

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

EDWARD J. PISCITELLO,

Plaintiff,

OPINION AND ORDER

v.

02-C-0252-C

GERALD BERGE,

Defendant.

This is a civil action for declaratory, injunctive and monetary relief in which plaintiff Edward J. Piscitello, an inmate at the Waupun Correctional Institution in Waupun, Wisconsin, was granted leave to proceed on claims that (1) he was denied biblical counseling courses in violation of the First Amendment and (2) the totality of the conditions of his confinement while housed at the Wisconsin Secure Program Facility (formerly the Supermax Correctional Institution) violated his Eighth Amendment rights. The alleged conditions of confinement that make up plaintiff's totality claim are: constant illumination, hourly bed checks throughout the night, extreme temperatures, 24-hour cell confinement, lack of a cell windows, limited use of the telephone, visits by video screen, constant monitoring, insufficient time in recreational facilities and inadequate facilities. See Order dated June 13, 2002, dkt. #4, at 7.

Presently before the court is defendant's motion to dismiss plaintiff's Eight Amendment claim

for failure to exhaust his administrative remedies. In support of the motion to dismiss, defendant has submitted the affidavit of John Ray, custodian of inmate complaints, in which Ray avers that plaintiff has not filed any appeal with respect to any of the above-mentioned conditions of confinement. In response, plaintiff argues that he is not required to exhaust his administrative remedies because (1) the conduct is ongoing; (2) the conditions of confinement claim is an issue that falls outside the scope of the inmate complaint review system; and (3) he was a class member in Jones 'El v. Berge, case no. 00-C-0421-C. In addition, plaintiff has submitted an institution complaint examiner's report (dated July 23, 2002) and reviewer's decision (dated August 8, 2002) for inmate complaint CCI-2002-25805 in which he complains that "he is being kept in prison without a legal basis for the WI DOC to do so." Plaintiff fails to assert what relevance these decisions have to the motion presently before the court. In any event, for the reasons stated below, I conclude that plaintiff has failed to exhaust his administrative remedies as to his Eighth Amendment conditions of confinement claim. Accordingly, I will grant defendant's motion to dismiss this claim.

OPINION

The Prison Litigation Reform Act 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." 42 U.S.C. § 1997e(a). The phrase "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.” 18 U.S.C. § 3626(g)(2). 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 Corr., 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v. Helman, 196 F.3d 727 (7th Cir. 1999). 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.”

Plaintiff argues first that he is not required to exhaust administrative remedies because the conduct is ongoing and his conditions of confinement claim falls outside the scope of the inmate complaint review system. Plaintiff is incorrect on both counts. The court of appeals has stated that “if a prison has an internal administrative 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.

Plaintiff notes that he was a class member in Jones ‘El v. Berge, case no. 00-C-421-C, a case filed in this court challenging the conditions of confinement at the Wisconsin Secure Program Facility. Plaintiff asserts that “undoubtedly [this court] relied on the plaintiff class in having exhausted their

administrative remedies.” Therefore, plaintiff argues, he should be deemed to have exhausted his administrative remedies for the purpose of prosecuting this case. However, this argument fails. The reasons for not requiring every member of a class action lawsuit to exhaust his administrative remedies before bringing a case are inapplicable to actions brought by single individuals. Plaintiff’s duty to exhaust his administrative remedies is statutory and there is no exception available to him. Accordingly, defendant’s motion to dismiss plaintiff’s Eighth Amendment claim will be granted.

ORDER

IT IS ORDERED that defendant Gerald Berge's motion to dismiss plaintiff's Eighth Amendment claim is GRANTED.

Entered this 4th day of November, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge