IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHN D. TIGGS, JR.; a.k.a. A'KINBO
JIHAD-SURU HASHIM,

Plaintiff,

v.

LINDA HODDY-TRIPP and
SECURITY CAPTAIN CALDWELL,

Defendants.

ORDER

01-C-171-C

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In an order entered May 29, 2001, I allowed plaintiff to proceed on his claims that defendants Hoddy-Tripp and Caldwell used excessive force against him in violation of the Eighth Amendment and that defendant Hoddy-Tripp violated the First Amendment by refusing to mail certain letters written by plaintiff. I dismissed all other claims.

Presently before the court is defendants' motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) and to stay discovery.[1] In their initial brief, defendants asserted that the entire case should be dismissed because plaintiff had three strikes against him yet

[1] Because it appears that Magistrate Judge Crocker has addressed defendants' motion to stay the proceedings, I do not address it in this order.

he asked to proceed in forma pauperis for the purpose of service of process (after he had paid the filing fee). However, in their reply brief, defendants concede that they waived service of process in this case and, therefore, plaintiff has not proceeded in forma pauperis. Accordingly, defendants have withdrawn this argument, making it unnecessary to decide whether proceeding in forma pauperis for purposes other than paying a partial filing fee violates the three strikes provision of the Prison Litigation Reform Act, 28 U.S.C. § 1915(g).

Defendants continue to contend that plaintiff failed to exhaust his administrative remedies before filing suit as required by 42 U.S.C. § 1997e(a) as to his First Amendment claim regarding the rejection of two letters, dated May 1, 2000 and June 5, 2000. In support of their motion, defendants have submitted documents relating to plaintiff's exhaustion efforts within the inmate complaint review system. Plaintiff has submitted additional documents in opposition to the motion. Consideration of this documentation is necessary to reach a decision on the motion. Documentation of a prisoner's use of the inmate complaint review system is a matter of public record. For this reason, a court may take judicial notice of the documents without converting the motion to dismiss into a motion for summary judgment. See Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 455 (7th Cir. 1998) (citing General Electric Capital Corporation v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997)). After reviewing the documents, I conclude that plaintiff has failed to exhaust his available administrative remedies and will grant

defendants' motion to dismiss plaintiff's First Amendment claim for the rejection of outgoing mail.

A motion to dismiss will be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. Cook v. Winfrey, 141 F. 3d 322, 327 (7th Cir. 1998) (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). For the purpose of deciding this motion to dismiss, I accept as true the allegations in the complaint. Those allegations of fact are set forth in the May 29, 2001 Order, dkt. #2. In addition, I am considering the exhibits that plaintiff and defendants submitted in support of their positions. I summarize below only the steps toward administrative exhaustion taken by plaintiff.

ADMINISTRATIVE EXHAUSTION

On May 14, 2000, plaintiff sent Deputy Secretary Cindy O'Donnell a letter with an attached copy of a grievance that he had recently filed. (Plaintiff alleges that this grievance concerned a May 1, 2000 letter to his daughter.) In a letter dated May 22, O'Donnell responded to plaintiff's letter, reminding plaintiff that he should "continue to utilize the inmate complaint review system to address any grievances."

On June 12, 2000, plaintiff filed an inmate complaint (#SMCI-2000-16956), alleging that an outgoing letter dated June 5 was improperly rejected because defendant Hoddy-Tripp

believed it was disrespectful toward her. On June 21, 2000, the inmate complaint examiner recommended dismissing the complaint with modification, recommending that the complaint be routed to the appropriate authority for disciplinary review. On June 23, 2000, reviewer Huibregtse dismissed the complaint and forwarded it to the security director for review of possible violations of rules. On September 27, 2000, plaintiff filed a request for corrections complaint examiner review. On October 9, 2000, plaintiff's appeal was dismissed as untimely. That decision was accepted as the decision of the Secretary of the Department of Corrections on October 26, 2000.

OPINION

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 Seventh Circuit has stated that "if a prison has an internal grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim. The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures." Massey, 196 F.3d at 733.

Wis. Admin. Code § DOC 310.04 requires that "[b]efore an inmate may commence a civil action . . . the inmate shall file a complaint under §§ DOC 310.09 or 310.10, receive a decision on the complaint under § DOC 310. 12, have an adverse decision reviewed under § DOC 310.13, and be advised of the secretary's decision under § DOC 310.14."

Defendants assert that plaintiff did not timely exhaust his administrative remedies with respect to the alleged rejection of his mail and, therefore, that his First Amendment claim should be dismissed. Specifically, defendants contend that plaintiff failed to exhaust his administrative remedies with respect to a May 1, 2000 letter to his daughter and a June 5, 2000 letter that was allegedly disrespectful to staff.

As to the May 1, 2000 letter to his daughter, plaintiff asserts that his grievance "went

directly to the Secretary." Pltf.'s Br. in Opp. Mo. to Dismiss, dkt. #31, at 2. In other words, plaintiff did not satisfy the requirements of Wis. Admin. Code § DOC 310.04, which requires that before filing a lawsuit, an inmate must file an inmate complaint, have an adverse decision reviewed and receive a decision from the Secretary of the department. Plaintiff has submitted no documentation showing that he sought review of the alleged rejection of his May 1, 2000 letter through the inmate complaint review system. Defendants' motion to dismiss will be granted as to the portion of plaintiff's First Amendment claim stemming from the May 1, 2000 letter.

As to the June 5, 2000 letter, plaintiff initiated the grievance process by filing inmate complaint no. SMCI-2000-16956. The complaint was dismissed on June 23, 2000 and was referred to the security director for possible discipline. According to plaintiff, the investigation took nearly four months to complete. Plaintiff appealed the dismissal on September 27, 2000, which plaintiff argues immediately followed the end of the investigation. The appeal was dismissed because it was filed untimely.

Plaintiff suggests that because he waited until the disciplinary investigation was complete, his appeal should be considered timely. Nevertheless, Wis. Admin. Code § DOC 310.13(1) explicitly requires inmates to file an appeal with the corrections complaint examiner within ten days of receipt of the inmate complaint examiner's or reviewer's adverse decision. In addition, the decision to dismiss plaintiff's complaint informed plaintiff that

he had ten calendar days in which to file an appeal of the dismissal. The fact that the complaint was referred to the security director is irrelevant to the ten-day deadline for appeals set out in § DOC 310.13(1). Accordingly, defendants' motion to dismiss for failure to exhaust as to the June 5, 2000 portion of plaintiff's First Amendment claim will be granted. The holding in Perez, 187 F.3d 532, requires that I dismiss plaintiff's First Amendment claim because he did not exhaust his administrative remedies before filing this suit.

ORDER

IT IS ORDERED that the motion to dismiss of defendants Linda Hoddy-Tripp and Security Captain Caldwell is GRANTED as to plaintiff's First Amendment claim regarding the rejection of outgoing mail.

Entered this 14th day of December, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge