

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

MUMIA ABU-JAMAL,

Plaintiff,

v.

JOHN KERESTES, et al.,

Defendants.

CIVIL ACTION NO. 3:15-CV-00967

(MARIANI, J.)
(MEHALCHICK, M.J.)

REPORT AND RECOMMENDATION

This matter comes before the Court upon the Plaintiff's motion for a preliminary injunction. ([Doc. 23](#)). For the reasons stated herein, it is recommended that the motion be denied.

I. BACKGROUND

On May 18, 2015, the Court received and filed a complaint in which prisoner-Plaintiff Mumia Abu-Jamal asserts violations of his constitutional rights pursuant to [28 U.S.C. § 1983](#) stemming from his hospitalization at Defendant Geisinger Medical Center ("Geisinger") for medical treatment. ([Doc. 1](#)). Specifically, Abu-Jamal claimed that he was denied access to his family members and to his attorneys while hospitalized at Geisinger. ([Doc. 1](#)). Abu-Jamal has since been discharged from Geisinger and returned to the general inmate population at SCI-Mahoney in Frackville, Pennsylvania. ([Doc. 13](#)). On August 3, 2015, Abu-Jamal filed a motion to file a first amended and supplemental complaint pursuant to [Federal Rule of Civil Procedure 15](#). ([Doc. 21](#)). In the amended complaint, Abu-Jamal seeks to name additional defendants and assert additional claims relating to the allegedly insufficient healthcare treatment he has received at SCI-Mahoney for his hyperglycemia, hepatitis C, and skin condition. ([Doc. 21](#)). The motion to file an amended complaint is currently pending before the Court.

On August 24, 2015, Abu-Jamal also filed the instant motion for a preliminary injunction. (Doc. 23). In this motion, Abu-Jamal requests that the Court enter an order directing that he be provided specific healthcare treatments, including the latest anti-viral drugs, a zinc supplement, and Protopic cream; and that he be allowed have an in-person examination with a doctor of his choosing. (Doc. 23). Abu-Jamal argues that an injunction is warranted because he is subject to an increased risk of liver damage or cancer if his hepatitis C is not treated properly, and because his skin condition and diabetes causes him chronic pain and fatigue. (Doc. 27, at 14).

II. DISCUSSION

Preliminary injunctive relief is extraordinary in nature and should only issue in limited circumstances. *See Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1426–27 (3d Cir. 1994). Moreover, issuance of such relief is at the discretion of the trial judge. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Chamberlain*, 145 F. Supp. 2d 621, 625 (M.D. Pa. 2001). In determining whether to grant a motion seeking preliminary injunctive relief, courts within the Third Circuit consider the following four factors: “(1) likelihood of success on the merits; (2) irreparable harm resulting from denial of the relief; (3) the harm to the non-moving party if relief is granted; and (4) the public interest.” *United States v. Bell*, 238 F. Supp. 2d 696, 699 (M.D. Pa. 2003). The moving party bears the burden of satisfying these factors. *Bell*, 238 F. Supp. 2d at 699. “Only if the movant produces evidence sufficient to convince the trial judge that all four factors favor preliminary relief should the injunction issue.” *Opticians Ass’n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 192 (3d Cir. 1990).

“[A]n essential prerequisite to the grant of a preliminary injunction is a showing by the movant of irreparable injury *pendente lite* if the relief is not granted.”¹ *United States v. Pennsylvania*, 533 F.2d 107, 110 (3d Cir. 1976). A preliminary injunction “may not be used simply to eliminate a possibility of a remote future injury.” *Holiday Inns of Am., Inc. v. B&B Corp.*, 409 F.2d 614, 618 (3d Cir. 1969). “[T]he irreparable harm must be actual and imminent, not merely speculative.” *Angstadt ex rel. Angstadt v. Midd-West Sch.*, 182 F. Supp. 2d 435, 437 (M.D. Pa. 2002). “[M]ore than a risk of irreparable harm must be demonstrated. The requisite for injunctive relief has been characterized as a ‘clear showing of immediate irreparable injury,’ or a ‘presently existing actual threat’” *Continental Grp., Inc. v. Amoco Chems. Corp.*, 614 F.2d 351, 359 (3d Cir. 1980) (citations omitted).

Moreover, “when the preliminary injunction is directed not merely at preserving the status quo but . . . at providing mandatory relief, the burden on the moving party is particularly heavy.” *Punnett v. Carter*, 621 F.2d 578, 582 (3d Cir. 1980). Therefore, “a request for any form of mandatory prospective relief in the prison context ‘must always be viewed with great caution because judicial restraint is [e]specially called for in dealing with the complex and intractable problems of prison administration.’” *Fontroy v. Wetzel*, No. CA 14-165, 2014 WL 4411079, at *2 (W.D. Pa. Sept. 8, 2014) (quoting *Goff v. Harper*, 60 F.3d 518, 520 (8th Cir. 1995)); *Barndt v. Pennsylvania Dep't of Corr.*, No. 3:09-CV-1790, 2010 WL 4791685, at *3 (M.D. Pa. Sept. 7, 2010) *report and recommendation adopted*, No. 3:CV-09-1790, 2010 WL 4789837 (M.D. Pa. Nov. 18, 2010) (“In particular, courts have been reluctant to accept inmate invitations to use preliminary

¹ *Pendente lite* is a Latin term meaning “while the action is pending” or “[d]uring the proceeding or litigation.” *Black’s Law Dictionary* 1154 (7th ed. 1999).

injunctions as a means to judicially prescribe specific medical courses of treatment for inmates.”).

A. FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Reviewing Abu-Jamal’s motion, it is clear that he has not shown that he is entitled to injunctive relief. As a preliminary matter, the Defendants have introduced evidence that Abu-Jamal did not properly exhaust his administrative remedies pursuant to 42 U.S.C. § 1997e. Under the Prison Litigation Reform Act of 1996 (the PLRA), a prisoner is required to pursue all avenues of relief available within the prison’s grievance system before bringing a federal civil rights action concerning prison conditions. See 42 U.S.C. § 1997e(a); *Booth v. Churner*, 206 F.3d 289, 291 (3d Cir. 2000). The exhaustion requirement is mandatory. See *Williams v. Beard*, 482 F.3d 637, 639 (3d Cir. 2007); see also *Booth*, 532 U.S. 731, 741 (holding that the exhaustion requirement of the PLRA applies to grievance procedures “regardless of the relief offered through administrative procedures”); *Nyhuis v. Reno*, 204 F.3d 65, 67 (3d Cir. 2000) (same). Moreover, in order to exhaust remedies, a plaintiff must pursue a grievance through final administrative review. *Salley v. PA Dept. of Corrections*, 181 Fed. Appx. 258, 264 (3d Cir. 2006). Inmates who fail to fully exhaust administrative remedies may not subsequently litigate those claims in federal court, and this prohibition extends to requests for injunctive relief. *Ghana v. Holland*, 226 F.3d 175, 184 (3d Cir. 2000).

Abu-Jamal has only filed one grievance concerning medical care since being transferred to SCI-Mahoney in 2011. (Doc. 28-2, at ¶¶ 5-6). That grievance, which involved the treatment of Abu-Jamal’s diabetes, was appealed to final agency review and signed by Abu-Jamal on June 25, 2015, and filed by the Secretary’s Office of Inmate Grievances and Appeals (“SOIGA”) on July 6, 2015. (Doc. 28-1, at 89-91). However, the grievance appeal still remains pending. (Doc.

28-1, at ¶ 16; Doc. 28-2, at ¶ 10). Because Abu-Jamal filed the instant motion before the issuance of a final grievance review decision, he did not fully exhaust his administrative remedies. *Oriakhi v. United States*, 165 F. App'x 991, 993 (3d Cir. 2006) (per curiam) (“Indeed, there appears to be unanimous circuit court consensus that a prisoner may not fulfill the PLRA's exhaustion requirement by exhausting administrative remedies after the filing of the complaint in federal court.”); *Ahmed v. Dragovich*, 297 F.3d 201, 209 n.9 (3d Cir. 2002) (collecting cases). Accordingly, the Court recommends that Abu-Jamal's motion for injunctive relief be dismissed without prejudice because the uncontroverted evidence presented by Defendants indicates that this claim has not been administratively exhausted. See, e.g., *Lyons v. Wetzel*, No. 1:12-CV-1357, 2013 WL 4041573, at *5 (M.D. Pa. Aug. 8, 2013) (“This failure to exhaust is fatal to the instant motion for preliminary injunction.”); *Hill v. Smith*, No. 4:05-CV-1724, 2005 WL 2666597, at *4 (M.D. Pa. Oct. 19, 2005) *aff'd*, 186 F. App'x 271 (3d Cir. 2006) (“Because [plaintiff] has not exhausted his administrative remedies as required by the PLRA, his complaint and motion for a preliminary injunction will be dismissed.”).

B. PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF ALSO FAILS ON THE MERITS

Further, Abu-Jamal's claim for injunctive relief also fails on the merits because he does not make a “clear showing of immediate irreparable injury” required to establish irreparable harm. *Continental Grp.*, 614 F.2d at 359. “In order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial. The preliminary injunction must be the only way of protecting the plaintiff from harm.” *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989). Here, a preliminary injunction is not the only way of protecting Abu-Jamal from harm because his administrative grievance appeal remains pending.

Moreover, although it is clear that hepatitis C constitutes a “serious medical need” that triggers Eighth Amendment scrutiny, the Court also finds that Abu-Jamal has not shown sufficiently immediate irreparable harm to warrant injunctive relief. See *Rodriguez v. Wiley*, No. CIV.A08CV02505PABCBS, 2009 WL 6325780, at *4 (D. Colo. Aug. 14, 2009) *report and recommendation adopted*, No. CIV.A08CV02505PABCBS, 2010 WL 1348021 (D. Colo. Mar. 31, 2010) (“While there is little question that hepatitis C is a ‘sufficiently serious’ condition under the Eighth Amendment, merely becoming infected with hepatitis C does not ensure that serious and irreparable damage will occur.”). Pennsylvania inmates frequently bring Eighth Amendment claims before federal courts seeking “preliminary injunctions directing their jailers to provide them with specially tailored treatment protocols” for their hepatitis C, “[y]et, these requests . . . have rarely been embraced by the courts.” *Barndt*, 2010 WL 4791685, at *7. “[T]he claimed injury cannot merely be possible, speculative or remote.” *Dice v. Clinicorp, Inc.*, 887 F. Supp. 803, 809 (W.D. Pa. 1995). Here, Abu-Jamal attached the declaration of Joseph Harris, M.D., who warns that if the hepatitis C goes untreated, “he faces an increasingly serious risk of suffering from fibrosis and cirrhosis, liver cancer, complications of his diabetes, and eventual death.” (Doc. 26, at ¶ 69). These risks, although severe, do not sustain Abu-Jamal’s burden of showing *immediate* irreparable harm that warrants injunctive relief, especially given the fact that it often takes significant time for hepatitis C to progress. See, e.g., *Iseley v. Dragovich*, 90 F. App’x 577, 581 (3d Cir. 2004) (“Regardless of whether Interferon was an FDA approved treatment for Hepatitis C or not, according to the professional judgment of his treating prison physicians in 1999, Interferon treatment was contraindicated in Iseley’s case because his condition had not yet progressed to the point where such treatment would have been appropriate.”).

The Court also finds that granting Abu-Jamal's motion for a preliminary injunction would be harmful to the Defendants' interests. A "viral load" test conducted by the medical staff at SCI-Mahoney revealed that Abu-Jamal had an active hepatitis C infection on or about July 31, 2015. ([Doc. 25](#), at ¶ 33). Abu-Jamal filed the instant motion for injunctive relief on August 24, 2015, seeking an order that he be provided specific healthcare treatments. ([Doc. 23](#)). "In this prison context, the Defendants' interests and the public's interest in penological order could be adversely effected if the Court began dictating the treatment protocols and priorities for the Plaintiff, one inmate out of thousands treated in the state's prison system." *Barndt*, 2010 WL 4791685, at *9. Here, the Court is particularly hesitant to dictate specific treatment because Abu-Jamal was only confirmed as having an active hepatitis C infection less than a month before he filed for the instant injunction. The Defendants' interests would therefore be harmed by granting injunctive relief because it would deny Defendants an opportunity to treat Abu-Jamal's hepatitis C in accordance with their own established protocols.

III. RECOMMENDATION

Based on the foregoing, it is respectfully recommended that Abu-Jamal's motion for preliminary injunctive relief ([Doc. 23](#)), be **DENIED**.

BY THE COURT:

Dated: September 18, 2015

s/ Karoline Mehalchick

KAROLINE MEHALCHICK
United States Magistrate Judge

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NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing **Report and Recommendation** dated **September 18, 2015**. Any party may obtain a review of the Report and Recommendation pursuant to Rule 72.3, which provides:

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in [28 U.S.C. § 636\(b\)\(1\)\(B\)](#) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Dated: September 18, 2015

s/ Karoline Mehalchick

KAROLINE MEHALCHICK
United States Magistrate Judge