

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

VINCENT L. AMMONS,

Plaintiff,

v.

GARY BURKUM and CAPTAIN
MARC CLEMENTS,

Defendants.

ORDER

98-C-861-C

This is a civil action for money damages pursuant to 42 U.S.C. § 1983. Plaintiff Vincent L. Ammons brings two claims: 1) that defendant Gary Burkum, the prison chaplain, impermissibly interfered with plaintiff's fundamental right to marry under state and federal law; and 2) Captain Marc Clements retaliated against plaintiff for exercising his First Amendment right to complain about actions taken by the prison social worker in relation to plaintiff's marriage request.

On January 25, 1999, I dismissed the case pursuant to 28 U.S.C. § 1915A, finding that plaintiff Vincent Ammons had failed to state a claim upon which relief could be granted on his federal law claims. Also, I declined to exercise jurisdiction over plaintiff's state law claim. On November 19, 1999, the Court of Appeals for the Seventh Circuit reversed the order of

dismissal and remanded the case for consideration of plaintiff's claims.

On July 20, 2000, I issued an order staying the proceedings in this case and all pending motions, noting that before considering the merits of plaintiff's claims, I must first consider whether plaintiff has exhausted his administrative remedies on each of the claims he presents in his complaint, as required by 42 U.S.C. § 1997e(a). (I did not reach this question in the January 25, 1999 order because I believed that plaintiff's proposed complaint failed to state a claim upon which relief could be granted.) Among the motions stayed were a motion for summary judgment filed by defendants and a motion to compel discovery filed by plaintiff.

Now before the court is plaintiff's motion for reconsideration of my July 20, 2000 order. In particular, plaintiff objects to those aspects of my order 1) staying the pending motion for summary judgment; 2) staying all discovery; and 3) denying plaintiff's motion to compel discovery and for sanctions and his opposition to the defendants' motion for an in camera review and protective order without prejudice to plaintiff's renewing the motions if the case survives the exhaustion determination.

Upon reconsideration, I agree that it was unnecessary to stay the pending motion for summary judgment to the extent that defendants are contending that plaintiff failed to exhaust his administrative remedies. Although ordinarily it is this court's practice to treat exhaustion as a threshold issue to be determined before the complaint is served on the defendants, there is no bar to considering it on a motion for summary judgment. That is particularly true, where,

as here, defendants are alleging that plaintiff has already litigated the exhaustion issue in another forum.

Specifically, defendants have filed copies of two orders of the Circuit Court for Dane County, entered March 5, 1998 and October 6, 1997, respectively, in which the court dismissed for failure to exhaust administrative remedies a § 1983 claim filed by plaintiff in which he raised essentially the same claims he is bringing against chaplain Burkum in the instant lawsuit. In the state court action, plaintiff contended that he had exhausted his administrative remedies by appealing the decision of the inmate complaint examiner on complaint number 0845-96 to the corrections complaint examiner. Defendant refuted this assertion with an affidavit from the corrections complaint examiner, who averred that he had no record of plaintiff's having filed an appeal concerning either his allegedly thwarted desire to marry or any act or omission on the part of Burkum. After an evidentiary hearing at which plaintiff testified, the state court found incredible plaintiff's claim that he had filed an appeal of complaint number 0845-96 and, consequently, dismissed the complaint without prejudice for plaintiff's failure to exhaust his administrative remedies.

In their motion for summary judgment, defendants ask this court to take judicial notice of these orders and to give them preclusive effect as to plaintiff's contention that he has exhausted his administrative remedies on his claims against defendant Burkum. Having re-reviewed the record, I conclude that defendants' contention may have merit. The orders of the

Dane County circuit court are likely to preclude plaintiff from relying on any administrative steps that he pursued before September 26, 1996 (the date on which he filed his state court action) to prove that he exhausted his administrative remedies on his failure to marry claim. (Specifically, among the evidence submitted in the instant case by plaintiff to show that he exhausted his administrative remedies on his claims against Burkum is a document that plaintiff alleges was an appeal he filed with respect to complaint number 0845-96. This appears to be the same document that the Dane County circuit court rejected as inadequate evidence that plaintiff exhausted his administrative remedies.) Accordingly, I am lifting the stay on summary judgment, but only in part. First, plaintiff shall have an opportunity to challenge the authenticity or accuracy of the copies of the state court orders submitted by the defendants. (Plaintiff should bear in mind that it is proper for a court to take judicial notice of records from another court's proceedings. See Opoka v. INS, 94 F.3d 392, 394 (7th Cir. 1996) (recognizing that court documents from state proceeding may be subject of judicial notice)). Plaintiff shall also be allowed to present any arguments he wishes to make in opposition to defendants' claim that, under the doctrine of issue preclusion or Rooker-Feldman, plaintiff is barred from relitigating the exhaustion issue to the extent that it was previously decided by the Dane County circuit court.

Second, because any finding of issue preclusion would be limited in scope to the specific issue decided by the Dane County circuit court, that is, whether plaintiff exhausted his

administrative remedies with respect to his claims against defendant Burkum *before* September 26, 1996, I must consider separately whether plaintiff exhausted his administrative remedies on the claims raised in this lawsuit against defendant Burkum *after* he filed his state court action and whether he has exhausted his administrative remedies with respect to defendant Clements. I note that at the time plaintiff filed his lawsuit in this court on December 21, 1998, he submitted documentation relating to the question of exhaustion, copies of which are attached to this order. Plaintiff may rely on these documents to prove that he exhausted his claims against defendants Burkum and Clements. He can make references to them without having to submit duplicate copies. Plaintiff may also submit additional documents if he believes they are necessary to respond to defendants' claim that he failed to exhaust his administrative remedies.

Because this court may not consider the merits of plaintiff's claims until the exhaustion question is determined, Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 536 (7th Cir. 1999), the motion for summary judgment shall remain stayed insofar as defendants seek summary judgment on the merits of plaintiff's claims. Thus, plaintiff should not respond to any of defendants' proposed findings of fact or arguments about the merits of his claims. For this same reason, I decline to lift the stay on discovery. The factual evidence that plaintiff needs to respond to defendants' claim that he failed to exhaust his administrative remedies should be in plaintiff's possession. Finally, because the magistrate judge's order denying defendants'

motion for an in camera review and protective order is not relevant to the exhaustion question, I decline to reconsider that portion of the July 20, 2000 order in which I denied as unnecessary plaintiff's opposition to defendants' motion.

ORDER

IT IS ORDERED THAT:

1. The order of July 20, 2000, staying summary judgment is rescinded in part and summary judgment proceedings shall resume on the limited issue whether plaintiff exhausted his administrative remedies prior to filing suit as required by 42 U.S.C. § 1997e(a);

2. Plaintiff shall have until August 21, 2000 in which to submit a brief responding to defendants' claims that he is barred by principles of issue preclusion or the Rooker-Feldman doctrine from litigating any claim that he exhausted his administrative remedies with respect to his failure to marry claim before September 26, 1996;

3. Plaintiff shall have until August 21, 2000 to submit any documentation he has to show that he exhausted his administrative remedies with respect to his claims against defendant Burkum and defendant Clements.

4. There is no need for a reply from defendants.

Entered this 8th day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge