

**IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA**

MUMIA ABU-JAMAL, et al.,	:	
Plaintiffs	:	Civil Action No. 3:15-CV-00967
	:	
v.	:	(Judge Mariani)
	:	
JOHN KERESTES, GEISINGER	:	(Magistrate Judge Mehalchick)
MEDICAL CENTER	:	
Defendants	:	FILED ELECTRONICALLY

**BRIEF IN OPPOSITION TO PLAINTIFF’S MOTION
FOR LEAVE TO AMEND COMPLAINT**

STATEMENT OF THE CASE

Plaintiff, Mumia Abu-Jamal (“Plaintiff”), is an inmate incarcerated at the State Correctional Institution at Mahanoy (“SCI-Mahanoy”). The Defendants are SCI-Mahanoy Superintendent John Kerestes and a private medical facility, Geisinger Medical Center.

Plaintiff initiated this action pursuant to 42 U.S.C. § 1983 with the filing of a complaint on May 18, 2015. (Doc. 1.) Plaintiff’s counsel were co-plaintiffs in the original action and, together, they asserted violations of their First, Fifth and Fourteenth Amendment rights when Plaintiff was denied visits during a one-week hospitalization at Geisinger Medical Center. Plaintiff sought only injunctive relief. Plaintiff’s counsel subsequently withdrew their claims on June 19, 2015. (Docs. 17, 18.)

By Stipulation and Order, Plaintiff waived his right to file an amended

complaint as of course pursuant to Fed. R. Civ. P. 15(a)(1). (Docs. 19, 20.) Plaintiff subsequently filed a motion seeking leave to amend and supplement his complaint on August 3, 2015. (Doc. 21.) Plaintiff then filed a supporting brief on Sunday, August 9, 2015. (Doc. 22.) In his proposed pleading, Plaintiff seeks to amend and supplement his complaint to include additional Defendants, additional claims under state and federal law, and additional prayers for relief.

For the reasons set forth below, Plaintiff's motion should be denied as futile.

STATEMENT OF QUESTIONS INVOLVED

WHETHER PLAINTIFF'S MOTION FOR LEAVE TO AMEND SHOULD BE DENIED AS FUTILE WHERE PLAINTIFF HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES AS TO THE CLAIMS IN THE ORIGINAL COMPLAINT OR THE PROPOSED AMENDED COMPLAINT?

SUGGESTED ANSWER: YES

ARGUMENT

Rule 15 provides that a party may amend its pleading once as a matter of course within 21 days after service of a motion for dismissal under Rule 12(b). Fed. R. Civ. P. 15(a)(1). Following the lapse of that time period, a party may amend its pleading only with consent of the opposing party or with leave of court. Fed. R. Civ. P. 15(a)(2). Supplements to add events occurring after the date of the complaint must be made on motion to the court. Fed. R. Civ. P. 15(d).

Leave to amend should be "freely given" when "justice so requires". Fed. R. Civ. P. 15(a)(2). However, a court may deny leave to amend where factors exist that

would render an amendment unjust. *Arthur v. Maersk, Inc.*, 434 F.3d 196, 200 (3d Cir. 2006) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Factors justifying leave to amend include undue delay, bad faith, and futility of the amendment. *Id.* (citing *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir.1993)); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir.1997). The test under Rule 15(a) “is in the disjunctive, meaning that if [Defendants] meet[] [their] burden to prove any one of these elements, the [amendment] should not be permitted.” *Graham v. Progressive Direct Ins. Co.*, 271 F.R.D. 112, 122 (W.D. Pa. 2010).

PLAINTIFF’S MOTION FOR LEAVE TO AMEND SHOULD BE DENIED AS FUTILE BECAUSE PLAINTIFF HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES AS TO THE CLAIMS IN THE ORIGINAL COMPLAINT OR THE PROPOSED AMENDED COMPLAINT.

Plaintiff has failed to exhaust his administrative remedies under 42 U.S.C. §1997e(a) and, as a result, the claims raised in the original complaint and the proposed amendment are barred. Section 1997e(a) provides that “[n]o action shall be brought with respect to prison conditions under . . . [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” The exhaustion requirement of § 1997e(a) is a mandatory precondition to filing suit that may not be waived by the courts. *Porter v. Nussle*, 122 S. Ct. 983, 988, 152 L. Ed. 2d 12, 21 (2002). This requirement “applies to all inmate suits about prison life,

whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” *Id.* at 992.

Inmates seeking redress for such claims must exhaust their administrative remedies regardless of whether the administrative process can provide the inmate-plaintiff with the relief he subsequently seeks in his federal action. *Booth v. Churner*, 121 S. Ct. 1819, 1825, 149 L. Ed. 2d 958 (2001). Prison grievance procedures provide the guidelines against which administrative exhaustion is measured for purposes of §1997e(a), and an inmate procedurally defaults on his claims when he fails to follow the established procedures. *Woodford v. Ngo*, 126 S. Ct. 2378, 2387 165 L. Ed. 2d 368 (U.S. 2006); *Spruill v. Gillis*, 372 F.3d 218, 231 (3d Cir. 2004). Where a plaintiff has failed to exhaust his administrative remedies, the defendant bears the burden of pleading and proving the failure. *Jones v. Bock*, 127 S. Ct. 910, 921, 166 L. Ed. 2d 798 (2007); *Ray v. Kertes*, 285 F.3d 287, 295 (3d Cir. 2002) (“failure to exhaust is an affirmative defense to be pleaded by the defendant”).

The administrative remedies for inmate grievances are provided for in Department of Corrections Administrative Directive 804 (“DC-ADM 804”). (West Decl. ¶ 5, attached as Exhibit 1.) The Department’s grievance system is a three-tiered system. (*Id.* at ¶ 6.) Pursuant to DC-ADM 804, the first step in the inmate grievance process is the initial review. (*Id.* at ¶ 7.) Grievances must be filed within

15 working days of the event on which the grievance is based, and the grievance must be filed at the institution where the incident occurred. (*Id.* at ¶¶ 7-8.)

An inmate who is dissatisfied with the initial review decision is permitted to appeal to the Superintendent. (*Id.* at ¶¶ 9-10.) An appeal to final review may be sought through the Secretary's Office of Inmate Grievances and Appeals ("SOIGA") by filing an appeal to that office within 15 working days of the date of the Superintendent's decision. (*Id.* at ¶ 11.)

Plaintiff seeks to amend and supplement his complaint to include claims relating to his medical care. Of the five grievances filed by Plaintiff since his transfer to SCI-Mahanoy in 2011, only one of the grievances (Grievance 561400) relates to medical care. (Hinman Decl. ¶¶ 6-16, attached as Exhibit 2.) Further, Plaintiff raised only treatment for his diabetes condition in that grievance. (*Id.* at ¶ 7, Ex. 2-A.) Finally, although Plaintiff has appealed that grievance to final review on July 6, 2015, he has not received a final review decision on that appeal. (West Decl. ¶ 16.) Because Plaintiff has not completed the grievance process on this issue, he is barred from bringing the unexhausted claims.

With respect to the claims in the original complaint for denial of visits with Attorneys Grote and Boyle during a one-week hospitalization at Geisinger Medical Center, Plaintiff did not file any grievances on that issue. (Hinman Decl. ¶¶ 5-16.) Thus, he is barred from raising these claims as well. Because these defects cannot

be cured through amendment, Plaintiff's motion for leave to proceed on the amended complaint should be denied.

Further, even had Plaintiff filed a grievance on the denial of visits while at Geisinger Medical Center, the claims and relief requested based on that denial are moot. In his complaint, Plaintiff alleged that he was denied visits with his family and attorneys while hospitalized at Geisinger Medical Center. (Doc. 1 ¶¶ 27-29.) Plaintiff sought only preliminary and injunctive relief directed at compelling visits between Plaintiff, his family, and his attorneys. (Doc. 1 pp. 10-11.) Plaintiff concedes that he has been discharged from Geisinger Medical Center and that he has received visits while at other outside medical facilities. (Doc. 1 ¶ 29, Doc. 21-1 ¶ 54.) Plaintiff does not alter or amend these facts in his proposed amended pleading. Because Plaintiff is no longer subject to the conditions of which he complained, his only claims for relief are now moot. *See Abdul-Akbar v. Watson*, 4 F.3d 195, 206 (3d Cir. 1993). Accordingly, the motion for leave to amend should be denied.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for leave to amend should be denied.

Respectfully submitted,

Office of General Counsel

Dated: August 26, 2015

By: /s/ Laura J. Neal

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing document upon the following person(s) in the manner indicated below.

Served Via ECF:

<p><u>For Defendant Geisinger Medical Center:</u></p> <p>Daniel T. Brier, Esq. dbrier@mbklaw.com</p> <p>John B. Dempsey, Esq. jdempsey@mbklaw.com</p> <p>Suzanne Conaboy, Esq. sconaboy@mbklaw.com</p>	<p><u>For Plaintiffs:</u></p> <p>Bret D. Grote, Esq. bretgrote@abolitionistlawcenter.org</p> <p>Robert J. Boyle, Esq. rjboyle55@gmail.com</p>
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s/ Laura J. Neal
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Dated: August 26, 2015