IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EUGENE L. CHERRY,

ORDER

Plaintiff,

02-C-544-C

v.

GERALD BERGE, CINDY SAWINSKI,
JOLENE MILLER, JOLINDA WATERMAN,

Defendants.

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EUGENE L. CHERRY,

Plaintiff,

02-C-394-C

v.

JON LITSCHER, GERALD BERGE,
JIM PARISI, TIMOTHY MASON,
PAM BARTELS, KATHRYN McQUILLAN,
JOHN SHARPE, and YASMIN YUSUF-SAFAVI,

Defendants.

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These consolidated cases were closed in June 2003, after I granted defendants' motion for summary judgment on all of plaintiff's claims that had not been dismissed at an earlier

stage. Dkt. #37. Plaintiff appealed the decision, which was affirmed by the Court of Appeals for the Seventh Circuit in April 2004.

Now, plaintiff has filed a document he calls a "motion for reconsideration," which I construe as a motion to reopen the case under Fed. R. Civ. P. 60. In his motion, plaintiff argues that the decision to dismiss two of his claims was erroneous in light of subsequent case law. First, plaintiff says that under Jones v. Bock, 127 S. Ct. 910 (2007), it was an error to dismiss a food deprivation claim for failure to exhaust his administrative remedies. Second, he says Gilllis v. Litscher, 468 F.3d 868 (7th Cir. 2006), requires reconsideration of his claim that several prison officials denied him medication in violation of the Eighth Amendment.

Plaintiff's motion will be denied for two reasons. First, as I explained to petitioner in the context of his Rule 60 motion in Cherry v. Berge, 05-C-38-C, district courts may not reopen cases because there has been a change in the law. Gleash v. Yuswak, 308 F.3d 758, 761 (7th Cir. 2002); Norgaard v. DePuy Orthopaedics, Inc., 121 F.3d 1074, 1076 (7th Cir. 1997).

Second, even if legal error were an appropriate ground for a Rule 60 motion, neither Jones nor Gillis has any bearing on these cases. In Jones, the Supreme Court made three determinations regarding the requirement in the Prison Litigation Reform Act for prisoners to exhaust their administrative remedies before bringing their claims to federal court: (1)

failure to exhaust is an affirmative defense that must be proven by the defendants; (2) the PLRA does not require prisoners to name potential defendants in their grievances; and (3) the PLRA does not impose a "total exhaustion" rule, meaning that district courts may not dismiss the entire case for failure to exhaust if the prisoner has exhausted some of his claims but not all of them.

Even before Jones, this court followed each of rules set forth in that case. Massey v. Helman, 196 F.3d 727 (7th Cir. 1999) (failure to exhaust is affirmative defense); Strong v. David, 297 F.3d 646 (7th Cir. 2002) (PLRA does not require defendants to be named in grievances); Henderson v. Sebastian, 2004 WL 1946398, *5 (W.D. Wis. 2004) (rejecting "total exhaustion" rule). Thus, I did not dismiss plaintiff's food deprivation claim because he did not name a defendant in his grievance, because another claim had been dismissed for a failure to exhaust or because plaintiff had failed to allege in his complaint that he had exhausted his administrative remedies. Rather, I dismissed this claim because defendants proved in their motion for summary judgment that petitioner had never completed the grievance process with respect to his food deprivation claim: he withdrew one grievance and failed to appeal another one.

Petitioner is wrong if he believes that Jones did away with the PLRA's exhaustion requirement all together. Rather, the case clarified how the requirement should be applied. If prison officials are able to prove that a prisoner failed complete the grievance process for

a particular claim, as defendants proved in this case, the claim is still subject to dismissal.

In Gillis, the court of appeals held that a district court had erred in granting summary judgment to prison officials in a prisoner's lawsuit challenging a behavior modification program in which the prisoner was housed in a cell without clothes, a mattress or hygiene products. Petitioner argues that Gillis is important in his case because he was denied medication as a result of a behavior modification program. Although petitioner is correct about the facts of his case, he is wrong about the implications of Gillis on his claim. Petitioner was denied medication in isolated incidents because he exposed himself to staff, making his claim much more similar to Freeman v. Berge, 441 U.S. 543 (7th Cir. 2006), in which the court of appeals held that there is no Eighth Amendment violation when a prisoner is denied food because he failed to a comply with a rule to be fully dressed during meal delivery.

In any event, I did not dismiss petitioner's claim for reasons related to Gillis or Freeman. Although I noted petitioner's failure to comply with rules, I did not rest the decision on that ground. Rather, I granted summary judgment to defendants on this claim because petitioner did not adduce any evidence that he had been harmed by any missed

doses of medication.

ORDER

Plaintiff's motion to reopen the case under Fed. R. Civ. P. 60 is DENIED.

Entered this 2nd day of April, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge