

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

HOWARD LEE BOONE, JR.,                    )  
  )  
  )  
                          Plaintiff,            )  
  )  
                  v.                            )     Civ. No. 03-624-SLR  
  )  
  )  
THOMAS CARROLL, RICH PORTER,            )  
JOE RICHARDSON, JESSICA                    )  
BARTON, MAJOR HOLMAN, and                )  
CAPT. SAGERS                                )  
  )  
  )  
                          Defendants.            )

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Howard Lee Boone, Delaware Correction Center, Smyrna, Delaware.  
Pro se Plaintiff.

Richard W. Hubbard, Esquire, Department of Justice, Wilmington,  
Delaware. Counsel for Defendants.

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**MEMORANDUM OPINION**

Dated: March 26, 2004  
Wilmington, Delaware

**ROBINSON, Chief Judge**

**I. INTRODUCTION**

On July 3, 2003, Howard Lee Boone, a pro se plaintiff proceeding in forma pauperis ("plaintiff"), filed the present action pursuant to 42 U.S.C. § 1983 against Thomas Carroll, Rick Porter, Joe Richardson, Jessica Barton, Major Holman, and Capt. Sagers (collectively, "defendants").<sup>1</sup> Plaintiff is incarcerated at the Delaware Correctional Center ("DCC"). Plaintiff alleges that prison officials and fellow inmates have threatened his physical safety in retaliation for providing information about contraband distribution within the prison system to the DCC internal affairs division.<sup>2</sup> (D.I. 1) The court has jurisdiction over the instant suit pursuant to 28 U.S.C. § 1331. Presently before the court are defendants' motion to dismiss, plaintiff's motion for representation by counsel, and plaintiff's motion to amend the previously requested relief. (D.I. 11, 20, 21) For the reasons that follow, the court grants defendants' motion to dismiss, denies plaintiff's motion for representation by counsel, and denies plaintiff's motion to amend the previously requested

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<sup>1</sup>At the time of plaintiff's complaint, Thomas Carroll served as the prison warden, Rick Porter and Joe Richardson were lieutenants, Jessica Barton worked as a counselor, Major Holman was the prison security chief, and Capt. Sagers was a secure housing unit captain. (D.I. 2 at 3)

<sup>2</sup>On September 3, 2003, plaintiff filed a letter with the court emphasizing his concerns for his physical safety. (D.I. 6) The court construed this letter as an amended complaint.

relief.

## **II. BACKGROUND**

On June 11, 2003, plaintiff tested positive for marijuana drug use. (D.I. 2) As a result, plaintiff was transferred to the secure housing unit (SHU) on June 12, 2003. (Id.) Defendants Porter and Barton spoke with plaintiff after his transfer. They allegedly encouraged plaintiff to "help himself" and tell them all he knew about illegal contraband distribution within the prison system. (Id.) They also allegedly told plaintiff that he would be moved to Gander Hill Prison if he agreed to provide the requested information. Plaintiff agreed and shared what he knew about the intra-prison drug chain at DCC.

On June 17, 2003, plaintiff consented to speak with a representative from the prison internal affairs division regarding drug suppliers. Defendant Richardson interviewed plaintiff in a glass enclosed room in the SHU. Plaintiff told defendant Richardson that four specific prison officers and a number of particular prisoners supplied illegal contraband (i.e., marijuana and tobacco) to inmates. Plaintiff claims that several prison officers walked by the interview room during the course of this interview and peered in at him through the glass. After seeing the officers, plaintiff told defendant Richardson that he was "very uncomfortable and scared." Defendant Richardson

stopped the interview and told plaintiff that he would reschedule it for a later date in defendant Sager's office.

On June 20, 2003, plaintiff completed the interview with defendant Richardson in defendant Sager's office. (Id.) Prison officials thereafter initiated the process to transfer plaintiff to Sussex Correctional Center, where plaintiff asked to be moved. (D.I. 6)

Since the interview, plaintiff claims that he has received direct and indirect threats to his personal safety from both officers and fellow prisoners. (Id.) Nevertheless, plaintiff has not filed a grievance under Inmate Grievance Procedure for the State of Delaware Bureau of Prisons because he contends that he would be exposed to an even greater risk of personal harm. (D.I. 2)

### **III. STANDARD OF REVIEW**

Because the defendants have referred to matters outside plaintiff's complaint, defendants' motion to dismiss shall be treated as a motion for summary judgment. See Fed. R. Civ. P. 12(b)(6). A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of

proving that no genuine issue of material fact exists. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted).

If the moving party has demonstrated an absence of material fact, then the nonmoving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, then the moving party is entitled to judgment as a matter of law. Celotex Corp.

v. Catrett, 477 U.S. 317, 322 (1986). In other words, the court must grant summary judgment if the party responding to the motion fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. Omnipoint Comm. Enters., L.P. v. Newtown Township, 219 F.3d 240, 242 (3d Cir. 2000) (quoting Celotex, 477 U.S. at 323).

#### **IV. DISCUSSION**

The court agrees with defendants that plaintiff's retaliation claim cannot stand because plaintiff failed to exhaust his administrative remedies prior to filing the instant civil rights action. Under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), "no action shall be brought with respect to prison conditions under § 1983 of this title ... by a prisoner confined ... until such administrative remedies as are available are exhausted." The Third Circuit has required a plaintiff to exhaust administrative remedies before filing a civil action, even if the ultimate relief sought is not available through the administrative process. Nyhuis v. Reno, 204 F.3d 65, 71 (3d Cir. 2000) (stating that the Prison Litigation Reform Act precludes a futility exception to its mandatory exhaustion requirement).

In order for § 1997e to apply, however, two requirements must be met. First, a prisoner's complaint must concern prison conditions. Prison conditions are defined as conditions with respect to the conditions of the confinement. See 18 U.S.C. §

3626(g) (2). The Third Circuit has interpreted this language to relate "to the environment in which prisoners live, the physical conditions of that environment, and the nature of the services provided therein." Booth v. Churner, 206 F.3d 289, 294 (3d Cir. 2000).

Second, the department of corrections must have an administrative procedure in place to remedy prisoner complaints. The State of Delaware Bureau of Prisons has an established and comprehensive Inmate Grievance Review System. The Inmate Grievance Procedure states that "[e]very inmate will be provided a timely, effective means of having issues brought to the attention of those who can offer administrative remedies before court petitions can be filed." State of Delaware Bureau of Prisons Procedure Manual, Procedure Number 4.4, section II (revised May 15, 1998). The procedure creates a three-step grievance process with two levels of appeal. Id. at section V. To exhaust all available administrative remedies, a prisoner must complete all stages of review or take part in the appeals process. The procedure also provides for an emergency grievance, defined as "an issue that concerns matters which under regular time limits would subject the inmate to a substantial risk of personal, physical[,] or psychological harm." Id. at section IV. Emergency grievance are addressed on an expedited basis. Specifically, the procedure provides in pertinent part:

Issues that concern substantial risk of personal, physical, or psychological inmate injury shall be addressed immediately by the [w]arden/[w]arden's [d]esignee. A copy of the grievance shall be sent to the [inmate grievance chair] upon receipt by the [w]arden/[w]arden's [d]esignee. And the [w]arden/[w]arden's [d]esignee shall respond within one calendar day. Grievant appeals of the [w]arden/[w]arden's [d]esignee's decision will be decided by the [b]ureau [c]hief of [p]rison within one calendar day upon receipt of the emergency appeal.

Id. at section V.

Plaintiff's retaliation claim is clearly directed at prison conditions, specifically the environment where plaintiff resides. As a result, plaintiff is subject to the § 1997e's exhaustion requirement. The court finds that plaintiff, nevertheless, did not exhaust the procedures available through the Inmate Grievance Review System. Plaintiff plainly stated in his complaint that he did not file a grievance, despite the fact that the Inmate Grievance Procedure provides for emergency grievances. (See D.I. 2) The court, consequently, concludes that plaintiff has failed to satisfy the requirements of § 1997e. Accordingly, the court grants defendants' motion to dismiss.<sup>3</sup>

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<sup>3</sup>In light of the decision to grant defendants' motion to dismiss, the court denies plaintiff's motion for representation by counsel as moot. The court also denies plaintiff's motion to amend the previously requested relief as moot. The court notes, however, that it will refer this matter to the United States Attorney's Office for further investigation, as plaintiff's allegations are serious in nature.

**V. CONCLUSION**

For the reasons stated above, the court grants defendants' motion to dismiss. The court denies plaintiff's motion for representation by counsel and plaintiff's motion to amend the previously requested relief. An appropriate order shall issue.

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CAPT. SAGERS                                )  
  )  
                          Defendants.                )

**O R D E R**

At Wilmington, this 26<sup>th</sup> day of March, 2004, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Defendants' motion to dismiss (D.I. 20) is granted.
2. Plaintiff's motion for representation by counsel (D.I. 11) is denied.
3. Plaintiff's motion to amend the previously requested relief (D.I. 21) is denied.

Sue L. Robinson  
United States District Judge