

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

MICHAEL L. WHITEHEAD,

Plaintiff,

ORDER

v.

02-C-0700-C

GARY McCAUGHTRY, JON E. LITSCHER,
JOHN D. ASHCROFT and KATHLEEN
HAWK SAWYER,

Defendants.

This is a civil action for declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Michael L. Whitehead, an inmate at the Waupun Correctional Institution in Waupun, Wisconsin, alleged that he is an Orthodox Hasidic Jew and that prison officials denied him a kosher diet in violation of the First Amendment, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc.

On January 9, 2003, I ordered defendants to show cause why plaintiff's motion for a preliminary injunction for a kosher diet should not be granted. On January 15, 2003, defendants responded, arguing that plaintiff's motion and lawsuit are now moot because

plaintiff has been given a kosher diet. On January 22, 2003, plaintiff filed an “answer in opposition to respondent’s response to show cause order” in which he argues that his case is not moot because (1) his allegedly kosher diet must “be certified or deemed acceptable by the Kashruth division of the Union of Orthodox Jewish Congregations or any other Jewish agency deemed acceptable by the plaintiff” and (2) the DOC approved kosher diet is not nutritionally sufficient. Plaintiff speculates, for example, that because he is often served food items from the regular food service, that his food is not kosher. Plaintiff alleges further that his diet lacks nutritional value because he is served basically the same food items at every meal (an apple or orange, peanut butter, graham crackers, cheese, cranberry or apple juice and bread) and that he has not been served meat during his last eight meals.

However, the alleged facts themselves indicate that plaintiff could not have exhausted his administrative remedies with regard to these new allegations. It is undisputed that after plaintiff initiated this lawsuit, prison officials began serving him a “DOC approved kosher diet.” In other words, at the time plaintiff filed this lawsuit, he was not being served even a DOC approved kosher diet. Plaintiff now alleges that the DOC approved diet he is receiving is insufficient for two reasons: (1) it is not truly kosher because it does not comply with the Kashruth and (2) it lacks nutritional value. A prisoner must exhaust his administrative remedies *before* filing suit in court. See Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999). Typically, failure to exhaust administrative

remedies is an affirmative defense. See Massey v. Helman, 196 F.3d 727, 735 (7th Cir. 1999). However, “when the existence of a valid affirmative defense is so plain from the face of the complaint . . . the district judge need not wait for an answer before dismissing the suit.” Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002). In this case, it is plain from the complaint that plaintiff could not have exhausted his administrative remedies (*before* filing suit) as to the alleged insufficiency of the DOC approved diet because, at the time he filed this lawsuit, he alleged that he was not being served even DOC approved kosher food. Accordingly, plaintiff’s lawsuit will be dismissed without prejudice to his filing a new lawsuit after he has exhausted his administrative remedies with respect to his two new allegations.

ORDER

IT IS ORDERED that plaintiff Michael Whitehead’s motion for a preliminary injunction is DENIED and his lawsuit is DISMISSED as moot because his new claims are

not part of his underlying lawsuit and cannot be part of this lawsuit because of his failure to exhaust his administrative remedies as to these new claims.

Entered this 7th day of February, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge