

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

TITUS HENDERSON,

Plaintiff,

ORDER

v.

04-C-39-C

VICKI SEBASTIAN, GERALD BERGE,
MATTHEW FRANK, CATHERINE BROADBENT,

Defendants.

In an order dated April 6, 2004, I granted plaintiff leave to proceed on his claims that defendants are violating his rights under the First Amendment and Religious Land Use and Institutionalized Persons Act by refusing to permit him to have two Taoist texts and by forcing him to submit to Christianity as part of a behavior modification program. Also I granted plaintiff leave to proceed on a claim that defendants are violating the establishment clause by using tax dollars to purchase a Christian television network. Now plaintiff has filed a motion to amend his complaint to allege that he exhausted his administrative remedies pursuant to 42 U.S.C. § 1997e, and a motion for a preliminary injunction.

Plaintiff's motion to amend his complaint to allege exhaustion of administrative remedies will be denied as unnecessary. Although it is true that plaintiff is required under

the 1996 Prison Litigation Reform Act to exhaust his administrative remedies before filing a federal lawsuit to challenge conditions of his confinement, he is not required to affirmatively allege exhaustion in his complaint. Instead, the exhaustion requirement is considered satisfied or waived unless the defendants challenge the matter in a motion to dismiss. Massey v. Helman, 196 F.3d 727 (7th Cir. 1999) (failure to exhaust is affirmative defense that defendants can waive); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999) (same). If defendants were to file such a motion, plaintiff would be given the opportunity to oppose the motion by proving that he did exhaust his administrative remedies. Because defendants have not moved to dismiss plaintiff's complaint for failure to exhaust, plaintiff's attempt to prove exhaustion is unnecessary.

In support of his motion for a preliminary injunction, plaintiff complains about lack of access to legal forms and the law library and the apparent confiscation of some of his legal books. In addition, he states that various persons who are not parties to this lawsuit are retaliating against him for filing his complaint in this court, by tightening his handcuffs excessively, denying him food and sanitary clothes, touching his genitals and refusing to address his complaints.

Plaintiff's claim of retaliatory conduct by persons not a party to this lawsuit cannot be brought in the context of this lawsuit. In situations in which a plaintiff alleges that state officials have retaliated against him for initiating a lawsuit, it is the policy of this court to require the claim to be presented in a lawsuit separate from the one which is alleged to have

provoked the retaliation. This is to avoid the complication of issues which can result from an accumulation of claims in one action. The court recognizes an exception to this policy only where it appears that the alleged retaliation would directly, physically impair the plaintiff's ability to prosecute his lawsuit. In this case, plaintiff suggests that some of his legal books have been confiscated, that he lacks access to "legal forms" and that his time in the law library is restricted, but he does not explain why he cannot prosecute this lawsuit despite these limitations. The legal authority for his claims was described by the court in the order permitting his to proceed with his lawsuit. Moreover, he will have an opportunity to ask questions about procedure at a preliminary pretrial conference that will be scheduled in this case as soon as defendants file a responsive pleading to the complaint. Because plaintiff has not shown that he is being physically prevented from prosecuting this lawsuit, his motion for a preliminary injunction will be denied.

ORDER

IT IS ORDERED that

1. Plaintiff's motion to amend his complaint is DENIED as unnecessary.

2. Plaintiff's motion for a preliminary injunction is DENIED.

Entered this 26th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge