IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BERRELL FREEMAN,

Petitioner,

v.

JON E. LITSCHER,
and GERALD BERGE,

Respondents.

OPINION AND ORDER

02-C-0365-C

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In an order entered on September 11, 2002, I granted plaintiff's request for leave to proceed in forma pauperis on his claims that defendants Jon E. Litscher and Gerald Berge violated his rights (1) to be free from unreasonable searches under the Fourth Amendment; and (2) to be free from cruel and unusual conditions of confinement under the Eighth Amendment relating to extreme cell temperatures, food deprivation, and sensory deprivation and social isolation stemming from lack of access to the outdoors, constant illumination in his cell and constant video monitoring. Defendants have filed a motion to dismiss plaintiff's claims for failure to exhaust his administrative remedies. Plaintiff opposes the motion and has filed two motions for sanctions, alleging that "counsel for defendants has knowingly and willingly allowed and submitted false testimony" by asserting that plaintiff failed to exhaust his administrative remedies. Plt.'s Mot. for Sanctions, dkt. #16, at 1.

I conclude that plaintiff has not exhausted his administrative remedies on any of the claims on

which he was granted leave to proceed. Therefore, I will dismiss this case without prejudice to plaintiff's filing a new lawsuit after he has satisfied the exhaustion requirement.

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. Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 455 (7th Cir. 1998).

FACTS

Plaintiff is an inmate at the Wisconsin Secure Program Facility (formerly known as Supermax Correctional Facility) in Boscobel, Wisconsin. Defendant Gerald Berge is the warden of the prison. Defendant Jon Litscher is Secretary of the Department of Corrections.

On February 11, 2002, plaintiff filed inmate complaint number SMCI-2002-5531. In that complaint plaintiff writes, "Since my arrival at SMCI my vision has deteriorated to the point that I need glasses and I suffer from headaches and eye pain." The inmate complaint examiner recommended that plaintiff's complaint be dismissed because plaintiff had consulted with an eye doctor the previous month and had another appointment for the following month. In his appeal to the corrections complaint examiner, plaintiff writes, "I can't even read or write at times because of constant exposure to lights and almost total isolation and sensory deprivation." The corrections complaint examiner agreed with the conclusion of the inmate complaint examiner and recommended dismissal. Defendant Litscher

dismissed the complaint.

On February 18, 2002, plaintiff filed inmate complaint numbers SMCI-2002-6213 and SMCI-2002-6214. In complaint number SMCI-2002-6213, plaintiff alleged, "Confinement at SMCI imposes (creates) an atypical and significant hardship on me in relation to the ordinary incidents of prison life in the Wisconsin Prison System." The examiner dismissed the complaint as frivolous because the complaint was only a statement and did not indicate the relief plaintiff wanted. In complaint number SMCI-2002-6214, plaintiff alleged, "The State has by regulation(s) (statute(s)) granted me a protected liberty interest in remaining free from the type of confinement (restraint) imposed on me at SMCI." The examiner dismissed this complaint as frivolous as well. The corrections complaint examiner rejected both appeals because frivolous complaints cannot be appealed under Wis. Admin. Code. § DOC 310.13(4).

On March 8, 2002, plaintiff filed inmate complaint number SMCI-2002-12627, alleging that prison officials were depriving him of food. The examiner recommended that plaintiff's complaint be dismissed. On appeal, defendant Litscher did not address the merits of plaintiff's complaint but dismissed it for plaintiff's failure to appeal the decision within 10 days as required by Wis. Admin. Code § DOC 310.13(1).

On May 6, 2002, plaintiff filed inmate complaint number SMCI-2002-16056, alleging that prison officials were torturing him by denying him sleep medication. The examiner concluded that plaintiff's doctor had determined that sleeping pills were no longer appropriate for plaintiff and recommended that the complaint be dismissed. On appeal, defendant Litscher affirmed the decision of the examiner and

dismissed the complaint.

OPINION

A. 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." Section 1997(a)'s exhaustion requirement is mandatory and applies to all prisoners seeking redress for wrongs occurring in prison. Porter v. Nussle, 534 U.S. 516 (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 sets forth the 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 support of their motion to dismiss, defendants have submitted the affidavit of John Ray, who is the custodian of records for appeals filed by inmates in the Inmate Complaint Review System. Ray avers that after examining his records, he concluded that although plaintiff filed several inmate complaints related to the issues on which he was allowed to proceed, he appealed only one of those complaints, SMCI-2002-5531. In that complaint to the inmate complaint examiner, plaintiff writes, "Since my arrival at SMCI my vision has deteriorated to the point that I need glasses and I suffer from headaches and eye pain." However, in his appeal to the corrections complaint examiner, plaintiff writes, "I can't even read or write at times because of constant exposure to lights and almost total isolation and sensory deprivation." Defendants argue that the complaints plaintiff raised to the inmate complaint examiner and the corrections complaint examiner were not the same, so plaintiff has failed to exhaust his administrative remedies on any claim.

In his brief in opposition, plaintiff does not address the discrepancy between his complaint to

the inmate complaint examiner and the corrections complaint examiner. I agree with defendants that plaintiff attempted to raise a new issue in his appeal. Plaintiff's complaint to the inmate complaint examiner contains an allegation that he is having vision problems, but it is not clear what prison condition he wants altered, whether he is asking for eyeglasses, pain medication or something else. The examiner construed plaintiff's complaint as a request for medical treatment. It was not until his appeal that plaintiff identified that he viewed the constant illumination as the source of his problem. However, that allegation could not have been inferred reasonably from plaintiff's initial complaint.

Further, even if plaintiff's two complaints were sufficiently similar for exhaustion purposes, those complaints relate only to cell illumination. In the order granting plaintiff leave to proceed, I concluded that plaintiff's claim regarding cell illumination did not state an independent claim under the Eighth Amendment, but I construed his complaint as alleging that the constant illumination, lack of access to the outdoors and constant video monitoring together had a mutually enforcing effect that deprives plaintiff of his basic human need for sensory stimulation and social interaction. Because plaintiff has not shown that he filed complaints regarding access to the outdoors or constant video monitoring, he has not exhausted his administrative remedies with respect to his claim that the particular conditions that he complained about in this action deprived him of his right to sensory stimulation and social internaction.

Plaintiff denies that SMCI-2002-5531 was the only complaint that he appealed. He asserts that he appealed complaint numbers SMCI-2002-6213, SMCI-2002-6214, SMCI-2002-16056 and SMCI-2002-12627. However, the record reflects that complaint numbers SMCI-2002-6213, SMCI-2002-6214

and SMCI-2002-16056 were not related to the claims on which plaintiff was allowed to proceed. Rather, in complaints numbered SMCI-2002-6213 and SMCI-2002-6214, plaintiff alleged that being confined at Supermax imposed "an atypical, significant hardship" on him and that he had a "protected liberty interest" in not being confined at Supermax. These are legal phrases relevant to a claim of a procedural due process violation under the Fourteenth Amendment, but plaintiff was not allowed to proceed on a due process claim, only on a Fourth Amendment claim and several Eighth Amendment claims.

In complaint number SMCI-2002-16056, plaintiff alleges that prison officials intentionally deprived him of sleep medication to torture him. Plaintiff was not allowed to proceed on a claim that defendants were denying him adequate medical care. Rather plaintiff's Eighth Amendment claims involve allegations of extreme cell temperatures, food deprivation and sensory deprivation and social isolation stemming from lack of access to the outdoors, constant illumination in his cell and constant video monitoring. There is no mention in complaint number SMCI-2002-16056 that plaintiff could not sleep as a result of constant illumination in his cell or as a result of any of the other conditions of confinement that defendant complains of in this action.

Plaintiff does not dispute that he failed to file appeals for complaints regarding unreasonable searches or extreme cell temperatures. Therefore, these claims will be dismissed.

Plaintiff's only remaining claim is complaint number SMCI-2002-12627, which contains an allegation of food deprivation. Although defendants' motion to dismiss purports to cover all of plaintiff's claims in this case, neither defendants' brief in support of their motion nor Ray's affidavit addresses plaintiff's food deprivation claim. However, the record shows that complaint number SMCI-

2002-12627 was dismissed as untimely by the corrections complaint examiner because plaintiff failed to appeal the decision within 10 days, as required by Wis. Admin. Code § DOC 310.13(1). Because plaintiff failed to comply with the procedural requirements of the system, this claim will be dismissed as well.

B. Motions for Sanctions

Plaintiff has filed two nearly identical motions for sanctions, in which he alleges that the materials he submitted in opposition to defendants' motion to dismiss show that counsel for defendants has "submitted false testimony" and is "misrepresenting the facts" regarding defendants' motion to dismiss. Because plaintiff's materials do not demonstrate that counsel for defendants acted improperly, plaintiffs' motions for sanctions will be denied.

ORDER

IT IS ORDERED that

1. Defendants Jon Litscher's and Gerald Berge's motion to dismiss plaintiff Berrell Freeman's claims for failure to exhaust his administrative remedies is GRANTED. Plaintiff's claims are DISMISSED without prejudice to plaintiff's filing a new action after he has exhausted his administrative remedies.

2. Plaintiff's motions for sanctions are DENIED.

3. The clerk of court is directed to enter judgment dismissing this case.

Entered this 14th day of November, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge