IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SHAROME ANDRE POWELL,

OPINION AND ORDER

Plaintiff,

05-C-112-C

v.

PHIL KINGSTON and
TIM DOUMA,

Defendants.

- -

This is a civil action brought pursuant to 42 U.S.C. § 1983. Plaintiff Sharome Andre Powell is an inmate at the Columbia Correctional Institution in Portage, Wisconsin. In his complaint, plaintiff contends that he was placed on a "bag meal restriction" that was nutritionally inadequate in violation of his right under the Eighth Amendment to be free from cruel and unusual punishment. Presently before the court is the motion of defendants Phil Kingston and Tim Douma to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6). Defendants contend that plaintiff failed to properly exhaust his administrative remedies prior to filing suit as required by 42 U.S.C. § 1997e(a).

In support of their motion, defendants have submitted two affidavits and six

documents relating to plaintiff's efforts to exhaust his remedies within the Department of Corrections inmate complaint review system. Plaintiff has submitted additional documents in opposition to the motion. I can consider the parties' documentation without converting the motion to dismiss into a motion for summary judgment because the documentation of a prisoner's use of the inmate complaint review system is a matter of public record. 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). For the reasons stated below, I conclude that plaintiff has failed to properly exhaust his administrative remedies as to his Eighth Amendment claim. Accordingly, I will grant defendants' motion to dismiss this case.

A motion to dismiss will be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. Cook v. Winfrey, 141 F.3d 322, 327 (7th Cir.1998) (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). For the purpose of deciding defendant's motion, I accept as true the factual allegations in plaintiff's complaint.

FACTS

On October 14, 2004, petitioner was transferred to the Columbia facility from the Wisconsin Resource Center. When he arrived, he was placed in a punitive segregation

housing unit pursuant to facility policy. According to this policy, all inmates transferred from the Wisconsin Resource Center are to be placed in the segregation unit upon arrival for at least thirty days as a safety precaution. Petitioner was placed on "bag meal restriction," "sharps restriction" and "low trap precaution." As a result of these restrictions, he was served meals in bags and not provided utensils. The bag meals do not provide 2,000 calories each day and are not nutritionally adequate; at times, they included rotten apples and moldy oranges. Because petitioner was not provided utensils, he was forced to "drink" his cereal and spread peanut butter and jelly with his finger. Petitioner was kept on the bag lunch restriction for his first 46 days at the Columbia facility and at some later point, for another 31-day period. As a result, he suffered weight loss and malnourishment.

On December 26, 2004, plaintiff filed an inmate complaint with the Inmate Complaint Examiner, which was assigned complaint number CCI-2004-40799. In this complaint, plaintiff writes,

> My issue is NOT the content of the bag/but the "time frame" I was placed on a bag lunch restriction for conduct report #1515730.
>
> But according to the DOC Policies "red book under 309.37(e) a bag lunch shall not exceed 5 days (15 meals) total."
>
> So my question is why am I still on a bag meal?
>
> My restriction started 12-04-2004 and should've ended 12-09-2004, according to DOC policies and procedures - red book(309.37(e). In it states a bag meal restriction shall not exceed 5 days (15 meals) total if no other

infractions have occurred. . ."

Again my issue is NOT the contents of the bag/but the "time frame". . .

Adm. Capt. was notified about these concerns.

Plaintiff appealed the dismissal of this complaint through the appropriate administrative channels. Plaintiff prepared an inmate complaint concerning the quality and nutritional value of the food contained in his bag lunches on November 29, 2004. On December 1, 2004, the institution complaint examiner returned plaintiff's complaint to him, claiming that the subject of the complaint was "previously addressed in CCI-2004-35387." The regularly maintained institution records of inmate complaint appeals indicate that plaintiff did not file an appeal from this decision. Plaintiff prepared a second complaint concerning the quality and nutritional value of bag lunches on May 5, 2005, two months after he filed his complaint in this court. This complaint was returned to plaintiff on May 6, 2005, because he had not attempted to resolve the issue by contacting the food service administrator in accordance with § DOC 310.09(4).

OPINION

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 "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits." Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir.1999); see also Massey v. Helman, 196 F.3d 727, 733 (7th Cir.1999). In addition, "if 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. Before filing a civil action, Wisconsin inmates must file a complaint with the inmate complaint examiner under §§ DOC 310.09 or 310.10, receive a decision on the complaint from the appropriate reviewing authority under § DOC 310.12, have an adverse decision reviewed by the corrections complaint examiner under § DOC 310.13 and be advised of the secretary's decision under § DOC 310.14. Wis. Admin. Code § DOC 310.07.

The facts reveal that plaintiff filed an inmate complaint on November 29, 2004 about the nutritional value of the food in his bag meals, but that this complaint was rejected on the ground that plaintiff had previously raised the issues in the complaint in inmate complaint CCI-2004-35387. The facts reveal also that plaintiff did not file an appeal from an adverse decision in inmate complaint CCI-2004-35387. Finally, the facts show that plaintiff filed a second complaint concerning the nutritional value of his bag lunches on May 5, 2005, two

months after he filed this complaint.

"[U]nless [a] prisoner completes the administrative process by following the rules the state established for that process, exhaustion has not occurred." Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002). Because the facts show that plaintiff did not utilize the administrative process to appeal an adverse decision to the Corrections Complaint Examiner or the Secretary of the Department of Corrections with respect to any inmate complaint concerning the nutritional value of the bag lunches he may have filed before he filed this lawsuit, I cannot find that he has exhausted his administrative remedies. Moreover, even if plaintiff were able to show that he satisfied the administrative procedure with respect to his May 5, 2005 inmate complaint, he could not save his complaint from dismissal. As noted above, plaintiff was required to utilize the administrative process before he filed this lawsuit. The court of appeals reasoned in Pozo that any other approach would defeat the statutory objective of allowing the prison administration the opportunity to fix the problem, id. at 1024, and would remove the incentive that § 1997e provides for inmates to follow state procedure. Id. at 1025.

Because I conclude that plaintiff failed to properly exhaust his administrative remedies on his Eighth Amendment claim against defendants, I will grant defendants' motion to dismiss this case.

ORDER

IT IS ORDERED that:

1) The motion to dismiss filed by defendants Phil Kingston and Tim Douma is GRANTED on the ground that plaintiff failed to properly exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a).

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

Entered this 8th day of June, 2005.

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