

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

FREDERICK T. RAY, III : CIVIL ACTION
: :
v. : :
: :
SGT. THOMAS A. MADONNA, et al. : NO. 04-cv-00805-JF

FREDERICK T. RAY, III : CIVIL ACTION
: :
v. : :
: :
MAJOR WALTER REED, et al. : NO. 04-cv-00810-JF

MEMORANDUM AND ORDER

Fullam, Sr. J.

September 6, 2007

At an earlier stage, I granted the defendants' motions to dismiss, noting that plaintiff had failed to respond to either motion. Plaintiff appealed, and a panel of the Third Circuit Court of Appeals found my Order "ambiguous." The Order, in its entirety, stated:

"Upon consideration of Defendants' Motion to Dismiss, to which no response has been filed, the Motion is GRANTED."

The panel decision expressed uncertainty as to whether the merits of the motion had been considered, and expressed the view that, at least in some circumstances, it is inappropriate for a district court to rely upon its own procedural rules concerning motion practice to dispose of motions by default.

The defense motions in question, styled as motions to dismiss the complaint for failure to state a claim, under Fed. R.

Civ. P. 12(b)(6), were accompanied by a significant amount of evidentiary material. In view of the remand from the Court of Appeals, I consider it appropriate to treat the defense motions as motions for summary judgment under Fed. R. Civ. P. 56, and will therefore provide the plaintiff with a further opportunity to respond to the motions, if he so desires. In particular, plaintiff will be invited to address some of the more significant evidentiary materials.

An Order follows.

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ORDER

AND NOW, this 6th day of September 2007, IT IS ORDERED:

1. The defendants' motions to dismiss shall be treated as motions for summary judgment under Fed. R. Civ. P. 56. Plaintiff may file a response to those motions, if he so desires, within 60 days.

2. If plaintiff decides to file a response to those motions, plaintiff is invited to address each of the following grounds asserted in the documents which have been presented by the defendants in support of the motions to dismiss:

- (a) that plaintiff has failed to exhaust his administrative remedies, by failing to complete the available appeals process within the prison.
- (b) that, over a period of two years and nine months (between May 31, 2001 and February 27, 2004), plaintiff was the subject of disciplinary charges

on 45 separate occasions, and entered pleas of guilty on 25 of those occasions.

(c) that plaintiff has made a practice of filing complaints against prison personnel on virtually a daily basis, during the period of his incarceration.

(d) that plaintiff has filed civil rights actions in this court on eight or nine previous occasions, most or all of which have been dismissed for lack of merit.

3. Unless plaintiff files a response to the pending motions for summary judgment, in compliance with the provisions of this Order, the captioned actions will be dismissed with prejudice.

BY THE COURT:

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