

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

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ANTOINE LONOVAN GUY,

Plaintiff,

v.

JON LITSCHER and GERALD BERGE,

Defendants.

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ORDER

02-C-47-C

In an order dated July 15, 2002, I granted defendants Jon Litscher's and Gerald Berge's motion to dismiss for plaintiff's failure to exhaust administrative remedies because the motion was unopposed. I noted that the dismissal was without prejudice to plaintiff's moving to reopen the case if he obtained evidence that he had exhausted his administrative remedies. Now, plaintiff has submitted a document entitled "Motion to Reconsideration," together with a number of documents relating to the exhaustion of his administrative remedies. I construe plaintiff's motion as a motion to reopen this case to allow him to defend defendants' motion to dismiss his claims for failure to exhaust his administrative remedies.

This case is in an unusual posture. Originally, plaintiff was allowed to proceed on

three claims: (1) that he was denied adequate medical and dental care in violation of the Eighth Amendment; (2) that he was subjected to physical conditions of confinement that violate the Eighth Amendment; and (3) that he was subjected to unreasonable searches in violation of the Fourth Amendment. In the order granting plaintiff leave to proceed, I concluded that plaintiff's allegations relating to his claims of denial of medical and dental care and unreasonable searches were insufficient in and of themselves to state independent claims of constitutional violations. However, because these claims overlapped with claims that had been raised in a then pending class action lawsuit, Jones'el v. Berge, 00-C-421-C, I allowed plaintiff to proceed with respect to these claims to preserve any claim he might have for money damages in the event defendants' liability was proven in the context of the Jones'el case. As it turned out, the Jones'el case settled without a determination of liability on the same day that this case was allowed to go forward. This meant that the complaints in each case filed by class members seeking money damages for alleged injuries stemming from the conditions challenged in Jones'el had to be re-screened for a determination whether the petitioners had stated independent claims of constitutional proportion. This was not done in this case because the case was disposed of on other grounds, that is, because plaintiff did not oppose defendants' motion to dismiss. Therefore, although I will grant plaintiff's motion to reopen this case for the purpose of deciding defendants' motion to dismiss for plaintiff's failure to exhaust his administrative remedies, I will dismiss immediately plaintiff's

claims that he was denied adequate medical and dental care and subjected to unreasonable searches because, as I already have found, he fails to state independent claims upon which relief may be granted with respect to these allegations.

Plaintiff's allegations relating to the physical conditions of his confinement state a viable Eighth Amendment claim. Therefore, I will consider defendants' contention that plaintiff has failed to exhaust his administrative remedies with respect to this claim.

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), provides that "[n]o 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." "To exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require." Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002).

Wis. Admin. Code § DOC 310.04 requires that 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 ." The regulations require an inmate wishing to file a complaint to do so within 14 calendar days after the occurrence giving rise to the complaint, but allow the inmate complaint investigator to accept a late complaint for good cause. Wis. Admin. Code § DOC 310.09(3). According to § DOC

310.11(11), the inmate's complaint is to be examined by the inmate complaint investigator, who investigates the complaint and recommends a decision to the appropriate reviewing authority. Within five working days after receipt of the inmate complaint investigator's report, the appropriate reviewing authority (defined in § DOC 310.03(3) as "the warden, bureau director, administrator or designee who is authorized to review and decide an inmate complaint") is to issue a written decision. Wis. Admin. Code § DOC 310.12(1). If, however, the complainant does not receive the reviewing authority's decision within 23 working days of the receipt of the complaint by the inmate complaint investigator, § DOC 310.12(3) provides that the complaint is considered denied and can be appealed immediately. An inmate has ten calendar days after the date of the decision to file a written request for review with the corrections complaint examiner and the corrections complaint examiner has discretion to accept a late appeal under certain circumstances "if the elapsed time has not made it difficult or impossible to investigate the complaint." Wis. Admin. Code § DOC 310.13(1), (3). The corrections complaint examiner makes a written recommendation that is forwarded to the secretary, who determines within ten days of receiving the recommendation whether to accept the recommendation, adopt the recommendation with modifications, reject the recommendation or return the recommendation to the corrections complaint examiner for further investigation. Wis. Admin. Code § DOC 310.13(7), 310.14.

In support of their motion to dismiss, defendants submitted the affidavit of Ellen K. Ray. Ray avers that she is an Institution Complaint Examiner at Supermax Correctional Institution in Boscobel, Wisconsin and that she is the custodian of records concerning inmate complaints about conditions of confinement. She avers also that plaintiff has not filed any inmate complaints concerning confinement for 23 hours a day, lack of access to daylight, lack of recreation, not being able to cover his head when he sleeps or constant monitoring. None of the documents submitted by plaintiff with his motion to reopen the case contradict Ray's affidavit. Accordingly, I conclude that defendants have shown that plaintiff has not exhausted his administrative remedies with respect to his claim that he was subjected to unconstitutional conditions of confinement.

#### ORDER

IT IS ORDERED that

- 1) Plaintiff's motion to reopen this case is GRANTED;
- 2) On review, plaintiff's claims that he was denied adequate medical and dental care in violation of the Eighth Amendment and subjected to unreasonable searches in violation of the Fourth Amendment are DISMISSED with prejudice for plaintiff's failure to state a claim upon which relief may be granted; and
- 3) Defendants' motion to dismiss plaintiff's remaining claim that his Eighth

Amendment rights were violated when he was confined in isolation 23 hours a day, denied access to daylight and recreation and subjected to constant monitoring is GRANTED and this claim is DISMISSED without prejudice to plaintiff's filing a new action after he has exhausted his administrative remedies; and

4) The clerk of court is directed to enter judgment dismissing this case.

Entered this 2nd day of October, 2002.

BY THE COURT:

BARBARA B. CRABB  
District Judge