

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

BATSAIHAN, PURVEEGIIN :
 :
 v. : CIVIL ACTION
 :
 BERKS COUNTY PRISON, ET AL. : NO. 05-2139-JF
 :

M E M O R A N D U M

Fullam, Sr. J.

May 24th, 2006

Plaintiff Batsaihan Purveegiin is a Mongolian citizen who is being held in prison pending a final determination of his immigration status. In this case, he challenges the conditions of his confinement at Berks County Prison from March 12, 2004 through July 1, 2005. His Second Amended Complaint alleges, among other things, that defendants: did not provide proper treatment for his diabetes; tampered with his legal mail; placed him in a cell with a dangerously unstable inmate; failed to respond to complaints about an unidentified white powder coming through the air vents; and retaliated against him for complaining about these issues. Defendants have moved to dismiss all fifteen claims raised in the Second Amended Complaint. As detailed in the attached Order, these motions will be granted in part and denied in part. The remaining claims allege serious violations of plaintiff's rights.

Also before the Court is plaintiff's motion to terminate his relationship with his court appointed attorney,

Darcy Walker, filed on March 21, 2006. Because plaintiff's primary concerns were specific to Ms. Walker, it is my opinion that his motion is moot because Ms. Walker's motion to withdraw her appearance in this case will be granted, and Andrew P. Foster will be appointed in her place.¹ Mr. Foster is an experienced attorney, and I am confident that plaintiff would benefit from being represented by him. Therefore, I am inclined to permit Mr. Foster and the plaintiff time to forge a productive attorney-client relationship. Should their attempts to work together prove unsuccessful, I would consider a motion to terminate the representation. Plaintiff is warned, however, that I will not grant a request for the appointment of new counsel. If Mr. Foster is removed from this case, plaintiff will be required to represent himself.

An Order follows.

1. In an August 31, 2005, letter to the then Chief Judge of this Court, attached to Docket No. 14, Mr. Foster represented that he would enter an appearance in this case and that a motion requesting the *pro hac vice* admission of Ms. Walker to practice before this Court would be filed shortly thereafter. Apparently believing that the September 7, 2005, Order appointing Ms. Walker to represent the plaintiff made these filings unnecessary, Mr. Foster did not enter an appearance or move for the *pro hac vice* admission of Ms. Walker. The attached Order should clarify any confusion.

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O R D E R

AND NOW, this 24th day of May, 2006, upon consideration of the pending motions and responses thereto, IT IS hereby ORDERED that:

- 1) Darcy D. Walker's "Notice of Withdrawal" (Docket No. 65), construed as a Motion for Leave to Withdraw, is GRANTED.
- 2) Andrew P. Foster is hereby APPOINTED to represent the plaintiff in this case. This appointment may be amended or revoked ONLY by Order of this Court.
- 3) Plaintiff's "Request Revoke Miss Walker Entering" (Docket No. 56), construed as a Motion to Terminate the Appointment of Counsel, is DISMISSED AS MOOT.
- 4) Plaintiff's "Motion for Add New Defendants" (Docket No. 66) is DENIED for the reasons stated above. In addition, none of the claims raised in the motion could be incorporated into this lawsuit.
- 5) All other motions filed by plaintiff directly, rather than through his attorney (Docket Nos. 48, 51-53, and 61-64), are DISMISSED. Because plaintiff has legal representation all documents must be filed by his counsel. The motions filed by plaintiff are also unnecessary because his counsel submitted full and timely responses to all motions to dismiss.
- 6) The Motions to Dismiss filed by Dr. Marybeth Jackson and PrimeCare Medical, Inc. (Document No. 43), Jesse T. Kirsch (Document No. 45), and David R. F. Day and Kelly

Halford, R.N. (Document No. 47) are GRANTED IN PART AND DENIED IN PART as follows:

- a) As to Counts I and II the Motions are DENIED;
 - b) Count III, styled as "Negligence," is construed as a claim for medical malpractice and DISMISSED WITHOUT PREJUDICE for the reasons stated in Rodriguez v. Smith, Civil Action No. 03-3675, 2005 WL 1484591 (E.D. Pa. June 21, 2005). Plaintiff may file a motion for leave to reinstate his medical malpractice claim within 60 days of the date of this Order if he attaches to the motion a certificate of merit that fully complies with the requirements of Rule 1042.3(a)(1) and (b);
 - c) Count IV, alleging "Corporate Liability," is DISMISSED, as it fails to articulate a cause of action.
- 7) The Motion to Dismiss filed by the Berks County Prison Defendants (Document No. 46) is GRANTED IN PART AND DENIED IN PART as follows:
- a) Because Berks County Prison is not a suable entity, but merely a building, all claims against the Prison are construed as claims against the Berks County Board of Prison Inspectors. The Clerk is directed to AMEND the caption accordingly;
 - b) The Second Amended Complaint is read to state claims against individual defendants only in their individual capacities;
 - c) Count VI is DISMISSED because the injuries that allegedly resulted from the powder in plaintiff's cell and from his cellmate were not serious enough to constitute a Constitutional violation;
 - d) Count VIII is DISMISSED against defendant James Wilson ONLY;
 - e) Counts IX and X, alleging tampering with plaintiff's legal mail, are DISMISSED against defendant Betsy Hivner ONLY;
 - f) Count XI, alleging inadequate grievance procedures, is DISMISSED;

- g) Counts XII and XIII, alleging denial of access to legal materials, are DISMISSED;
- h) Count XVI is DISMISSED, as there is no allegation that Warden Wagner had knowledge of the alleged harassment by other inmates;
- i) In all other respects, the Motion is DENIED.
- j) As all claims against defendant Betsy Hivner have been dismissed, the Clerk is directed to TERMINATE her as a party to this action.

BY THE COURT:

/s/ John P. Fullam
John P. Fullam, Sr. J.