

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA

JOHN A. THOMAS (#177753)

CIVIL ACTION

VERSUS

WARDEN BURL CAIN, ET AL.

NO. 05-0941-D-M2

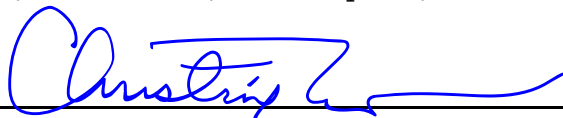
**NOTICE**

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the United States District Court.

In accordance with 28 U.S.C. § 636(b)(1), you have ten (10) days after being served with the attached Report to file written objections to the proposed findings of fact, conclusions of law and recommendations therein. Failure to file written objections to the proposed findings, conclusions, and recommendations within 10 days after being served will bar you, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions of the Magistrate Judge which have been accepted by the District Court.

ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.

Signed in chambers in Baton Rouge, Louisiana, January 31, 2008.



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MAGISTRATE JUDGE CHRISTINE NOLAND

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MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter comes before the Court on the defendants' Motions to Dismiss. Rec.doc.nos. 53 and 69. These motions are opposed.

The pro se plaintiff, an inmate incarcerated at the Louisiana State Penitentiary ("LSP"), Angola, Louisiana, instituted this action pursuant to 42 U.S.C. § 1983 against Warden Burl Cain, Warden Donald Barr, Warden Doug Durette, Major Ronnie Constance, Dr. Mai Tran, Dr. Charles Barkmeyer, Nurse Vona, Sgt. Todd Moreau, Nurse Farrow, Nurse Chuck, Major Myers, Capt. Presley Bordelon, Capt. Lonnie Edmonds, Lt. Eric Hinyard, Lt. Skiels, Sgt. Mullard, Lt. Reginald Smith, Akisha Lewis, Sgt. Ernest, Dennis Kimble and Classification Officer Williams, contending that the defendants violated his constitutional rights through deliberate indifference to his serious medical needs in September, 2004. At that time, he was allegedly administered an incorrect medication which caused him injury. Further, the plaintiff asserts that he was thereafter subjected to deliberate indifference to his serious medical needs and unconstitutional conditions of confinement. Finally, he complains that he was subjected to harassment in the form of threats and verbal abuse, mishandling of his personal, legal and religious property, and false and retaliatory disciplinary reports.<sup>1</sup>

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<sup>1</sup> Attempts by the United States Marshal's Office to serve defendants Dr. John Doe, Nurse Vona, Nurse Chuck, Nurse Farrow, Major Myers, Lt. Skiels, Akisha Lewis, Sgt. Ernest and Officer Williams have proven unsuccessful because the Louisiana Department of Public Safety and Corrections has refused to accept

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure may not be granted unless it appears certain that the plaintiff will be unable to prove any set of facts in support of his claim that would entitle him to relief. Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 524 (5th Cir. 1994), citing Norman v. Apache Corp., 19 F.3d 1017, 1021 (5th Cir. 1994). See also Green v. State Bar of Texas, 27 F.3d 1083, 1086 (5th Cir. 1994) ("A dismissal will not be affirmed if the allegations support relief on any possible theory"). Accordingly, this Court must accept all well-pleaded facts as true, and must review them in the light most favorable to the plaintiff. Green, supra, at 1086.

Initially, it is unclear from the allegations of the plaintiff's Complaint whether he has named the defendants herein in their individual and/or their official capacities. However, in light of the liberality with which this Court views the pleadings of pro se petitioners, Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), the Court interprets the plaintiff's Complaint as naming the defendants in both capacities. Notwithstanding, the law is clear that § 1983 does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. Neither a State, nor its officials acting in their official capacities, are "persons" under § 1983. Will v. Michigan Department of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Thus, it is clear that the plaintiff

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service on behalf of these individuals. Accordingly, these defendants have not appeared in this proceeding and have not participated in the instant motions. Pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, the failure of a plaintiff to serve a defendant within 120 days of commencement of an action is cause for dismissal of that defendant from the proceedings. It is appropriate, therefore, that the plaintiff's claims against defendants Dr. John Doe, Nurse Vona, Nurse Chuck, Nurse Farrow, Major Myers, Lt. Skiels, Akisha Lewis, Sgt. Ernest and Officer Williams be dismissed, without prejudice.

fails to state a claim under § 1983 against the defendants in their official capacities.

Turning to the plaintiff's allegations against the defendants in their individual capacities, he alleges in his long and rambling Complaint that he was transferred to LSP in September, 2004, at which time he was only superficially examined by defendant Dr. Mai Tran, with defendant Major Constance and another officer, Lt. Milam (not named as a defendant herein) allegedly present. According to the plaintiff, the defendant physician was skeptical regarding the plaintiff's asserted need for a wheelchair and regarding some of his other medical complaints. Nonetheless, the plaintiff was apparently referred for examination by a specialist, defendant Dr. Barkmeyer, which examination initially took place in February, 2005, after which defendant Dr. Barkmeyer referred the plaintiff for diagnostic testing at both Earl K. Long Hospital in Baton Rouge, Louisiana, and at Charity Hospital in New Orleans, Louisiana. These examinations, together with associated diagnostic testing, took place in May and June, 2005. The plaintiff complains, however, that defendant Dr. Barkmeyer has generally been of little assistance in responding to the plaintiff's medical complaints.

The plaintiff also complains of a specific incident of alleged wrongdoing at LSP, which occurred on September 9, 2004, shortly after his arrival at LSP, on which date he asserts that defendant Nurse Moreau improperly gave him a medication ("morphine") which was not prescribed for him. After the plaintiff complained of adverse symptoms relative to the medication, he was initially told by attending nurses that the medication had been prescribed by a physician. When the plaintiff continued to complain of symptoms from the medication, he was given an

injection of a second medication ("Norcan") by defendant Nurse Vona, reportedly to counteract the effects of the initial dosage. The plaintiff complains, however, that the nurses thereafter continued to mislead him as to whether the "morphine" had been prescribed for him or whether it had been mistakenly given to him. He further complains that he was provided with no further medical treatment or attention relative to the improper medication other than the single injection of "Norcan". As a result, he developed a "great deep embedded fear" of seeking medical attention at LSP. In addition, he asserts that the defendant nurses ultimately fabricated a false disciplinary report against him, accusing him of having obtained the improper medication by having answered for another inmate when the medication was being distributed.

It further appears from the plaintiff's allegations that, on November 4, 2004, he was transferred from one LSP hospital ward to another, where he complains that conditions were more onerous. Specifically, he asserts that in the newly assigned housing unit, conditions were unsanitary, food was improperly prepared and/or cold, his mail was tampered with, the thick doors behind which he was confined presented a dangerous condition, he was not provided with accommodation for showering in a wheelchair, the climate controls were utilized by security officers to expose him to uncomfortably hot or cold temperatures, and he was denied an opportunity for exercise. However, notwithstanding his conclusory assertions regarding these conditions and his conclusory assertions that his transfer was motivated in retaliation for his complaints regarding the alleged misapplication of "morphine", he concedes that his medical records will show that, as a result of symptoms exhibited by him at that time, the medical staff suspected that

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