encouraged both assaults; that defendant Lilley called him "dick headed Todd the pussyass Jew", as well as a "fakeass Jew" and stated "Jews don't eat this good in Russia" and stated that there is no such thing as a black Jew and also encouraged both assaults; that defendant Prinkey told the plaintiff that he would not secure medical attention for him until "hell freezes over" and delayed securing medical attention for him; that defendant Cairns jokingly related that he would immediately report the assaults to the warden; that defendant Conforti tried to cover up the assault by falsifying medical records, by lying in the investigation and saying that nothing appeared wrong with the plaintiff and failed to provide adequate medical care; that defendant Novack covered up the assault by lying to state police investigators and that defendant Buss covered up the assault by refusing to interview the plaintiff. These facts are said to state a cause of action under the provisions of 42 U.S.C. 1983 and the plaintiff invokes this Court's jurisdiction pursuant to Section 1343 of Title 28, United States Code.

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).

The movants now move to dismiss on the grounds that prior to the commencement of this action, the plaintiff had failed to exhaust the available administrative remedies. The Prison Litigation Reform Act ("PLRA") 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.²

The instant complaint was executed on June 20, 2003 and received on June 30, 2003. The plaintiff did not complete the inmate grievance procedure until August 11, 2003.³ The issue which the movants raise here, is whether the instant complaint should be dismissed, without prejudice, since it was filed prematurely, or whether the complaint should go forward since at this juncture the exhaustion requirement has been fulfilled.

² See: Administrative Directive 804 which is Exhibit A to the instant motion.

³ See: Exhibit D to the instant motion.

There is no doubt that the PLRA has as a condition precedent to filing suit the exhaustion of the available administrative remedies. In Ahmed v. Sromovski, 103 F.Supp.2d 838 (E.D. Pa. 2000), relying on Nyhuis v. Reno, 204 F.3d 65 (3d Cir.2000) the district court observed that exhaustion is clearly a prerequisite to filing suit, and concluded that because suit was initiated before the administrative remedies were exhausted, the complaint should be dismissed without prejudice. After the statute of limitations had run, the plaintiff in Ahmed, sought to amend his original complaint so as not be time barred rather than filing a new complaint. Leave to amend was denied by the district court and the denial affirmed on appeal. Ahmed v. Dragovich, 297 F.3d 201 (3d Cir.2002). While not reaching the issue of whether or not the original complaint was properly dismissed, the Court of Appeals observed:

Although Ahmed argues that the PLRA's exhaustion requirement should be interpreted to permit prisoners to exhaust administrative remedies after they have filed a complaint in federal courts, the Commonwealth replies that the administrative procedures available within the prison system must be exhausted before the inmate brings the federal suit.

However plausible we might find the Commonwealth's argument were we free to reach it,* the Commonwealth has raised a serious challenge to our jurisdiction

*In Nyhuis, we concluded "[T]he ... rule ... we believe Congress intended is that inmates first test *and exhaust* the administrative process, and then, if dissatisfied, take the time necessary to file a timely federal action." (Emphasis in original).

to do so in its contention that Ahmed failed to file a timely notice of appeal. Because this court has held that failure to exhaust is not a jurisdictional defect ... we cannot consider the exhaustion issue until we first reach the jurisdictional challenge.

297 F.3d at 206. The Court then determined that it did not have jurisdiction to consider the merits and did not specifically address the exhaustion issue. However, the Court observed that

whatever the doctrine of substantial compliance referred to in Nyhuis, "it does not encompass ... the filing of a suit before administrative exhaustion, however late, has been completed [citing to cases holding that the administrative remedies must be filed prior to the initiation of federal litigation]" 297 F.3d at 209.

In McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir.2002), the Court addressed the identical issue of

whether a district court must dismiss an action involving prison conditions when the plaintiff did not exhaust his administrative remedies prior to filing suit but is in the process of doing so when a motion to dismiss is filed... We join eight other courts of appeals in holding that dismissal is required under 42 U.S.C. § 1997e(a).

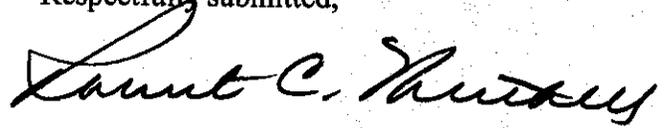
* * *

The Courts of Appeals for the First, Second, Third, Seventh, Tenth, Eleventh, and D.C. circuits have held that § 1997e(a) requires exhaustion before filing of a complaint and that a prisoner does not comply with this requirement by exhausting available remedies during the course of the litigation.

Thus, it would appear that there is strong argument for the proposition that the statute means exactly what it say, i.e., that prior to commencing a federal action, the prisoner must exhaust all available administrative remedies. Accordingly, it is recommended that the instant motion to dismiss be granted as to all defendants without prejudice to the plaintiff's right to recommence this action.

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,

A handwritten signature in cursive script, appearing to read "Robert C. Mitchell".

Robert C. Mitchell,
United States Magistrate Judge

Dated: January 15, 2004