

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

MONTELL M. HORTON,

Plaintiff,

v.

GERALD BERGE, PETER HUIBREGSTE,
PAMELA BARTELS and LINDA HODDY-TRIPP,

Defendants.

OPINION
and ORDER

02-C-0470-C

This is a civil action for monetary, declaratory and injunctive relief. Plaintiff Montell M. Horton, a prisoner at the Wisconsin Secure Program Facility (formerly the Supermax Correctional Institution), is proceeding on four claims: (1) defendants Peter Huibregtse and Linda Hoddy-Tripp denied his advancement to level 4 in retaliation for grievances he had filed; (2) defendant Pamela Bartels was deliberately indifferent to his serious medical needs when she refused to let him see an optometrist for over 21 days for his eye condition; (3) defendant Berge's previous policy of 24-hour cell illumination and allowing noisy mentally ill inmates to be confined at the institution caused plaintiff sleep deprivation; and (4) the combination of certain conditions of confinement imposed by defendant Berge (windowless

cell; no contact with other prisoners; four hours of “so called” exercise a week; limited use of library, exercise cell and telephone; visits by video; video monitoring; and the lack of any meaningful programming) caused him social isolation and sensory deprivation in violation of his Eighth Amendment rights.

This case is now before the court on defendants Berge, Huibregste and Hoddy-Tripp’s motion to dismiss the claims against them on the ground that plaintiff failed to exhaust his administrative remedies. (Defendant Bartels was not served until February 3, 2003, and has not joined in this motion.) I conclude that plaintiff has not exhausted his administrative remedies with respect to his claim of retaliation against defendant Huibregtse and Hoddy-Tripp or his claims against defendant Berge for sleep deprivation caused by Berge’s policy of constant cell illumination plus allowing noisy mentally ill inmates to be housed at the institution and for social isolation and sensory deprivation caused by Berge’s policy of allowing a combination of certain conditions of confinement. Therefore, these claims will be dismissed on exhaustion grounds. I conclude that plaintiff can state a viable claim against defendant Berge for sleep deprivation caused by defendant’s policy of allowing 24-hour cell illumination and that plaintiff has exhausted his administrative remedies with respect to such a claim but that defendant Berge is qualifiedly immune from a suit for money damages on this claim.

In support of their motion to dismiss for failure to exhaust administrative remedies,

defendants submitted documents relating to plaintiff's exhaustion efforts within the inmate complaint review system. Plaintiff submitted additional documents in opposition to the motion. I can consider this documentation without converting the motion to dismiss into a motion for summary judgment because documentation of a prisoner's use of the inmate complaint review system is a matter of public record. See General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997). Also, for the sole purpose of deciding defendants' motion to dismiss, I accept as true the allegations in plaintiff's complaint.

ALLEGATIONS OF FACT

A. Parties

Plaintiff Montell M. Horton is a prisoner presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Defendant Gerald Berge is the warden at the facility; defendant Peter Huibregste is a deputy warden at the facility; and defendant Linda Hoddy-Tripp is an employee of the Wisconsin Department of Corrections.

B. Retaliation Claim

On October 26, 2001, defendants Huibregste and Hoddy-Tripp denied plaintiff advancement to level 4 on the exaggerated charges that plaintiff caused "a death."

Defendants Huibregste and Hoddy-Tripp advanced similarly situated prisoners who refused to participate in recommended programming. Despite his belief that this was retaliation, plaintiff did not file an inmate complaint contending that defendants Huibregste and Hoddy-Tripp denied him advancement to level 4 in retaliation for grievances he had filed.

C. Sleep Deprivation Claim

Defendant Berge's policies of 24-hour cell illumination required plaintiff to sleep with his face uncovered. Plaintiff is housed with mentally ill prisoners who cause a high level of noise. The combination of these two factors caused plaintiff to suffer sleep deprivation.

On October 19, 2000, plaintiff joined in a group complaint (#SMCI-2000-29942), contending that the complainants were suffering from both sleep deprivation and sensory deprivation because of 24-hour cell illumination. On October 25, 2000, the inmate complaint examiner recommended dismissal because the lights in question were needed for security purposes. On November 9, 2000, defendant Huibregste accepted the recommendation of the inmate complaint examiner and dismissed the complaint. The group filed a request for a corrections complaint examiner review on November 17, 2000. On December 12, 2000, the corrections complaint examiner agreed with the inmate complaint examiner's decision and recommended dismissal. The Secretary of the Department of Corrections dismissed the complaint on December 28, 2000. Plaintiff did not file an inmate

complaint complaining specifically that the combination of 24-hour cell illumination and noisy mentally ill inmates at the institution caused him sleep deprivation.

D. Sensory Deprivation and Social Isolation Claim

On October 6, 2000, plaintiff filed an inmate complaint (#SMCI-2000-28714), contending that he was being subjected to sensory deprivation and social isolation by multiple conditions of confinement including inadequate ventilation, uncomfortable cell temperatures, no recreation, no outside view, inadequate dental and medical care, no confidentiality, no adequate legal access, lack of publications for blacks, 24-hour camera surveillance and visitation on video. On October 16, 2000, the inmate complaint examiner rejected the complaint because it contained more than one issue. On October 17, 2000, plaintiff filed a request for a corrections complaint examiner review. On November 2, 2000, the corrections complaint examiner recommended dismissal because according to Wis. Admin. Code § DOC 310.09(1), only one issue can be addressed in each complaint. The Secretary of the Department of Corrections dismissed the complaint on November 11, 2000.

OPINION

The exhaustion provisions of the 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), state 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.” The phrase “‘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.” 18 U.S.C. § 362(g)(2).

The Court of Appeals for the Seventh Circuit has held that “a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits.” Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v. Helman, 196 F.3d 727, 733 (7th Cir. 1999). The court of appeals has held also that “if a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim. The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures.” Massey, 196 F.3d at 733.

Before inmates may begin a civil action, Wis. Admin. Code § DOC 310.04 requires that they “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." Plaintiff contends that he exhausted his administrative remedies because he filed complaints and appeals and pursued them through the review system to the Secretary of the Department of Corrections.

A. Retaliation Claim

Nothing in the record establishes that plaintiff raised a retaliation claim in the inmate complaint review system regarding defendants Huibregste and Hoddy-Tripp's denial of his level 4 advancement on October 26, 2001. In an effort to demonstrate that he exhausted his administrative remedies, plaintiff submitted to the court two inmate complaints he filed in April 2001 and September 2001, concerning level 4 advancement (#SMCI-2001-11695) and the denial of a 90-day level 4 advancement review (#SMCI-2001-26115). Neither of those inmate complaints concern defendants Huibregste and Hoddy-Tripp's decision to deny plaintiff advancement to level 4 on October 26, 2001. Plaintiff has nothing else to support his contention that he exhausted his retaliation claim against defendants Huibregste and Hoddy-Tripp.

Plaintiff contends that he could not file an inmate complaint because he did not know defendant Hoddy-Tripp's identity at the time of the level 4 denial on October 26, 2001. Even if it is true that plaintiff was still searching for this information in October, he could

have filed a complaint alleging that the denial of his level 4 advancement was a result of retaliation by those reviewing his application. He did not do this and therefore, failed to exhaust his administrative remedies. Accordingly, I will grant defendants' motion to dismiss plaintiff's retaliation claim against defendants Huibregste and Hoddy-Tripp.

B. Sleep Deprivation Claim

To demonstrate that he had exhausted his administrative remedies with respect to his claim of sleep deprivation arising out of the prison's policy of requiring cells to be illuminated at all times and allowing noisy mentally ill inmates to be confined at the institution, plaintiff filed with the court a copy of a group inmate complaint (#SMCI-2000-29942), alleging sleep and sensory deprivation because of 24-hour cell illumination. However, plaintiff did not produce a copy of any inmate complaint in which he alleged that noisy mentally ill inmates caused him sleep deprivation. Therefore, I will dismiss plaintiff's claim that the combination of 24-hour cell illumination and noisy mentally ill inmates caused him sleep deprivation and sensory deprivation. Because plaintiff was granted leave to proceed only on the combination claim and not on the cell illumination claim standing by itself, his failure to exhaust the combined claim might be the end of the matter.

However, in at least one other case, I have allowed an inmate plaintiff to proceed on a claim of cell illumination standing by itself. See Warren v. Litscher, No. 02-C-0093-C

(W.D. Wis. Dec. 4, 2002) (copy attached). To be consistent with that case, I will consider the claim in this case as if plaintiff had been granted leave to proceed on it. Plaintiff has exhausted this claim by filing the group inmate complaint (#SMCI-2000-29942).

In Warren, I held that a prisoner could state an Eighth Amendment claim of cruel and unusual treatment by alleging merely that he had been subjected to 24-hour cell illumination because, liberally construed, such an allegation could be read as alleging an intense and prolonged illumination sufficient to cause a prisoner physical and emotional harm. According to plaintiff, 24-hour cell illumination caused his thinking to be impaired, caused him to suffer hallucinations and caused his perception to become disturbed. Moreover, plaintiff alleges, as warden, defendant Berge had direct responsibilities for the safety and treatment of prisoners and condoned the practice of 24-hour cell illumination. Although it is not plausible to read plaintiff's allegations as encompassing allegations that the prison used high wattage bulbs such as search lights in the cells or subjected inmates to the kind of lighting conditions used in some places to extract confessions, it is within the realm of reason to hypothesize that plaintiff was exposed constantly to lighting bright enough to cause him sleep deprivation and other harms. Such an allegation would be sufficient to state a viable Eighth Amendment claim against defendant Berge. Giving consideration to this claim makes it necessary to address defendant Berge's argument that he is entitled to qualified immunity.

To determine whether the defense of qualified immunity is available to a defendant,

a court must first consider whether the alleged facts show that the defendant's conduct violated a constitutional right when those facts are read in the light most favorable to plaintiff. Saucier v. Katz, 533 U.S. 194, 201 (2001). I have found that plaintiff's allegations can be read as stating a viable Eighth Amendment claim. If at a later stage of this proceeding, plaintiff is able to show that the lighting in his cell was so bright as to make it unreasonably difficult to sleep and that it was much brighter than necessary to accomplish any legitimate penal goal such as the safekeeping of the inmates so that one could draw the inference that defendant Berge was using it as punishment for inmates, it is probable that defendant's conduct would be held to violate the Constitution.

The second step of the analysis requires plaintiff to establish that he has a right to be free from 24-hour illumination. Saucier, 533 U.S. at 201. I have previously found that the law on 24-hour cell illumination is not clearly established. See Warren, 02-C-0093-C, slip op. at 20-22. Plaintiff has not provided any reason to think that this conclusion is erroneous. The lack of a clearly established right to be free from 24-hour illumination entitles defendant Berge to qualified immunity. Accordingly, I will grant defendants' motion to dismiss plaintiff's claim for money damages based on his sleep deprivation claim against defendant Berge. (Plaintiff cannot obtain injunctive or declaratory relief against Berge on this claim; any such relief is barred by the settlement agreement approved in Jones 'El v. Berge, 00-C-0421-C (W.D. Wis. Mar. 28, 2002). As a member of the class, plaintiff is

bound by the agreement that accepts cell illumination limited to 5 watt light bulbs.)

C. Sensory Deprivation and Social Isolation Claim

Plaintiff filed an inmate complaint (#SMCI-2000-28714), alleging a variety of grievances relating to sensory deprivation and social isolation. The inmate complaint examiner rejected the complaint because it violated the filing requirements set forth in the Wisconsin Administrative Code. Plaintiff did not comply with the requirement to include only one issue in each complaint. See Wis. Admin. Code § DOC 310.09(1).

By failing to address the conditions in individual complaints in accordance with § DOC 310.09(1), plaintiff failed to exhaust his administrative remedies. Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002) (“[t]o exhaust administrative remedies, a person must follow the rules governing the filing and prosecution of a claim”). Plaintiff’s duty to exhaust his administrative remedies is statutory. No exception is available to him. Accordingly, I will grant defendants’ motion to dismiss plaintiff’s sensory deprivation and social isolation claim against defendant Berge.

ORDER

IT IS ORDERED that

1. Defendants’ motion to dismiss plaintiff’s retaliation claim against defendants Peter

Huibregste and Linda Hoddy-Tripp is GRANTED for plaintiff's failure to exhaust administrative remedies.

2. Defendants' motion to dismiss plaintiff's claim of sleep deprivation because of the combination of 24-hour cell illumination and noisy mentally ill inmates is GRANTED as to defendant Gerald Berge for plaintiff's failure to exhaust his administrative remedies.

3. Defendant's motion to dismiss the claim of sleep deprivation resulting from 24-hour cell illumination is GRANTED as to defendant Berge on the ground of qualified immunity.

4. Defendants' motion to dismiss plaintiff's sensory deprivation and social isolation claim is GRANTED as to defendant Berge for plaintiff's failure to exhaust his administrative remedies.

5. Defendants Berge, Huibregtse and Hoddy-Tripp are DISMISSED from the case.

Entered this 12th day of March, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge