

FILED
USDC, WESTERN DISTRICT OF LA
ROBERT H. SHEMWEEL, CLERK
DATE 12-1-04
BY JDS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

PATRICK BROWN, et al.,
Plaintiffs

CIVIL ACTION
SECTION "P"
NO. CV04-0759-A

VERSUS

TOM RIDGE, et al.,
Defendants

JUDGE DEE D. DRELL
MAGISTRATE JUDGE JAMES D. KIRK

ORDER AND REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Before the court is a civil rights complaint filed pursuant to 28 U.S.C. § 1983 by Patrick Brown, Fredo Gustave, Ismael (Ismet) Karaca, Eric Bell, Ramit Narang, Franklin Moreno, Leroy Bacchus, Rafiu Abimbola, Prince C. Brown, Gervase Blackwood, Hussein Nasrallah, Augusto Moreira, Alexander W. Ndaula, and Curtis Banks.¹ The plaintiffs were all being detained in the Concordia Parish Correctional Center in Ferriday, Louisiana, by the Department of Homeland Security's Bureau of Immigration and Customs Enforcement ("BICE"), pending deportation. The named defendants are Tom Ridge (Secretary of the Department of Homeland Security), BICE Field Director Christine Davis in New Orleans, BICE Officer in Charge

¹ Although is it this court's general practice to sever plaintiffs in civil rights cases, due to the individuality of each plaintiff's circumstances, experiences, and injuries, and the procedural problems inherent in joining several plaintiffs' claims, that has not yet been done in this case and it is not necessary at this point. There appears to be only one plaintiff remaining in this action.

Nancy Hooks (Oakdale facility), the Concordia Parish Sheriff's Department, the CPDC Warden (unnamed), and the CPDC Chief of Security Lance Moore. This case was referred to the undersigned Magistrate Judge for further consideration after an objection was filed to the Report and Recommendation dated July 23, 2004 (Doc. Item 41) by plaintiff Alexander W. Ndaula.

1.

In April 2004, each plaintiff was ordered by the court to pay the filing fee or submit an application to proceed in forma pauperis ("IFP") (Doc. Items 4-16). In response, plaintiffs Ismael (Ismet) **Karaca** and Gervase **Blackwood** filed motions to voluntarily dismiss their complaints, which were granted (Doc. Items 29, 33, 36, 37). Plaintiffs Fredo **Gustave**, Ramit **Narang**, Franklin **Moreno**, and Curtis **Banks** failed to comply with the court's order of April 2, 2004, and did not submit either the filing fee or an IFP application (Doc. Items 4, 7, 8, 16). Accordingly, their complaints should be dismissed for failure to comply with an order of this Court. See Rule 41(b) of the Federal Rules of Civil Procedure; Link v. Wabash Railroad Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); Gonzalez v. Trinity Marine Group, Inc., 117 F.3d 894, 898 (5th Cir. 1997).

2.

Plaintiffs Eric **Bell**, Fredo **Gustave**, Ramit **Narang**, Franklin **Moreno**, Hussein **Nasrallah**, Patrick L. **Brown**, Curtis **Banks**, Augusto

Moreira, Leroy Bacchus, and Hussein Nasrallah have failed to notify the court of their new addresses. Mail addressed to these plaintiffs from this court was returned as undeliverable on August 2, 2004, August 9, 2004, August 24, 2004, September 8, 2004, September 27, 2004, September 30, 2004, October 4, 2004, October 8, 2004, October 12, 2004, October 15, 2004, and November 1, 2004, November 18, 2004, and November 22, 2004. Local rule LR41.3W provides that the failure of a pro se litigant to keep the Court apprised of an address change may be considered cause for dismissal for failure to prosecute when a notice is returned to the Court for the reason of an incorrect address and correction is not made to the address for a period of 30 days. Since Eric Bell, Fredo Gustave, Ramit Narang, Franklin Moreno, Hussein Nasrallah, Patrick L. Brown, Curtis Banks, Augusto Moreira, Leroy Bacchus, and Hussein Nasrallah failed to inform the court of their address changes within 30 days after their mail was returned to the Clerk of Court, and have made no inquiry about this case nor attempted in any way to further prosecute the case, these plaintiffs' complaints should be dismissed without prejudice for failure to prosecute pursuant to LR41.3W and Rule 41(b) of the Federal Rules of Civil Procedure as interpreted by the Court and under the Court's inherent power to control its own docket. Link v. Wabash Railroad Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.734 (1962); Rogers v. Kroger Co., 669 F.2d 317, 320-21 (5th Cir. 1982).

3.

On August 9, 2004, plaintiff Rafiu **Abimbola** filed a motion for extension of time in which to file an objection to the Report and Recommendation (Doc. Item 4); a thirty day extension was granted (Doc. Item 43). However, Abimbola never filed any objection to the Report and Recommendation. Therefore, Abimbola's complaint should be dismissed in accordance with the un-objected to Report and Recommendation, as well as for failure to exhaust his administrative remedies, as discussed below.

4.

All plaintiffs have failed to exhaust their administrative remedies as to each claim alleged in the complaint. Section 1997e(a), as amended by the Prison Litigation Reform Act (PLRA), provides that "[n]o action shall be brought with respect to prison conditions under Section 1983...by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Exhaustion is *mandatory*, irrespective of the forms of relief sought and offered through administrative remedies. Booth v. Churner, 532 U.S. 731, 741 n. 6, 121 S.Ct. 1819 (2001). The exhaustion requirement of 42 U.S.C. § 1997e applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong. Porter v. Nussle, 534 U.S. 516, 532, 122 S.Ct. 983, 992 (2002). Also, Clifford v.

Gibbs, 298 F.3d 328, 330-331 (5th Cir. 2002); Wright v. Hollingsworth, 260 F.3d 357, 358 (5th Cir. 2001). Also, Days v. Johnson, 322 F.3d 863 (5th Cir. 2003). Resort to a prison grievance process must precede resort to a court. Porter, 534 U.S. at 529, 122 S.Ct. at 990.

Plaintiffs provided a copy of a grievance purported to be filed on behalf of all BICE detainees, which is signed by Prince Brown, Rafiu Abimbola, and Gervase Blackwood, is only raises issues as to collect calls, access to the prison law library, and access to typewriters (Doc. Item 1). There is one other grievance, filed by Gervase Blackwood, concerning an incident of verbal abuse by a corrections officer (Doc. Item 1). It is clear that none of the plaintiffs have filed grievances for each and every claim alleged in the complaint. Although a lack of response may result in a waiver of the requirement of complete exhaustion of the grievance procedures, each plaintiff must show that exhaustion was at least attempted as to each claim alleged herein. Therefore, plaintiffs' complaint should be dismissed for lack of exhaustion.

5.

Plaintiff Alexander **Ndaula** filed the sole objection to the Report and Recommendation (Doc. Item 48). Although Ndaula purports to file his objection on behalf of all plaintiffs, he cannot do so since he is not an attorney and may not represent others before

this court.² Therefore, Ndaula's objection will be considered only as to his own claims in this action.

The original complaint raises claims concerning the conditions of confinement in the Concordia Parish Correctional Center ("CPCC"), where Ndaula was detained by BICE in 2004, pending his deportation. Ndaula alleges that BICE contracted with the Concordia Parish Sheriff to house BICE detainees.

The claims in the original complaint involve denial of access to the courts, infringement of the right to religious freedom, denial of the First Amendment "right to the press" or censorship of incoming publications, unsanitary living conditions, inadequate exercise and recreation, exposure to environmental tobacco smoke, verbal abuse, and use of excessive force. There are two problems

² Although plaintiffs moved for class certification, that has not yet been granted and, even if it were, it is unlikely that Ndaula would be permitted to act as the class representative since he is a layman proceeding pro se. Because a lay person ordinarily does not possess the legal training and expertise necessary to protect the interests of a proposed class, courts usually will not certify a class represented by a pro se litigant. Ability to protect the interests of the class depends in part on the quality of counsel, and the competence of a layman representing himself is generally too limited to allow him to risk the rights of others. Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975); Wright, Miller & Kane, Federal Practice and Procedure 2d: Civil § 1769.9, n.12. See also, Lightbourne, 118 F.3d at 425; McGrew, 47 F.3d at 161; Anderson v. Moore, 372 F.2d 747, 751 n.5 (5th Cir. 1967); McClain, 187 F.R.D. at 281; Washington v. CSC Credit Serv., Inc., 178 F.R.D. 95, 100 (E.D.La.), amended, 180 F.R.D. 309 (E.D.La. 1998). Moreover, Ndaula has been transferred out of the CCPC and is awaiting deportation. Therefore, Ndaula would not be an adequate class representative.

with Ndaula' claims.

First, as discussed above, there is no evidence in the record, nor does Ndaula allege, that he has exhausted his claims in the prison administrative remedy procedures. Although there are two grievances filed by other inmates, to which there was allegedly no response, Ndaula has not shown that he attempted to exhaust his administrative remedies as to each claim alleged herein. Since exhaustion is mandatory, Booth v. Churner, 532 U.S. 731, 741 n. 6, 121 S.Ct. 1819 (2001), Ndaula's complaint should be dismissed for lack of exhaustion.

Second, none of the claims cite specific instances of violations of Ndaula's constitutional rights by the named defendants, or actual injuries suffered by Ndaula. In order to establish the personal liability of a certain defendant to a plaintiff who is claiming damages for deprivation of his civil rights, that plaintiff must show that particular defendant's action or inaction was a violation of the plaintiff's civil rights. Reimer v. Smith, 663 F.2d 1316, 1322 n. 4 (5th Cir. 1981). Also, Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 1098 n. 7, 89 L.Ed.2d 271 (1986). Moreover, an actual injury is a constitutional prerequisite to Section 1983 claim. Lewis v. Casey, 518 U.S. 343, 351-53, 116 S.Ct. 2174, 2180 (1996), discussing Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491 (1977). The requirement that an inmate alleging a violation of Bounds must show actual injury derives

ultimately from the doctrine of standing. Lewis, 518 U.S. at 349, 116 S.Ct. at 2179. See also, Chriceol v. Phillips, 169 F.3d 313, 317 (5th Cir. 1999).

