

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

TONY WALKER,

Plaintiff,

v.

JON E. LITSCHER, DANIEL R. BERTRAND,
LORA HALLET, PATRICK BRANT,
FRANCIS LARDINOIS, RICHARD JAUQUET,
GLEN RIPLEY and WENDY BRUNS,

Defendants.

ORDER

02-C-135-C

In an order entered on July 25, 2002, I established a schedule for briefing defendants' motion to dismiss plaintiff's Eighth Amendment claim that he was subjected to extreme cell temperatures, inadequate food and constant illumination in segregation. Defendants moved to dismiss this claim on the ground that plaintiff had failed to exhaust his administrative remedies. In the same order, I stayed all proceedings on plaintiff's claim that defendants violated his First Amendment right to free speech by confiscating certain items of his mail as contraband. Before the stay was imposed, defendants had moved to dismiss the majority of this claim on the ground that plaintiff had failed to exhaust his administrative remedies.

As to one alleged rejection, however, defendants moved to dismiss on the merits pursuant to Fed. R. Civ. P. 12(b)(6), contending that the item contained pornographic material and was properly withheld from plaintiff. I imposed the stay regarding plaintiff's First Amendment claim after recognizing that the claim might implicate issues litigated in Aiello v. Litscher, 104 F. Supp. 2d 1068 (W.D. Wis. 2000), a class action, and that counsel for the class should decide whether she would prefer to raise plaintiff's claim in the context of the class action lawsuit. I asked counsel for the class in Aiello to advise the court no later than August 15, 2002, whether she wished to represent plaintiff's claim in the context of that suit, with the understanding that if she did not respond by August 15, I would assume that she did not wish to undertake representation of plaintiff's claim. Counsel has not responded to the court's letter. Therefore, I will lift the stay imposed in this case with respect to plaintiff's First Amendment claim.

With the lifting of the stay, it is necessary to consider whether to convert defendants' motion to dismiss as it relates to plaintiff's First Amendment claim into a motion for summary judgment. Defendants have submitted matters outside the pleadings in support of their motion. Most of the material is documentation of plaintiff's use of the inmate complaint review system, which is a matter of public record and may be considered without converting a 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)).

However, defendants also submitted the item allegedly rejected for containing pornography. This item may be considered only if the motion is converted to a motion for summary judgment.

Therefore, I will convert defendants' motion to dismiss to a motion for summary judgment. For the ease of the parties in briefing the motion, the entire motion will be converted, including the portion in which defendants seek dismissal for plaintiff's failure to exhaust his administrative remedies. Defendants have requested that the court review the rejected item *in camera*. This motion will be granted.

With respect to defendants' motion to dismiss plaintiff's Eighth Amendment claim, plaintiff has failed to oppose the motion. Accordingly, defendants' motion to dismiss this claim will be granted as unopposed.

One final matter requires attention. In an order dated July 11, 2002, I gave plaintiff until August 2, 2002, in which to complete and return Marshals Service and summons forms for defendant Lora Hallet, who is no longer employed by the Wisconsin Department of Corrections and has not been served with plaintiff's complaint. I advised plaintiff that if he failed to return the forms by August 2, 2002, I would assume that he cannot locate Hallet and that she must be dismissed from the case for plaintiff's failure to provide her notice of the claims against her. Plaintiff has not returned a completed Marshals Service form for

defendant Hallet. Therefore, she will be dismissed from the case.

ORDER

IT IS ORDERED that

1. Defendant Lora Hallet is DISMISSED from this case on the ground that plaintiff has not served her with his complaint;

2. Defendants' motion to dismiss plaintiff's Eighth Amendment claim that he was subjected to extreme cell temperatures, inadequate food and constant illumination in segregation for plaintiff's failure to exhaust his administrative remedies is GRANTED as unopposed;

3. The stay relating to plaintiff's claim that defendants violated his First Amendment right to free speech when they confiscated certain items of his mail allegedly containing contraband is LIFTED;

4. Defendants' motion to dismiss plaintiff's First Amendment claim is converted to a motion for summary judgment;

5. Defendants' motion for in camera review of exhibit C to John Ray's affidavit in support of defendants' motion for summary judgment is GRANTED;

5. The parties are to observe the following schedule for briefing defendants' motion for summary judgment. Defendants may have until September 6, 2002, in which to serve

and file proposed findings of fact, evidentiary materials and a brief in support of their motion for summary judgment. Plaintiff may have until September 27, 2002, in which to oppose the motion. Defendants may have until October 7, 2002, in which to serve and file a reply. In briefing the motion for summary judgment, the parties are to observe this court's Procedures to be Followed on Motions for Summary Judgment, a copy of which is enclosed with this order.

Entered this 27th day of August, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge