

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

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RODNEY KYLE,

Plaintiff,

v.

MARION FEATHER, P.D. SHANKS
and MICHAEL GALLO,¹

Defendants.

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OPINION and ORDER

09-cv-90-bbc

In this prisoner civil rights action, plaintiff Rodney Kyle alleges that defendant Michael Gallo refused to allow him to share a cell with another prisoner of a different race and that defendants P.D. Shanks and Marion Feather refused to correct the problem once they became aware of it. Racial segregation in prison violates the Constitution unless it is justified by a narrowly tailored, compelling interest. Johnson v. California, 543 U.S. 499

¹ In his complaint, plaintiff identified this defendant as “Officer Gallo.” I have amended the caption to reflect Gallo’s full name as identified by defendants in their summary judgment materials.

(2003). Because plaintiff is a federal prisoner, his claim for denial of his right to equal protection arises under the due process clause of the Fifth Amendment rather than the Fourteenth Amendment, but the standard is the same. United States v. Nagel, 559 F.3d 756, 759-60 (7th Cir. 2009) (“[T]he Fifth Amendment applies to the federal government and also contains an equal protection component. The approach to Fifth Amendment equal protection claims has been precisely the same as to equal protection claims under the Fourteenth Amendment.”) (internal quotations and citations omitted).

Defendants’ motion for summary judgment is ready for decision. Defendants argue that (1) plaintiff failed to exhaust his administrative remedies, as required by 42 U.S.C. § 1997e(a); (2) none of the defendants were personally involved in discriminating against plaintiff because of his race; (3) defendants are entitled to qualified immunity; (4) plaintiff’s request for injunctive relief is moot; and 42 U.S.C. § 1997e(e) prohibits him from obtaining damages for emotional distress. Although defendants have failed to meet their burden to prove that plaintiff failed to exhaust his administrative remedies, I am granting defendants’ motion for summary judgment because I conclude that plaintiff has failed to raise a genuine issue of material fact that any of the defendants violated his constitutional rights. This makes it unnecessary to determine whether defendants are entitled to qualified immunity and the type of relief available to plaintiff.

From the parties’ proposed findings of fact and the record, I find that the following

facts are undisputed.

UNDISPUTED FACTS

Plaintiff Rodney Kyle is an African American. He was incarcerated at the Federal Correctional Institution in Oxford, Wisconsin from January 9, 2009 to July 23, 2009. On January 9, 2009 plaintiff was placed in cell #24 with another black prisoner; on January 10, plaintiff was moved to cell #6 and a white prisoner was moved into cell #24. Individual officers do not have the authority to change cell assignments. As of January 10, 2009, there were at least five cells on plaintiff's unit that housed two prisoners of different races.

On January 12, 2009, plaintiff filled out an "inmate request to staff," in which he complained that he had been moved "from cell 24 to cell 5 in order to accommodate a white person." He asked to be returned to cell #24. In addition, plaintiff spoke with defendant P.D. Shanks (the unit manager) and Marion Feathers (the assistant warden) about his cell assignment.

OPINION

It is undisputed that plaintiff did not file a formal grievance related to his claim in this case, as required by 28 C.F.R. § 542.14. Generally, if a prisoner does not complete the grievance process before he files a federal lawsuit, the court must dismiss the case. Ford v.

Johnson, 362 F.3d 395, 397 (7th Cir. 2004) (“In order to exhaust administrative remedies, a prisoner must take all steps prescribed by the prison's grievance system.”); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999) (“[A] suit filed by a prisoner before administrative remedies have been exhausted must be dismissed.”). However, dismissal is not required if the grievance process was not “available” to the prisoner within the meaning of § 1997e(a). Kaba v. Stepp, 458 F.3d 678, 684 (7th Cir. 2006).

In this case, plaintiff argues that he could not file a formal grievance because grievance forms are not “readily available” in the prison library and Theodore Edgecomb, a counselor at the prison, refused to provide one. Kyle Aff. ¶ 11, dkt. #78. Under § 542.14(c)(1), “[t]he inmate shall obtain the appropriate form from CCC staff or institution staff (ordinarily, the correctional counselor).” Defendants do not directly dispute plaintiff’s averments, but Edgecomb avers in his declaration that he has no record in his log book of plaintiff’s request for an administrative remedy form. Edgecomb Decl. ¶ 6, dkt. #86. Even if I considered Edgecomb’s averment as evidence that plaintiff never requested a form, this simply would create a genuine dispute that could not be resolved on a motion for summary judgment.

Alternatively, defendants argue that plaintiff could have asked another staff member for a form or could have submitted a request to the regional director under the procedure identified in 28 C.F.R. § 542.14(d)(1). Neither of these arguments is persuasive.

“In determining whether a particular remedy was ‘available’ to a prisoner who failed to exhaust, the Court of Appeals for the Seventh Circuit has held that the key question is whether the prisoner or an official was at fault for the failure to complete the grievance process properly.” Shaw v. Jahnke, 607 F. Supp. 2d 1005, 1010 (W.D. Wis. 2009) (internal quotations omitted). For example, in Dale v. Lappin, 376 F.3d 652, 645-56 (7th Cir. 2004), the court concluded that a federal prisoner’s failure to file a grievance did not require dismissal because prison employees told him that they did not have grievance forms and instead gave him blank sheets of paper.

Although Dale involved alleged interference by multiple prison officials rather than just one, dismissal is not appropriate under § 1997e(a) simply because a prisoner may find ways to work around one official’s refusal to help. In Dole v. Chandler, 438 F.3d 804, 809-10 (7th Cir. 2006), prison officials never responded to a prisoner’s grievance because they lost it. When the prisoner filed a federal lawsuit, the defendants argued that the case should be dismissed for the prisoner’s failure to exhaust because he could have filed another grievance. The court flatly rejected this argument, concluding that the prisoner had “already given the prison administrative process an opportunity to resolve his complaint” and “the misstep . . . was entirely that of the prison system.” Id. at 810. This suggests that prison officials may not rely on § 1997e(a) if they place roadblocks in the prisoner’s way to completing the grievance process, even if the prisoner could have found other alternatives.

Any other rule would create an improper incentive for officials to make the grievance process as complicated and difficult as possible, so long as they left a route open for those prisoners savvy enough to find it. “The grievance process is not intended to be a game of ‘gotcha’ or a test of the prisoner's fortitude or ability to outsmart the system.” Shaw, 607 F. Supp. 2d at 1010.

Further, defendants’ reliance on 28 C.F.R. § 542.14(d)(1) is misplaced. That section allows prisoners to “submit the Request directly to the appropriate Regional Director” if “the inmate reasonably believes the issue is sensitive and the inmate's safety or well-being would be placed in danger if the Request became known at the institution.” Plaintiff does not aver in his affidavit that he feared for his safety, so it is not clear how § 542.14(d)(1) could be relevant. In any event, on its face, that provision does not excuse a prisoner from using the appropriate form even in the cases in which it applies. Accordingly, I cannot grant defendants’ summary judgment motion on the ground that plaintiff failed to exhaust his administrative remedies.

Unfortunately for plaintiff, his claim fails on the merits because he has not adduced evidence that any of the defendants changed his cell assignment because of his race. Plaintiff alleged in his complaint that defendants changed a cell assignment he had with a white prisoner, but defendants’ records show that plaintiff’s first cell assignment at the Oxford prison, cell #24, was with another black prisoner; the records do not show that plaintiff was

transferred out of an interracial cell. Rather, it is undisputed that, when plaintiff was transferred out of cell #24, he was replaced by a white prisoner. This *created* an interracial cell rather than eliminated one.

In fact, the “inmate request to staff” produced by the parties suggests that plaintiff was upset not about segregation in the prison, but that a white prisoner was taking his place in cell #24. In the order screening plaintiff’s complaint, I did not understand him to be alleging that a particular white prisoner was receiving preferential treatment and I did not allow him to proceed on such a claim. Plaintiff did not seek reconsideration of that decision or for leave to amend his complaint to add that claim. In any event, plaintiff has not adduced any evidence in his summary judgment materials to support a view that he was transferred out of cell #24 for racially discriminatory reasons.

With respect to the claim on which I allowed plaintiff to proceed, he includes the following averment in his affidavit: “After getting off the bus, I was told that I was going to be placed in a cell with a white inmate, but then I was told by Officer Gallo that I had to go into Cell #24 because I am black and I need to live with a black cellmate.” Kyle Aff. ¶ 4, dkt. #78. This averment cannot carry the day for plaintiff for two reasons. First, plaintiff does not identify who told him that he was “going to be” placed in a cell with a white prisoner and he has not adduced any evidence that any prison official or officials initially assigned him to a cell other than cell #24.

Second, both Gallo and a prison supervisor at the Oxford prison, Randall Williams, deny that Gallo had any authority to change plaintiff's cell assignment. Randall Decl. ¶ 7, dkt. #43; Gallo Decl. ¶ 3, dkt. #58. Because plaintiff has not adduced any evidence to the contrary or otherwise objected to the admissibility of those averments, I must accept them as true. Thus, at most, plaintiff's affidavit is evidence that Gallo holds racist beliefs. Such beliefs are deplorable, but they do not violate plaintiff's equal protection rights unless they are coupled with discriminatory *conduct*. Chavez v. Illinois State Police, 251 F.3d 612, 635-36 (7th Cir. 2001) ("To show a violation of the Equal Protection Clause, plaintiffs must prove that the defendants' actions had a discriminatory *effect* and were motivated by a discriminatory purpose.") (emphasis added).

Without evidence that defendant Gallo was responsible for plaintiff's cell assignment, plaintiff cannot sustain a claim against the other defendants either. Plaintiff does not allege that defendant Shanks or defendant Feather was involved in any of plaintiff's cell assignments. It is true that supervisors may be held liable in some circumstances for failing to correct the constitutional violations of their subordinates, at least if they share the discriminatory motives of their employees. Trentadue v. Redmon, 619 F.3d 648, 652 (7th Cir. 2010) ("[L]iability under § 1983 as [a] supervisor requires some evidence that he knew about [a constitutional violation] and facilitated, approved, condoned, or turned a blind eye to it."); Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) ("[P]urpose rather than knowledge

is required to impose Bivens liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.”). However, because plaintiff has not adduced any evidence that defendant Gallo or anyone else assigned plaintiff to a particular cell because of his race, neither defendant Shanks nor defendant Feathers may be held liable for approving a constitutional violation or even turning a blind eye to one.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Michael Gallo, P.D. Shanks, Marion Feather, dkt. #54, is GRANTED. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 23d day of March, 2011.

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