

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

DONALD LEE PIPPIN, JR.,

Plaintiff,

v.

OPINION and
ORDER

04-C-582-C

JUDY P. SMITH - Warden of Oshkosh
Correctional Institution;
JIM SCHWOCHERT, Security Director at OSCI;
TOM EDWARDS, HSU Director at OSCI;
DR. ALEXANDER STOLARSKI, Chief Psychologist at OSCI;
CAPT. DERRINGER, 1st Shift Security at OSCI;
JOHN DOE, 1st Shift Security at OSCI (accomp. Dr. A.S. on 4/20/04);
LT. ROBERT BLECHL, 2nd Shift Security at OSCI (now Capt. and 1st Shift),

Defendants.

This is a civil action for monetary relief brought under 42 U.S.C. § 1983. Plaintiff Donald Lee Pippin, Jr., was granted leave to proceed on the following claims arising out of his incarceration at the Oshkosh Correctional Institution: (1) an unnamed official refused to send a letter he wrote on July 29, 2003, in violation of his rights under the First Amendment; (2) medical staff violated his rights under the Eighth Amendment by not obtaining corrective shoes for him; (3) defendant Robert Blechl refused to mail his letters

to family and friends in violation of the First Amendment; (4) defendants Alexander Stolarski, Judy Smith, Jim Schwochert, and John Doe conspired to deprive him of his constitutional right of access to the courts by requiring him to undergo a psychological evaluation; and (5) defendants Schwochert and Derringer conspired to deprive him of his constitutional right of access to the courts by creating false transportation costs that plaintiff could not afford to pay.

This case is now before the court on defendants' motion to dismiss for plaintiff's failure to exhaust his administrative remedies within the prison system, as required under 42 U.S.C. § 1997e(a). In support of their motion to dismiss, defendants submitted the affidavit of John Ray, the custodian of business records at the Wisconsin Department of Corrections. In his affidavit, Ray avers that the twenty-six inmate complaints attached to his affidavit are the only complaints plaintiff succeeded in filing under the inmate complaint review system as of July 6, 2005. Defendants did not submit any other documentation regarding plaintiff's exhaustion efforts, such as the recommendations made in response to his complaints or any appeals from adverse decisions that plaintiff may have filed. However, plaintiff attached additional documents relating to his use of the inmate complaint review system to his complaint in this case. Because documentation of a prisoner's use of the inmate complaint review system is a matter of public record, these documents may be considered without converting defendants' motion to dismiss to a motion for summary

judgment. Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 455 (7th Cir. 1998); General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997).

I conclude that plaintiff did not raise in any inmate complaint any of the claims he has raised in this lawsuit except one, which is plaintiff's claim that defendant Blechl violated his First Amendment rights by refusing to allow plaintiff to mail letters to his family, friends and clergy sometime in November 2003.

I draw the following facts from the complaint, the inmate complaints submitted by defendants and the documents concerning plaintiff's administrative exhaustion submitted with his complaint.

FACTS

In his complaint in this court, plaintiff alleges that on July 29, 2003, a letter was returned to him for being "inappropriate and pornographic." It contained information revealing that plaintiff is gay, but gave no "graphic details." On the same day, plaintiff filed an inmate complaint regarding this incident. However, this complaint was rejected because it addressed more than one issue. Plaintiff did not file a subsequent complaint about the July 29, 2003 letter.

Plaintiff alleges in his complaint in this court that from March 27, 2003 until

September 14, 2003, he was forced to use a wheelchair because he had no corrective shoes.

Plaintiff did not file an inmate complaint about this matter.

Plaintiff alleges that sometime after November 5, 2003, he wrote several letters to family, friends, and clergy in which he asked the addressees to contact federal authorities and other parties to demand an investigation and help him. Defendant Robert Blechl stopped these letters from going out, saying they were a threat to the institution and in violation of federal and state law. Subsequently, an investigator from the Winnebago County District Attorney's office conducted an interview regarding plaintiff's allegations of criminal wrongdoing. Prison officials told plaintiff he would be found guilty of lying about staff. On January 7, 2004, plaintiff filed inmate complaint #OSCI-2004-799, saying:

This is a group complaint by Donald Lee Pippin, Jr. #226834 and Shannon Charles Steindorf #300697. It deals with one issue, illegal censor of mail, but has several facts to support it. From Nov. 15th until Dec. 24th, all mail sent by both of us was opened and read under [Wis. Admin. Code ch.] 309 [illegible]. Seven letters by Donald Lee Pippin, Jr. were never sent out. . .A letter seeking help against criminal activity from friends, family and clergy is not contraband or a violation. . .We do not know if external mail is still being censored. We want all the letters sent that are still in security under evidence by our request. We want all censoring of external mail stopped. . . .

In his complaint, plaintiff alleges that defendants Dr. Alexander Stolarski, Judy Smith, Jim Schwochert and John Doe conspired to affect a court case plaintiff and inmate Shannon Charles Steindorf filed concerning plaintiff's desire to adopt Steindorf. Defendant Stolarski created a false psychological evaluation and false files to make people believe that

he and Steindorf are unstable. On April 16, 2004, plaintiff filed inmate complaint #OSCI-2004-12258, which reads in its entirety:

This is a group complaint by Shannon Charles Steindorf #300697 and Donald Lee Pippin, Jr. #226834. It deals with one issue, violation of Civil Rights associated with Confidential Information. Judy P. Smith ordered a psychological profile be done on Shannon Charles Steindorf and Donald Lee Pippin, Jr. For the Winnebago County Court, Bench IV, related to the adoption. (1) The Court has not ordered this evaluation or document (2) We have signed NO consent to this document. (3) We have signed NO consent for any psychological examination. (4) We have a conflict with OSCI staff and feel this document is another attempt at retaliation and to discredit us. By Law, Ms. Smith has no legal right to order any such document without a court order or our consent. It is a major violation of the few protected Constitutional Rights of a Prisoner. We have signed NO consent to these actions. We have been forced into them against our will. We oppose these actions and demand any documents created be destroyed, per regulations for the destruction of confidential documents. Nothing associated with these actions is to remain in the files. There is NO written consent.

In the space provided on the form for inmates to list individuals having information about the issue raised in the complaint plaintiff wrote his own name as well as the names of inmate Steindorf, defendant Smith and defendant Stolarski.

On April 20, 2004, the institution complaint examiner recommended dismissal of inmate complaint #OSCI-2004-12258 on the grounds that Pippin and Steindorf were incorrect that defendant Smith “is not allowed to order such evaluation.” The examiner noted that Smith is “responsible for the safety and well being of all inmates” and that if she believes an inmate is in need of a clinical consult then “she is in the position to request that

one be done.”

On April 27, 2004, the appropriate reviewing authority accepted the institution complaint examiner’s recommendation to dismiss plaintiff’s inmate complaint. Plaintiff appealed this decision to the correctional complaint examiner, stating:

The A.R.A. [appropriate reviewing authority] never reviewed the issues of the complaint. Plus, the A.R.A. is the Subject of the complaint. The complaint was a group complaint. Ms. Smith ordered a Psychological profile for a civil court proceeding, without a court order. This has NOTHING to do with Institutional Security. Furthermore, it is illegal for her to order a profile for a court case, without a court order. We want all the records associated with the psych report and testing, destroyed. We have filed a complaint with the Board of Ethics. We have 2 psychologists who have stated it is illegal. This is another event involving Mr. Pierce, who we have multiple claims against. This is a group complaint by: Donald Lee Pippin, Jr. #226834 [and] Shannon Charles Steindorf #300697.

On the appeal form, plaintiff listed Dr. Stolarski and Dr. Adams as individuals who could verify statements in their appeal. On May 7, 2004, the corrections complaint examiner recommended that the appeal be dismissed on the ground that “the Warden of the institution is charged with providing a safe and secure correctional institution for the public, staff, and offenders” and “if she believes a situation arises that warrants such an evaluation, she certainly has the authority to request it be done.” On May 11, 2004, the Office of the Secretary accepted the recommendation and dismissed plaintiff’s complaint.

In his complaint in this court, plaintiff alleges that defendants Schwochert and Derringer conspired to affect the adoption proceedings by creating false costs for

transportation to insure that plaintiff and Steindorf could not afford the bill. On April 5, 2004, plaintiff filed inmate complaint #OSCI-2004-11002, stating,

This is a group complaint by Donald Lee Pippin, Jr. #226834 and Shannon Charles Steindorf #300697. We received an estimated cost for transportation to court from security. We must pay this prior to court. It totaled \$272.53 each. This figure came from the security director. This figure is completely out of line and overly exorbitant [sic]. It is based on 4 hours. Yet, at the far extreme, court would not last beyond 1 hour and the courthouse is only 10 minutes away. Furthermore, we are being billed \$33.66 an hour, per staff. This rate would mean staff makes \$70,012.00 per year with benefits. This is not accurate. The entire charge is overly done to make our ability to reach court impossible. It is deliberate and malicious. There is no justification for this kind of bill. We want a new bill that reflects actual numbers based on time and salary. Court is in 19 days from today and we will hold the DOC personally responsible if we are unable to make court due to an outrageous charge.

On the complaint form, plaintiff listed himself, Steindorf and defendant Schwochert as individuals who had information about the issue raised in his complaint.

On April 7, 2004, the institution complaint examiner recommended dismissal of plaintiff's complaint. He explained that the estimated transportation costs had been calculated by "tak[ing] an average officer's salary and doubl[ing] it" to account for expenses such as health care, and by taking into account "possible delays at court along with the additional time of preparing for the trip." On April 9, 2004, the appropriate reviewing authority accepted the recommendation of dismissal. Plaintiff appealed the dismissal to the corrections complaint examiner, stating:

The A.R.A. [appropriate reviewing authority] is in direct conflict of interest in all matters of ICRS related to Shannon Charles Steindorf #300697 and myself. We have both signed this request because it was a group complaint. We have filed a criminal complaint against the A.R.A. with the local court. Therefore, all our issues are dismissed. We have received no appropriate ICRS actions since Oct. 2003, when those problems came to a head. On this complaint, we are expected to believe the institutions staff, i.e. guards, make \$70,012.00 per year, with their benefits. Because the Security Director, another party in our action, has deliberately tried to create problems, he has given an estimate at too much time and too much money so we could not afford to pay and we would be restricted and cut off from the court. The complaint is accurate. The conflicts keep us from actual relief. This system is flawed by its own self. There is no neutral party. We have NO ONE available to us for complaint.

On April 20, 2004, the corrections complaint examiner recommended dismissal of plaintiff's complaint, stating he found "no good cause to question the cost estimates of the institution."

On April 21, 2004, the office of the Secretary accepted the corrections complaint examiner's recommendation and dismissed plaintiff's complaint.

DISCUSSION

The 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), provides 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." The Court of Appeals for the Seventh Circuit has held that "[e]xhaustion of administrative remedies, as required by

§ 1997e, is a condition precedent to suit" and that 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). Exhaustion is an affirmative defense that defendants have the burden of pleading and proving. Massey v. Helman, 96 F.3d 727, 735 (7th Cir. 1999).

"[I]f a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim." Massey, 196 F.3d at 733. Exhaustion has not occurred unless an inmate follows the rules that the state has established governing the administrative process. Dixon, 291 F.3d at 491; Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). Wisconsin inmates have access to an administrative grievance system governed by the procedures set out in Wis. Admin. Code §§ DOC 310.01-310.18. Under these provisions, prisoners start the complaint process by filing an inmate complaint with the institution complaint examiner. An institution complaint examiner may investigate inmate complaints, reject them for failure to meet filing requirements or recommend to the appropriate reviewing authority that they be granted or dismissed. Wis. Admin. Code § DOC 310.07(2). If a complaint is rejected, the inmate may appeal the rejection to the appropriate reviewing authority, who can review only the reason for the rejection but not the merits of the complaint. Wis. Admin. Code § DOC 310.11(6). However, if the institution

complaint examiner makes a recommendation that the complaint be granted or dismissed on its merits, the appropriate reviewing authority has the authority to dismiss, affirm or return the complaint for further investigation. Wis. Admin. Code § DOC 310.12. If an inmate disagrees with the decision of the reviewing authority, he may appeal to a corrections complaint examiner, who is required to conduct additional investigation where appropriate and make a recommendation to the secretary of the Wisconsin Department of Corrections. Wis. Admin. Code § DOC 310.13. Within ten working days following receipt of the corrections complaint examiner's recommendation, the secretary must accept the recommendation in whole or with modifications, reject it and make a new decision or return it for further investigation. Wis. Admin. Code § DOC 310.14.

Alternative exhaustion processes exist for issues that fall outside the scope of the inmate complaint review system. For example, Wis. Admin. Code § DOC 310.08(2)(a) states that the inmate complaint review system may not be used to address an issue related to a conduct report unless the inmate has exhausted the disciplinary process of Wis. Admin. Code ch. DOC 303. Under this process, the inmate is given a hearing at which he may make statements on his own behalf. Wis. Admin. Code §§ DOC 303.75(4), 303.76(1)(e)1. If he disagrees with the outcome of the hearing, he must appeal the disciplinary officer's decision to the warden within the allotted time period. Wis. Admin. Code §§ DOC 303.75(6), 303.76(7). After exhausting this appeal process, an inmate may use the inmate complaint

review system to challenge procedural issues only. Wis. Admin. Code § DOC 310.08(3).

In analyzing plaintiff's exhaustion efforts, the first question is whether plaintiff filed a complaint that adequately raises any one of the claims he raises in this lawsuit. Defendants bear the burden of proving plaintiff's failure to exhaust. If it appears from the inmate complaints supplied by the parties that plaintiff raised a claim raised in this lawsuit with sufficient clarity to allow prison officials an opportunity to resolve the claim and avoid litigation, I must deny defendants' motion to dismiss as to that claim. Perez, 182 F.3d at 537-38 (purpose of exhaustion to narrow dispute and avoid litigation).

A. First Amendment Claim Against Unnamed Official

Plaintiff alleges that on July 29, 2003, an unnamed official refused to send a letter he wrote in violation of his rights under the First Amendment. However, the facts reveal that the institution complaint examiner rejected the inmate complaint plaintiff filed regarding this incident because it contained more than one issue and that plaintiff did not refile his complaint in proper form. Therefore, plaintiff has failed to exhaust his administrative remedies with respect to this claim in the manner required under 42 U.S.C. § 1997e. Accordingly, I will grant defendants' motion to dismiss plaintiff's claim that an unknown official violated his First Amendment rights by refusing to mail a letter plaintiff wrote on July 29, 2003.

B. Eighth Amendment Claim

Plaintiff alleges that he was required to use a wheelchair from March 27, 2003, until September 14, 2003, because medical staff failed to obtain corrective shoes for him. Plaintiff did not file an inmate complaint concerning this issue. Therefore, I will grant defendants' motion to dismiss this claim for plaintiff has failed to exhaust his administrative remedies.

C. First Amendment Claim Against Defendant Blechl

Plaintiff contends that sometime after November 5, 2003, he wrote letters to friends, family and clergy asking them to contact federal authorities and demand an investigation of staff at the Oshkosh Correctional Institution. He alleges that defendant Blechl refused to mail these letters in violation of his rights under the First Amendment. Although defendants argue that plaintiff failed to exhaust his administrative remedies on this claim, the evidence they submitted is insufficient to carry their burden of proof on this issue.

The facts reveal that on January 7, 2004, plaintiff filed inmate complaint #OSCI-2004-799 in which he alleged that between November 15, 2003 and December 24, 2003, his mail was opened and read and several of his letters were not sent out. In that complaint, plaintiff stated that “[a] letter seeking help against criminal activity from friends, family and clergy is not contraband or a violation.” Plaintiff’s description of the letters in his complaint

in this court and in his inmate complaint as communications to “friends, family and clergy,” the close timing of the disturbance to his mail alleged in the inmate complaint to the timing of the disturbance alleged in his complaint in this court and plaintiff’s listing of defendant Blechl’s name in the inmate complaint as someone having information about the issue complained of are enough to allow an inference to be drawn that plaintiff was challenging in inmate complaint #OSCI-2004-799 the incident that forms the basis for his claim against defendant Blechl in this court.

In supporting their motion to dismiss, defendants chose not to submit documentation of plaintiff’s use of the inmate complaint review system beyond his filing of an inmate complaint. Specifically, defendants did not file documentation revealing the institution complaint examiner’s response to complaint #OSCI-2004-799, the reviewing authority’s decision, plaintiff’s appeal to the corrections complaint examiner, the examiner’s response and the secretary’s final decision. Defendants’ failure to make the necessary showing that plaintiff failed to take these additional steps dooms their argument that plaintiff failed to exhaust his administrative remedies with respect to his First Amendment claim against defendant Blechl.

D. Access to Courts: Conspiracy to Interfere with Adoption Proceedings

In his complaint in this court, plaintiff alleges that defendants Stolarski, Smith,

Schwochert and Doe conspired to deprive him of his constitutional right of access to the courts and affect the case associated with his adoption of inmate Steindorf when they created a false psychological evaluation and false files to make people believe that he and Steindorf are unstable.

Defendants have put in evidence to show that the only inmate complaint filed that remotely touches on this claim is inmate complaint #OSCI-2004-12258, in which plaintiff and inmate Steindorf argue that Judy Smith does not have the authority to order their psychological examination. Nothing in this inmate complaint puts prison officials on notice that plaintiff believed that defendants Smith, Stolarski, Schwochert and John Doe were conspiring to interfere with his right of access to the courts.

In considering what facts or pleadings an inmate's administrative complaint should contain, the court must look to the appropriate administrative system requirements, Wis. Admin. Chapter DOC 310. Strong v. David, 297 F.3d 646, 649 (7th Cir. 2002). When the administrative requirements are silent as in the Wisconsin Administrative Code, "a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought." Id. at 650. Plaintiff need not articulate specific legal theories or particular remedies but need only make known an objection to some problem or wrongdoing. Id. Nevertheless, the complaint must be clear enough to allow the inmate complaint examiner to understand the nature of the claim.

The only action plaintiff challenges in inmate complaint #OSCI-2004-12258 is the action of defendant Judy Smith in ordering a psychological profile. Although defendant Stolarski is listed on the complaint form as someone having information about the matter, nothing in plaintiff's complaint suggests that plaintiff is attempting to notify prison officials that Smith might be plotting with defendants Stolarski, Schwochert and a John Doe to deprive him of his right of access to the courts. Because plaintiff's inmate complaint was not sufficiently clear to alert prison officials that his grievance was about a conspiracy to deprive him of his right of access to the courts, I conclude that he has failed to exhaust his administrative remedies on this claim. Therefore, I will grant defendant's motion to dismiss plaintiff's claim that defendants Stolarski, Smith, Schwochert and Doe conspired to deprive him of his right of access to the courts.

E. Access to Courts: Conspiracy to Create False Transportation Costs

Finally, plaintiff has been allowed to proceed in this court on his claim that defendants Schwochert and Derringer conspired to deprive him of his constitutional right of access to the courts by creating false transportation costs that petitioner could not pay. Defendants admit that in inmate complaint #OSCI-2004-11002 plaintiff challenges the amount of the transportation costs he has been told he must pay, but they argue that the complaint does not give prison officials notice that plaintiff is asserting the existence of a

conspiracy between Schwochert and anyone else.

As with plaintiff's conspiracy claim discussed in the previous section, plaintiff's inmate complaint does not hint that anyone other than defendant Schwochert has calculated the transportation charges to which he and inmate Steindorf object. Defendant Derringer is not mentioned in the complaint or listed as someone who might have information about the subject of the complaint. This is insufficient to put defendants on notice of his conspiracy claim. Therefore, I will grant defendants' motion to dismiss plaintiff's claim that defendants Schwochert and Derringer conspired to deprive him of his right of access to the courts by inflating transportation costs beyond plaintiff's ability to pay.

ORDER

IT IS ORDERED that defendants' motion to dismiss for plaintiff's failure to exhaust his administrative remedies is DENIED with respect to plaintiff's claim that defendant Blechl violated plaintiff's First Amendment rights by refusing to mail letters to family friends

and clergy. Defendants' motion to dismiss all of plaintiff's remaining claims for his failure to exhaust his administrative remedies is GRANTED.

Entered this 29th day of September, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge