IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TITUS HENDERSON,

OPINION AND ORDER

Plaintiff,

05-C-157-C

v.

BRIAN KOOL and
JUDITH HUIBREGTSE,

Defendants.

- -

Plaintiff Titus Henderson, a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, has been granted leave to proceed in forma pauperis in this action on the following claims: 1) defendant Brian Kool denied him a promotion to security level three in retaliation for plaintiff's assertion that he had been transferred to the Wisconsin Secure Program Facility because he had sued Redgranite Correctional Institution; and 2) on September 5, 2004, defendant Judith Huibregtse opened and read outside plaintiff's presence a letter from the United States Supreme Court labeled in red "Open in Presence of Inmate," and on November 10, 2004, she opened and read a letter from the Center for Constitutional Rights labeled "Legal Mail . . . Open in Presence of Prisoner." Jurisdiction

is present. 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

Presently before the court is defendants' motion to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6), on the ground that plaintiff has failed to 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 authenticated documents relating to plaintiff's use of the inmate complaint review system. Consideration of this documentation is necessary to reach a decision on the motion to dismiss. However, because documentation of a prisoner's use of the inmate complaint review system is a matter of public record, I may consider such records without converting defendants' motion 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).

From the documentation submitted by the parties and accepting as true the allegations in plaintiff's complaint, I find the following facts that are relevant to the motion to dismiss.

FACTS

Plaintiff Titus Henderson is an inmate currently incarcerated at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. In his complaint in this court, plaintiff alleged that

defendant Kool denied him a promotion to security level three in retaliation for plaintiff's writing in a questionnaire: "I was transferred to Wisconsin Secure Program Facility for filing civil action against Redgranite prison officials."

On December 2, 2004, plaintiff filed offender complaint WSPF-2004-37826, stating:

> U.M. Kool has punished me for saying "I will continue to file lawsuits against corrupt W.S.P.F. staff" in [an] application by denying me level 3 for protected speech of legal access.

On December 7, 2004, Institution Complaint Examiner Ellen Ray summarized plaintiff's complaint as a complaint that plaintiff had been denied a promotion to level three. She recommended dismissal of the complaint on the ground that "the level three system at WSPF does not affect the inmate's liberty interest." On December 22, 2004, Peter Huibregtse, Deputy Warden of the Wisconsin Secure Program Facility, issued a Reviewer's Decision accepting Ellen Ray's recommendation and dismissing plaintiff's complaint. At the bottom of the page announcing the Reviewer's Decision, the following statement appears:

> A complainant dissatisfied with a decision may, within 10 calender days after the date of the decision, appeal that decision by filing a written request for review with the Corrections Complaint Examiner on form DOC-405.

Plaintiff did not appeal Deputy Warden Huibregtse's dismissal of his complaint to the Corrections Complaint Examiner.

On January 3, 2005, plaintiff filed offender complaint WSPF-2005-338. In this complaint, plaintiff wrote: "U.M. Kool is using CR #1357711 which I was punished once

for [as] a ground to deny level 3 as punishment, in violation of [my] due process 14th Amend[ment] [rights]." In an attachment to the complaint, plaintiff wrote:

> U.M. Kool has used CR# 1357711 which I received 8 and 360 and sent to W.S.P.F. I told U.M. Kool it was against the law and it violat[es] [the] due process [clause of the] 14th Amend[ment]. U.M. Kool has no ground in denying me level 3. [U.M. Kool] has referred to me as being a National Socialist Party member, by writing it in a request form [that] I have as evidence for [a] lawsuit. U.M. Kool specifically stated I was not getting level 3 because of my protected speech [which] he didn't like about [the] racist staff at W.S.P.F. Atty. Garvey and DOC Atty. McCambridge & Potter said that levels in the program systems are "liberty interest[s]" as referred to in Motion To Enforce Settlement Agreement. Level 2 shall be no longer than 60 days unless extended by the Warden.

On January 4, 2005, Ellen Ray, Institution Complaint Examiner, summarized plaintiff's complaint as "[plaintiff] states he has been denied level 3." She recommended that plaintiff's complaint be dismissed, stating, "UM Kool has stated that inmate Henderson is still on Level 2 because he has not requested and completed a Level 3 application. As such, dismissal of this complaint is recommended." On January 13, 2005, Deputy Warden Peter Huibregtse accepted Ellen Ray's recommendation and dismissed offender complaint WSPF-2005-338.

On January 19, 2005, plaintiff filed a "Request For Corrections Complaint Examiner Review." In this request, plaintiff states:

> Ellen Ray has dismissed my complaint to conspire with Unit Manager Kool to punish me for saying "I filed lawsuits against staff at RGCI is the reason [why] I'm at WSPF," [which is] lawfully protected speech." Ellen Ray & Unit

> Manager Kool punishment of not promoting me to level 3 for saying this statement is against the 1st Amend[ment]. I showed Ellen Ray that I had filled out [a] level 3 application and requested another which on 12-2-04 U.M. Kool denied level 3 & refused to send application. Ellen Ray still has evidence she ignored the truth that I was punished for my statement in W.S.P.F-2005-2047.

On January 28, 2005, Sandra Hautamaki, the Corrections Complaint Examiner, recommended that plaintiff's offender complaint WSPF-2005-338 be dismissed, "based on and in agreement with the report of the Institution Complaint Examiner." On January 31, 2005, Department of Corrections Secretary Rick Raemisch issued an Office of the Secretary Report accepting the recommendation to dismiss plaintiff's offender complaint WSPF-2005-338.

Also, in his complaint in this court, plaintiff alleged that on September 5, 2004, defendant Huibregtse "opened and read [a] letter from the United States Supreme Court [dated] August 25, 2004, that stated in red 'Open in Presence of Inmate.'" Plaintiff did not file an offender complaint on this matter.

Finally, plaintiff alleged in his complaint in this court that on November 10, 2004, "J. Huibregtse opened and read outside of [his] presence a letter and manual from Center of Constitutional Rights [which] stated: 'Legal Mail . . . OPEN IN PRESENCE OF Prisoner.'" On November 10, 2004, plaintiff filed offender complaint WSPF-2004-35799, in which he wrote: "Sgt. Huibregtse opened and copied my legal mail that specifically state

'Legal Mail . . . Open In Presence of Prisoner,' and sent me the copied version." On November 24, 2004, Institution Complaint Examiner Kelly Trumm recommended that plaintiff's complaint be dismissed on the ground that the letter from the Center for Constitutional Rights does not qualify as privileged mail. On December 3, 2004, Deputy Warden Peter Huibregtse issued a Reviewer's Decision accepting Trumm's recommendation and dismissing plaintiff's complaint. Plaintiff did not file an appeal of the dismissal to the Corrections Complaint Examiner.

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." Dixon v. Page, 291 F.3d 485, 488 (7th Cir. 2002); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999). "[I]f a prison has an internal administrative grievance system through which a prison can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim." Massey v. Helman, 196 F.3d 727, 733 (7th Cir. 1999). 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. McCaughty, 286 F.3d 1022, 1025 (7th Cir. 2002). In other words, the inmate must file complaints and appeals in the place, and at the time, the prisoner's administrative rules require. Id. at 1025.

The purpose of the exhaustion requirement is to "provide[] the prison system with prompt notice of problems," giving prison officials "an opportunity to address a situation internally." Smith v. Zachary, 255 F.3d 446, 450 (7th Cir. 2001). If the grievance is not resolved during the administrative process, administrative exhaustion at the least helps to insure complete development of the factual record before a prisoner brings his case to the courtroom. Id.

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. Wis. Admin. Code § DOC 310.09. An institution complaint examiner may investigate the inmate complaint, reject it for failure to meet filing requirements or recommend to appropriate review authority that it 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 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 § 310.12. 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.

Defendants contend that plaintiff's retaliation claim against defendant Kool should be dismissed because plaintiff failed to exhaust his administrative remedies on this claim. I agree. If prison officials are to have any chance of resolving a prisoner's grievance concerning alleged retaliatory conduct, it is imperative that the complaining inmate inform prison officials precisely of two things: the conduct of the prisoner that allegedly provoked the retaliation and what the defendant did that was retaliatory. These are the same essential factual allegations necessary in a federal action asserting retaliation to give the defendant sufficient notice of the claim so that he or she can defend against it. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir.2002) (minimal notice pleading requirement for retaliation claim is

specification of protected activity and act of retaliation). A prisoner cannot have prison officials investigating one retaliatory motive or one retaliatory act in the administrative process and then claim another retaliatory motive or another retaliatory act in his federal lawsuit, because the internal investigation of plaintiff's complaint and the system's ability to resolve the matter and avoid litigation turn on these key assertions.

In this case, the facts reveal that plaintiff did not give prison officials the information they needed to investigate the claim of retaliation against defendant Kool that he raised in his lawsuit in this court, that is, that defendant Kool denied him a promotion to security level three because he said in a questionnaire that he had been transferred to the Wisconsin Secure Program Facility for filing a civil action against Redgranite prison officials. In offender complaint WSPF2007-37826, plaintiff complained that Kool had denied him a promotion to security level three "for saying 'I will continue to file lawsuits against corrupt W.S.P.F. staff.'" In offender complaint WSPF-2004-37826, plaintiff stated that defendant Kool had denied him a promotion to security level three on account of "CR#1357711." In a separate statement attached to inmate complaint WSPF-2005-338, plaintiff alludes to the possibility that defendant Kool denied him a promotion because Kool viewed plaintiff as a Nationalist Socialist Party member or "because of [plaintiff's] protected speech he didn't like about racist staff at W.S.P.F." In his appeal from the dismissal of offender complaint WSPF-2005-338, plaintiff shifts direction again, this time contending that Ellen Ray, the

institution complaint examiner investigating complaint WSPF-2005-338, "dismissed [his] complaint to conspire with Unit Manager Kool to punish me for saying 'I filed lawsuits against staff at RGCI is the reason I'm at W.S.P.F.'" Although in this appeal plaintiff identifies the same constitutionally protected activity he alleges in this court, identifying the activity in an appeal did not satisfy plaintiff's administrative exhaustion obligations. Plaintiff had turned his attention to Ellen Ray, identified a new retaliatory act and was claiming a conspiracy between Ray and defendant Kool.

Even if plaintiff had focused his attention in the appeal directly on defendant Kool, reiterated his complaint about his inability to reach level three as the retaliatory act and properly identified the protected activity he alleged in this court, he would not have satisfied the exhaustion requirement because he did not observe the procedural requirements of the system, which require him to articulate his grievance in an inmate complaint before reasserting it on appeal.

In sum, I conclude that plaintiff has failed to exhaust his administrative remedies with respect to his claim that defendant Kool refused to promote him to security level three in retaliation for his having said in a questionnaire that he was transferred to the Wisconsin Secure Program Facility because he had filed a lawsuit against staff at the Redgranite Correctional Institution. Defendant's motion to dismiss this claim will be granted.

Defendant's motion to dismiss plaintiff's claims against defendant Huibregtse also

must be granted. The facts reveal that plaintiff did not file any offender complaint concerning the letter he received from the United States Supreme Court on September 5, 2004, and that he did not appeal the decision to dismiss his complaint concerning the November 10, 2004 letter from the Center for Constitutional Rights. Because he did not observe the full procedural requirements for grieving these claims before filing federal suit, plaintiff cannot proceed on the claims in this court at this time.

ORDER

IT IS ORDERED that defendants' motion to dismiss plaintiff's claims in this lawsuit is GRANTED because plaintiff has failed to exhaust his administrative remedies as required under the Prison Litigation Reform Act. The clerk of court is directed to enter judgment dismissing this case without prejudice.

Entered this 17th day of November, 2005.

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