Therefore, Ndaula's complaint should be dismissed for lack of exhaustion and for failure to state a violation of his constitutional rights by the named defendants that is cognizable under Section 1983.

Ndaula also objected to the recommendation that plaintiffs' motion for class certification be denied. Since there is only one plaintiff left in this case, this issue is moot.³

6.

The "Concordia Parish Sheriff's Department" is not a proper defendant. Parish "sheriff's departments" are not legal entities capable of being sued. The State of Louisiana grants no such

³ A class may be certified under Rule 23(b)(3) only if it meets the four prerequisites found in Rule 23(a) and the two additional requirements found in Rule 23(b)(3). Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 623 (5th Cir. 1999).

Under Fed.R.Civ.P. 23(a), an action may be maintained as a class action if it meets the criteria of numerosity, commonality, typicality, and adequacy of representation. McGrew v. Texas Bd. of Pardons & Paroles, 47 F.3d 158, 161 (5th Cir. 1995).

The requirements for Rule 23(b) are "predominance" and "superiority": Common questions must predominate over any question affecting only individual members; and class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy. Mullen, 186 F.3d at 624, citing Anchem Products v. Windsor, 521 U.S. 591, 117 S.Ct. 2231, 2245, 138 L.Ed.2d 689 (1997).

It is clear that, in this case, the plaintiff lacks both numerosity and adequate representation (discussed above in footnote 2).

legal status to any Parish Sheriff's Office. Thus, the Concordia Parish Sheriff's Department is not a "person" capable of being sued. Ruggiero v. Litchfield, 700 F. Supp. 863, 865 (M.D.La. 1988); Liberty Mut. Ins. Co. v. Grant Parish Sheriff's Dept., 350 So.2d 236, 238 (La. App., 3d Cir.), writ den., 352 So. 2d 235 (La. 1977). Also, Riley v. Evangeline Parish Police Jury, 630 So.2d 1314, 1320 (La. App. 3d Cir. 1993), rev'd on part on other grounds, 637 So.2d 395 (La. 1994); Ferguson v. Stephens, 623 So.2d 711, 714-15 (La. App. 4th Cir. 1993); Garner v. Avoyelles Parish Sheriff's Dept., 511 So.2d 8 n.1 (La. App. 3d Cir. 1987). Ndaula's Section 1983 action against the Concordia Parish Sheriff's Department should be dismissed with prejudice.

Conclusion

IT IS ORDERED that the Report and Recommendation issued July 23, 2004, Doc. Item 41, is hereby WITHDRAWN.

Based on the foregoing discussion, IT IS RECOMMENDED that the complaint filed by Patrick Brown, Fredo Gustave, Eric Bell, Ramit Narang, Franklin Moreno, Leroy Bacchus, Rafiu Abimbola, Prince C. Brown, Hussein Nasrallah, Augusto Moreira, and Curtis Banks be DISMISSED WITHOUT PREJUDICE for failure to comply with one or more orders of this court, failure to apprise the court of a change of address, and failure to exhaust administrative remedies.

IT IS FURTHER RECOMMENDED that Rafiu Abimbola's complaint be

DISMISSED WITHOUT PREJUDICE for lack of exhaustion and failure to state a claim cognizable under Section 1983.

IT IS FURTHER RECOMMENDED that Alexander W. Ndaula's complaint be DISMISSED WITHOUT PREJUDICE for failure to exhaust administrative remedies, and failure to state a claim cognizable under Section 1983.

IT IS FURTHER RECOMMENDED that the action against the "Concordia Parish Sheriff's Department" be DISMISSED WITH PREJUDICE.

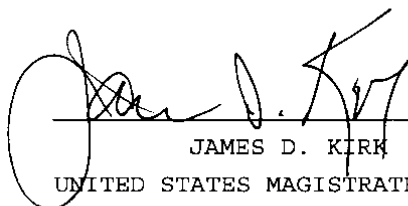
IT IS ALSO RECOMMENDED that plaintiffs' motion for class certification be DENIED AS MOOT.

Under the provisions of 28 U.S.C. § 636(b)(1)(c) and Fed.R.Civ.P. 72(b), the parties have **ten (10) business days** from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within **ten (10) days** after being served with a copy thereof. A courtesy copy of any objection or response or request for extension of time shall be furnished to the District Judge at the time of filing. Timely objections will be considered by the district judge before he makes a final ruling.

A PARTY'S FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL

BAR AN AGGRIEVED PARTY, EXCEPT ON GROUNDS OF PLAIN ERROR, FROM
ATTACKING ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND
LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.

THUS DONE AND SIGNED at Alexandria, Louisiana, on this 30
day of November, 2004.



JAMES D. KIRK
UNITED STATES MAGISTRATE JUDGE