

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

JOSHUA A. ANEY,

Plaintiff,

ORDER

v.

02-C-131-C

CAPT. GILBERG, in his official and individual capacities; C/O D. ESSER, in his official and individual capacities; SGT. HOTTENSTEIN, in his official and individual capacities; GERALD BERGE, in his official capacity; and DOES 1-100, in their official and individual capacities,

Defendants.

Plaintiff Joshua Aney has been allowed to proceed in forma pauperis in this case on two claims: 1) that on September 16, 2001, defendants Gilberg, Esser, Hottenstein and Does used excessive force when they extracted him from his cell, hitting him under his eye, hitting him a few times, smashing his face into the wall and ground and twisting his arms into painful positions; and 2) after he was extracted from his cell, defendants Doe (members of the cell extraction team) subjected him to an unreasonable search by cutting off his clothes and performing a strip search in the middle of the hallway during which they fondled

his genital area and stuck a finger partway into his anus. Plaintiff has been denied leave to proceed in forma pauperis on claims that he was subjected to cruel and unusual punishment in violation of his Eighth Amendment rights when he was placed in controlled status immediately following the September 16 incidents; that his First Amendment free speech rights were violated when defendants extracted him from his cell for his refusal to respond to officers' direct orders to answer them; and that his Fourteenth Amendment due process rights were violated in connection with a disciplinary hearing on a conduct report issued after the incidents.

Now before the court is plaintiff's proposed amended complaint, which has been submitted in compliance with this court's requirements that plaintiff identify in an amended complaint the "Doe" defendants once he has learned their names. Also before the court is defendants' motion to dismiss plaintiff's claim that he was subjected to an unreasonable search, on the ground that plaintiff failed to exhaust his administrative remedies with respect to that claim as required by 42 U.S.C. § 1997e.

1. Plaintiff's Proposed Amended Complaint

Plaintiff's proposed amended complaint is identical to his original complaint in all substantive respects, except that he has appropriately eliminated factual allegations and requests for relief pertaining to his previously dismissed claims. He has removed the name

of Capt. Blackburn from the caption of the complaint (Blackburn was dismissed in the order granting plaintiff leave to proceed in part and denying him leave to proceed in part), and he has substituted the names of Thomas Brown, Shawn Gallinger, James Boisen, Chad Winger and Timothy Nordengren in the caption and in the body of the complaint for the Doe defendants. Therefore, I will accept plaintiff's amended complaint for filing with one exception explained below and will consider defendants' motion to dismiss as applying to it.

Plaintiff was allowed to proceed in forma pauperis against defendant Gerald Berge for the sole purpose of permitting him to conduct discovery to learn the names of the Doe defendants. Otherwise, neither plaintiff's original complaint nor the amended complaint contains allegations from which it can be inferred that defendant Berge personally participated in the alleged use of excessive force or unreasonable search to which plaintiff alleges he was subjected. Nevertheless, plaintiff has listed Gerald Berge as a defendant in the caption of his amended complaint. Because a superior may not be sued for a subordinate's tortious acts under 42 U.S.C. §1983, Polk County v. Dodson, 454 U.S. 312, 325 (1981), Gerald Berge will be dismissed from plaintiff's amended complaint.

Defendants' Motion to Dismiss

In deciding defendants' motion to dismiss, I have considered the parties' affidavits

and the exhibits they submitted documenting the steps plaintiff took to exhaust his administrative remedies on his claim that he was subjected to an unreasonable search following a cell extraction on September 16, 2001.

FACTS

On or around September 26, 2001, plaintiff filed an inmate complaint complaining of an unreasonable search that occurred following a cell extraction occurring on September 16, 2001. The complaint was rejected on the ground that it contained more than one issue, in violation of Wis. Stat. DOC § 310.09(1). Plaintiff appealed this decision to the Corrections Complaint Examiner on or around October 9, 2001. The appeal was denied on the ground that no complaint number was listed on the form.

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." Section 1997(a)'s exhaustion requirement is mandatory and applies to all prisoners seeking redress for wrongs occurring in prison. Porter v. Nussle, 122 S. Ct. 983, 986 (2002). 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 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 has certain specific requirements that inmates must follow when filing a complaint. "Before 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." An inmate shall include only one issue in each complaint. Wis. Admin. Code § DOC 310.09(1). The inmate complaint examiner may reject a complaint as frivolous if it fails to allege sufficient facts upon which redress may be made. Wis. Admin. Code § DOC 310.11(4)(c).

To exhaust administrative remedies, a prisoner must observe the procedural requirements of the system. Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002) (“unless the prisoner completes the administrative process by following the rules the state has established for that process, exhaustion has not occurred”). The court reasoned that any other approach would defeat the statutory objective of allowing the prison administration the opportunity to fix the problem, id. at 1024, and would remove the incentive that § 1997e provides for inmates to follow state procedure, id. at 1025.

In this case, plaintiff failed to follow state procedure with respect to his unreasonable search claim. He raised it in a complaint containing more than one issue. When his complaint was rejected because it contained more than one issue, plaintiff appealed instead of rewriting his inmate complaint to raise one issue. His appeal was rejected because it did not contain an inmate complaint number.

The Wisconsin Administrative Code makes it clear that inmates may not include more than one issue in each complaint, Wis. Admin. Code § DOC 310.09(1). Plaintiff concedes that he failed to follow state procedure and that he did not obtain a decision on the merits of his inmate complaint. Therefore, he has failed to exhaust his administrative remedies as to his claim of an unreasonable search occurring after his September 16, 2001 cell extraction.

ORDER

IT IS ORDERED that

1. Plaintiff's amended complaint is accepted for filing in this case. It is considered to have been filed as of the date of this order.

2. Defendant Gerald Berge is DISMISSED from the amended complaint on the ground that plaintiff has not alleged facts from which it appears that defendant Berge participated personally in the complained of unconstitutional acts.

3. Thomas Brown, Shawn Gallinger, James Boisen, Chad Winger and Timothy Nordengren are named as defendants in place of the previously named Doe defendants. These defendants are to be served with plaintiff's amended complaint forthwith and may have until August 26, 2002, in which to file and serve a responsive pleading as directed in the magistrate judge's order of July 9, 2002.

4. Defendants' motion to dismiss plaintiff's claim that defendants Doe and Berge subjected him to an unreasonable search following his cell extraction on September 16,

2001, is GRANTED. This claim is DISMISSED for plaintiff's failure to exhaust his administrative remedies.

Entered this 12th day of August, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge