IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ALPHONCY DANGERFIELD, CARLOS A. AUSTIN, LAMONT E. MOORE, TINGIA WHEELER, BARON L. WALKER, SR., JOEDDIE SMITH, ERIC WASHINGTON, JOHN D. TIGGS, JR., RASHID TALIB and WALTER BROWN, SR.,

ORDER

Plaintiffs,

99-C-480-C

v.

JON E. LITSCHER, Secretary, Wis. Dept. of Corrections; RICHARD SCHNEITER, Deputy Ch. Security, Division of Adult Institutions; WM. NOLAND, Inst. Complaint Examiner; RICHARD VERHAGAN, Administrator, Division of Adult Institutions; TIM DOUMA, Asst. Warden Security, Columbia Correctional Institution; and JEFFREY P. ENDICOTT, Warden, Columbia Correctional Institution,

Defendants.

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In an order entered November 16, 1999, I allowed plaintiffs to proceed in forma pauperis on two claims: 1) that while they were inmates at Columbia Correctional Institution in Portage, Wisconsin, they were kept in cells infested with insects and had to sleep on the floor

and endure extremely cold temperatures in violation of their Eighth Amendment rights; and 2) that their placement in administrative segregation while at Columbia was based upon their race in violation of their rights under the equal protection clause of the Fourteenth Amendment. Defendants have filed a motion for summary judgment, arguing among other things that plaintiffs have failed to exhaust their administrative remedies as required by the Prison Litigation Reform Act. In an order entered August 7, 2000, I stayed all proceedings related to the merits of this case and ordered plaintiffs to respond to defendants' motion for summary judgment only as it relates to the exhaustion question. Plaintiff Tiggs is the only plaintiff who has responded to defendants' proposed findings of facts. As is proper, he has limited his response to the proposed facts that relate to his administrative exhaustion. As to the remaining plaintiffs, defendant's uncontested proposed facts will be accepted as true.

UNDISPUTED FACTS

On November 30, 1998, plaintiff Tingia Wheeler filed inmate complaint # CCI-1998-22811, alleging that bugs were entering his cell and biting him. The institution complaint examiner rejected the complaint as frivolous. Plaintiff Wheeler did not appeal the finding of frivolousness to the institution complaint examiner reviewing authority.

On December 23, 1998, plaintiff Eric Washington filed inmate complaint # CCI-1998-

24822, alleging that the ventilation duct in his cell provided inadequate heat. The institution complaint examiner and the institution complaint examiner reviewing authority dismissed the complaint. Plaintiff Washington did not request the Corrections Complaint Examiner to review the complaint.

On May 11, 1998, plaintiff Baron Walker filed inmate complaint # CCI-1189-98, alleging that there were bugs in his cell, he was double-celled and forced to sleep on the floor. The institution complaint examiner and the institution complaint examiner reviewing authority dismissed the complaint. Plaintiff Walker did not request corrections complaint examiner review of the complaint.

On September 30, 1998, plaintiff Walker filed inmate complaint # CCI-1998-19068, alleging that there were bugs in his cell and that he was forced to sleep on the floor.

> I'm complaining about . . . sleeping on the floor. If facing the window laying on the floor, the inmate is subjected to laying under another inmate's feet and if laying the opposite direction, the inmate on the floor is laying next to the toilet and the cells air vent which blows 24 hrs daily causes dry skin. The inmate on the floor is subjected to laying amongst trash and dust which usually is found on the sheets of the floor mattress. From time to time I find myself killing small bugs. Mentally this is degrading to force a man to sleep on an floor like an animal or project a future conflict amongst two cellmates. Because what makes one inmate better than the other, that one must sleep on the floor next to where he has to urinate and the other has a bunk. . . .

Affid. of Joy Anacker Exh. 502, dkt. # 107, at 3. The institution complaint examiner and the institution complaint examiner reviewing authority dismissed the complaint. After receiving

plaintiff Walker's request for corrections complaint examiner review of the complaint, the corrections complaint examiner recommended dismissal. On February 15, 1999, the Secretary of the Department of Corrections dismissed the complaint. Plaintiff Walker's appeal to the Secretary included the following allegations:

> My complaint was about having to sleep on the floor on a mattress next to a toilet and a blowing vent at the feet of another s_ly dangerous inmate. This isn't a problem that can't be fixed. . . . I requested for another bed to be added to the upper level cells in order to discontinue this inhumane act of forcing grown men to sleep on the floors. . . . Since being on the floor I find trash on my bedding daily, I keep terrible headaches sleeping under the air of this vent, I can't remain sleep if my cellmate has to urinate because it may splash on me in sprinkles, I'm constantly killing bugs, lower back hurts. . .

Affid. of John Ray Exh. 504, dkt. # 108, at 3.

On December 7, 1998, plaintiff John Tiggs filed group complaint # CCI-1998-23280, complaining of inmates' placement in administrative confinement. With the exception of Eric Washington, all plaintiffs signed the complaint. On December 17, 1998, the institution complaint examiner dismissed the complaint. In an envelope with a January 11, 1999, postmark, plaintiff Tiggs requested corrections complaint examiner review of the group complaint. On February 24, 1999, the corrections complaint examiner recommended dismissal of the group complaint. On March 4, 1999, the Office of the Secretary dismissed the complaint.

Tiggs's group complaint # CCI-1998-23280 is five pages long and is broken into sections

including a preamble, averred violations and four charges. See Supp. Affid. of John Ray Exh. 506, dkt. # 133, at 12-17. The complaint challenges the type of administrative confinement to which the complainants were subject. See id. at 12. Charge Two is titled "Violation of the doctrine; Res judicata, Ex Post facto and Equal Protection Clauses under the 5th and 14th Amend., U.S. Constitution." Id. at 13. That section includes the claim that "the Equal Protection clause demands equality in treatment of all similarly circumstanced persons and forbid unjustifiably singled out treatments and hostile discrimination of the same." Id. Charge Three is titled "Violation of the Rehabilitation Act, 29 U.S.C. § 794, and the Equal Protection Clause of the 14th Amend., U.S. Constitution." Id. at 15. That section includes the claim that

> C.C.I. and other DOC facilities is indeed using the herein [de]scribed policies and procedures arbitrarily, capriciously, in a racial and discriminatory fashion; in hostility, retaliatory purposes and specifically for other than its intended purpose; additionally, such is being used for a punishment extension and prolonged periods of very unnecessary segregation . . . All contrary to law and in an exercise of will and not judgement; Contrary to 29 U.S.C. § 794, Rehabilitation Act and Equal Protections of the law.

Id. (Ellipsis in original). The institution complaint examiner's report recommending dismissal summarizes the facts in the following way:

> Complains of challenging the development of the Administrative Tracking system. The ICE would first note that complainant is neither on Administrative Tracking or Administrative Confinement (and one other inmate, Mark Taylor #227751), thus per the back of the inmate complaint form DOC 400 (0198), number 6, states the issue raised must affect the complainant personally, which it does not; thus this complaint would be rejected. However, since there are eight

(Austin-Dnagerfield-Hanke-Luttrell-Manns-Moore-Wheeler-White) on Administrative Tracking, and seven (Branch-Brown-Murillo-Rice-Smith-Talib-Walker) on Administrative Confinement, the ICE will choose to accept this complaint for cause and tender an answer to complainant, who can share the answer with the other complainants.

Administrative tracking is a designation giving [sic] to inmate who are being considered for referral to the Administrative Confinement Review Committee (ACRC) for placement in Administrative Confinement upon release from segregation. The step program guidelines have always been just those - guidelines. The severity of the offense, past history, and the other factors determine how an inmate moves through the step program and/or whether they are released early. Inmates in Administrative Tracking are there because they have a very serious rule violation - which put them there due to the nature of these violations. Their movement through the step program is expected to be slower and early release less likely. This is perfectly consistent with the policies that define the step program at CCI. Inmates who have this designation are reviewed every 30 days like all program segregation inmates. At any time in this process this designation could be added or deleted.

Id. at 19-20.

In his request for corrections complaint examiner review, plaintiff Tiggs writes as spokesperson:

. . .
Congress has established the Fourteenth Amendment many, many years ago and it is without unnecessary broad construction when we understand "That Amendment came into being primarily to protect Negroes from discrimination and (that) while some of its language can and does protect others, all know that the chief purpose behind it was to protect ex-slaves." Adamson v. Califonia, 332 U.S. 46, 71-72 and n.5, 67 S.Ct. 1672, 1686, 19 L.Ed. 1903 (1947).

Although, the terms "Negroes and ex-slaves" isn't used so very openly, we cannot dispute that forbidden those within the complaint the most basic of rights, the right to be heard, and present and any prison committee formed to

> decide one's future disposition, i.e. prolonged program segregation in terms of (360) day in totality and subjecting him or her to the extension of six-month additionally to be served is nothing more than that good ole "keep that boy in-place precept" instituted by the founding fathers, brothers and cousin of these United states as well as a blaten and total disregard penological concerns, justice, safety and even sanity.
> . . .

Affid. of John Ray Exh. 506, dkt. # 108, at 6.

OPINION

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). All evidence and inferences must be viewed in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). If the non-movant fails to make a showing sufficient to establish the existence of an essential element on which that party will bear the burden of proof at trial, summary judgment for the moving party is proper. See Celotex v. Catrett, 477 U.S. 317, 322 (1986).

II. ADMINISTRATIVE EXHAUSTION

A. Legal Standards

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), mandates 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 term "prison conditions" is defined in 18 U.S.C. § 3626(g)(2), which provides that "the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." The Court of Appeals for the Seventh Circuit has held that "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits." Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v. Helman, 196 F.3d 727 (7th Cir. 1999).

The inmate complaint review system is described in Wis. Admin. Code Chapter DOC 310. Before commencing a civil action, an inmate "shall file a complaint under s. DOC 310.09 or 310.10, receive a decision on the complaint under s. DOC 310.12, have an adverse decision reviewed under s. DOC 310.13, and be advised of the secretary's decision under s. DOC

310.14." DOC 310.04. An inmate's complaint is first examined by an institution complaint examiner, who sends a report and recommendation to the appropriate reviewing authority. See DOC 310.11. The reviewing authority may dismiss or affirm the complaint or return the recommendation to the institution complaint examiner for further investigation. See DOC 310.12(2). If the complaint is dismissed, the inmate may appeal the decision by filing a written request for review with the corrections complaint examiner on forms supplied for that purpose. See DOC 310.13(1). The corrections complaint examiner makes a written recommendation that is forwarded to the secretary, who may adopt or reject the recommendation. See DOC 310.14.

DOC 310.10 allows "[i]nmates who have a complaint in common [to] file as a group by using one complaint form. All complainants shall sign the form. The group shall designate a spokesperson or, if none is designated the first name signed on the first complaint shall be deemed the spokesperson for the group." DOC 310.10(2). The corrections complaint examiner or institution complaint examiner will issue a receipt to the spokesperson acknowledging the complaint. See 310.10(3).

The institution complaint examiner may reject a complaint as frivolous if the examiner finds that the inmate submitted the complaint solely for the purpose of harassing or causing malicious injury to Department of Corrections employees; the complaint does not raise a

significant issue regarding rules, living conditions or staff actions affecting institution environment; or the complaint does not allege sufficient facts upon which redress may be made. See DOC 310.11(4). "An inmate may appeal a rejected complaint because the [institution complaint examiner] has determined it to be frivolous only to the appropriate reviewing authority." Id.

B. Complaint # CCI-1998-22811

Because plaintiff Wheeler did not appeal the rejection of his complaint as frivolous to the institution complaint examiner reviewing authority as required by DOC 310.11(4), plaintiff has failed to exhaust his administrative remedies on his claim that there were bugs in his cell.

C. Complaint # CCI-1998-24822

Because plaintiff Washington did not request corrections complaint examiner review of his complaint, plaintiff has failed to exhaust his administrative remedies on his claim that his cell had inadequate heat.

D. Complaint # CCI-1189-98

Because plaintiff Walker did not request corrections complaint examiner review of

complaint # CCI-1189-98, he failed to exhaust the administrative process with respect to that complaint. However, plaintiff raised many of same issues in complaint # CCI-1998-19068, the exhaustion of which is discussed below.

E. Complaint # CCI-1998-19068

Because plaintiff Walker received a dismissal from the Secretary of the Department of Corrections, he has exhausted his administrative remedies with respect to this complaint. Defendants contend that although Walker mentioned in both the complaint and appeal that he is constantly killing bugs, bug infestation was not the subject of the complaint and therefore that Walker failed to exhaust his administrative remedies for any bug infestation claim. When I allowed plaintiffs to proceed on their claim that the conditions of their confinement violated the Eighth Amendment, I noted that they would "not be precluded from arguing that the fact that they were sleeping on the floor coupled with the insect infestations in the cells constituted a constitutional violation." Op. of Nov. 16, 1999, dkt. # 4, at 9. Although I agree with defendants that plaintiff Walker's complaint did not focus on a claim of bug infestation, the claim upon which I allowed plaintiffs to proceed was one that considered the totality of the circumstances. See id. at 7-9. I conclude that plaintiff Walker's administrative complaint sufficiently alerted defendants to these concerns.

Defendants also contend that Walker failed to appeal to the complaint corrections examiner within the ten-day time period. Defendants waived this argument when the Secretary of the Department of Corrections dismissed the complaint on the merits by adopting the corrections complaint examiner's recommendation. See Affid. of John Ray Exh. 504 at 1. I conclude that plaintiff Walker has exhausted his administrative remedies on his claim that the conditions of his confinement violated the Eighth Amendment.

F. Complaint # CCI-1998-23280

Defendants contend that plaintiffs "failed to complain of discriminatory placement in administrative confinement based on their race." Defs.' Br., dkt. # 110, at 9. In their group complaint, plaintiffs allege that the prison used administrative confinement and program segregation policies and procedures "in a racial and discriminatory fashion." Plaintiffs made this allegation under a section title indicating the claims following were brought in part under the equal protection clause of the Fourteenth Amendment. The corrections complaint examiner's response to the group complaint states that "Inmates in Administrative Tracking are there because they have a very serious rule violation - which put them there due to the nature of these violations." I read this as denying plaintiffs' complaint that they were placed in administrative tracking because of their race. In their request for corrections complaint

examiner review, plaintiffs argue that the Fourteenth Amendment was enacted "primarily to protect Negroes from discrimination" and that it forbids inmates' placement in program segregation based on "good ole 'keep that boy in-place precept.'" Affid. of John Ray, Exh. 506 at 6. I read this as proof that plaintiffs raised their claim of racial discrimination in their appeal. The corrections complaint examiner recommended that the group complaint be dismissed "[i]n agreement with and based on the report of the Institution Complaint Examiner." Id. at 2. The Secretary of the Department of Corrections accepted the corrections complaint examiner's recommendation to dismiss the complaint. Because the corrections complaint examiner and the secretary dismissed the complaint on its merits, defendants may not now argue that plaintiffs' appeal of the group complaint was untimely. I conclude that plaintiffs have exhausted their administrative remedies on their claim that they were assigned to administrative tracking in violation of the equal protection clause. Because plaintiff Eric Washington did not sign the group complaint and has not provided any proof that he exhausted his administrative remedies on this claim in any other inmate complaint, defendants will be granted summary judgment as to plaintiff Washington.

In summary, the only claims going forward are plaintiff Baron L. Walker, Sr.'s claim that his cell conditions at Columbia Correctional Institution violated the Eighth Amendment and the claim of plaintiffs Alphoncy Dangerfield, Carlos A. Austin, Lamont E. Moore, Tingia

Wheeler, Baron L. Walker, Sr., Joeddie Smith, John D. Tiggs, Jr., Rashid Talid and Walter Brown, Sr. that their placement in administrative segregation at Columbia Correctional Institution was based upon their race in violation of their rights under the equal protection clause of the Fourteenth Amendment. Before I stayed all proceedings related to the merits of this case, plaintiffs filed a cross-motion for summary judgment on July 27, 2000. Briefing on both plaintiffs' and defendants' motions for summary judgment will now resume.

ORDER

IT IS ORDERED that

1. Defendants' motion for summary judgment on the ground that plaintiffs Alphoncy Dangerfield, Carlos A. Austin, Lamont E. Moore, Tingia Wheeler, Joeddie Smith, Eric Washington, John D. Tiggs, Jr., Rashid Talid and Walter Brown, Sr. failed to exhaust their available administrative remedies on their claim that extreme cold and infestations by insects in their cells violated the Eighth Amendment is GRANTED;

2. Defendants' motion for summary judgment on the ground that plaintiff Baron L. Walker, Sr. failed to exhaust his available administrative remedies on his claim under the Eighth Amendment is DENIED;

3. Defendants' motion for summary judgment on the ground that plaintiff Eric

Washington failed to exhaust his available administrative remedies on his claim that he was placed in administrative tracking in violation of the equal protection clause of the Fourteenth Amendment is GRANTED;

4. Defendants' motion for summary judgment on the ground that plaintiffs Alphoncy Dangerfield, Carlos A. Austin, Lamont E. Moore, Tingia Wheeler, Baron L. Walker, Sr., Joeddie Smith, John D. Tiggs, Jr., Rashid Talid and Walter Brown, Sr. failed to exhaust their available administrative remedies on their claim under the equal protection clause of the Fourteenth Amendment is DENIED;

5. Plaintiff Eric Washington is DISMISSED from this case;

6. The stay of proceedings related to the merits of this case is lifted and briefing on the parties' cross-motions for summary judgment is resumed. Plaintiffs' response to defendants' motion for summary judgment must be filed and served before November 1, 2000. Defendants' reply must be filed and served within 10 calendar days of service of the response, which the court presumes to be the date the response is filed with the court. Defendants' response to plaintiffs' motion for summary judgment must be filed and served on the same date as defendants' reply to plaintiffs' response to defendant's motion for summary judgment. Plaintiffs' reply must be filed and served within 10 calendar days of defendants' response to plaintiffs' motion for summary judgment. The parties are reminded that they must follow this

court's procedure governing summary judgment motions, a copy of which was attached to the scheduling order entered March 17, 2000. The court will not consider any document that does not comply with its summary judgment procedure.

7. The trial date of November 27, 2000 is rescinded. If this case survives the

motions for summary judgment, a status conference will be held to establish a new trial date.

Entered this 11th day of October, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge