UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Charles E. Collins, III,

Plaintiff,

-against-

James B. Campbell,
John Doe and Jane Doe,

Defendants.

MEMORANDUM OF LAW

Case No.: 00-CV-1348
DNH/DRH

PRELIMINARY STATEMENT OF FACTS

Following a conviction by a jury of intentionally and willfully spraying the Court of Appeals Building in the City and County of Albany with liquid chicken manure the claimant/plaintiff Charles Collins, III herein was remitted to the Albany County Penitentiary where he remained until sometime in March of the year 2000 at which time he was sent to Fishkill or the Ulster County Correctional Facility.

The plaintiff sets forth many allegations principally alleging the violation and infringement of his privacy rights while an inmate at the Albany County Jail and also exposure to unhealthy conditions which, interpreting and advancing the allegations of the plaintiff to their natural conclusion and consequence, could constitute a violation of the 8th Amendment of the Constitution which prohibits cruel and unusual punishment by exposing him to unhealthy, unsanitary or physically hazardous conditions.

POINT I

THE CORRECTIONAL FACILITY IN WHICH THE CLAIMANT WAS HOUSED AT THE TIME OF THE ALLEGATIONS SET FORTH IN PLAINTIFF'S COMPLAINT DID NOT VIOLATE ANY FEDERALLY PROTECTED RIGHTS.

The case of Tunnell v. Robinson, D.C. (Pennsylvania) 1980, 486 F Supp 1265 established once again, after restatement over the previous 20 years of the bromide, that when a person is committed to a penitentiary or jail it is expected by society that they will give up something that they had when they were not committed to a correctional facility. They are deprived of their right to freedom and they are restrained and obliged to fulfill, and comply with, all the requirements of the institution to which they are committed by a court of competent jurisdiction. It is also true that only rights which are secured by the Constitution should be the subject of actions in the Federal District Courts to remedy the deprivation thereof. Battle v. Anderson, CA 10 (Oklahoma) 1977, 564 F2d 388.

The issues raised by Mr. Collins in his complaint bring into focus the issue between State Court Tort Law and the Federal Law of deprivation of constitutional privileges. It is also true that in many ways because of the necessity of security in a penal or correctional facility, "privacy" in a jail setting is often an illusion and not a reality as it must be so in order to maintain the security of the facility in question. Davis v. Bucher, CA 9 (Washington) 1988, 853 F2d 718; Holman v. Central Arkansas B.C. CA 8 (Arkansas) 1979, 610 F2d 542. These cases recognize, as do the progeny of these cases, that what may support a complaint of grievance to a Department of Corrections or a Commission on Corrections for the present maintenance of conditions at a penal institution would

not necessarily support a similar claim under 42 USC 1983. As a matter of fact directed to one of the claimant's grievances set forth in this complaint [which should have been the subject of grievances directed to the facility], the mere "possibility" of smoke and its possible relation to a future injury not yet defined was not enough for a Federal Court to take jurisdiction of the issue without a clear and present showing that a plan or policy of the institution was put in place for the purpose of harming or exposing to risk and harm the inmates of that facility. Harris v. Murray E.D. (Virginia) 1997, 61 F Supp 409; Memms v. Philadelphia News D.C. PA 1972, 352 F Supp 862.

Some courts also have handled and considered the concern expressed that female corrections officers in a facility are of themselves a deprivation of privacy or an incursion into the privacy of the male inmates who reside there. Such discussion was had in Hudson v. Goodlander D.C. MD 1980, 494 F Supp 890. The court there concluded that even though it might find that the use of female corrections officers in certain operations within the jail may be embarrassing under some circumstances and might even "aggravate normalization of the prison environment", they were still not federally actionable and were not the proper subject of actions brought under the statutes cited here.

Indeed the courts have gone on the affirmative side of the issue to determine that an inmate's limited right to privacy may be violated where a prison official regularly was compelled to watch inmates of the opposite sex shower, as the court so held in Klein v. Pyle D.C. CO 1991, 767 F Supp 215. In contrary position to the *Klein* case is the more regularly accepted principal that a lawful incarceration in and of itself brings about the necessary withholding or even limiting of many priviledges and rights that a person would have if not incarcerated. Of necessity and due to the nature of the security of the facility in which they are housed, such restrictions are justified by the

considerations underlying the penal system and the penal methodology of incarceration in America. These are all well acknowledged in the case of Childs v. Duckworth D.C. (Indiana) 1981, 509 F Supp 1254, aff'd 705 F2d 915, as well as the progeny of that case in succeeding years. It is the purview of the court only to intervene and effect a Federal right when there is inadequate or no remedy at the State level or when the State law ignores such egregious conduct as to impose a complete restriction of and therefore "deprivation of" a federally guaranteed right. (Holt v. Sarver CA 8 (Arkansas) 1971, 442 F2d 304 and Martinez v. Mancusi CA 2 (New York) 1971, 443 F2d 921, cert denied at 91 S.CT. 1202 also cited as 401 US 983.

Regarding the right of privacy the *Goodlander* court cit supra held that neither inadequate shielding from or even regular visits by female officers and corrections facility employees while male prisoners were showering, using the toilet, or dressing rose to the level of constituting a deprivation of a federally guaranteed right or constitutionally guaranteed privilege. Such incursions into the "privacy" rights of an inmate [which are in some state of suspension during incarceration] are logistic problems which can be easily cured and therefore do not rise to, or constitute deprivations of, constitutionally guaranteed privileges. Forts v. Ward D.C. (New York) 1978, 471 F Supp 1095, 621 F2d 1210 (vacated in part and sustained in part on different grounds). Therefore it is clear that the courts have recognized consistently that occasional "intrusions" into the privacy of a male prisoner [or more frequently the privacy of a female prisoner] if not part of a "grand plan" or scheme for the purpose of aggravating or upsetting the balance of a correctional facility are not such events as rise to the level of "Constitutional Privileges."

The fact that the inmate, now claimant, did not file a grievance is of significant importance in assessing the impact and availability of redress under the statute as well. If the inmate did not file

a grievance or complaint of any kind that the action was egregious such as to cause him to bring suit for redress in Federal Court, while he was still an inmate, the facility thus, could not be on notice of the allegation, could not investigate the same, nor could it take steps within reasonable rescheduling and logistic rearrangement to alleviate or terminate the alleged offending conduct. The fact that Mr. Collins did not file any such grievances [which is clear from his prisoner inmate folder and from the affidavit of Sheriff Campbell attached] removes a normal prerequisite to his right to bring this action in Federal Court. If the grievance filed by him had not been investigated and appropriately attended to the legal predicate may then be present. Tokar v. Armontrout CA 8 (Missouri) 1996, 97 F3d 1078.

Indeed the Federal Courts since the early '90s have held to the principal that in order to establish a right to Federal redress for such events there must be a showing of substantial risk of serious harm to the claimant and that that harm or risk was knowingly or so egregiously foisted on the claimant that it constituted a malicious and willful act on the part of the jailer (Baker v. Delo CA 8 (Missouri) 1994, 38 F3d 1024). In the case at bar there has been no allegation on the part of the claimant that there has been a deliberate intention to inflict harm on him for any reason whatsoever or such willful indifference as may constitute an intentional act. Not having alleged the same to be so nor offering any proof thereof, the failure to do so is fatal to a claim under 32 USC 1983 as is set forth in Sanford v. Brookshire WD (Texas) 1994, 879 F Supp 691.

Turning to the conditions of rust and mold alleged to be present in the prisoner's cell and even the fact that it was cold, unpleasant conditions in the facility do not constitute the deprivation of Constitutional rights absent an actual suffering of physical harm, not a putative harm or potential harm but a documented suffering of actual physical harm *intentionally* inflicted by the jailer. In the

case of Robinson v. Illinois Correctional Center ND (Illinois) 1995, 890 F Supp 715 the conditions of cockroaches, bedbugs and other unpleasant things were considered by the Federal District Court in Illinois and determined not to rise to the level of a violation of 42 USC 1983.

Additionally, it must be stated that although the claimant uses the magic words "under color of state authority" there is no showing that any of the acts posited here were other than the acts of a jailer in the running of a facility which was intended to be and designed to be a correctional facility.

The general principal that a protected liberty interest must be the predicate for the right denied by the jailer had been upheld in Richmond v. Cagle ED (Wisconsin) 1996, 920 F Supp 955 and has been quoted throughout all the cases that follow, in which unhygienic conditions are raised by prisoners as deprivations under 42 USC 1983.

The Federal Courts are unanimous in holding that not merely unhygienic conditions which exist, unless they have been shown to exist for a long time coupled them with failure to correct those conditions that expose inmates to physical harm are therefore an infringement of their Constitutional rights. The failure, even to enforce rules which were promulgated for a facility such as no smoking, does not rise to the level of a 1983 violation as was so stated in the case of Bussue v. Lankler DC (New York) 1972, 337 F Supp 146 and Turner v. Plageman DC (Virginia) 1976, 418 F Supp 132.

As pointed out previously the failure to show actual knowledge on the part of the facility then coupled with the subsequent failure to alleviate such hazardous condition would be fatal to a claim. Such is fatal here since there is no showing that there was actual knowledge in anyone at the facility brought by a grievance procedure that Mr. Collins had available to him at Albany County Correctional Facility. Tokar v. Armontrout *cit supra*. He, Collins, chose not to complain.

Addressing Mr. Collins' concern about the cold, even the exposure to working in cold conditions in frigid weather or cold in the facility is not enough to rise to the level of a violation of ones Constitutional rights under 42 USC 1983 as the court held in Pendergrass v. Hannigan DC (Kansas) 1992, 788 F Supp 488.

In sum, the failure to demonstrate a deliberate indifference to the rights of the inmates and therefore a violation of the 8th Amendment of the Federal Constitution is fatal to a claim brought under 42 USC 1983 especially when the claimant is no longer an inmate of the facility against which the complaint is made. The mere negligence or temporary conditions both unhygienic or uncomfortable or such conditions as result from temporary or intermittent shortages all have proper vehicles for being addressed and corrected in the State law or State grievance procedure both through the Department of Corrections and the Commission on Corrections. Therefore they do not rise to the level of Federal rights violations unless those avenues are pursued and the authorities refuse to correct the conditions. In essence, as previously stated, the knowledge on the part of the facility must be actual combined with either deliberate indifference or presumed deliberate indifference by the calculated and egregious conduct of the prison officials. Burton v. Armentrout CCA8 (Missouri) 1992, 975 F2d 543, cert denied 113 S.CT. 2960; Wright v. Collins CA4 (Maryland) 1985, 766 F2d 841 and Haney v. Stevens DC (Kansas) 1993, 817 F Supp 97.

All of the grievances which are set forth by Mr. Collins in his complaint have been addressed by the Federal Courts before and all of them have appropriate vehicles for state redress.

For all of these reasons it is respectfully submitted that the claim and cause of action set forth in the plaintiff's complaint herein does give rise to a Federal right or protection which was denied and the Court therefore cannot effect a justiciable result.

CONCLUSION

THE COMPLAINT OF THE PLAINTIFF SHOULD RESPECTFULLY BE DISMISSED AS NOT RISING TO THE LEVEL OF 42 USC 1983.

Respectfully submitted.

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