IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JONATHON M. MARK,

OPINION AND ORDER

Plaintiff,

03-C-516-C

v.

DENISE OLSON, DAVID HAGGLUND,
BRIAN MESHUN, JAMES McARTHUR,
ELIZABETH TEGELS, STEVEN DOUGHERTY,
TROY BENGAL, WARREN DOHMS,
PHILIP JOHNSON[1] and
MEDICAL STAFF BETWEEN
7-15-02 TO 9-15-02 (JOHN AND JANE DOES),

Defendants.

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This is a civil action for declaratory, monetary and injunctive relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Jonathon Mark asserts the following claims against various prison officials at Jackson Correctional Institution, in Black River Falls, Wisconsin:

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[1] In his complaint, plaintiff identified these nine defendants as "Officers Olson; Haglin," "Sgt. Meshun," Sgt. McAurther," "Mrs. Tegels," "Mr. Dougherty," "Lt. Bengal," "Lt. Dohms" and "Lt. Johnson." Defendants have identified their full names in their summary judgment materials. Because plaintiff does not suggest that the names provided by defendants are inaccurate, I have amended the caption to reflect defendants' correct names.

(1) an unknown defendant or defendants violated plaintiff's rights to adequate medical treatment and to equal protection of the laws by refusing to provide him with a hepatitis test because of his race;

(2) defendants Brian Meshun, James McArther and Elizabeth Tegels breached their duty to protect plaintiff under the Eighth Amendment when they placed him in a cell with another inmate who had been diagnosed with hepatitis;

(3) defendant Troy Bengal placed plaintiff in segregation and kept him there longer than his cell mate because plaintiff is Native American and because plaintiff had exercised his right to free speech;

(4) defendant Warren Dohms prolonged plaintiff's placement in segregation in retaliation for plaintiff's exercise of his right to free speech;

(5) defendant Dohms, Steven Doherty and Philip Johnson entered into a conspiracy to place plaintiff in segregation a second time because he is Native American and because he exercised his rights to free speech and to gain access to the courts;

(6) defendants Olson and David Hagglund searched plaintiff's cell more often than other inmates because he is Native American.

Defendants have moved to dismiss plaintiff's claim against the unnamed defendants on the ground that he has not served them as required by Fed. R. Civ. P. 4. In addition, defendants assert that plaintiff has failed to exhaust his administrative remedies with respect

to that claim, as well as several of his other claims. Finally, defendants argue that they are entitled to summary judgment on plaintiff's claim that defendant Dohms retaliated against him for the exercise of his First Amendment rights.

Defendants are correct that plaintiff failed to amend his complaint to identify the unnamed defendants by February 20, 2004, as required by Magistrate Judge Stephen Crocker's January 7, 2004 order. However, the reason for this is likely that defendants failed to "file and serve a letter identifying all 'John Doe' defendants who fit the description provided in plaintiff's complaint" by February 6, 2004, as required by the same order. I need not linger on the question whether plaintiff should be granted additional time to name these defendants because defendants have shown that plaintiff did not exhaust his administrative remedies with respect to that claim. Plaintiff's claim against the unnamed defendants will be dismissed for his failure to exhaust his administrative remedies, as will the rest of his claims, with the exception of his retaliation claim against defendant Dohms. That claim will be dismissed because plaintiff has failed come forward with any evidence that Dohms retaliated against him because he exercised his First Amendment rights.

Before I set forth the undisputed facts, a word is required regarding their source. Plaintiff did not submit any proposed findings of fact as required by this court's Procedures to Be Followed on Summary Judgment, which were attached to the magistrate judge's preliminary pretrial conference order, dkt. #11. In addition, he failed to file a response to

defendants' proposed findings of fact. Plaintiff did file a document that he labeled an "affidavit," but it does not comply with 28 U.S.C. § 1746, which requires parties to represent in the affidavit that all averments are "true under penalty of perjury." In addition, almost all of the content in the "affidavit" is either not based on personal knowledge as required under Fed. R. Civ. P. 56, or it relates to what plaintiff "believes" without indicating any basis for that belief. As I told plaintiff in the order granting him leave to proceed, his unsupported beliefs are not evidence of retaliation or discrimination. Sanderson v. Henderson, 188 F.3d 740, 746 (7th Cir. 1999) (evidence of plaintiff's belief that defendant's decision was motivated by discriminatory intent insufficient to survive motion for summary judgment).

Because plaintiff failed to dispute defendants' proposed findings of fact with admissible evidence, I have accepted all of defendants' proposed findings of fact as true so long as they were properly supported by the record. Stewart v. McGinnis, 5 F.3d 1031, 1034 (7th Cir. 1993). From defendants' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiff Jonathon Mark is an inmate at the Fond Du Lac County Jail. During the events giving rise to this lawsuit, plaintiff was incarcerated at the Jackson Correctional

Institution in Black River Falls, Wisconsin. (At the time he filed this lawsuit, he was incarcerated at the Milwaukee Secure Detention Facility, where he had been since some time between April 2003 and September 2003.) Defendants Troy Bengal and Warren Dohms were both sergeants and later lieutenants at the Jackson Correctional Institution until they were transferred to other institutions in 2003 and 2004. (Defendants did not propose any findings of fact about the other defendants.)

On July 22, 2002, defendant Bengal issued a conduct report to plaintiff because he believed that plaintiff had placed a razor blade in his cell mate's mattress with the hope that doing so would lead to a new cell assignment. Plaintiff was placed in temporary lockup. Bengal did not issue the conduct report because plaintiff is Native American or because plaintiff had complained about a volunteer who read from the Bible before conducting religious services. Bengal was not aware that plaintiff had complained about the volunteer.

Plaintiff's disciplinary hearing was scheduled for August 6, 2002, but it was later postponed until August 12, 2002, because the witnesses plaintiff wished to call were not available on the earlier date. Plaintiff remained in temporary lockup during this time, a decision authorized by defendant Dohms. Dohms was not aware that plaintiff had complained about a religious services volunteer.

Defendant Dohms presided over the disciplinary hearing. He found plaintiff not guilty because there was insufficient evidence to show that plaintiff was responsible for the

razor blade. Plaintiff did not receive the document in which the warden approved plaintiff's continued confinement in temporary lockup until after the disciplinary hearing.

In an inmate complaint dated July 22, 2002, plaintiff wrote that defendant Denise Olson placed him in temporary lockup for possessing a razor blade in his cell, even though the razor blade belonged to his cell mate. Plaintiff wrote, "I feel that this is a discriminatory action." The inmate complaint examiner rejected plaintiff's complaint under Wis. Admin. Code § DOC 310.08(2)(a), which prohibits prisoners from using the inmate complaint review system to raise an issue that is the subject of a conduct report that has "not been resolved through the disciplinary process in accordance with ch. DOC 303." Plaintiff did not appeal this decision.

A week later, plaintiff filed another inmate complaint in which he argued that there was no basis for disciplining him. In addition, he complained again about being placed in a cell with someone who had hepatitis. The inmate complaint examiner rejected plaintiff's complaint, again under Wis. Admin. Code § DOC 310.08(2)(a). Plaintiff did not appeal this decision.

In a complaint dated April 23, 2003, plaintiff alleged that in July 2002, he had been celled with an inmate that had hepatitis and that he had asked both to be moved from the cell and to take a hepatitis test, but both of these requests had been refused. The inmate complaint examiner rejected plaintiff's complaint because he had not filed it within 14 days

of the occurrence giving rise to the complaint, as required by Wis. Admin Code § DOC 310.09(6). In addition, she wrote, "Inmate Mark may submit a HSR and request to be seen (evaluated) and tested." In his request to the warden to review the rejection, he complained only about his cell assignment. The warden affirmed the examiner's decision to reject the complaint as untimely.

On September 17, 2003, plaintiff filed an inmate complaint at the Milwaukee Secure Detention Facility in which he alleged that "HSU" refused to give him requested medical treatment, including a hepatitis test. Plaintiff completed the administrative grievance process with respect to this complaint on October 21, 2003.

In a complaint dated October 13, 2003, plaintiff alleged that some cells at the Milwaukee facility were being searched more than others, in violation of the equal protection clause. This complaint was dismissed by the inmate complaint examiner, who wrote that cell searches were performed randomly. The dismissal was affirmed by the reviewer, the corrections complaint examiner and the office of the secretary.

Plaintiff did not file any other inmate complaints related to his cell assignment, a hepatitis test, his placement in temporary lockup or discriminatory cell searches. (Plaintiff refers to another inmate complaint that he filed relating to treatment of his foot after he was injured. However, I dismissed this claim in the October 21, 2003 screening order for failure to state a claim upon which relief could be granted. Therefore, it is no longer relevant

whether plaintiff exhausted his administrative remedies with respect to this claim.)

OPINION

I. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Under 42 U.S.C. § 1997e(a), prisoners may not bring federal lawsuits challenging prison conditions until they have exhausted all available administrative remedies. The Wisconsin Department of Corrections has enacted a prisoner grievance process known as the inmate complaint review system, which is codified in Chapter DOC 310 of the Wisconsin Administrative Code. (In November 2002, the department amended many of the regulations in Chapter 310. Plaintiff filed some of his inmate complaints before November 2002 and some of them after that date. I have analyzed each complaint under the provisions that were in effect at the time plaintiff filed his complaint.)

Defendants argue that plaintiff failed to complete the administrative exhaustion process for all but one of his claims. I agree, for the reasons discussed below.

A. Cell Assignment

Plaintiff filed two inmate complaints in which he complained about being housed with an inmate with hepatitis. In July 2002, he included this issue in the same complaint in which he challenged the decision to discipline him for possessing a razor blade. The

inmate complaint examiner appears to have overlooked the cell assignment issue. In rejecting the complaint, the examiner wrote only that plaintiff's challenge to his conduct reports was premature because the disciplinary process was ongoing. If the examiner *had* addressed the cell assignment issue, she could have rejected it under Wis. Admin. Code § DOC 310.09(1) (April 1998), which limits inmate complaints to one issue each. However, the court of appeals has held that a prisoner's failure to follow procedural rules "is fatal to the litigation in federal court only if the state tribunal *explicitly relies on that default*." Ford v. Johnson, 362 F.3d 395, 397 (7th Cir. 2004) (emphasis added). Nevertheless, the complaint *was* rejected, even if it was not for the reason that plaintiff put two issues in his complaint. Thus, plaintiff was on notice that he needed to either appeal the rejection or file a new complaint. Because plaintiff did neither of those things, he failed to exhaust his administrative remedies with respect to that complaint. See Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002) ("unless the prisoner completes the administrative process by following the rules the state has established for that process, exhaustion has not occurred").

In April 2003, plaintiff filed a second inmate complaint raising the cell assignment issue, but the examiner rejected it because plaintiff failed to file the complaint within 14 days of the event giving rise to the complaint, as required by Wis. Admin. Code § 310.09(6) (Nov. 2002). An inmate whose complaint is rejected as untimely has not exhausted his administrative remedies, even though there may no longer be any administrative remedies

available to him. The Court of Appeals for the Seventh Circuit has held that so long as administrative remedies *were* available at one time, a prisoner is not exempted from the exhaustion requirements if his own negligence resulted in an untimely complaint that was rejected. If the prisoner cannot convince prison officials to consider his grievance after the deadline has passed, he is barred from bringing the claim in federal court so long as he remains subject to the requirements of § 1997e(a). Pozo, 286 F.3d at 1024.

I will dismiss plaintiff's claim that defendants Brian Meshun, James McArther and Elizabeth Tegels breached their duty to protect plaintiff under the Eighth Amendment when they placed him in the same cell as another inmate who had been diagnosed with hepatitis for plaintiff's failure to exhaust his administrative remedies. In accordance with Ford, 362 F.3d at 401, the dismissal will be without prejudice, even though it is unlikely that plaintiff will be able to exhaust this claim at a later date or avoid the exhaustion requirement by filing his claim in state court. See Wis. Stat. § 801.02 (7)(b) (2001-2002) (prisoner who has not exhausted his administrative remedies may not bring civil action challenging prison conditions in state court).

B. Failure to Test Plaintiff for Hepatitis

Plaintiff complained about not being tested for hepatitis in both his April 23, 2003 grievance and his September 17, 2003 grievance. The inmate complaint examiner rejected

plaintiff's April 2003 complaint as untimely while noting that plaintiff could request a test from health services. The examiner's decision is a bit confusing. She appears to have dismissed plaintiff's complaint because there were other avenues of relief open to him while at the same time she rejected the complaint because it was not timely filed. (An examiner "rejects" a complaint if the prisoner has failed to follow a procedural rule; the examiner "dismisses" a complaint if she denies the complaint on its merits.) Regardless of the reason for the examiner's decision or its correctness, plaintiff did not challenge the refusal to provide a test in his appeal to the warden, which he could have done. Wis. Admin. Code § DOC 310.11(6) (Nov. 2002). Because plaintiff did not complete the administrative exhaustion process with respect to the April 2003 complaint, he did not satisfy the requirements of § 1997e(a).

Plaintiff completed the administrative process with respect to his September 2003 complaint. Unfortunately for plaintiff, this complaint challenged the refusal of the staff at Milwaukee Secure Detention Center to provide him with a hepatitis test, while his claim in this case is that staff at Jackson Correctional Institution refused to give him a test. An inmate complaint about a failure to give treatment at one institution cannot be used to satisfy the exhaustion requirements with respect to a claim relating to events at another institution. Accordingly, plaintiff's claim that an unknown defendant or defendants violated his rights to adequate medical treatment and to equal protection of the laws by refusing to

provide plaintiff with a hepatitis test because of his race will be dismissed for plaintiff's failure to exhaust his administrative remedies.

C. Placement in Temporary Lockup

Plaintiff filed two inmate complaints in which he challenged his placement in temporary lockup. Both times the examiner rejected the complaint as premature because the issue might be resolved in the context of the disciplinary process. See Wis. Admin. Code § DOC 310.08(2)(a). Petitioner did not file an inmate complaint after the disciplinary proceedings were complete, as he should have done in order to exhaust his administrative remedies. Accordingly, I will dismiss plaintiff's claims that defendants Troy Bengal, Steven Doherty and Philip Johnson placed plaintiff in segregation because plaintiff is Native American and in retaliation for plaintiff's exercise of his right to free speech and to gain access to the courts because plaintiff failed to exhaust his administrative remedies.

D. Cell Searches

Plaintiff filed one complaint in which he alleged that his cell was being searched more than other cells. Again, however, this complaint related to staff at the Milwaukee Secure Detention Facility, not the Jackson Correctional Institution. Because plaintiff filed no inmate complaints about discriminatory cell searches at the Jackson Correctional Institution,

plaintiff's claim that defendants Olson and David Hagglund searched plaintiff's cell more often than other inmates because he is Native American will be dismissed for his failure to exhaust his administrative remedies.

II. RETALIATION

Defendants concede that plaintiff exhausted his administrative remedies with respect to his claim that defendant Dohms prolonged plaintiff's placement in segregation in retaliation for plaintiff's exercise of his right to free speech. However, they contend that plaintiff has failed to adduce any evidence that Dohms acted with a retaliatory motive. I agree.

I instructed plaintiff in the screening order that he would have to show that his protected speech was a substantial or motivating factor in defendant Dohms's decision to keep plaintiff in temporary lockup. Rasche v. Village of Beecher, 336 F.3d 588, 597 (7th Cir. 2003). Despite this instruction, plaintiff has not come forward with any evidence that defendant Dohms extended plaintiff's placement in temporary lockup because of objections plaintiff voiced about a volunteer who performed religious services. In fact, it is undisputed that Dohms did not even *know* that plaintiff held such an objection. Obviously, a person cannot be motivated by conduct of which he is not even aware. Morfin v. City of East Chicago, 349 F.3d 989, 1005 (7th Cir. 2003). Although plaintiff writes in his "affidavit"

that he "find[s] it hard to believe that Lt. Dohms" was "unaware of the issues with the Native American group," he does not point to any evidence contradicting Dohms's testimony. He writes only that another inmate told him that prison officials *other than Dohms* were aware of "issues [that] had happened before." Plaintiff's only argument with respect to Dohms is that he must have been aware of plaintiff's speech because Dohms "supervises other correctional staff." Even if I assume that "other correctional staff" were aware of plaintiff's speech and that Dohms supervised these staff members, it would not be reasonable to assume on the basis of those facts alone that those staff members would have told Dohms about plaintiff's speech.

In any event, it is undisputed that defendant Dohms continued plaintiff's placement in temporary lockup because plaintiff's witnesses were not available on the day the disciplinary hearing was originally scheduled. Plaintiff writes in his "affidavit" that he had requested witnesses to be present at his hearing far enough in advance so that they should have been available by August 6. However, plaintiff sets forth no facts showing that he had identified by name the witnesses he wished to question, that it was Dohms's responsibility to insure that witnesses were prepared or that, if it was Dohms's responsibility, his failure to notify the witnesses was a result of anything but a busy schedule or absentmindedness. Thus, even if I accepted plaintiff's fact as true, it would not call Dohms's explanation into doubt.

In his brief, plaintiff appears to argue that it is suspicious that Dohms did not show plaintiff the warden's written approval of plaintiff's continued placement in temporary lockup until after plaintiff was released back into the general population. Whatever this alleged fact might show, it does not indicate that Dohms felt any animus toward plaintiff as a result of his speech.

Finally, plaintiff argues also that a retaliatory motive may be inferred because the charges against him were dismissed. This fact undermines rather than supports his claim because it was defendant Dohms who concluded the evidence was insufficient to discipline plaintiff. Plaintiff does not provide any explanation why Dohms would have found plaintiff not guilty of the charges if Dohms harbored any animus against plaintiff.

Because plaintiff would have the burden of persuasion at trial to prove that defendant Dohms violated his constitutional rights, plaintiff's failure to come forward with any evidence supporting this claim is fatal. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (if nonmovant fails to make showing sufficient to establish existence of essential element on which that party will bear burden at trial, summary judgment for moving party is proper).

Defendants' motion for summary judgment will be granted.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Denise Olson, David Hagglund, Brian Meshun, James McArthur, Elizabeth Tegels, Steven Dougherty, Troy Bengal, Warren Dohms and Philip Johnson is GRANTED.

2. The following claims are DISMISSED without prejudice for plaintiff's failure to exhaust his administrative remedies:

(1) An unknown defendant or defendants violated plaintiff's rights to adequate medical treatment and to equal protection of the laws by refusing to provide him with a hepatitis test because of his race;

(2) Defendants Brian Meshun, James McArther and Elizabeth Tegels breached their duty to protect plaintiff under the Eighth Amendment when they placed him in the same cell as another inmate who had been diagnosed with hepatitis;

(3) Defendant Troy Bengal placed plaintiff in segregation and kept him there longer than his cell mate because plaintiff is Native American and in retaliation for plaintiff's exercise of his right to free speech;

(4) Defendant Warren Dohms, Steven Doherty and Philip Johnson entered into a

conspiracy to place plaintiff in segregation a second time because he is Native American and because he exercised his rights to free speech and to gain access to the courts;

(5) defendants Olson and David Hagglund searched plaintiff's cell more often than other inmates because he is Native American.

3. The following claim is DISMISSED with prejudice because plaintiff failed to show that there are genuine issues of material fact with respect to this claim: defendant Warren Dohms prolonged plaintiff's placement in segregation in retaliation for plaintiff's exercise of his right to free speech.

4. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 11th day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge