IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BERRELL FREEMAN,

Plaintiff,

v.

JON E. LITSCHER and GERALD BERGE,

Defendants.

OPINION AND ORDER

02-C-024-C

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In this civil action brought pursuant to 42 U.S.C. § 1983, plaintiff Berrell Freeman alleges that defendants violated several of his constitutional rights. In an order dated March 12, 2002, I allowed plaintiff to proceed on his Fourth Amendment unreasonable searches claim against defendants Litscher and Berge, stayed his Eighth Amendment conditions of confinement claim in order to allow him to provide the court with additional information and dismissed all other claims. After plaintiff submitted additional information, I allowed him to proceed on his Eighth Amendment claim relating to extreme cell temperatures and to the totality of the conditions of his confinement, both against defendants Litscher and Berge. The totality claim includes the following conditions: confinement to cell all but three hours a week; constant illumination; limited use of the telephone; no contact visits; and

constant monitoring. Plaintiff was not allowed to proceed on any other Eighth Amendment claims.

The case is now before the court on defendants' motion to dismiss. Defendants contend that plaintiff failed to exhaust his administrative remedies before filing suit as required by 42 U.S.C. § 1997e(a) as to his Fourth and Eighth Amendment claims. 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. I can consider this documentation without converting the motion to dismiss into a motion for summary judgment because documentation of a prisoner's use of the inmate complaint review system is a matter of public record. 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 his claims.

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 March 12, 2002 Order, dkt. #10, and the May 10 Order, dkt. #26. In addition, I am considering the exhibits that defendants and plaintiff submitted in support of their positions. I summarize below only the steps toward administrative exhaustion taken by plaintiff.

ADMINISTRATIVE EXHAUSTION

On June 16, 2000, plaintiff filed an inmate complaint (#SMCI-2000-17782), alleging that inmates at Supermax are being punished by virtue of their placement at the prison in violation of the due process clause. On July 6, 2000, the inmate complaint examiner recommended dismissing the complaint. On July 26, 2000, reviewer Huibregtse dismissed the complaint.

On July 10, 2000, plaintiff filed an inmate complaint (#SMCI-2000-19942), alleging that the cells are "extremely hot and humid" and that the heat is unbearable. On July 20, 2000, the inmate complaint examiner recommended dismissing the complaint with modification, recommending that the complaint be provided to the health and safety committee for review. On August 8, 2000, reviewer Huibregtse dismissed the complaint with modification.

On June 13, 2001, plaintiff filed an inmate complaint (#SMCI-2001-17779), complaining that a unit fan was not turned off between the hours of midnight and 8 a.m.,

disturbing his sleep. On June 21, 2001, the inmate complaint examiner recommended dismissing the complaint. On June 29, 2001, reviewer Huibregtse dismissed the complaint.

On August 15, 2001, plaintiff filed an inmate complaint (#SMCI-2001-24314), alleging that prison officials had retaliated against him by placing him in administrative segregation for pursuing his due process rights to have a Tennessee disciplinary report expunged from his file. On September 28, 2001, the inmate complaint examiner recommended dismissing the complaint. On October 4, 2001, reviewer Boge dismissed the complaint. On or about October 10, 2001, plaintiff filed a request for corrections complaint examiner review. On October 29, 2001, plaintiff's appeal was dismissed. That decision was accepted as the decision of the Secretary of the Department of Corrections on November 10, 2001.

On February 10, 2002, plaintiff filed an inmate complaint (#SMCI-2002-5531), alleging that his eyesight had deteriorated since his arrival at Supermax. On March 14, 2002, the inmate complaint examiner recommended dismissing the complaint. On March 16, 2002, reviewer Huibregtse dismissed the complaint. On March 22, 2002, plaintiff filed a request for corrections complaint examiner review, specifying that he cannot "read or write at times because of constant exposure to lights and almost total isolation and sensory deprivation." On April 1, 2002, plaintiff's appeal was dismissed. That decision was accepted as the decision of the Secretary of the Department of Corrections on April 8, 2002.

On February 24, 2002, plaintiff filed an inmate complaint (#SMCI-2002-7265), alleging that he had suffered depression since his arrival at Supermax. On March 5, 2002, the inmate complaint examiner dismissed the complaint as frivolous.

On December 12, 2001, plaintiff filed this lawsuit in circuit court for Dane County, Wisconsin.

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 unreasonable searches and seizures and to the conditions of his confinement and, therefore, his Fourth and Eighth Amendment claims should be dismissed. Specifically, defendants contend that plaintiff never filed inmate complaints relating to the unreasonable searches and seizures, the extreme cold, confinement to cell all but three hours a week, limited use of the telephone, constant monitoring or no contact visits. Although plaintiff complained of excessive heat in complaint #SMCI-2002-19942, he did not appeal that complaint to the corrections complaint examiner. In complaint #SMCI-2002-5531, plaintiff complained of deteriorating eyesight and clarified his allegation that the

deterioration was the result of the constant illumination when he filed a request for corrections complaint examiner review. Even if this complaint could be construed as a complaint about the constant illumination, the complaint was untimely. No final determination on the complaint was made by the Department of Corrections Secretary's office until April 8, 2002, almost four months after plaintiff had filed this suit. In short, plaintiff has failed to exhaust his administrative remedies with respect to his Fourth Amendment unreasonable searches claim and each aspect of his Eighth Amendment conditions of confinement claims.

Plaintiff defends his stance that he has exhausted his administrative remedies on three creative but unpersuasive grounds. First, he asserts that he is a class member in Jones 'El v. Berge, case no. 00-C-421-C, that exhaustion by one class member satisfies the requirement for the class, Hartman v. Duffey, 88 F.3d 1232, 1235 (D.C. Cir. 1996), that the unreasonable searches and conditions of confinement claims in Jones 'El were administratively exhausted and, therefore, he should be deemed to have exhausted his administrative remedies in this case. Although creative, plaintiff's argument fails. Plaintiff overlooks the fact that his case is an independent lawsuit for monetary relief and not a class action for injunctive relief. Plaintiff's suit must stand on its own merits rather than ride the coattails of Jones 'El. Whether the named plaintiffs in Jones 'El exhausted their administrative remedies is wholly irrelevant to this lawsuit.

Second, plaintiff asserts that he exhausted his administrative remedies related to "the erroneous disciplinary conviction and due process violations that resulted in his being subjected to the conditions of confinement at Supermax" in complaint #SMCI 2001-24314. Plt.'s Br. in Opp. to Dfts.' Mo. to Dismiss, dkt. #32, at 2. At best, plaintiff is correct that his inmate complaint states that his placement in administrative confinement "will ultimately lead to cruel and unusual punishment," suggesting an Eighth Amendment violation. Plt.'s Add. Br. in Opp., dkt. #33, Ex. A, at 1. Nonetheless, the inmate complaint does not focus on the conditions in segregation but instead on plaintiff's placement there. In addition, plaintiff's one general statement that his placement at Supermax "will lead to cruel and unusual punishment" does not support his argument that he exhausted his administrative remedies because such a general statement does not address the specific conditions of confinement that make up the alleged Eighth Amendment violation.

Finally, plaintiff argues that the issues raised in his lawsuit relate to "movement" rather than discipline and, therefore, are not within the scope of the inmate complaint review system. Plaintiff asserts that he must move through the level system in order not to be subjected to the inhumane conditions of confinement at Supermax. Although this argument is at least as creative as the others, it fails because the exhaustion requirement of § 1997e applies to "all inmate suits, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle,

534 U.S. 516, 122 S. Ct. 983, 992 (2002).

I conclude that plaintiff has failed to exhaust his administrative remedies and I will grant defendants' motion to dismiss.

ORDER

IT IS ORDERED that the motion to dismiss filed by defendants Jon E. Litscher and Gerald Berge is GRANTED. Because there is nothing plaintiff can do to amend his complaint that would allow it to go forward, the clerk of court is directed to enter judgment for defendants without prejudice and close the case.

Entered this 12th day of June, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge