IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LEONARD COLLINS,

Plaintiff,

v.

GARY McCAUGHTRY,
DICK POLINSKE, and
MOLLY OLSON,

Defendants.

OPINION AND ORDER

04-C-147-C

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This is a civil action brought under 42 U.S.C. § 1983 in which plaintiff Leonard Collins alleges that his First Amendment rights were violated when (1) defendant Gary McCaughtry denied him a hardbound English book; (2) defendant Molly Olson retaliated against him for filing an appeal by placing him in segregation; and (3) defendant Dick Polinske retaliated against him for speaking out against an anger management course by denying him a transfer to a lower security facility. Now before the court is defendants' motion for summary judgment. Jurisdiction is present. 28 U.S.C. § 1331.

Defendants allege that plaintiff failed to exhaust administrative remedies and that he cannot meet his burden of proof on the merits of his claims. "Exhaustion of administrative

remedies, as required by § 1997e, is a condition precedent to suit" and district courts lack discretion to decide claims on the merits unless the exhaustion requirement has been satisfied. Dixon v. Page, 291 F.3d 485, 488 (7th Cir. 2002); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999). Thus, I must address the exhaustion issue first. However, I am unable to reach a decision on the issue of exhaustion as it relates to plaintiff's claims regarding the denial of hardbound books in segregation and retaliation by defendant Olson at this time because neither party has submitted copies of the relevant inmate complaints. Nonetheless, I will grant defendants' motion as to plaintiff's claim of retaliation by defendant Polinske.

A. Exhaustion of Claims Against Defendants McCaughtry and Olson

The exhaustion provision of the 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), states 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." Failure to exhaust is an affirmative defense; defendants bear the burden of pleading and proving it. Dale v. Lappin, 376 F.3d 652, 655 (7th Cir. 2004); Massey v. Helman, 196 F.3d 727 (7th Cir. 1999). To this end, defendants have submitted the affidavit of John Ray, a corrections complaint examiner, who avers that he has reviewed

plaintiff's inmate complaint history and all related documents of his office and ascertained that plaintiff failed to file an inmate complaint regarding the denial of hardbound books in the Waupun Segregation unit or file an appeal claiming that either defendant Polinske or defendant Olson retaliated against him. Technically speaking, Ray's averments about what is or is not raised in plaintiff's complaints are not admissible as evidence of the content of those complaints; Fed. R. Evid. 1005 provides that secondary evidence of the contents of public records is not admissible in lieu of a certified or authenticated copy of the original unless such copies could not be obtained by the exercise of reasonable diligence.

However, "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." Fed. R. Evid. 1006. Attached to the Ray affidavit is an authenticated copy of plaintiff's inmate complaint history report listing the nearly 300 inmate complaints plaintiff filed from September 16, 1993 through October 27, 2004. The report includes a brief summary of the contents of each complaint and has been shaded to identify those complaints that were appropriately appealed. This is exactly the type of information for which a summation is both appropriate and desirable.

In conjunction with his response, plaintiff submitted affidavits in which he avers that complaints numbered KMCI-1998-1770, KMCI-1998-1823, KMCI-1998-1903 and KMCI-1998-2035 relate to his claim that defendant Olson retaliated against him and that

complaint WCI-2001-13011 relates to his claim regarding the prohibition of hardbound books in the segregation unit. Just as Ray's averments were not admissible as evidence of the contents of these documents, neither are plaintiff's statements. Fed. R. Evid. 1005. Plaintiff does not say that he was unable to obtain copies of these complaints through discovery but instead testifies that he has not yet conducted discovery as to these complaints. See Plt.'s Aff., dkt. #42, at 4, ¶ 18. Accordingly, there is no reason to believe that plaintiff exercised "reasonable diligence" in attempting to obtain copies of these complaints.

The only admissible evidence regarding the contents of plaintiff's inmate complaints is the complaint history summary attached to the Ray affidavit. However, the brevity of the descriptions contained therein makes it impossible to determine whether plaintiff clearly identified his complaints as retaliation by Olson or as a ban on hardbound books in segregation. For example, the description of complaint KMCI-1998-1823 says "[i]nmate complains about being unjustly placed in [temporary lock up]," but does not indicate whether plaintiff mentioned defendant Olson and if so, whether plaintiff alleged that she acted in retaliation for his filing an appeal. The summary of WCI-2001-13011 indicates that plaintiff "complain[ed] of being provided with no programs in segregation as specified in DOC 303.70," but does not indicate whether the ban on hardbound books was identified specifically. These two complaints are shaded, indicating that they were properly appealed.

(In KMCI-1998-1770, KMCI-1998-1903 and KMCI-1998-2035, plaintiff complained about program review committee issues and about a conduct report; there is no indication in these descriptions that these complaints might relate to plaintiff's claim against defendant Olson.)

Federal Rule of Evidence 1006 provides that a court may order the production of the originals or duplicates of the documents that are the subject of a summary under the rule. Pursuant to this authority, I will give defendants, who bear the burden of proof on the exhaustion question and who submitted the complaint history summary, until March 11, 2005, in which to submit authenticated copies of inmate complaints KMCI-1998-1823 and WCI-2001-13011. I will stay a decision as to plaintiff's exhaustion of his claims against defendants Olson and McCaughtry until that time.

B. Failure to Exhaust Claim Against Defendant Polinske

In his proposed findings of fact, plaintiff identifies complaints numbered WCI-2004-11652, WCI-2004-12145 and WCI-2004-15824 as pertaining to his claim against Polinske. The brief summary of WCI-2004-11652 in the complaint history summary indicates that plaintiff complained about "social worker / [program review committee] assessment of [his] willingness to participate in [an] [a]nger [m]anagement [course]." (The summaries of the other two inmate complaints do not suggest that they might relate to plaintiff's claim that defendant Polinske retaliated against him for speaking out against an anger management

course by denying him a transfer to a lower security facility.) Although this description of WCI-2004-11652 arguably suggests that plaintiff may have alleged retaliation by defendant Polinske, there is no evidence that plaintiff appealed this complaint.

Plaintiff argues that defendants' representations as to which complaints were appealed properly do not reflect the fact that there are actually two means for appealing inmate complaints. The Wisconsin Administrative Code provisions governing inmate complaints draw a distinction between complaints that have been rejected and those that have been dismissed. Inmate complaint examiners may reject complaints when they do not comply with certain procedural requirements. See Wis. Admin. Code § DOC 310.11(5) (complaints may be rejected if they have been brought for the purpose of harassment, do not invoke a significant issue regarding prison conditions, do not allege sufficient facts, are brought more than 14 days after the occurrence giving rise to complaint, raise issues not affecting inmate personally, are moot, have already been addressed or are not within the scope of the inmate complaint review system). Rejected complaints may be appealed "to the appropriate reviewing authority" but only for review of the basis for rejection. Wis. Admin. Code § DOC 310.11(6). In contrast, denials are decisions on the merits and are appealable to the corrections complaint examiner. Wis. Admin. Code § DOC 310.13.

Plaintiff argues that complaints he appealed to the warden, including WCI-2004-11652, WCI-2004-12145 and WCI-2004-15824, have not been shaded on his complaint

history. If his appeal was taken to the warden rather than the corrections complaint examiner, it can be inferred that these complaints were rejected rather than denied. In addition, plaintiff has submitted a copy of the inmate complaint examiner's rejection of complaint WCI-2004-11652 and a copy of defendant McCaughtry's review of complaint WCI-2004-12145, indicating that the complaint had been rejected. Plaintiff's suggestion that appealing a rejected complaint satisfies the exhaustion requirement is in error. "To exhaust administrative remedies, a person must follow the rules governing the filing and prosecution of a claim." Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). Because rejected claims are presumably procedurally flawed, they cannot satisfy the exhaustion requirement even if appealed.

Plaintiff might contend that this creates a system in which prison officials may escape all liability simply by rejecting all inmate complaints as a matter of course. First, this argument ignores the fact that inmate complaint examiners have an obligation to adhere to DOC regulations that limit the grounds for complaint rejection. Furthermore, the Prison Litigation Reform Act requires inmates to exhaust only those administrative remedies that are available to him. If an inmate complaint examiner abuses the discretion to reject complaints under Wis. Admin. Code § DOC 310.11(5), a court might find that administrative review through the inmate complaint review system was not available to the inmate filing the complaint. In any event, plaintiff does not contend that his inmate

complaints were improperly rejected. Accordingly, defendants' motion for summary judgment will be granted as to plaintiff's claim against defendant Polinske for plaintiff's failure to exhaust his administrative remedies as to this claim.

ORDER

IT IS ORDERED that

1. The motion for summary judgment of defendants Gary McCaughtry, Dick Polinske and Molly Olson is GRANTED with respect to plaintiff Leonard Collins's First Amendment retaliation claim against defendant Polinske. Plaintiff's claim is DISMISSED as to defendant Polinske.

2. A decision on defendants' motion is STAYED as it relates to plaintiff's First Amendment claims against defendants McCaughtry and Olson pending defendants submission of certified or authenticated copies of plaintiff's inmate complaints nos. KMCI-1998-1823 and WCI-2001-13011.

3. Defendants will have until March 11, 2005 in which to submit these copies; failure to do so by this date will be construed as a waiver of their failure to exhaust defense, in

which instance I will proceed to consider defendants' motion for summary judgment on the merits of plaintiff's two remaining claims against them.

Entered this 28th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge