

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

MICHAEL JACKSON,

Case No. **1:08cv203**

Plaintiff

Judge Barrett

vs

**DEFENDANTS' RULE 12(b)(1)
MOTION TO DISMISS DUE TO LACK
OF SUBJECT MATTER
JURISDICTION AND RULE 12(c)
MOTION FOR JUDGMENT ON THE
PLEADINGS AND TO STAY
DISCOVERY**

HAMILTON COUNTY OHIO, ET AL.,

Defendants

All Defendants respectfully move this Court to dismiss the Plaintiff's Complaint against them pursuant to Fed.R.Civ.P. 12(b)(1) because this Court lacks subject matter jurisdiction under 42 U.S.C. §1997e(a); and Fed.R.Civ.P. 12(c) because the Complaint fails to state a cause of action against the Defendants.

The 12(b)(1) motion is based on Plaintiff's Complaint, the attached Memorandum and the Affidavit of Jeff Eiser, Deputy Director of the Corrections Division of the Hamilton County Sheriff's Office. The 12(c) motion is based on the Complaint and the attached Memorandum.

Pursuant to this Court's previous Order, all Defendants also hereby re-submit the Motion to Stay Discovery. (Doc.7).

Respectfully Submitted,

JOSEPH T. DETERS
PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO

/s/ Mark C. Vollman
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MEMORANDUM

I. FACTS

Plaintiff Michael Jackson's Complaint (Doc.1) sets forth a single cause of action under 42 U.S.C. § 1983. He alleges that "The defendants, by using and ratifying the use of excessive and gratuitous force against Mr. Jackson while operating under the color of state law, subjected Mr. Jackson to cruel and unusual punishment in violation of the Eight Amendment to the United States Constitution."¹

He further alleges that while he was a prisoner at the Hamilton County Justice Center on August 10, 2007, "Defendant (Michelle) Moore acted negligently, intentionally, recklessly, knowingly and with deliberate indifference to the safety and rights of plaintiff Jackson when she discharged the pepper balls at point blank range."² Plaintiff then adds "...willfully, callously and maliciously..." to the allegations against Moore in paragraph 21.

¹Doc. 1 par.26.

²Doc.1 par.20.

Regarding any injuries, plaintiff alleges that as a result of being shot with the pepper balls, he suffered “bruises and contusions across his chest”.³ Plaintiff currently is a prisoner in the Ross Correctional Institution serving a felony sentence.⁴

At the time of this incident and thereafter, the Hamilton County Sheriff maintained a grievance procedure pursuant to OAC §5120:1-8-16 for inmates incarcerated in the Hamilton County Justice Center.⁵ Said grievance procedure included the ability to lodge complaints against the staff of the Justice Center.⁶ Sheriff Leis does discipline his deputies in response to inmate grievances.⁷ All inmates of the Justice Center are made aware of the grievance procedure.⁸ Inmate Jackson did not timely lodge any grievances against Defendant Moore regarding the incident of August 10, 2007.⁹ He did not file until October 30, 2007.¹⁰

Plaintiff has sued Sheriff Leis and Deputy Michelle Moore in their individual and official capacities. Plaintiff alleges that Sheriff Leis failed to properly train and discipline Michelle Moore thereby ratifying her acts.¹¹

³Doc.1 par. 25.

⁴Eiser affidavit.

⁵Id.

⁶Id.

⁷Id.

⁸Id.

⁹Id.

¹⁰Id.

¹¹Doc.1 par.23.

The allegations against Hamilton County are also ratification and failure to properly train Michelle Moore.

II. LAW

A. Failure of Plaintiff to comply with the provisions of 42 U.S.C. § 1997e mandates dismissal for lack of subject matter jurisdiction under Rule 12(b)(1).

The Prison Litigation Reform Act of 1995 (PLRA), 42 USC §1997e *et seq*, requires prisoners to exhaust prison grievance procedures before filing suit.¹² Plaintiff was confined on the date of the incident complained of and remains confined today. This action is therefore subject to the requirements of the PLRA. In considering this motion under 12(b)(1), the Court may look to evidence outside the pleadings to resolve factual disputes concerning jurisdiction.¹³ This motion is a factual attack on subject matter jurisdiction. Such a factual attack on subject matter jurisdiction is known as a “speaking motion.”¹⁴ When considering these speaking motions, the Court has wide discretion to allow affidavits or to hold an evidentiary hearing to resolve jurisdictional disputes.¹⁵ Thus Defendants have attached the affidavit of Jeff Eiser as factual proof that this Court lacks subject matter jurisdiction over Plaintiff’s Complaint.

¹²“No action shall be brought with respect to prison conditions under [42 U.S.C. Sec.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.” 42 U.S.C. Sec. 1997e(a).

¹³*Young v. Mahasagar, Inc.*, 2005 WL 1868151 (S.D. Ohio); *Nichols v. Muskingum College*, 318 F.3d 674 (6th Cir. 2003).

¹⁴*See generally* C. Wright & A. Miller, *Federal Practice and Procedure* Sec. 1364, at 662-64 (West 1969).

¹⁵*Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981).

Plaintiff has failed to exhaust administrative remedies that were available to him through the grievance procedure instituted by Sheriff Leis.¹⁶ The United States Supreme Court recently held that there is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court.¹⁷ This Court lacks subject matter jurisdiction over the claims asserted in Plaintiff's Complaint. Thus the Complaint should be dismissed.

B. Legal standard under Rule 12(c).

A motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) attacks the sufficiency of the pleadings and is evaluated under the same standard as a motion to dismiss.¹⁸ "The Supreme Court has recently clarified the pleading standard necessary to survive a Rule 12(b)(6) motion."¹⁹ The Court held that factual allegations in the complaint must "raise a right to relief above the speculative level."²⁰ Said claims must be plausible rather than merely conceivable.²¹

While the Court must construe Plaintiff's Complaint in the light most favorable to Plaintiff, the Court need not accept as true a legal conclusion couched as a factual allegation or unwarranted factual inferences.²²

¹⁶Eiser affidavit.

¹⁷*Jones v. Brock*, 127 S.Ct. 910 (2007).

¹⁸*Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979).

¹⁹*Bassett v. National Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008).

²⁰*Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 167 L.Ed. 2d 929 (2007).

²¹*Id.*

²²*Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389 (6th Cir. 1998).

It is not enough for a complaint to contain mere conclusory allegations of unconstitutional conduct by persons acting under the color of state law. Some factual basis for such claims must be set forth in the pleadings.²³

C. Plaintiff's Cause of Action fails to state a claim upon which relief may be granted.

In his complaint Plaintiff alleges that the defendants used and ratified excessive force against him which amounted to a violation of his Eighth Amendment right against cruel and unusual punishment. Specifically that Michelle Moore acted maliciously when, without justification, she fired three rounds of pepper balls into his chest at point blank range and that Defendants Hamilton County and Sheriff Leis are responsible for the violation of civil rights because they failed to properly train their employees and/or ratified their actions by not disciplining Michelle Moore.²⁴

Plaintiff's allegations are legal conclusions which contain no facts upon which to base a constitutional claim. In *Chapman*, the Sixth Circuit has declared that unless some factual basis for constitutional claims against government officials is set forth in the pleadings, dismissal is appropriate.²⁵ Merely stating improper training and/or ratification is not enough. Such conclusory allegations have warranted dismissal in the Sixth Circuit under *Chapman*.²⁶

²³*Chapman v. City of Detroit*, 808 F.2d 459 (6th Cir. 1986).

²⁴Doc.1 par. 21-24.

²⁵*Id.*

²⁶*Bilder v. Akron*, 7 F.3d 232 (6th Cir.1993).

Plaintiff has sued Hamilton County naming it as a political subdivision of the State of Ohio. However, Hamilton County is not *sui juris* because it is simply a geographical area. The political subdivision, i.e., the governing body is the Board of Commissioners of Hamilton County. By state law the County Commissioners do not operate the Justice Center, they merely fund it's operation. O.R.C. § 341.01 places the statutory obligation of operating the county jail on the county sheriff.

For local government entities to be subject to liability under §1983, certain specific legal requisites must be met. In this case, in order to state a cause of action under §1983 against the County Commissioners, Plaintiff must allege that he was denied a specific right under the constitution and that the moving force behind said denial was a custom, policy or practice of the County. In addition, said policy must be identified in the complaint.²⁷ The complaint is devoid of the requisite factual allegations against the County Commissioners.

D. Immunity of Defendants Sheriff Leis and Michelle Moore.

Plaintiff has sued Sheriff Leis and Deputy Michelle Moore in their individual capacities alleging excessive force in violation of his civil rights. The Sheriff and Deputy Moore are government officials, entitled to the protection of qualified immunity. In determining whether government officials are entitled to qualified immunity there is a two step procedure. First the Court must determine whether the Plaintiff, has put forth facts which, when taken in the light most favorable to the Plaintiff, show that the defendant-official's conduct violated a constitutionally protected right. As set forth in the argument under section C above, Defendants

²⁷*Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

do not believe Plaintiff has put forth sufficient specific, non-conclusory facts to allege a violation of a constitutionally protected right. However, if we answer the first question in the affirmative, we must then determine whether the right was clearly established such that a reasonable official, at the time the act was committed, would have understood that his behavior violated that right.²⁸

Thus, for each of the Defendants, the focus must be on whether the actions of each as they approach the circumstances involved, was objectively reasonable. It is only the unnecessary and wanton infliction of pain on an inmate in this context that amounts to a constitutional violation. The core judicial inquiry is whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.²⁹ That standard, i.e., maliciously and sadistically, has been interpreted by courts as “an act so dangerous that the defendant’s knowledge of the risk can be inferred.”³⁰

In the instant case, Plaintiff alleges that the incident began when Plaintiff was being extracted from his cell. Plaintiff had flooded his cell and jammed the door. When asked by the guards to open the door he refused. Plaintiff’s actions on August 10, 2007 not only constituted violations of the rules of the institution, but also amounted to a felony violation of Ohio law.³¹

It was shortly after he had to be forcefully extracted from the cell that Michelle Moore fired the pepper balls in order to get plaintiff in compliance and restore discipline in the

²⁸*Comstock v. McCrary*, 273 F.3d 693, 702 (6th Cir. 2001); *Saucier v. Katz*, 121 S.Ct. 2151 (2001).

²⁹*Hudson v. McMillian*, 112 S.Ct. 995 (1992); *Caldwell v. Moore*, 968 F.2d 595 (6th Cir. 1992).

³⁰*Whitley v. Albers*, 106 S.Ct. 1078 (1986).

³¹Plaintiff pled guilty to a violation of ORC Sec. 2917.01A1 Inciting Violence.

institution.

Important to this Court's analysis is that plaintiff's injury as a result of the pepper balls was *de minimus*. He was checked by the medical staff at the Justice Center but required no treatment for any serious injury, nor was he taken to the E.R. at University Hospital. In this analysis, it is fair to assume that if Plaintiff had been seriously injured, he would have included that factual allegation in his Complaint.³²

In order for there to be a constitutional violation, Michelle Moore's actions have to have been so dangerous that the knowledge of the risk of injury (harm) to plaintiff can be inferred. Here, the plaintiff has engaged in a riot in the jail and was at best uncooperative with the Michelle Moore and at worst insulting and combative towards her. The facts as alleged by plaintiff demonstrate force used by Michelle Moore to gain control over the plaintiff to maintain order in the jail. Pepper balls are used to gain control without injury. The facts do not allege that the actions were not in accordance with generally accepted practices and procedures for corrections officers. The facts further demonstrate that the amount of force used caused no injury to plaintiff that required medical treatment. These facts do not demonstrate use of excessive force by Michelle Moore. These facts do not amount to a constitutional violation.

This Court should conclude that as a matter of law, Deputy Michelle Moore reasonably believed that plaintiff was not only violating the rules of the institution but also the laws of Ohio. Further, that he was uncooperative to the point of being combative and that her conduct was objectively reasonable in light of her lawful duty to maintain order in the jail. Therefore this Court should dismiss plaintiff's Complaint against Deputy Michelle Moore on the basis that she

³²*Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434 (6th Cir. 1988).

is entitled to qualified immunity on the record before this Court. Further, because there was no constitutional violation by the Deputy Moore, Sheriff Leis as policy maker for the operation of the jail is entitled to qualified immunity and dismissal as well.

III. CONCLUSION

As has been clearly demonstrated: (1) Plaintiff has failed to exhaust his available administrative remedies which is a prerequisite to this Court's subject matter jurisdiction; (2) Michelle Moore did not use excessive force against Plaintiff; (3) Michelle Moore and Sheriff Leis, sued in their individual capacities, are entitled to qualified immunity; (4) Hamilton County is not *sui juris*; (5) No policy has been identified by Plaintiff to state a cause of action for an official capacity claim against any named defendant. Therefore, Plaintiff's complaint should be dismissed.

Respectfully Submitted,

JOSEPH T. DETERS
PROSECUTING ATTORNEY
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DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify on October 21, 2008, a copy of the foregoing Motion was electronically filed. Notice of its filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Mark C. Vollman
Mark C. Vollman, 0007040
Assistant Prosecutor