

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

TRACY L. TODD,

Plaintiff,

v.

PHILIP JOHNSON, Warden, et al.,
Defendants.

)
)
)
)
)
)
)

Civil Action No. 04-247

~~CASE CLOSED~~

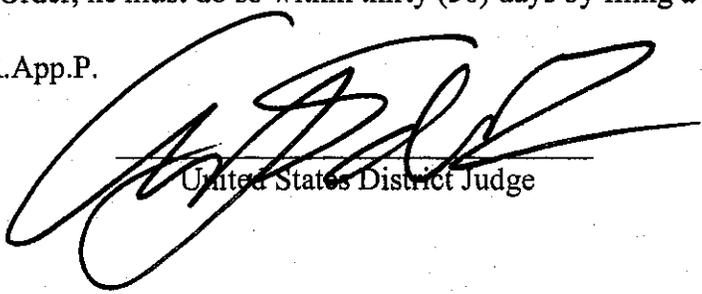
O R D E R

AND NOW, this 22nd day of July 2004, after the plaintiff, Tracy L. Todd,

filed a civil rights complaint in the above-captioned case, and after motions to dismiss the complaint were submitted by several defendants, and after a Report and Recommendation was issued by the United States Magistrate Judge, and the parties were granted ten days after being served with a copy to file written objections thereto, and upon consideration of the objections filed by the plaintiff, and after independent review of the pleadings, and the Magistrate Judge's Report and Recommendation, which is adopted as the opinion of this Court,

IT IS ORDERED that the motions to dismiss submitted on behalf of defendants Noel (Docket No. 16) and on behalf of defendants Johnson, Delie and Beard (Docket No. 22) are granted as to them, as well as to all defendants due to the plaintiff's failure to state a claim upon which relief may be granted.

IT IS FURTHER ORDERED that pursuant to Rule 4(a)(1) of the F.R.App.P., 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 by Rule 3 F.R.App.P.


United States District Judge

cc: Tracy L. Todd
AM-9118
SCI Rockview
Box A
Bellefonte, PA 16823

All Counsel of Record

Honorable Robert C. Mitchell
United States Magistrate Judge

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

41
AB

TRACY L. TODD, AM-9118,
Plaintiff,

v.

PHILIP L. JOHNSON, et al.,
Defendants.

)
)
)
) Civil Action No. 04-247
)
)
)

27

KSA

Report and Recommendation

I. Recommendation:

It is respectfully recommended that the Motions to Dismiss submitted on behalf of defendants Noel (Docket No.16) and on behalf of defendants Johnson, Delie and Beard (Docket No. 22), be granted as to them as well as to all defendants for failure to state a claim upon which relief may be granted.

II. Report:

Presently before the Court for disposition are motions to dismiss submitted on behalf of defendants Paul Noel, Johnson, Delie and Beard

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 alleges that during the period from February 31, 2001 (sic.) through December 4, 2001 while housed in the prison hospital at the State Correctional Institution at Pittsburgh he was denied adequate medical attention. Specifically, he contends that he was discharged from the prison hospital on October 15, 2001 by Samuel Watterson; that at

4

that time he was unable to ambulate; that for four days he was denied medication and access to his legal materials; that he was then returned to the hospital; that he was forced to sit in human excrement and subjected to second-hand smoke which aggravated his asthma; that he was subjected to racist remarks and threats and denied medication for his asthmatic condition by Jim Farnary; that defendant Doe Shoster threatened him, denied him food and permitted him to be assaulted by an inmate with AIDS; that he was then transferred to a psychiatric cell where he suffered from stress and was subjected to medical personnel who were indifferent to his medical needs. 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 Sections 1331 and 1343 of Title 28, United States Code. Named as defendants are Jeffrey A. Beard, the Secretary of the Department of Corrections, Warden Philip Johnson, Paul Noel the director of the medical department, health care administrator Joan Delie, Samuel Watterson and Doe Shoster. Defendants Noel, Beard, Johnson and Delie 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 complaints are construed. Haines v. Kerner, 404 U.S. 519 (1972). Movants now contend that they are entitled

to have the complaint dismissed on the grounds that suit is barred by the applicable two year statute of limitations as well as that liability cannot be assigned on the grounds of respondeat superior.

Because § 1983 does not contain a statute of limitations, the most applicable state statute of limitations is applied. Here the Pennsylvania two year period. Garvin v. Philadelphia, 354 F.3d 215 (3d Cir.2003). In his complaint which is signed but conveniently undated, the plaintiff sets forth various complaints which occurred during the period from February 31, 2001 (sic.) through December 4, 2001, while he was housed at the State Correctional Institution at Pittsburgh.¹ The request for a financial statement to accompany the complaint was dated December 3, 2003 and executed by institutional personnel on December 5, 2003.² The so-called prison "mailbox rule" was designed to give inmates the benefits of delays in the institutional mail system and generally permits consideration of a complaint's filing date to be that of its placement in the prison mail system Houston v. Lack, 487 U.S. 266 (1988). In the instant case, although the plaintiff's request for financial information was timely dated, left unexplained is why the plaintiff failed to date the complaint and the fact that two and a half months elapsed from the time the financial forms were executed until the matter was submitted to this Court. Since the plaintiff has not elected to respond to these allegations, it would appear that no credible explanation for this discrepancy exists. For this reason, it appears that the motions to dismiss should be granted as to the movants as well as to the unserved other named defendants.

The movants also contend that they are entitled to relief on the grounds that liability

¹ See: Complaint at ¶ IV.A.

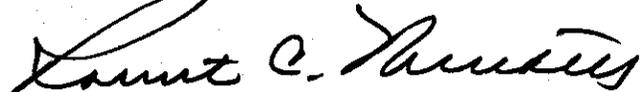
² See: Docket entry No.1.

cannot be assigned on the basis of respondeat superior. As to Noel, the complaint merely names him as the director of the medical department and does not set forth any affirmative acts of omission or commission committed on his part. Therefore, as to him the complaint is subject to dismissal for failure to state a claim upon which relief may be granted. Durmer v. O'Carroll, 991 F.2d 64 (3d Cir.1993). For the same reason, the complaint is subject to dismissal as to defendants Beard, Johnson and Watterson.

Accordingly, it is recommended that the motions to dismiss be granted for failure to state a claim upon which relief may be granted and that for the same reason the complaint be dismissed as to the other unserved defendants.

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: June 21, 2004