

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

DONALD WINNETT
ADC# 139544

PLAINTIFF

v. No. 2:10-cv-106-DPM-HDY

GERALDINE CAMPBELL,
CRYSTAL SIMS, CHIQUITA DAVIS,
WENDY KELLEY, WALTER HOLLOWAY, and
MARYBETH FLOYD

DEFENDANTS

ORDER

On *de novo* review of Magistrate Judge H. David Young's Proposed Findings and Recommended Disposition and Winnett's timely filings in objection, *Document Nos. 160, 162, 163, 164 & 165*, the Court adopts the recommendation for the most part, remands on one issue, and addresses some other pending motions.

1. The Court adopts Judge Young's suggested no-exhaustion decision as to Defendant Kelley. She is entitled to summary judgment.

2. The Court adopts Judge Young's suggested no-exhaustion analysis as to all other Defendants on grievances EA-10-1022, EA-10-1118, and EA-10-1213. Winnett, for example, agreed at the hearing that he did not exhaust the administrative process on EA-10-1118 and EA-10-1213, *Document Nos. 136-4*

& 136-5, before filing suit because the administrative process takes too long.

3. The Court remands, however, for reconsideration of Winnett's 27 May 2010 grievance, EA-10-975, which is attached to *Document No. 8*, and which Winnett highlights in one of his objections. *Document No. 164, at 2*. This grievance covers the rash and ingrown-toenail issues; it was not discussed at the hearing; and it may have been exhausted before Winnett sued. The remaining Defendants have not carried their burden of proving otherwise. *Nerness v. Johnson*, 401 F.3d 874, 876 (8th Cir. 2005) (*per curiam*). The Court requests Magistrate Judge Young to consider exhaustion of grievance EA-10-975 on a supplemented record.

4. There are some loose ends. *Document Nos. 162 & 163* are not proper objections because they cover matters beyond the toenail and rash issues. Winnett's motion to amend, *Document No. 170*, is denied: asserting new claims against Defendant Kelley is futile in the face of no exhaustion; and the proposed claims against Defendant Burl are too far afield from Winnett's deliberate-indifference claim about the toenail and rash. Winnett's many motions for appointed counsel, *Document Nos. 154, 167 & 172*, are denied because the issues of fact and law are not complex.

* * *

Magistrate Judge Young's Proposed Findings and Recommended Disposition, *Document No. 160*, is accepted in part and declined in part. Wendy Kelley's motion for summary judgment, *Document No. 136*, granted. Remaining Defendants' motion for summary judgment, *Document No. 139*, is remanded for supplementing the record and a recommendation about exhaustion of the 27 May 2010 grievance, No. EA-10-975, or the merits. Winnett's motions to appoint counsel, *Document Nos. 154, 167 & 172*, are denied. His motion to amend, *Document No. 170*, is denied.

So Ordered.



D.P. Marshall Jr.
United States District Judge

12 October 2011