IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARKUS GRANSBERRY,

OPINION and ORDER

Plaintiff,

10-cv-449-bbc

v.

C/O GOLDSMITH and SGT. FRIEND,

Defendants.

- -

In this civil action for monetary and injunctive relief brought pursuant to 42 U.S.C. § 1983, plaintiff Markus Gransberry is proceeding on claims that defendants C/O Goldsmith and Sergeant Friend are retaliating against him because he filed a lawsuit against defendant Friend. Now before the court is defendants' motion for summary judgment on their defense that plaintiff has failed to exhaust his administrative remedies, dkt. #33.

Plaintiff has not responded to the motion or to defendants' proposed facts. In fact, plaintiff has not filed anything in this case since December 2010, and both defendants' and the court's efforts to contact plaintiff have been unsuccessful. Because plaintiff has not responded in any way to defendants' motion or findings of fact, defendants' proposed findings of fact must be taken as undisputed. Procedure to Be Followed on Motions for

Summary Judgment, II.A, II.B and II.C and Memorandum to Pro Se Litigants Regarding Summary Judgment Motions, attached to Preliminary Pretrial Conference Order, dkt. #32. Despite this, defendants have not shown that plaintiff failed to exhaust his administrative remedies. Therefore, I will deny their motion for summary judgment.

However, plaintiff's failure to communicate with the court in any way concerning his case or to even provide the court with a current mailing address for more than two months is a strong indication that he is no longer interested in prosecuting the case. (Specifically, the court attempted to mail documents plaintiff at 2799 North Avondale Boulevard, Milwaukee, Wisconsin, 53210. The mail was returned as "Not at this address – Return to Sender.") Plaintiff may have until April 22, 2011, in which to provide a valid address to the court and show cause why this case should not be dismissed with prejudice for his failure to prosecute it. If plaintiff fails to respond within the time allowed, this case will be closed.

OPINION

Under 42 U.S.C. § 1997e(a), a prisoner must exhaust all available administrative remedies before filing a lawsuit in federal court, meaning that the prisoner must "file complaints and appeals in the place, and at the time, the prison's administrative rules require." Burrell v. Powers, 431 F.3d 282, 285 (7th Cir. 2005) (citing Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002)). To satisfy exhaustion requirements, the prisoner

must give the prison grievance system "a fair opportunity to consider the grievance," which requires that the complainant "compl[y] with the system's critical procedural rules," Woodford v. Ngo, 548 U.S. 81, 95 (2006) and that the grievance "contain the sort information that the administrative system requires." Strong v. David, 297 F.3d 646, 649 (7th Cir. 2002). At a minimum, the plaintiff must "alert[] the prison to the nature of the wrong for which redress is sought." Id. at 650. Section 1997e(a) requires more than simply notifying the prisoner grievance system once; a prisoner must take any administrative appeals available under the administrative rules. Burrell, 431 F.3d at 284-85. Because exhaustion is an affirmative defense, defendants bear the burden of establishing that plaintiff failed to exhaust. Jones v. Bock, 549 U.S. 199, 216 (2007).

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 within 14 days after the occurrence giving rise to the complaint. Wis. Admin. Code § DOC 310.09. The complaint examiner may investigate inmate complaints, reject them for failure to meet filing requirements, recommend a disposition to the appropriate reviewing authority (the warden or the warden's designee) or direct the inmate to attempt to resolve the complaint informally. Id. at §§ 310.07(2), 310.09(4), 310.11, 310.12. If the institution complaint examiner makes a recommendation that the complaint

be granted or dismissed on its merits, the appropriate reviewing authority may dismiss, affirm or return the complaint for further investigation. Id. at § 310.12. If an inmate disagrees with the decision of the reviewing authority, he may appeal. Id. § 310.13.

Plaintiff was granted leave to proceed on claims that defendants Goldsmith and Friend are violating his right to free speech under the First Amendment by retaliating against him because he filed a lawsuit against defendant Friend in December 2009. Plaintiff alleged that defendant Friend retaliated by refusing to give plaintiff dry clothes and defendant Goldsmith retaliated by using a racial slur against plaintiff, breaking plaintiff's glasses, hiding medication under plaintiff's mattress, which caused plaintiff to received a conduct report, performing extra searches of plaintiff's bunk and issuing conduct reports to plaintiff in situations in which other inmates would not have been cited. Defendants have submitted plaintiff's complete inmate complaint history report, dkt. #35-1, which shows that plaintiff filed four inmate complaints that arguably relate to the subject matter of this lawsuit. Two of the complaints involve issues on which plaintiff was denied leave to proceed in this case. The other two were rejected by the complaint examiner because they were related to conduct reports that had been issued against plaintiff.

A. Complaint Alleging Damage to Plaintiff's Glasses

On January 27, 2010, plaintiff filed offender complaint CCI-2010-2175, dkt. #35-3,

alleging that defendant Goldsmith "accidentally" broke his eyeglasses during a cell search. Plaintiff asked to be reimbursed for the glasses. Although plaintiff properly exhausted this complaint, the complaint includes no allegations of retaliation by Goldsmith. Rather, the complaint merely seeks compensation for damage to plaintiff's reading glasses, a claim on which I denied plaintiff leave to proceed. Because the complaint does not allege that defendant Goldsmith retaliated against plaintiff by breaking his glasses, this complaint does not relate to any of the issues on which plaintiff is proceeding in this lawsuit.

B. Complaint Alleging Denial of Dry Clothes

On July 22, 2010, plaintiff filed offender complaint CCI-2010-15703, dkt. #35-5, alleging that defendant Friend and correctional officer Graff denied him dry clothing after he got wet in the rain. Plaintiff contended that the denial of dry clothing was a violation of the Eighth Amendment's prohibition on cruel and unusual punishment because he had to sit in wet clothes for over three hours. The complaint examiner rejected plaintiff's complaint, concluding that plaintiff's complaint about wet clothes was not a "significant issue" as that term is used in Wis. Admin. Code § DOC 310.08(1) and § DOC 310.03(16). It is unclear from the record whether plaintiff appealed the rejection to the highest level possible. (Defendants contend that plaintiff did not exhaust this complaint because it was rejected, but this would be correct only if plaintiff did not appeal the rejection.) However,

this does not matter because plaintiff did not allege retaliation in the complaint and the complaint examiner would have had no reason to consider whether defendant Friend denied dry clothes in retaliation for plaintiff's previous lawsuit against Friend. Plaintiff alleged only a violation of his Eighth Amendment rights, a claim on which I denied him leave to proceed.

C. Complaints Alleging Retaliation by Goldsmith and Friend

On January 20, 2010 plaintiff filed inmate complaint CCI-2010-1615, dkt. #35-2, complaining that defendants Goldsmith and Friend retaliated against him because of plaintiff's federal lawsuit against Friend. Plaintiff alleged that defendants conducted a bunk and locker search and that Goldsmith broke plaintiff's glasses and issued plaintiff a minor conduct report. He stated that defendants had never issued conduct reports to other inmates in similar circumstances.

The complaint examiner rejected CCI-2010-1615 because

> [t]he disciplinary hearing on this situation has yet to take place. It is not within the scope of the inmate complaint review system to investigate circumstances leading up to a conduct report and then determine whether or not that report should have been written. It is, however, one of the duties of the disciplinary committee, and the complainant will have the opportunity to present any defense at that time.

Dkt. #35-2, at 4.

On February 3, 2010, plaintiff filed a second grievance in which he complained about

defendants' retaliation, making the same factual allegations as the earlier rejected grievance. Dkt. #35-4. The complaint examiner rejected the grievance, stating that

> [o]nce a conduct report is issued, the disciplinary process is invoked. Complaints which argue substantive issues regarding the conduct report are outside the scope of the [inmate complaint review system] as noted under DOC 310. After receiving the disciplinary hearing paperwork, an appeal may be sent directly to the Warden. The [inmate complaint examiner] may only address procedurally based allegations of error contained in complaints filed AFTER the Warden's decision is made on appeal, following DOC 310.08(3). The Warden has not yet rendered a decision on the appeal of the conduct report. Consequently, this complaint falls out of the scope of the [inmate complaint review system].

Dkt. #35-4, at 4.

These grievances allege retaliation consistent with the claims on which plaintiff is proceeding in these cases. Thus, the question is whether plaintiff exhausted these two inmate complaints. Defendants contend that plaintiff failed to exhaust these grievances because they were rejected properly by the complaint examiner under Wis. Admin. Code § DOC 310.08(2). That regulation prohibits prisoners from filing a grievance on "[a]ny issue related to a conduct report" until the conduct report has been resolved. Id. According to defendants, because plaintiff's use of the inmate complaint system to challenge the basis of a conduct report was "clearly improper," he failed to exhaust his grievances.

Defendants' argument makes no sense. To the extent defendant means to argue that plaintiff filed his first grievance too soon, the argument has multiple problems. Any

application of § DOC 310.08(2)(a) must be read in conjunction with § DOC 310.08(3), which says that, even after the disciplinary appeal process is finished, a prisoner may file a grievance only with respect to the *procedure* used during the disciplinary process. Because plaintiff's grievance did not raise a procedural issue, § DOC 310.08(3) suggests that he could not use the grievance process at all for the purpose of complaining about defendant's retaliation. Madyun v. Cook, 08-cv-30-bbc, 2008 WL 4330896, *3 (W.D. Wis. May 23, 2008) (concluding that § DOC 310.08(3) prohibited prisoner from filing grievance on excessive force because issue was related to conduct report and prisoner had raised it during disciplinary proceedings).

This view is supported by the examiner's first decision, in which he directed plaintiff to raise his complaint before the disciplinary committee; he did not tell plaintiff to file a new grievance once the disciplinary process was finished. It is supported by the second decision as well, in which the examiner tells plaintiff that unless plaintiff wants to challenge a procedural problem with the disciplinary hearing, plaintiff cannot use the grievance system to complain about defendants' alleged retaliation.

If plaintiff's grievance fell outside the inmate complaint review system, whether plaintiff filed an inmate complaint is irrelevant to determining whether plaintiff complied with § 1997e(a). Rather, the important inquiry would be whether plaintiff raised the issue at his disciplinary hearing and filed any necessary appeals of the disciplinary decision.

Defendants adduce no evidence on this question and do not discuss it in their brief. Because defendants have the burden to prove that plaintiff did not exhaust his administrative remedies, Jones, 549 U.S. at 216, this failure requires that defendants' motion for summary judgment be denied.

D. Conclusion

Although I am denying defendants' motion for summary judgment, plaintiff has not shown that he wishes to continue prosecuting this case. Thus, if plaintiff does not respond to this order by April 22, 2011, provide a valid address and show cause why this case should not be dismissed with prejudice for his failure to prosecute it, I will dismiss the case.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants C/O Goldsmith and Sergeant Friend, dkt. #33, is DENIED.

2. Plaintiff Markus Gransberry may have until April 22, 2011 to provide a valid address to the court and show cause why this case should not be dismissed with prejudice for his failure to prosecute it. If plaintiff does not respond by this date, the clerk of court

is directed to enter judgment for defendants and close this case.

Entered this 13th day of April, 2011.

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