IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RANDY McCAA,

Plaintiff,

v.

MICHAEL MEISNER, JANEL NICKEL,
DONALD MORGAN, BRIAN FRANSON,
TONY ASHWORTH, COREY SABISH,
LESLIE BAIRD, PATRICK KUMKE,
RAYMOND MILLONIG, JR., TRAVIS BITTELMAN,
BRIAN NEUMAIER, MICHAEL RATACZAK,
JOSEPH EBERT and JOHN DOE,

Defendants.

OPINION and ORDER

12-cv-61-bbc

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Pro se plaintiff Randy McCaa is proceeding on various claims relating to his conditions of confinement at the Columbia Correctional Institution, most of which relate to defendants' alleged failures to provide adequate mental health care, as required by the Eighth Amendment:

(a) defendants Michael Meisner and Janel Nickel are failing to provide adequate mental health care to plaintiff and are housing him in conditions that exacerbate his mental illness;

(b) on May 8, 2011, defendant Corey Sabish denied plaintiff's request for medical treatment;

(c) defendant Michael Rataczak wrote plaintiff a conduct report for engaging in self harm and placed plaintiff on a "no hygiene" restriction, even though plaintiff could not control his actions; defendants Sabish and Nickel approved the conduct report; defendants Donald Morgan and Brian Franson found plaintiff guilty and sentenced him to 180 days in segregation; defendant Meisner approved that decision;

(d) on June 1, 2011, defendant Leslie Baird refused to speak to plaintiff after plaintiff said, "I'm depress[ed,] I need to check in[to] observation";

(e) on June 1, 2011, defendant Joseph Ebert and an unknown officer refused to take any action after plaintiff told them that he was going to kill himself and needed to be taken to observation;

(f) on June 1, 2011, after plaintiff harmed himself, Sabish refused to provide medical treatment for plaintiff because plaintiff had urinated on the floor of his cell;

(g) defendant Ebert gave plaintiff a conduct report, extending his time in segregation and placing him on a "no hygiene restriction"; Sabish and Nickel approved the conduct report; defendants Morgan and Tony Ashworth found plaintiff guilty and sentenced him to 210 days in segregation;

(h) on June 2, 2011, defendants Brian Neumaier, Travis Bittelman, Raymond Millonig and Baird refused to provide medical care to plaintiff;

(i) on June 2, 2011, defendants Neumaier, Bittelman and Millonig used excessive force against plaintiff;

(j) defendants Nickel, Morgan and Patrick Kumke subjected plaintiff to excessive cold

while he was housed in an observation cell;

(k) defendants Nickel and Morgan subjected plaintiff to unsanitary conditions while he was housed in observation;

(l) defendants Nickel and Morgan required plaintiff to sleep on a rubber mat;

(m) defendants Nickel and Morgan housed plaintiff in conditions that exacerbated his mental illness while he was in observation.

Four motions are now before the court: (1) defendants' motion for summary judgment on the ground that plaintiff failed to exhaust his administrative remedies, as required by 42 U.S.C. § 1997e(a); (2) plaintiff's motion for a preliminary injunction; (3) plaintiff's motion for appointment of counsel; and (4) a motion in which plaintiff asks the court to overturn a restriction on his access to sharp writing utensils. I am denying each motion.

With respect to defendants' motion for summary judgment, defendants rely entirely on the affidavit of Welcome Rose, dkt. #47, and attached exhibits to prove that plaintiff failed to exhaust his administrative remedies. In that affidavit, Rose discusses various grievances that plaintiff filed on issues related to this lawsuit and she explains why each of them was dismissed or rejected, but she does not say that the grievances in her affidavit are the *only* grievances plaintiff filed on these issues. Because defendants have the burden of proof, Jones v. Bock, 549 U.S. 199, 211-12 (2007), their failure to account for the possibility of other grievances is sufficient reason to deny their motion. E.g., Bouman v. Robinson, No. 07-C-367-C, 2008 WL 2595180 (W.D. Wis. June 27, 2008) (explaining that

"defendants must adduce evidence showing that plaintiff filed no grievances on the issues giving rise to his claims in the lawsuit" and describing how defendants can meet that burden).

Plaintiff does not identify any additional grievances in his response brief, so one might argue that he has conceded implicitly for the purpose of defendants' motion that he did not file any other relevant grievances. However, even if I were to draw that inference from a pro se plaintiff's silence, I could not grant defendants' motion. In their reply brief, defendants concede that plaintiff *did* successfully complete the grievance process with respect to some of the grievances, but they never identify which *claims* they believe plaintiff did or did not exhaust, which is the only question that matters. For the purpose of § 1997e(a), prisoners exhaust claims, not grievances. Jones, 549 U.S. at 221.

In a case with only one or two distinct claims, it might be possible to overlook defendants' lack of precision. In this case, however, plaintiff has raised no fewer than 13 claims, most of which are related and many of which include the same defendants. Thus, it is far from obvious which grievances defendants believe are matched with particular claims, particularly because their summaries of the grievances are terse and the electronic copies of some of the grievances defendants filed with the court are difficult to read.

Again, it is defendants' burden in the first instance to show that plaintiff failed to exhaust his administrative remedies with respect to a particular claim. Because defendants have failed to meet that burden, I am denying their motion. However, because the deadline for dispositive motions on the merits is still several months away, I will give defendants one

more chance to get it right. Defendants may have until November 2, 2012, to file a renewed motion for summary judgment related to exhaustion. If defendants choose to file a renewed motion, they must organize their brief by *claim* rather than by grievance. In other words, , defendants must develop an argument for each claim they believe plaintiff did not exhaust.

I am denying plaintiff's motions as well. Plaintiff's motion for a preliminary injunction is the third one he has filed in this case. Dkt. ##64, 17 and 7. As with his previous motions, he does not explain how he believes any of defendants are violating his rights or even what he wants the court to order. Plaintiff says that he continues to feel suicidal, but he acknowledges that prison staff have placed him on observation status in response to this risk of self harm and he does not identify any additional actions defendants could take to make him safer at this time.

This leads to plaintiff's motion in which he is asking the court to overturn a restriction on his access to sharp writing utensils, which requires him to write with a black crayon. However, plaintiff acknowledges that prison staff imposed the restriction after he cut himself intentionally with a pen, so I cannot conclude that staff were acting unreasonably. Although I understand that plaintiff is frustrated, he has not shown that the restriction is preventing him from communicating with the court or anyone else. The documents he submitted to the court in crayon are clear and easy to read. Further, as plaintiff himself has recognized by suing defendants for failing to prevent past acts of self harm, prison officials have the obligation to take reasonable steps to protect plaintiff. Thus, if plaintiff is harming himself with particular items, defendants have little choice but to take

those items away from him. So long as plaintiff is provided a reasonable means of communicating with the court, he cannot argue successfully that he is being denied access to the courts.

I am denying plaintiff's motion for appointment of counsel without prejudice until the issues regarding exhaustion are resolved. It makes little sense to decide whether plaintiff is able to represent himself in this case until it is clear what his claims are. Further, plaintiff's response to defendants' original motion for summary judgment was clear and well-reasoned, so much so that defendants conceded certain issues in their reply brief.

Plaintiff says that another prisoner was helping him but has since been transferred to the Wisconsin Resource Center. Dkt. #65. I know from other cases that transfers to the center are often short term, but even if plaintiff is working on his own, I am confident that he has the ability to respond to a summary judgment motion on exhaustion. The primary task for a prisoner in that situation is simply to explain why he believes he successfully completed the grievance process with respect to a particular claim. Because defendants have the burden of proof, he can ignore any claims or issues defendants do not discuss in their motion. Further, the issues will be similar to those discussed in his original summary judgment submissions; the only difference will be that he may have to explain which grievances are relevant to particular claims. After the court resolves the exhaustion question or if defendants do not file another summary judgment motion on the issue of exhaustion, plaintiff is free to renew his motion for appointment of counsel at that time if he continues to believe that he needs a lawyer to litigate this case.

In the meantime, I ask plaintiff again to refrain from further acts of self harm and to work with mental health staff to determine ways of dealing with his depression more effectively. In addition, I encourage defendants to monitor plaintiff's situation carefully and take any appropriate action if plaintiff's symptoms become acute.

Finally, in reviewing these motions, I discovered that plaintiff has named a John Doe defendant, but he has not received a deadline for amending his complaint to identify that defendant by name. It is unfortunate that neither plaintiff nor defendants raised this issue with the magistrate judge at the preliminary pretrial conference or with the court in the seven months since the complaint was screened. However, regardless of the relative fault of the parties or the court, it is necessary to resolve this issue as quickly as possible now.

Ordinarily, the plaintiff receives a deadline for serving discovery requests on counsel for defendants to help them to do the research necessary to identify the John Doe. In this case, however, plaintiff may have provided enough information in his complaint so that the first step can be skipped. In particular, plaintiff alleges that the John Doe defendant came to his cell at the Columbia Correctional Institution on June 1, 2011, that the Doe defendant was "a rookie," that he was being trained by defendant Ebert at the time and that the interaction among plaintiff, Ebert and the Doe defendant on that date led to plaintiff receiving a conduct report from Ebert. Cpt. ¶¶ 121-41, dkt. #1. That information should be sufficient for counsel to identify the John Doe. Accordingly, I will set deadlines for counsel to identify the Doe defendant, for plaintiff to file an amended complaint and for the newly named defendant to file an answer.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Joseph Ebert, Michael Rataczak, Brian Neuamier, Travis Bittleman, Raymond Millonig, Patrick Kumke, Leslie Baird, Corey Sabish, Tony Ashworth, Brian Franson, Donald Morgan, Janel Nickel and Michael Meisner, dkt. #45, is DENIED without prejudice to their refiling a renewed motion no later than November 2, 2012.

2. Plaintiff Randy McCaa's motion for a preliminary injunction, dkt. #64, and his motion to remove the restriction on sharp writing utensils, dkt. #66, is DENIED.

3. Plaintiff's motion for appointment of counsel, dkt. #58, is DENIED without prejudice to his refiling after it has been determined whether plaintiff has exhausted his administrative remedies for each of his claims.

4. Counsel for defendants may have until November 21, 2012, to provide plaintiff the name of the John Doe defendant. If counsel does not have enough information to identify the Doe defendant, he should notify the court by November 7 to explain what additional information he needs from plaintiff.

5. Also by November 21, counsel must report to the court whether he will accept service of the amended complaint on behalf of the Doe defendant. If he chooses not to accept service, then he must provide to the court, ex parte and under seal, the known address of the now-identified Doe defendant so that the Marshals Service may serve him with the complaint.

6. Plaintiff may have until December 5, 2012, to file an amended complaint. The caption of the document shall be changed to identify it as the amended complaint. Plaintiff shall replace all references to the Doe defendant with the name provided to him by counsel. Plaintiff may hand-write in his changes. Plaintiff shall not make any other changes to his complaint without first asking for and receiving permission from the court. If plaintiff does not file an amended complaint naming the Doe defendant by December 5, then I will dismiss plaintiff's claim against the Doe defendant. The Doe defendant will have 30 days from the date of service to file an answer.

Entered this 22d day of October, 2012.

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