IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DONALD WHITE,

Plaintiff,

v.

Sgt. MATTI, Sgt. HOFFMAN, Officer GOVIER, Officer SHAW, Officer W. BROWN, Officer WIEGEL, Officer L. BROWN, Sgt. BOWDY, and Unit Manager HOMPE,

Defendants.

OPINION AND ORDER

01-C-0600-C

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This is a civil action for monetary, declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Donald White, who is presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, contends that he was subjected to excessive force on three occasions and that he has been the target of retaliation for filing lawsuits. Specifically, plaintiff alleges that he was subjected to excessive force in violation of the Eighth Amendment by defendants Matti and Govier on February 1, 2000; by defendants Shaw, W. Brown, Hoffman and Hompe on June 23, 2000; and by defendants Bowdy, Wiegel, L. Brown and Hoffman on February 6, 2001. Plaintiff contends also that the alleged

use of excessive force on June 23, 2000 was ordered by defendant Hompe as retaliation for a lawsuit plaintiff had filed previously against defendant Hompe. In an order dated November 16, 2001, I granted plaintiff leave to proceed in forma pauperis on these claims. In that same order, I denied him leave to proceed in forma pauperis on all other claims against all other proposed defendants because he failed to state claims upon which relief could be granted.

Presently before the court is defendants' motion for partial dismissal of plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6). Defendants contend that plaintiff failed to exhaust his administrative remedies prior to filing suit as required by 42 U.S.C. § 1997e(a). Defendants seek only the dismissal of the excessive force claims alleged to have occurred on February 1, 2000 and June 23, 2000, and dismissal of the retaliation claim against defendant Hompe stemming from the June 23, 2000 incident. In support of their motion, defendants have submitted documents relating to plaintiff's efforts to exhaust his remedies within the Department of Corrections inmate complaint review system. Plaintiff has submitted similar 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 Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997)). After reviewing the documents, I conclude that plaintiff failed to timely exhaust his available administrative remedies with regard to the February 1, 2000 and June 23, 2000 incidents and I will grant defendants' partial motion to dismiss.

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 defendants' motion, I accept as true the factual allegations in plaintiff's complaint. Those allegations are set forth in this court's November 16, 2001 Order, dkt. #2, at 3-7, and need not be repeated in detail here. In addition, I am considering the exhibits that plaintiff and defendants submitted regarding plaintiff's use of the inmate complaint review system, which are summarized below.

ADMINISTRATIVE EXHAUSTION

A. February 1, 2000 Incident

On February 6, 2000, plaintiff filed an inmate complaint, alleging that on February 1, 2000, defendants Matti and Govier used excessive force against him. The inmate

complaint examiner returned plaintiff's complaint with instructions to plaintiff to take the complaint first to his unit manager and first shift supervisor for resolution. The inmate complaint examiner informed plaintiff that if the issue was not settled, the unit manager and first shift supervisors' responses must be submitted when filing another complaint.

Rather than file another inmate complaint, on April 25, 2000, plaintiff filed a complaint in this court regarding the February 1, 2000, incident. On May 26, 2000, I granted plaintiff leave to proceed in forma pauperis on his excessive force claim against defendants Matti and Govier. On October 20, 2000, defendants Matti and Govier prevailed on a motion for summary judgment based on plaintiff's failure to exhaust his administrative remedies and I ordered the case dismissed. On January 11, 2001, I entered an order clarifying the fact that the dismissal was without prejudice. At the time of the judgment, plaintiff's file at the institution did not contain a response from the unit manager or the first shift supervisor or any other complaints concerning plaintiff's allegations that defendants Matti and Govier used excessive force on February 1, 2000. Additionally, plaintiff had not filed an appeal with the corrections complaint examiner concerning his allegations that defendants used excessive force on February 1, 2000.

On January 17, 2001, plaintiff submitted offender complaint SMCI-2001-2250 regarding the February 1, 2000 incident. The complaint was received by the inmate

complaint examiner on January 19, 2001. On January 18, 2001, plaintiff initiated this lawsuit in which he re-alleged that he had been subjected to excessive force on February 1, 2000, and asserted that all administrative remedies related to that claim had now been exhausted. On February 11, 2001, the inmate complaint examiner rejected complaint SMCI-2001-2250 on the grounds that it was untimely. Almost a month later, on March 9, 2001, plaintiff appealed the inmate complaint examiner's decision to the corrections complaint examiner. On April 2, 2001, the corrections complaint examiner recommended dismissal of plaintiff's complaint, finding both that the complaint was not timely filed in accordance with Wis. Admin. Code § DOC 310.09(3) and that the request for review by the corrections complaint examiner was not filed timely in accordance with Wis. Admin. Code § DOC 310.13(1). On April 7, 2001, the Department of Corrections accepted the corrections complaint examiner's recommendation to dismiss plaintiff's complaint.

B. June 23, 2000 Incident

On July 5, 2000, plaintiff submitted offender complaint SMCI-2000-20138, alleging that on June 23, 2000, defendants Shaw, W. Brown, Hoffman and Hompe used excessive force against him and that Hompe had ordered the use of excessive force in retaliation for a prior lawsuit plaintiff filed against him. That offender complaint was received on July 13,

2000. On August 16, 2000, the inmate complaint examiner recommended dismissal of plaintiff's complaint. The reviewer concurred and on August 18, 2000, plaintiff's complaint was dismissed. On October 19, 2000, more than two months after the complaint was dismissed initially, plaintiff submitted a request for review by the corrections complaint examiner. On October 30, 2000, the corrections complaint examiner issued a report in which he recommended dismissal of plaintiff's appeal, finding that it was untimely. On November 11, 2000, the Department of Corrections accepted the corrections complaint examiner's recommendation to dismiss the complaint. On January 18, 2001, plaintiff initiated this lawsuit, alleging, in addition to his claim regarding the February 1, 2000 incident, that excessive force was used against him on June 23, 2000, and that defendant Hompe had directed that excessive force be used in retaliation for plaintiff naming him in an earlier lawsuit.

OPINION

A. The Exhaustion Requirement

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), provides 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) as "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).

B. Application of Exhaustion to Excessive Force and Retaliation Claims

Although plaintiff does not dispute that the exhaustion requirement applies to his claims, the issue whether exhaustion applies to excessive force or retaliation claims has been a matter of considerable recent debate. The Supreme Court has now settled the issue. In Porter v. Nussle, 122 S. Ct. 983 (2002), the Court held that "the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Id. at 992. In so holding, the Supreme Court reversed the decision of the Court of

Appeals for the Second Circuit that the exhaustion requirement does not apply to allegations of excessive force by prison employees. Nussle v. Willette, 224 F.3d 95 (2d Cir. 2000). Unlike the Second Circuit, the Court of Appeals for the Seventh Circuit held in Smith v. Zachary, 255 F.3d 446, 452 (7th Cir. 2001), that exhaustion does apply to excessive force and retaliation claims. In Smith, an inmate claimed that guards used excessive force in retaliation for his participation in a prison riot. Id. at 448. The court held that such a claim fit within the definition of "prison conditions" found in the PLRA, noting that "[i]n the context of prisons, harassment from correctional officers or government officials is not equivalent to an unsolicited attack on the street; rather, the harassment is made possible by the correctional environment. Thus, a remedy lies in addressing prison conditions that facilitates [sic] or tolerates [sic] aberrant behavior by guards." Id. at 450. Noting the Seventh Circuit's decision in Smith, the Supreme Court observed that "[a]n unwarranted assault by a corrections officer may be reflective of a systemic problem traceable to poor hiring practices, inadequate training, or insufficient supervision," Nussle, 122 S. Ct. at 991, and that prison administrators have as much of an interest in having an opportunity to address guard brutality through an internal grievance system as they do other varieties of staff misconduct. Id. at 992. Thus, it is now clear that the PLRA's exhaustion requirement applies to claims of excessive force and retaliation like those made by plaintiff in this case.

C. Inmate Complaint Review System

Wis. Admin. Code § DOC 310.04 requires that 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 ." The regulations require an inmate wishing to file a complaint to do so within 14 calendar days after the occurrence giving rise to the complaint, but allow the inmate complaint investigator to accept a late complaint for good cause. Wis. Admin. Code § DOC 310.09(3). According to § DOC 310.11(11), the inmate's complaint is to be examined by the inmate complaint investigator, who investigates the complaint and recommends a decision to the appropriate reviewing authority. Within five working days after receipt of the inmate complaint investigator's report, the appropriate reviewing authority (defined in § DOC 310.03(3) as "the warden, bureau director, administrator or designee who is authorized to review and decide an inmate complaint") is to issue a written decision. Wis. Admin. Code § DOC 310.12(1). If, however, the complainant does not receive the reviewing authority's decision within 23 working days of the receipt of the complaint by the inmate complaint investigator, § DOC 310.12(3) provides that the complaint is considered denied and can be appealed immediately. An inmate has ten calendar days after the date of the decision to file a written request for review with the corrections complaint examiner and the corrections complaint

examiner has discretion to accept a late appeal under certain circumstances "if the elapsed time has not made it difficult or impossible to investigate the complaint." Wis. Admin. Code § DOC 310.13(1), (3). The corrections complaint examiner makes a written recommendation that is forwarded to the secretary, who determines within ten days of receiving the recommendation whether to accept the recommendation, adopt the recommendation with modifications, reject the recommendation or return the recommendation to the corrections complaint examiner for further investigation. Wis. Admin. Code § DOC 310.13(7), 310.14.

D. Timeliness and the Failure to Exhaust Administrative Remedies

Plaintiff contends that he exhausted his administrative remedies within the meaning of the PLRA because he filed complaints and appeals and followed them all the way through the review system to the Secretary of the Department of Corrections, albeit without regard to the timeliness requirements contained in Wis. Admin. Code ch. DOC 310. Plaintiff also asserts that he should be excused from any exhaustion timeliness requirements because he was on a restriction under which he was allowed only one piece of paper at a time in his cell.

1. Untimely complaints and appeals

Plaintiff argues that the PLRA does not require *timely* exhaustion of administrative remedies; rather, he contends, it requires only that the administrative process be exhausted. Plaintiff maintains that because he filed administrative complaints and appeals regarding the incidents of February 1, 2000, and June 23, 2000, he has exhausted his administrative remedies even though the appeals (and one of the complaints) were dismissed as untimely.

The argument that the PLRA does not require timely exhaustion has been considered and rejected by this court on at least one prior occasion. In Ammons v. Burkum, No. 98-C-861-C, slip op. at 21-23 (order entered Dec. 8, 2000), I held that untimely use of a prison administrative complaint system did not satisfy the PLRA's exhaustion requirement and I dismissed the plaintiff's claim with prejudice for failure to exhaust his administrative remedies. In that case, I noted that in one sense, the plaintiff was correct in asserting that his remedies were exhausted, because there was nothing more he could do to obtain an administrative remedy. That is equally true in this case. Plaintiff has appealed all the way to the Secretary of the Department of Corrections. That is as far as he can go within the administrative system. However, plaintiff's suggestion that it makes no difference under 1997e(a) whether he filed a complaint within the time limits mandated by the inmate complaint review system runs counter to the policies animating the PLRA's exhaustion requirement. These policies include allowing the relevant agency to correct its own mistakes with regard to the programs it administers before it is haled into court; conserving scarce

judicial resources by narrowing disputes or avoiding the need for litigation entirely; and improving the efficacy of the administrative process. See Perez, 182 F.3d at 537-38.

None of these goals is furthered if a prisoner who ignores the agency's procedures for bringing complaints to the attention of prison officials may nonetheless gain access to federal court simply by filing an untimely grievance or appeal. To the contrary, allowing prisoners to pursue § 1983 claims that are based on untimely administrative grievances would undermine the PLRA's goal of fostering administrative resolution of prisoner complaints. See Harper v. Jenkin, 179 F.3d 1311, 1312 (11th Cir. 1999) ("If we were to accept appellant's position – that the filing of an untimely grievance exhausts an inmate's administrative remedies – inmates, such as appellant, could ignore the PLRA's exhaustion requirement and still gain access to federal court merely by filing an untimely grievance.") (per curiam); Wright v. Morris, 111 F.3d 414, 418 n. 3 (6th Cir. 1997) (stating in dicta that "it would be contrary to Congress' intent in enacting the PLRA to allow inmates to bypass the exhaustion requirement by declining to file administrative complaints and then complaining that administrative remedies are time-barred and thus not available."); Marsh v. Jones, 53 F.3d 707, 710 (5th Cir. 1995) (applying pre-PLRA version of § 1997e and concluding that "[w]ithout the prospect of a dismissal with prejudice, a prisoner could evade the exhaustion requirement by filing no administrative grievance or by intentionally filing an untimely one, thereby foreclosing administrative remedies and gaining access to a federal

forum without exhausting administrative remedies.").

The Supreme Court has not yet addressed the timeliness issue, but it has not hesitated to effectuate the policies underlying the PLRA's exhaustion requirement. In Booth v. Churner, 532 U.S. 731 (2001), the Court confirmed that exhaustion applies even where the desired relief is not available in the relevant administrative system, remarking that Congress could not have intended to give prisoners such incentive to "skip" the administrative process. Id. at 740-41. ("Congress's imposition of an obviously broader exhaustion requirement makes it highly implausible that it meant to give prisoners a strong inducement to skip the administrative process simply by limiting prayers for relief to money damages not offered through administrative grievance mechanisms."). Allowing untimely complaints to fulfill the exhaustion requirement would create a similar incentive to wait and skip the administrative process.

Courts have applied these same policies to § 1983 claims outside the prison setting as well. In Frazier v. Fairhaven School Comm., 276 F.3d 52, 63, 69 (1st Cir. 2002), the Court of Appeals for the First Circuit affirmed the dismissal with prejudice of a § 1983 claim for money damages brought by parents against their child's school district. The parents had waited until their learning-disabled daughter had graduated from high school and then attempted to bring a claim against the district in federal court, rather than first exhausting

the administrative process established by the Individuals with Disabilities Education Act. In affirming the district court's dismissal of the parents' claim, the court of appeals noted that the issue of timing is largely within a plaintiff's control and that exhaustion requirements have no meaning if plaintiffs can simply evade them by waiting for deadlines to pass and then filing a lawsuit. Id. at 63. ("It would be a hollow gesture to say that exhaustion is required – and then to say that plaintiffs, by holding back until the affected child graduates, can evade the requirement.").

Plaintiff here does not argue that he acted promptly in his efforts to exhaust his administrative remedies. Rather, he suggests that timeliness should not be a factor in evaluating whether he exhausted those remedies. For the reasons stated above, I find that timely exhaustion is required under § 1997e(a). Because plaintiff did not meet the deadlines in utilizing the inmate complaint review system, he failed to exhaust his administrative remedies and defendants' motion for partial dismissal must be granted.

When a plaintiff fails to exhaust administrative remedies, courts often dismiss a complaint without prejudice in order to allow the plaintiff to fulfill the exhaustion requirement and refile if necessary. See, e.g., Santiago v. Meinsen, 89 F. Supp. 2d 435, 441 (S.D.N.Y. 2000). In fact, such a procedure has already occurred in this case. However, because there is no longer any relief that the administrative grievance process can afford

plaintiff regarding the claims at issue here, they will be dismissed with prejudice.

2. Plaintiff's paper restriction

Finally, plaintiff asserts that even though his use of the administrative system was untimely, his untimeliness should be excused because prison officials allowed him to possess only one sheet of paper at a time in his cell for nineteen months. This argument is not persuasive. According to plaintiff's reply brief and the attached memoranda, the paper restriction began in December 1999 and ran continuously through July 2001. Plt.'s Br., dkt. #13, at 3. However, the restriction did not always cause timeliness problems for the plaintiff. Plaintiff filed the offender complaint for the June 23, 2000 incident on July 5, 2000. See Exh. B-1 to Ray Aff., dkt. #11. The complaint was four pages long. Plaintiff sent a letter with the offender complaint, explaining that his complaint was untimely because he was "in *Control Status* [sic] from 6-23-00 to 7-3-00, and being able to pocess [sic] any Property [sic] during this period of time." Id. This complaint was the one item plaintiff did file within the prescribed time limits. The paper restriction did not keep him from filing that grievance on time. The complaint was dismissed, but on grounds other than timeliness.

In addition, plaintiff's complaint stemming from the February 1, 2000 incident is only one page and all of the appeals plaintiff filed were no more than a page long. See Exhs.

A-3 and B-4 to Ray Aff., dkt. #11. Accordingly, even with the restriction, plaintiff should have been able to file his complaints and appeals on time. Under the restriction, paper may be exchanged twice a day. See Plt.'s Br., dkt. #13. Even if plaintiff needed to do several drafts of a document, he had several days in which to complete the complaint and appeal forms. Instead, plaintiff took weeks or months after deadlines passed to file his appeals. After his first lawsuit was dismissed in October 2000, for failure to exhaust administrative remedies, he did not file an offender complaint regarding the February 1, 2000 incident until January 17, 2001. His appeal on that claim was not filed until March 9, 2001, almost a month after the inmate complaint examiner rejected his complaint as untimely. Additionally, plaintiff did not appeal the decision on his complaint regarding the June 23, 2000 incident until October 19, 2000, more than two months after the inmate complaint examiner dismissed his complaint. Plaintiff has not shown that the paper restriction prevented him from meeting the grievance system's deadlines.

ORDER

IT IS ORDERED that:

1. Defendants' motion to dismiss with prejudice plaintiff's claim that defendants Matti and Govier used excessive force against him on February 1, 2000 is GRANTED and

defendants Matti and Govier are DISMISSED from this case;

2. Defendants' motion to dismiss with prejudice plaintiff's claim that defendants Shaw, W. Brown, Hoffman, and Hompe used excessive force against him on June 23, 2000 is GRANTED and defendants Shaw and W. Brown are DISMISSED from this case;

3. Defendants' motion to dismiss with prejudice plaintiff's claim that defendant Hompe ordered the use of excessive force against him in retaliation for a lawsuit he filed on April 25, 2000, naming Hompe as a defendant is GRANTED and defendant Hompe is DISMISSED from this case.

4. The case shall continue on plaintiff's claim that defendants Bowdy, Wiegel, L. Brown and Hoffman used excessive force against him on February 6, 2001.

Entered this 25th day of March, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge