IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CEDRIC JOHNSON,

Plaintiff,

v.

JON LITSCHER, DONALD BANEY, JOANNE BARTON, THOMAS BORGEN, KEVIN CANNON, JASON MacPHETRIDGE, CLYDE MAXWELL, DENNIS MEYER, ERIN RICHARDS, and JESS ROONEY, in their personal capacities,

Defendants.

OPINION AND ORDER

00-C-0401-C

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This civil action for injunctive relief and monetary damages is before the court following a hearing on plaintiff Cedric Johnson's motion for a preliminary injunction. Plaintiff is an inmate of the Fox Lake Correctional Institution. He is seeking an injunction preventing defendants from transferring him to a more secure institution on the ground that the planned transfer is one in a series of illegal actions defendants have taken against him in retaliation for his successful litigation against Dr. George Daley, Medical Director of the Department of Corrections. Plaintiff brings his suit under 42 U.S.C. § 1983.

The initial question is whether 42 U.S.C. § 1997e, as amended by the Prison Litigation Reform Act, applies to plaintiff's claim so as to require dismissal of the case at the outset. 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."

Plaintiff contends that his complaint is not subject to § 1997e(a) for two reasons. First, § 1997e(a) does not apply to First Amendment claims and second, Wisconsin provides no administrative mechanism for challenging a decision to transfer a prisoner from one institution to another. Plaintiff's first argument is that the language of § 1997e(a) and § 3626(g) does not state clearly that everything that happens in a prison falls within the definition of "a civil action with respect to prison conditions." He does not view a First Amendment claim as coming within either of the two categories defined in § 3626(g), whether "conditions of confinement" or "the effects of actions by government officials on the lives of persons confined in prison." He argues

that not only is such a claim is far removed from complaints about general living conditions but it relates to the efforts to impair his First Amendment rights taken by low level prison employees, not "government officials."

Plaintiff maintains that the definition of "civil action with respect to prison conditions" in § 3626(g) ambiguous and he argues that if Congress had meant to apply the exhaustion requirement to every possible kind of lawsuit filed by a prisoner, it could have made its intent plain. In support of this argument, he cites Judge Noonan's dissenting opinion in Booth v. Churner, 206 F.3d 289 (3d Cir. 2000). In Booth, the majority held that the exhaustion requirement applied to a suit alleging battery by prison guards. Judge Noonan argued that acts of battery do not fit within either of the two categories in § 3626(g): first, they are not prison conditions and second, the term, "acts of government officials having effects on the lives of prisoners," was intended to refer to decisions that affected prisons broadly, not to individual acts of intentional violence. Judge Noonan was of the opinion that no speaker of the English language would describe a beating by a prison guard by saying, "A government official has taken an action having an effect on my life"; therefore, "[w]hy should we attribute such circuitousness to Congress?" Id. at 302. From this and certain legislative history, he reasoned that Congress had not intended to make it more difficult for prisoners to raise claims of unconstitutional acts of cruelty and that the language it chose reflects that intent.

A district court in the Southern District of New York came to a similar conclusion, holding that the exhaustion requirements did not extend to Fourth or Eighth Amendment claims. Such claims were not related to a "condition" of prison life in the same way that medical treatment, food, clothing and the nature and circumstances available in the prison are related to conditions. Moreover, they did not relate to the imposition of general rules and policies issued by government officials that influence the way a prison is run. Rather, the claims of battery and unconstitutional search were based on "day-to-day interactions between prisoners and corrections officers." Giannattasio v. Artuz, No. 97-Civ-7606, 2000 WL 335242 (S.D.N.Y. Mar. 30, 2000). Although I respect both Judge Noonan's effort in Booth and the district court's effort in Giannattasio to divine the intent of Congress, I am not persuaded that the statutory language supports their interpretations. I believe that the language demonstrates Congress's intention to make the exhaustion requirement applicable to every kind of civil action challenging any aspect of prison life, whether relating to the physical conditions of the prison, medical care, distribution of mail, visiting privileges, cell searches, the complaint process or intentional battery by guards. The only exception is the one specified by Congress: petitions for writs of habeas corpus (which have their own exhaustion requirements). This broad interpretation is the most natural reading of the language in the two statutes. It is also the one that accords with the common judicial practice of treating proposed suits from

prisoners as falling into one of two categories: "conditions" suits, a category that covers every challenge to anything that happens in prison or jail, and habeas corpus actions, a category that covers any action implicating the fact or duration of confinement. See, e.g., Preiser v. Rodriguez, 411 U.S. 475, 498-99 (1973) (discussing difference between challenges that must be brought as petitions for writs of habeas corpus and those that may be brought as suits attacking conditions of confinement; latter category includes suits alleging the denial of permission to purchase certain religious publications, Cooper v. Pate, 378 U.S. 546 (1964); suits alleging the confiscation of legal materials, Houghton v. Shafer, 392 U.S. 639 (1968); and suits seeking damages for physical injuries sustained while in solitary confinement, Haines v. Kerner, 404 U.S. 519 (1972)). See also Farmer v. Brennan, 511 U.S. 825, 833 (1994) (discussing protection of inmates from other inmates as a condition of confinement subject to strictures of Eighth Amendment) (citing Wilson v. Seiter, 501 U.S. 294, 303 (1991)).

The Court of Appeals for the Seventh Circuit has adopted an expansive reading of §§ 1997e(a) and 3626(g). See Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 534 (7th Cir. 1999) (holding that § 1997e applies to claim of excessive force and reading statutory language in light of McCarthy v. Bronson, 500 U.S. 136 (1991), in which the Supreme Court held that when Congress used the phrase "prisoner petitions challenging conditions of confinement" in 28 U.S.C. § 636(b)(1)(B), it meant to include prisoner petitions relating both

to continuous conditions and to isolated episodes of unconstitutional conduct, such as claim of excessive force). See also Booth, 206 F.3d at 295 ("Therefore, we believe that the expansive and somewhat overlapping language Congress employed in § 3626(g)(2) must be read — naturally and in the proper context — to encompass all prisoner petitions."); Freeman v. Francis, 196 F.3d 641, 643-44 (6th Cir. 1999) (claim of excessive force is covered by exhaustion requirements of § 1997e(a)); Garrett v. Hawk, 127 F.3d 1263 (10th Cir. 1997) (claims of excessive force and inadequate medical care covered by exhaustion requirements). I conclude from these cases and from my own reading of the statutes that plaintiff's First Amendment claim of retaliation is one covered by § 1997e(a).

This does not end the inquiry, however, because § 1997e(a) does not require the exhaustion of remedies that do not exist, that is, that are not "available." Plaintiff argues that he could not have utilized the administrative complaint process because there is no provision in that process for challenging a final decision of transfer made by the department. Defendants disagree, but it is unnecessary to decide whether there is a mechanism for review of this particular decision. The fact is that plaintiff's transfer is merely the last in a series of allegedly retaliatory acts. Petitioner has alleged that guards at Fox Lake went out of their way to issue conduct reports to him after the verdict in his favor, many times for the most minor transgressions, that they removed him from his job as barber and put him in a job paying only

half as much and that they taunted him about his victory and with their ability to "make him pay" for what he had won. His ongoing complaint is retaliation; if he contends that the proposed transfer is the logical result of unjust, retaliatory acts, he should have been complaining about those acts when they occurred. If he did not recognize the retaliation at the outset, he would have known it when the number of conduct reports started to mount or when the guards let him know what they intended to do to him in the way of harassment. Despite the opportunities he had for bringing his concerns to the attention of the department promptly, he has provided no evidence that he exhausted his administrative remedies with respect to any of the conduct reports or that he filed complaints about the alleged retaliation and exhausted his remedies with respect to those complaints before filing this suit. (Exhaustion must precede the filing of suit, see Perez, 182 F.3d at 537 (case filed before exhaustion has been accomplished must be dismissed).)

Wis. Admin. Code § DOC 310.08(2) provided plaintiff a mechanism for bringing a complaint of retaliation. Under that code section, "[a]n inmate may use the [Inmate Complaint Review System] to raise significant issues regarding rules, living conditions and staff actions affecting institution environment . . . ." The regulation sets out certain exceptions. The only that might apply to plaintiff is the one excepting "[t]he subject matter of a conduct report that has not been resolved through the disciplinary process in accordance with ch. DOC 303."

Although this exception would have prevented plaintiff from complaining about any particular conduct report, it would not have prevented him from raising the issue of retaliation as it related to staff actions and comments and the loss of his barbershop job. (I disagree with defendants that § 1997e(a) requires an inmate to seek a writ of certiorari in the state courts before he can be said to have accomplished exhaustion. The statute refers to state *administrative* remedies. It does not mandate the exhaustion of state *judicial* remedies.)

All of the reasons for requiring administrative exhaustion are present in plaintiff's case. Bringing his claim to the attention of prison authorities would have enabled them to investigate the allegations of retaliation and put an end to it if it existed, thus giving them the first opportunity to correct their own errors. At the least, filing a claim might have helped to narrow the dispute or to develop the factual record. And finally, allowing the complaint system to work without judicial intervention would encourage development of an effective system. See Perez, 182 F.3d at 537-38 (7th Cir. 1999); see also Nyhuis v. Reno, 204 F.3d 65, 75 (3d Cir. 2000).

I conclude that plaintiff has had an adequate opportunity to raise the claim of retaliation that underlies his challenge to the transfer and that his failure to exhaust his remedies with respect to that claim requires that his complaint be dismissed under 42 U.S.C. § 1997e(a). Having reached this conclusion, I need not address in detail defendants' alternative defense, which is based upon Heck v. Humphrey, 512 U.S. 477 (1994), as it has

been applied to prison disciplinary proceedings in Edwards v. Balisok, 520 U.S. 641 (1997), and Stone-Bey v. Barnes, 120 F.3d 718 (7th Cir. 1997). In Heck, the Supreme Court held that a prisoner could not bring a claim for money damages pursuant to 42 U.S.C. § 1983 if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence," unless he could show that the conviction or sentence had been invalidated in a separate proceeding. Heck, 512 U.S. at 487. In Edwards, 520 U.S. at 648, the Court extended the holding in Heck to prison disciplinary proceedings in which the prisoner lost good-time credits and directed the lower court to dismiss the petitioner's suit. In Stone-Bey, the Court of Appeals for the Seventh Circuit extended the holding in Edwards to any kind of prison disciplinary proceeding, whether or not good-time credits were at stake. Defendants contend that these cases mandate dismissal of plaintiff's suit because it necessarily implicates the validity of his discipline; if it were to be established that the discipline was the result of retaliation it would have to be found invalid.

Defendants' argument raises a number of interesting questions about the applicability of Heck, Edwards and Stone-Bey to plaintiff's situation. To the extent that plaintiff is not contending that any but a few of the many conduct reports he has received since January of this year were without foundation, the cases may be inapplicable. Plaintiff concedes that most of the reports had a factual basis but he contends that defendants' retaliatory motives are

shown, not in ticketing him without any reason, but in ticketing him for matters they would have overlooked in other inmates. He characterizes the discipline he received as merely evidence.

As I understand defendant's argument, it is that the rules and regulations governing prison life are so varied and complex that almost no one could go through a day without violating some rule or another, making it only a matter of time before retaliatory guards can issue a ticket. This is something like an argument that might be made by a person who believes he is being targeted by the police for one reason or another and subjected to unreasonable and excessive traffic stops. Given the ease with which police can find minor traffic violations in any person's driving (certainly they have no difficulty finding them in the driving patterns of suspected drug dealers), the targeted person could not hope to prove his case by showing that the traffic stops had no justification, in and of themselves. Instead, he would have to show that the number and nature of the stops were so disproportionate to those made of other drivers as to suggest illegal conduct by the police.

Thus, I agree with defendants that to the extent plaintiff is arguing that retaliation was shown by the fact that he was given *baseless* conduct reports, he would be required to pursue his claim through a writ of habeas corpus, as required by Heck, Edwards and Stone-Bey. However, if he was arguing only retaliation based on excessive conduct reports for minor infractions, the

cases might be inapplicable. Interesting as this question is, I need not pursue it. Plaintiff should have taken his retaliation claim for the exercise of his First Amendment rights through the prison administrative system before he filed this law suit. He did not do so. Therefore, his complaint must be dismissed.

ORDER

IT IS ORDERED that plaintiff Cedric Johnson's complaint is DISMISSED WITHOUT PREJUDICE for his failure to exhaust his administrative remedies before filing this suit for damages and injunctive relief pursuant to 42 U.S.C. § 1983.

Entered this 24th day of July, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge