IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ANDREW BRIAN COLLETTE,

Plaintiff,

v.

GARY R. McCAUGHTRY, JON E. LITSCHER,
DR. STEPHEN D. FLECK,

Defendants.

OPINION AND ORDER

02-C-0181-C

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This is a civil action for monetary and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff Andrew Brian Collette has been allowed to proceed on three claims arising under the Eighth Amendment: 1) defendant Fleck deprived him of adequate mental health care; 2) defendant McCaughtry subjected him to extreme cell temperatures; and 3) defendants Litscher and McCaughtry subjected him to conditions of confinement that, when combined, deprived him of his basic human need for social interaction and sensory stimulation. Presently before the court is defendants' motion to dismiss plaintiff's complaint. Defendants contend that plaintiff has not exhausted his administrative remedies as required by 42 U.S.C. § 1997e(a). Alternatively, defendants argue that they are entitled to qualified immunity. I conclude that plaintiff has not exhausted his administrative remedies. Therefore, I will dismiss this case without prejudice to plaintiff's filing a new lawsuit after he has satisfied the exhaustion requirement. Because I will dismiss the case for plaintiff's failure to exhaust administrative remedies,

it is not necessary to decide whether defendants are entitled to qualified immunity.

For the purpose of deciding this motion to dismiss, I accept as true the allegations in plaintiff's complaint. Additionally, 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 Memominee 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)).

FACTS

Plaintiff is confined in the Waupun Correctional Institution in Waupun, Wisconsin. Defendants are Wisconsin Department of Corrections officials. Defendant Fleck is the psychologist for the Health and Segregation Complex at the Waupun prison and Defendant McCaughtry is the prison's warden. Defendant Litscher is Secretary of the Department of Corrections.

On December 27, 2001, plaintiff filed inmate complaint number WCI-2002-391, alleging that the conditions of his confinement violated an order issued by this court in Jones 'El v. Berge, 00-C-421-C. The Institution Complaint Examiner dismissed plaintiff's inmate complaint, stating that plaintiff had not provided any reason why he should not be confined at Waupun Correctional Institution and that the court's order did not apply to the Waupun Correctional Institution. Plaintiff appealed the decision to defendant Litscher, who affirmed the examiner's decision.

On January 28, 2002, plaintiff filed inmate complaint number WCI-2002-4238, complaining

about the lack of outdoor exercise and the inadequacy of the institution's recreational facilities, showers and law library. The examiner dismissed plaintiff's complaint as frivolous because plaintiff had failed to articulate what he was being denied and had failed to raise a substantial issue. Plaintiff did not appeal this decision.

On April 8, 2002, plaintiff filed inmate complaint number WCI-2002-13330, alleging that a cell extraction had violated his Eighth Amendment rights. The examiner dismissed plaintiff's complaint as falling outside the scope of the inmate complaint review system. On appeal, the Office of the Secretary affirmed the dismissal because plaintiff had not filed his complaint with the correct authority.

OPINION

A. Standard of Review

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)).

B. Failure to Exhaust Administrative Remedies

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 1997e(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 has held 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 § 1997(e) provides for inmates to follow state procedure. Id. at 1025.

In this case, plaintiff has not exhausted his administrative remedies as to any of the three claims on which he has been allowed to proceed. First, plaintiff has provided no proof that he filed inmate complaints about the inadequacy of mental health care. Second, in his January 28, 2002 inmate complaint, plaintiff did not squarely address how the totality of the conditions of confinement at the Waupun Correctional Institution deprived him of social interaction and sensory stimulation. Even if plaintiff had articulated such concerns in his inmate complaint, he did not appeal the decision as required step for exhausting his administrative remedies. Therefore, I will grant defendant's motion to dismiss. Because I am granting defendants' motion on their first claim, it is not necessary to decide whether they are entitled to qualified immunity.

ORDER

IT IS ORDERED that

Defendants' motion to dismiss plaintiff's claims that defendant Dr. Stephen Fleck failed to provide him with adequate mental health care and defendants Gary McCaughtry and Jon Litscher

subjected plaintiff to extreme cell temperatures and to a totality of conditions in segregation at Waupun Correctional Institution that deprived him of social interaction and sensory stimulation is GRANTED on the ground that plaintiff has failed to exhaust his administrative remedies. This case is DISMISSED without prejudice.

Entered this 30th day of October, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge