IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

VINCENT L. AMMONS,

Plaintiff,

OPINION AND ORDER

v.

98-C-861-C

GARY BURKUM and CAPTAIN MARC CLEMENTS,

Defendants.

This is a civil action for damages brought by a prisoner pursuant to 42 U.S.C. § 1983. Plaintiff Vincent L. Ammons brings two claims: 1) defendant Gary Burkum, the prison chaplain, impermissibly interfered with plaintiff's fundamental right to marry; and 2) Captain Marc Clements retaliated against plaintiff for exercising his First Amendment right to complain about actions taken by the prison social worker in response to plaintiff's marriage request. This court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

This case was filed in December 1998. On January 25, 1999, I dismissed the case pursuant to 28 U.S.C. § 1915A, finding that plaintiff had failed to state a claim upon which relief could be granted on his federal law claims and declining to exercise supplemental jurisdiction over a related state law claim. Because 42 U.S.C. § 1997e (c)(2) permits a district court to dismiss a prisoner's underlying claims without first requiring the exhaustion of

administrative remedies if the court is satisfied that the action fails to state a claim upon which relief can be granted, I did not consider whether plaintiff had exhausted his administrative remedies on the questions presented in his lawsuit. On November 19, 1999, the Court of Appeals for the Seventh Circuit reversed the dismissal of plaintiff's case and remanded it for consideration of his claims of interference with his right to marry and retaliation.

Before the court is defendants' motion for summary judgment on the exhaustion question. (Also, defendants have moved for summary judgment on the merits of plaintiff's claims. In a previous order, I stayed proceedings on this aspect of the motion, concluding that I would consider the exhaustion issue before any dispositive motions on the merits. See Order, Aug. 9, 2000, dkt. #61.) Defendants contend that any argument by plaintiff that he exhausted his administrative remedies concerning his claim against defendant Burkum is barred by the doctrine of collateral estoppel or Rooker-Feldman because plaintiff has litigated that claim in a Wisconsin state court and lost. In support of this contention, defendants have filed copies of two orders of the Circuit Court for Dane County, entered March 5, 1998 and October 6, 1997, respectively, in which the court dismissed for failure to exhaust administrative remedies a § 1983 claim filed by plaintiff in which he raised essentially the same claims he is bringing against Burkum in the instant lawsuit. Alternatively, defendants contend that irrespective of the state court judgment, plaintiff failed to exhaust his administrative remedies with respect to both his claims.

To prevail on a motion for summary judgment, the moving party must show that even when all inferences are drawn in the light most favorable to the non-moving party, there is no

genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); McGann v. Northeast Illinois Regional Commuter Railroad Corp., 8 F.3d 1174, 1178 (7th Cir. 1993). Construing the undisputed facts in the light most favorable to plaintiff, I conclude that defendants are entitled to summary judgment on plaintiff's claims because plaintiff cannot demonstrate that he exhausted his administrative remedies on either of his claims before filing suit as required by 42 U.S.C. § 1997e(a). As a result of the judgment of the Circuit Court of Dane County, plaintiff is collaterally estopped from presenting any evidence to show that he exhausted his administrative remedies on his failure to marry claim before September 25, 1996, the date on which he filed his action against Burkum in the state court. As for plaintiff's contention that he exhausted his administrative remedies on his failure to marry claim *after* September 25, 1996, plaintiff's failure to file a complaint against Burkum actions within the time allowed by Wisconsin's Inmate Complaint Review System bars him from proceeding in this court. Finally, plaintiff has not exhausted his administrative remedies with respect to his retaliation claim against defendant Clements.

Before setting out the facts, I must address plaintiff's argument that copies of documents from the state court case are not admissible because they were not authenticated and certified as required by the full faith and credit statute. See 28 U.S.C. § 1798 ("The records and judicial proceedings of any court of any such State . . . or copies thereof, shall be proved or admitted in other courts within the United States . . . by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the

said attestation is in proper form."). Instead of following the authentication procedure described in 28 U.S.C. § 1738, defendants have asked this court to take judicial notice of various documents filed in the circuit court proceeding, which they have submitted with an affidavit from a paralegal who attests to the accuracy of the copies. See Aff. of Linda Bredeson in Supp. of Defs' Mot. for Judicial Notice, dkt. #39. Plaintiff does not contest the accuracy of the copies of the documents that defendants have submitted and he does not deny that the state court dismissed his complaint for failure to exhaust his administrative remedies. His sole complaint is that defendants failed to comply with the procedure of 28 U.S.C. § 1738.

Contrary to plaintiff's understanding, the procedure described in 28 U.S.C. § 1738 is not the exclusive means by which a party can establish the existence of records from a state court proceeding. As I noted in a previous order, it is proper for a court to take judicial notice of records from another court's proceedings. See Opoka v. INS, 94 F.3d 392, 394 (7th Cir. 1996) (recognizing that court documents from state proceeding may be subject of judicial notice); Mandarino v. Pollard, 718 F.2d 845, 849 (7th Cir. 1983) (finding that whatever "slight weight" could be given to appellant's technical argument that appellee had not properly established existence of state court judgment for res judicata purposes was "completely dispelled" by court's ability to take judicial notice of state circuit court judgment) (citing cases). Because plaintiff has not challenged the accuracy of the records submitted by defendants, I will take judicial notice of the documents described in defendants' motion for judicial notice (dkt. #38).

Although plaintiff has not submitted any proposed findings of fact, he filed an affidavit with his complaint for the purpose of showing compliance with the exhaustion requirement. From that affidavit, the documents attached thereto and documents filed in the Circuit Court for Dane County in Ammons v. Burkum, Case No. 96-CV-2245, I make the following findings of fact for the purpose of deciding the motion for summary judgment.

UNDISPUTED FACTS

A. Parties

At all times relevant to this lawsuit, plaintiff Vincent Ammons was an inmate at the Columbia Correctional Institution. Columbia has procedures that inmates must follow if they wish to marry. Defendant Gary Burkum was a chaplain at Columbia. Burkum's duties as chaplain included providing counseling services to inmates seeking permission to marry in accordance with the institution's procedures. Defendant Marc Clements was a lieutenant serving under the security director at the institution.

B. Inmate Complaint Review System

Wisconsin's Inmate Complaint Review System is described in Wis. Admin. Code Chapter DOC 310. Before commencing a civil action, an inmate "shall file a complaint under s. DOC 310.09 or 310.10, receive a decision on the complaint under s. DOC 310.12, have an adverse decision reviewed under s. DOC 310.13, and be advised of the secretary's decision under s. DOC 310.14 ." § DOC 310.04 (1998). The regulations in effect during the relevant

time period required an inmate wishing to file a complaint to do so within 14 calendar days after the occurrence giving rise to the complaint, but provided that the inmate complaint investigator could accept a late complaint for good cause. See § DOC 310.05(2) (1994).[1] Once filed, the inmate's complaint was examined by the inmate complaint investigator, who investigated the complaint and recommended a decision to the superintendent. See § DOC 310.025(2). Within five calendar days after receipt of the inmate complaint investigator's report, the superintendent was to issue a written decision. See § DOC 310.08(1). If, however, the complainant did not receive the superintendent's decision within 23 calendar days of the receipt of the complaint by the inmate complaint investigator, the complaint was considered denied and could be appealed immediately. See § DOC 310.08(2). An inmate had five calendar days after receipt of the superintendent's decision to file a written request for review with the corrections complaint examiner but the corrections complaint examiner had discretion to accept a late complaint "if the elapsed time has not made it difficult or impossible to investigate the complaint." § DOC 310.09. The corrections complaint examiner was to make a written recommendation that was forwarded to the secretary, who could adopt or reject the recommendation. See § DOC 310.09, 310.10.

C. Failure to Marry

[1]Wisconsin's inmate complaint review system was modified by emergency rule in August 1997 and by amendments and modifications to the administrative code in April 1998. The changes are not material to the exhaustion question presented in this case.

On May 20, 1996, plaintiff filed inmate complaint # 0845-96 in which he complained that defendant Burkum had not responded to three letters plaintiff had sent him during the previous four months regarding plaintiff's desire to get married. On May 28, 1996, the institution complaint examiner rejected plaintiff's complaint, noting that plaintiff had been put on a list to speak with the chaplain personally and therefore the issues raised in the complaint had been addressed. The rejection form included what appears to be a standard paragraph stating that the decision could be appealed to the corrections complaint examiner.

On September 25, 1996, plaintiff filed a § 1983 action for damages and injunctive relief against Burkum in the Circuit Court for Dane County, Wisconsin. In his complaint, plaintiff alleged that Burkum had violated his constitutional right to marry his fiancée by intentionally and repeatedly refusing to provide counseling services to him as required by the institution's policy. Specifically, plaintiff alleged that (1) Burkum failed to respond to three letters in which plaintiff had indicated an intent to begin the marriage process; (2) it was not until plaintiff filed an institutional complaint against Burkum that he responded; (3) subsequently, Burkum failed to attend a scheduled counseling session with plaintiff and his fiancée; and (4) Burkum failed to respond to a letter from plaintiff asking why he had missed the scheduled counseling session.

On January 3, 1997, Burkum filed a motion for summary judgment in the circuit court, alleging that plaintiff had not exhausted his administrative remedies because he had not appealed his complaint against Burkum to the corrections complaint examiner.

On January 16, 1997, plaintiff wrote to Charles F. Miller, corrections complaint examiner, and stated the following:

> Through litigation I discovered that you allege I never filed an appeal in inmate complaint 0845-96. My contention is that on approximately April 29, 1996, I mailed to you the enclosed Request for Corrections Complaint Examiner Review.
>
> Again, herein I am requesting complaint review. Although you allege that you never received my complaint for review, that does not prevent you from reviewing it now.

Miller responded in a letter dated February 6, 1997, in which he informed plaintiff that he would not enlarge the time for plaintiff to appeal complaint # 0845-96. Specifically, Miller wrote:

> Though you have not advised me of the date your complaint was filed I have been advised that your complaint was rejected by the ICE on 5/28/96. Your time for appeal started either 23 calendar days from the date of receipt by the CCI ICE or when it was rejected by him. For purposes of this discussion, your appeal should have been received in this office by mid June of 1996. According to my records, no appeal to ICRS complaint CCI 845-96 was received here until January 21, 1997 and by this letter I am advising you that it is not being accepted for CCE review. Your appeal is far beyond the time limits and you offer no acceptable excuse for the six month delay. According to my records, you filed ten (10) complaint appeals with this office on 1996 complaints. Each was acknowledged as received . . . Based on the above, as well as records of your many other complaint appeals received from 1993 to the present, I believe that all complaint appeals sent to this office by you were received and acknowledged as required under DOC 310.09. Based on these same records I find no reason to suspect CCI or the US Postal Service failed to properly process your out-going mail. I therefore find no compelling reason to accept your late appeal in light of the above as well as the extremely high inventory of pending appeals timely filed by other inmates.

On October 6, 1997, the Circuit Court for Dane County issued a decision and order addressing Burkum's motion for summary judgment on the ground that plaintiff had failed to exhaust his administrative remedies. See Ammons v. Burkum, Case No. 96-CV-2245, Opinion and Order of October 6, 1997, attached to dkt. #39 at Exh. 2. After concluding that

exhaustion was a mandatory prerequisite to suit under the Prison Litigation Reform Act and that plaintiff's claim against Burkum was subject to the exhaustion requirement because it involved "prison conditions," the court examined the evidence submitted by the parties on the exhaustion question. (Although plaintiff had not filed a brief opposing defendant's motion for summary judgment, the court noted that it had "scrutinized his other filings.") The court noted that defendant had presented the affidavit of Corrections Complaint Examiner Miller, who averred that he had no record of any appeal having been filed by plaintiff within the Inmate Complaint Review System concerning Burkum's alleged interference with his desire to marry. Deeming this evidence sufficient to establish a prima facie case for defendant on summary judgment, the court then examined the evidence submitted by plaintiff. After noting that plaintiff had submitted a copy of what he purported to be a "certified copy" of an appeal he had filed of inmate complaint # 0845-96, the court observed that there were "several problems" with the document that led the court to believe that it may have come into existence only after Burkum filed his motion for summary judgment on January 3, 1997. The court scheduled an evidentiary hearing for the purpose of determining whether plaintiff had complied with the exhaustion requirement. See Opin. and Order, October 6, 1997, dkt. # 39, Exh. B, at 7-11.

The evidentiary hearing was held on November 13, 1997. Plaintiff appeared by telephone and was allowed to explain what had transpired. After the hearing, the court took the matter under advisal. On January 6, 1998, before the circuit court had issued its decision on the exhaustion issue, plaintiff filed inmate complaint # 088-98, in which he alleged that

Chaplain Burkum failed to attend a scheduled a meeting with him and his fiancée on July 29, 1996. On January 6, 1998, the institution complaint examiner rejected the complaint because it was filed more than 14 days after the occurrence. Plaintiff appealed to the corrections complaint examiner, who recommended that the appeal be denied because it was untimely and no cause existed to accept it. Specifically, the corrections complaint examiner wrote:

> The ICE rejected this complaint as untimely in accordance with DOC 310.09(3). Noting the complaint was filed nearly six months after the occurrence giving rise to it and also noting Mr. Ammons filed timely appeals regarding the same issue (his difficulty in obtaining approval to marry) I find no cause to accept this complaint for the purposes of appeal.[2]

On February 11, 1998, the secretary issued a decision adopting the correction complaint examiner's recommendation.

On March 5, 1998, the circuit court issued an opinion and order, concluding that plaintiff had not exhausted his administrative remedies before filing suit. The court found as follows:

> It is undisputed that on May 21, 1996, plaintiff filed an inmate complaint (Inmate Complaint No. CCI 0845-96) concerning Defendant Burkum's apparent refusal to respond to plaintiff's requests for pre-marriage counseling. The complaint was **rejected** by the ICI on May 28, 1996, on the ground that the issues raised had already been addressed, the plaintiff having already been placed on the pass list to speak with the defendant. Thus the complaint was resolved in his favor and there was no reason to appeal.
>
> In late June 1996, Plaintiff alleges that he was again experiencing problems with the defendant. Certain letters allegedly went unanswered and at

[2]Actually, plaintiff's complaint was filed nearly one year and six months after the alleged occurrence.

> least one counseling appointment had to be re-scheduled. Plaintiff then commenced this action in September 1996.
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> Prior to commencing this action, plaintiff did not file a second inmate complaint. Such a complaint would arguably have been justified since it would have concerned new allegations of error on the part of the defendant. Nevertheless granting plaintiff all possible deference and assuming that the subject of this civil action was also the subject of his May 1996 inmate complaint, the question inevitably became whether plaintiff had appealed the ICI's decision of that complaint to the Corrections Complaint Examiner . . . .
>
> Plaintiff testified that after he had received a "favorable response," he knew that he was going to file a civil rights action and so he filed an appeal on May 29, 1996. (Trans. of Hearing, p. 4, 11. 9-22) He stated that he had no independent record of this.
>
> After listening to plaintiff's testimony, and having considered all of the proffered evidence, the court does not find plaintiff's explanation to be credible, and therefore conclude that he did not exhaust his administrative remedies.

The court dismissed the complaint without prejudice. In its order, the court noted that plaintiff had submitted copies of the January 5, 1998 inmate complaint he had filed against Burkum and his subsequent appeal of that complaint. Observing that plaintiff's administrative complaint had not been filed until after plaintiff had commenced his state court action against Burkum, the court found it insufficient to satisfy the exhaustion requirement. However, the court noted that whether the documents "would be sufficient to satisfy the exhaustion requirement on a new action is not an issue before this court."

D. Retaliation

Lieutenant Clements placed plaintiff in temporary lockup on March 13, 1997. Clements told plaintiff that he was being investigated for mail fraud. On April 16, 1997,

plaintiff filed inmate complaint # 0993-97, in which he raised various objections to his placement in temporary lockup. Specifically, plaintiff alleged that 1) institution security did not need to remove him from the general population because no one in the general population had any incriminating evidence against him; 2) institution security had no reason to investigate him for mail fraud because any fraudulent outgoing mail would have been detected by institution security staff; 3) he was given insufficient notice to allow him to object to his placement, as required by § DOC 303.11(5); and 4) upon his release from temporary lockup, he was not told why he had been placed there or informed of the result of the mail fraud investigation.

The institution complaint examiner recommended that the complaint be dismissed and the warden agreed. On appeal, the secretary adopted the corrections complaint examiner's recommendation that the complaint be dismissed.

OPINION

A. The Exhaustion Requirement

Section § 1997e(a) provides that "No action shall be brought with respect to prison conditions under section 1983 of this title, 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 term "prison conditions" is defined in 18 U.S.C. § 3626(g)(2), which provides that "the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects

of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." Because plaintiff is complaining about the "effects of actions by government officials" on his life, the exhaustion requirement applies to both his claims. In order to satisfy § 1997e(a), a prisoner must attempt to obtain relief through the prison's internal administrative grievance system before he brings a lawsuit, even if the grievance system does not afford the relief he seeks. See Massey v. Helman, 196 F.3d 727, 733 (7th Cir. 2000); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 537 (7th Cir. 1999) (no futility exception to PLRA's exhaustion requirement).

Plaintiff contends that he exhausted his administrative remedies with respect to his claim against defendant Burkum in four different ways: 1) by receiving a favorable response to complaint # 0845-96, as evidenced by his placement on the pass list to see defendant Burkum; 2) by filing an unnecessary but precautionary appeal of the favorably resolved complaint to the corrections complaint examiner on May 29, 1996; 3) by refiling that appeal with the corrections complaint examiner in January 1997; and 4) by filing a new, albeit untimely, complaint against Burkum (# 088-98) in January 1998 and receiving a decision from the secretary on that complaint. He contends that he exhausted his claim against defendant Clements by filing inmate complaint # 0993-97 and receiving a decision from the secretary on that complaint.

B. Failure to Marry–Exhaustion of Administrative Remedies before September 25, 1996

Defendants contend that plaintiff's claim against defendant Burkum is a reincarnation of the suit dismissed by the circuit court for failure to exhaust administrative remedies and is therefore barred by the doctrine of collateral estoppel. The law of collateral estoppel, also known as issue preclusion, is intended to protect the parties from the burden of relitigating the same issue following a final judgment and to promote judicial economy by preventing needless litigation. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979). The policy recognizes that "one fair opportunity to litigate an issue is enough." Gildorn Savings Ass'n v. Commerce Savings Ass'n, 804 F.2d 390, 392-93 (7th Cir. 1986) (quoting Bowen v. United States, 570 F.2d 1311, 1322 (7th Cir. 1978)). Because collateral estoppel is an affirmative defense, the party asserting it has the burden of proving that the doctrine applies. See Freeman United Mining Co. v. Office of Workers' Compensation Programs, 20 F.3d 289, 294 (7th Cir. 1994).

It is well-settled that a proceeding in a state court may collaterally estop inconsistent arguments in a later federal action, including actions under § 1983. See Allen v. McCurry, 449 U.S. 90, 104-05 (1980). In determining the validity of a collateral estoppel defense that rests on a prior state court judgment, a federal court must give the state court judgment the same preclusive effect as would the courts of the state in which the judgment was rendered. See Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 373 (1996); 28 U.S.C. § 1738 ("judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories . . . as they have by law or usage in the courts of such State [or] Territory . . . from which they are taken"). To accomplish this, this court must determine whether under

Wisconsin law, the circuit court judgment has a preclusive effect in this case. See Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985).

Wisconsin courts apply the doctrine of issue preclusion regularly. See Northern States Power Co. v. Bugher, 189 Wis. 2d 541, 550, 525 N.W. 2d 723, 727 (1995). "Issue preclusion refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in a prior action." Id., 189 Wis. 2d at 550, 525 N.W.2d at 727 (citation omitted). The proceedings at issue need not have involved a decision on the merits for issue preclusion to apply. See, e.g., In the Interest of H.N.T., 125 Wis. 2d 242, 247-51, 371 N.W. 2d 395 (Ct. App. 1985) (decision disposing of case for lack of subject matter jurisdiction subject to res judicata and collateral estoppel principles) (citing Restatement (Second) of Judgments § 12). The doctrine bars relitigation of particular issues that were "essential to the judgment." See Heggy v. Grutzner, 156 Wis. 2d 186, 195, 456 N.W. 2d 845, 849 (Ct. App. 1990).

In addition to examining whether the issue was actually litigated and decided in a prior action, Wisconsin courts consider whether it is fair to allow one party to collaterally estop another. In making this determination, Wisconsin law sets forth an array of factors, including: (1) Could the party against whom preclusion is sought have obtained review of the judgment as a matter of law? (2) Is the question one of law that involves two distinct claims or intervening contextual shifts in the law? (3) Do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issues? (4) Have the burdens of persuasion shifted so that the parties seeking preclusion had a lower burden of persuasion in

the first trial than in the second? and (5) Are matters of public policy and individual circumstances involved that would render the application of [issue preclusion] to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action? See Michelle T. v. Crozier, 173 Wis. 2d 681, 687-88, 495 N.W. 2d 327, 330 (1993) (citing Restatement (Second) of Judgments § 28 (1980)).

Applying these principles, I am persuaded that plaintiff would be barred in a Wisconsin court from presenting any evidence or argument to show that he exhausted his administrative remedies before September 25, 1996, the date on which he filed his complaint against Burkum in the state court, with respect to his claim that defendant Burkum interfered with his right to marry. (Whether plaintiff exhausted his administrative remedies after September 25, 1996, is outside the scope of the state court's judgment and must be determined independently by this court.) This precludes plaintiff from arguing that his administrative remedies were exhausted as of May 28, 1996, when he was informed by the institution complaint examiner that he had been placed on a pass list to see Burkum and that he exhausted his remedies by filing an unnecessary but precautionary appeal of the favorably resolved complaint to the corrections complaint examiner on May 29, 1996. Both of these issues were "actually litigated" before the state circuit court. See Bugher, 189 Wis. 2d at 550, 525 N.W. 2d at 727. Both parties presented documentary evidence and plaintiff testified at an evidentiary hearing about his efforts to exhaust his administrative remedies. See Landess v. Schmidt, 115 Wis. 2d 186, 198, 340 N.W. 2d 213, 219 (Ct. App. 1983) (summary judgment in prior action sufficient to meet "actually litigated" requirement).

In addition, the circuit court "actually decided" whether plaintiff exhausted his administrative remedies before September 25, 1996, in either of the two ways that he contends he did. Although the court focused on plaintiff's argument that he had appealed to the corrections complaint examiner on May 29, 1996, it also addressed his first contention, noting that plaintiff's inmate complaint regarding Burkum's failure to respond to his letters "was resolved in his favor and there was no reason to appeal." However, as the circuit court recognized, the acts of which plaintiff complained in the circuit court (and in this court) were not merely Burkum's failure to respond to three letters as outlined in his inmate complaint, but were other alleged dilatory acts by Burkum that occurred after plaintiff's inmate complaint about the letters was resolved. (If the only acts upon which plaintiff was bringing his failure to marry claim were Burkum's three failures to respond to plaintiff's letters over the span of approximately three and a half months, plaintiff would have no cognizable constitutional claim. See Ammons v. Burkum, No. 99-1835 (7th Cir. Nov. 19, 1999) (suggesting that plaintiff would have to show that total delay "substantially exceeded five months" to prove constitutional violation) (unpublished order)). Therefore, plaintiff should have filed a new inmate complaint about the new problems he was having with Burkum. However, rather than dismiss plaintiff's civil action on the basis of his failure to file a second inmate complaint, the circuit court gave plaintiff the benefit of the doubt and assumed that all of the conduct on which his lawsuit was based was the subject of inmate complaint # 0845-96. Thus, plaintiff's contention that the favorable response he received on his inmate complaint absolved him of any further obligation to pursue his administrative remedies was litigated and decided in the state court proceeding.

Touching on the last of the "equitable factors" examined by the Wisconsin courts in deciding whether to apply issue preclusion, plaintiff argues that it is unfair to apply the doctrine to him in this case. According to plaintiff, defendant Burkum concealed evidence from the state court that proves plaintiff exhausted his administrative remedies by appealing inmate complaint # 0845-96 to the corrections complaint examiner on May 29, 1996. See, e.g., Hammes v. First National Bank & Trust, 79 Wis.2d 355, 363, 255 N.W.2d 555, 559-560 (1977) (judgment has no binding effect in subsequent litigation where plaintiff proposes to rely on evidence that he or she was unable or failed to present in first action because of defendant's fraud or concealment). As evidence of this deception, plaintiff points to the corrections complaint examiner's denial of his appeal in inmate complaint # 088-98, stating:

> The ICE rejected this complaint as untimely in accordance with DOC 310.09(3). Noting the complaint was filed nearly six months after the occurrence giving rise to it and also noting Mr. Ammons filed timely appeals regarding the same issue (his difficulty in obtaining approval to marry) I find no cause to accept this complaint for the purposes of appeal.

According to plaintiff, the only other complaint he filed about his difficulties in obtaining approval to marry was complaint # 0845-96; therefore, the corrections complaint examiner's remark about other timely appeals having been filed by plaintiff could only mean the appeal in # 0845-96.

Plaintiff's "evidence" does not persuade me that the state court's judgment was procured by fraud or was otherwise unfair. First, in making the assertion that the only complaint he filed against Burkum aside from # 088-98 was # 0845-96, plaintiff has failed to support it with any sworn statement attesting to the number of appeals he filed, even though he has filed several

affidavits in this case relating to other matters. Thus, plaintiff's unsupported assertion is not properly before this court and shall be given no evidentiary weight. By itself, the corrections complaint examiner's decision is insufficient to establish that plaintiff filed one previous appeal regarding his difficulty to marry, for it does not identify the prior appeals that plaintiff had filed. There is no evidence to back up plaintiff's argument that Burkum concealed evidence from the state court.

Second, plaintiff had an opportunity to present this alleged "smoking gun" evidence to the state court. In fact, plaintiff submitted to that court an affidavit with supporting documents related to inmate complaint # 088-98 and his subsequent appeal but the court rejected his submissions because they post-dated the date on which plaintiff filed his lawsuit. See Opin. and Order, March 5, 1998, dkt. #39, Exh. A, at 5, n. 4. The circuit court did not indicate in its opinion that plaintiff had made the allegation of fraudulent concealment that he makes here. From this, I infer that plaintiff did not make the argument. Even if plaintiff had made this argument and the circuit court overlooked it, plaintiff could have filed a direct appeal from the circuit court's judgment and asked the court of appeals to remedy the error. See Wis. Stat. § 808.03 (providing that final judgment is one "that disposes of the entire matter in litigation as to one or more of the parties" and may be appealed as of right).

In short, plaintiff had a full and fair opportunity to present to the state court all of his evidence in support of his contention that he exhausted his administrative remedies before September 25, 1996, and he could have appealed the judgment of the circuit court to the Wisconsin Court of Appeals. None of the other equitable factors considered by the Wisconsin

courts militate against applying the rule of issue preclusion in this case. The controlling facts and law on the exhaustion issue are unchanged; there are no significant differences between the proceedings in the state court and this court that warrant relitigation of the issues; and defendants bear the same burden of persuasion on the exhaustion issue in this court as they did in the state court. Having failed to take advantage of his opportunity to take a direct appeal of the circuit court's judgment, plaintiff cannot now seek to avoid the consequences of his inaction by filing a new claim in federal court. Nor does § 1983 permit "relitigation of federal issues decided after a full and fair hearing in a state court simply because the state court's decision may have been erroneous." Allen, 449 U.S. at 101.

Because I conclude that plaintiff is barred by the doctrine of issue preclusion from presenting any evidence to show that he exhausted his administrative remedies before September 25, 1996, concerning his claim against defendant Burkum, it is unnecessary to address defendants' argument that plaintiff is barred by the Rooker- Feldman doctrine.

C. Failure to Marry–Exhaustion after September 25, 1996

As noted previously, the doctrine of issue preclusion precludes relitigation only of issues that were actually decided in a previous action. Thus, although plaintiff is barred from presenting evidence to demonstrate that he exhausted his administrative remedies concerning his claim against defendant Burkum before September 25, 1996, he is not barred from presenting evidence to show that he exhausted his administrative remedies after that date. To this end, plaintiff points to his belated appeal of inmate complaint # 0845-96 to Corrections

Complaint Examiner Miller in January 1997, and to inmate complaint # 088-98, which he filed in January 1998 and which was ultimately rejected by the secretary as untimely. Plaintiff argues that it is irrelevant that these filings were time-barred; according to plaintiff, all that matters for exhaustion purposes is that he pursued all the levels of review that were available to him through the Inmate Complaint Review System.

In one sense, plaintiff's assertion that his claims are "exhausted" is correct: there is nothing more he can do to obtain an administrative remedy for defendant Burkum's alleged interference with his right to marry. However, I disagree with plaintiff's suggestion that it makes no difference under § 1997e(a) that he did not properly file a complaint about Burkum's actions within the time limits prescribed by the Inmate Complaint Review System. The policies underlying the exhaustion requirement include allowing the agency to correct its own mistakes with regard to the programs it administers before it is haled into court; conserving scarce judicial resources by narrowing the dispute or avoiding the need for litigation; and improving the efficacy of the administrative process. See Perez, 182 F.3d at 537-38 (7th Cir. 1999); see also Nyhuis v. Reno, 204 F.3d 65, 75 (3d Cir. 2000). None of these goals is furthered if a prisoner who ignores the agency's procedures for bringing complaints to the attention of prison officials may nonetheless gain access to federal court simply by filing an untimely grievance or appeal. To the contrary, allowing prisoners to pursue § 1983 claims that are based on untimely administrative grievances would undermine the PLRA's goal of fostering administrative resolution of prisoner complaints. See Harper v. Jenkin, 179 F.3d 1311, 1312 (11th Cir. 1999) ("If we were to accept appellant's position--that the filing of an untimely grievance exhausts an

inmate's administrative remedies--inmates, such as appellant, could ignore the PLRA's exhaustion requirement and still gain access to federal court merely by filing an untimely grievance.") (per curiam); Wright v. Morris, 111 F.3d 414, 418 n. 3 (6th Cir. 1997) (stating in dicta that "it would be contrary to Congress' intent in enacting the PLRA to allow inmates to bypass the exhaustion requirement by declining to file administrative complaints and then complaining that administrative remedies are time-barred and thus not available."); Marsh v. Jones, 53 F.3d 707, 710 (5th Cir. 1995) (applying pre-PLRA version of § 1997e and concluding that, "Without the prospect of a dismissal with prejudice, a prisoner could evade the exhaustion requirement by filing no administrative grievance or by intentionally filing an untimely one, thereby foreclosing administrative remedies and gaining access to a federal forum without exhausting administrative remedies.").

By failing to bring his allegations about defendant Burkum's continued interference with his right to marry to the attention of prison authorities in a timely fashion, plaintiff deprived the agency of an opportunity to conduct a prompt, contemporaneous investigation into the matter and put an end to it if it existed. At the least, filing a claim promptly might have helped to narrow the dispute or to develop the factual record. Aside from unsupported allegations of fraud on the part of prison officials, plaintiff has provided no explanation for his failure to file an appeal of inmate complaint # 0845-96 or a new complaint about Burkum's alleged failure to attend a scheduled meeting within the time limits prescribed by the Inmate Complaint Review System. Accordingly, I conclude that his untimely complaint is insufficient to satisfy the exhaustion requirement of § 1997e and that his failure to exhaust his administrative

remedies bars him from proceeding on his failure to marry claim. Because there is no more relief that the Inmate Complaint Review System can provide plaintiff, this claim will be dismissed with prejudice.

D. Retaliation

In his § 1983 complaint, plaintiff alleges that defendant Clements placed him in temporary lockup to retaliate against him for complaining about actions taken by the prison social worker in response to his marriage request. To show that he exhausted his administrative remedies concerning this claim, plaintiff has supplied copies of inmate complaint # 0993-97 dated April 16, 1997; an April 25, 1997 order of the warden dismissing the complaint; and a September 8, 1997, order of the secretary accepting the recommendation of the corrections complaint examiner to affirm the dismissal of the complaint.

Plaintiff's administrative complaint and subsequent appeal concerning his placement in temporary lockup are insufficient to demonstrate compliance with the exhaustion requirement. In his administrative complaint, plaintiff alleged that there was no reason for the institution to investigate him for mail fraud, that he was given insufficient notice to allow him to contest his placement and that, upon his release from temporary lockup, he was not told why he had been placed there or how the mail fraud investigation had been resolved. Nowhere in the complaint did plaintiff assert the claim upon which his § 1983 claim is based, that is, that Clements placed him in lockup in retaliation for his complaints about the prison social worker, nor did he allege a chronology of events from which retaliation on the part of Clements could be inferred. As a result, prison officials have never had the opportunity to address plaintiff's retaliation claim. This claim is unexhausted.

Any administrative complaint that plaintiff files now regarding his retaliation claim will most likely be rejected as untimely. Nonetheless, because the prison regulations allow the

institution complaint examiner to accept a late complaint for good cause, the possibility remains open that plaintiff may still be able to exhaust his administrative remedies with respect to his retaliation claim. Accordingly, I will dismiss this claim without prejudice to his refiling it after he has exhausted his administrative remedies. However, plaintiff should bear in mind that a decision by the secretary that the complaint is untimely will not satisfy the exhaustion requirement for the reasons stated earlier in this opinion.

ORDER

IT IS ORDERED that the motion for summary judgment by defendants Gary Burkum and Marc Clements is GRANTED. Plaintiff Vincent Ammons's claims against defendant Burkum are DISMISSED with prejudice because he failed to exhaust his administrative remedies and further administrative relief is unavailable. Plaintiff's retaliation claim against defendant Clements is DISMISSED without prejudice to his refiling it after he has exhausted his administrative remedies.

The clerk of court is directed to enter judgment in favor of the defendants and close this case.

Dated this 8th day of December, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge