

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

RONALD ROBINSON,

Plaintiff,

v.

WARDEN J.T. O'BRIEN,
COUNSELOR M. KLAWITTER,
COUNSELOR K. ZOOK, CASE
MANAGER M CISKE, UNIT MANAGER
S. ROBINSON, L.T.R.E. ROBINSON,
D.H.O. W.W. SKIDERSKI,

Defendants.

ORDER

03-C-32-C

This is a civil action for declaratory, injunctive and monetary relief, brought pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and the Federal Tort Claims Act, 28 U.S.C. §§ 2671 - 2680. Plaintiff, who is presently confined at the Federal Correctional Institution in Memphis, Tennessee, alleges that defendants have retaliated against him, refused to separate him from his cell mate and confiscated his property. Although plaintiff has accumulated three strikes under 28 U.S.C. § 1915(g), he has submitted the full filing fee.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner who is suing a government entity or official, the 1996 Prison Litigation Reform Act requires the court to screen the complaint and dismiss it or any portion of it that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief.

On the first page of plaintiff's complaint, he writes: "I filed administrative remedies at F.C.I. Memphis and the final result was it was untimely which was they're answer." Thus, plaintiff appears to be conceding in his complaint that his grievances were rejected by prison officials as untimely. If so, plaintiff cannot proceed on his claims. The Prison Litigation Reform Act requires prisoners to exhaust their administrative remedies before filing an action in federal court. 42 U.S.C. § 1997e(a). Furthermore, to exhaust administrative remedies, a prisoner must observe the procedural requirements of the system. Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002). "[A] prisoner who does not properly take each step within the administrative process has failed to exhaust state remedies, and thus is foreclosed by § 1997e(a) from litigating. Failure to do what the state requires bars, and does not just postpone, suit under § 1983." Id. at 1024.

Because plaintiff's grievances were dismissed as untimely, he has not properly taken each step within the administrative process and has not exhausted his administrative

remedies. Although failure to exhaust administrative remedies is an affirmative defense, the Court of Appeals for the Seventh Circuit has held that courts have discretion to raise affirmative defenses on their own. Gleash v. Yuswak, 308 F.3d 758, 760-61 (7th Cir. 2002). In Walker v. Thompson, 288 F.3d 1005, 1009-10 (7th Cir. 2002), the court held that a court may dismiss a claim if it is plain from the face of the complaint that the plaintiff failed to exhaust his administrative remedies. In this case, plaintiff has admitted in his complaint that his grievances were dismissed as untimely. However, he may have until March 3, 2003, in which to inform the court whether it has misconstrued his statement. If plaintiff does not respond by that date with a showing that his claims in this lawsuit were considered administratively on their merits, this case will be dismissed.

ORDER

IT IS ORDERED that plaintiff Ronald Robinson may have until March 3, 2003, in which to inform the court that the court has misconstrued his statement that his administrative complaint relating to the claims raised in this lawsuit were dismissed as untimely. If plaintiff does not respond by that date, the clerk of court is directed to enter

judgment dismissing this case for plaintiff's failure to exhaust his administrative remedies.

Entered this 13th day of February, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge