IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DONALD WHITE,
Inmate #00053811,

Plaintiff,

OPINION AND ORDER
00-C-237-C

v.

OFFICER MATTI and OFFICER GOVIER,

Defendants.

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This is a civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Donald White is an inmate at the Supermaximum Correctional Institution in Boscobel, Wisconsin. He contends that defendants Matti and Govier violated his rights under the Eighth Amendment by using excessive force. In an order entered on May 26, 2000, I granted plaintiff leave to proceed in forma pauperis on this claim. On August 7, 2000, defendants filed a motion for summary judgment in which they contend that plaintiff failed to exhaust his administrative remedies prior to filing suit as required by 42 U.S.C. § 1997e(a). Subject matter jurisdiction is present. See 28 U.S.C. § 1331.

UNDISPUTED FACTS

Plaintiff Donald White is an inmate at the Supermax Correctional Institution in Boscobel, Wisconsin. Defendants Matti and Govier are officers at the institution. Plaintiff filed a lawsuit under 42 U.S.C. § 1983, in which he alleges that defendants Matti and Govier used excessive force against him on February 1, 2000.

In an offender complaint dated February 6, 2000, plaintiff complained about the February 1 incident. The inmate complaint examiner returned plaintiff's offender complaint along with a memorandum dated February 8, 2000. The memorandum stated:

> You are directed to contact your Unit Manager and the First Shift Supervisor regarding this issue. You should submit an **interview request form** to the staff member and direct your concern(s) directly to him or her. If the issue is not resolved, you must submit the interview request **response** to show their answer when filing another complaint.

Plaintiff's file at the institution does not contain a response from the unit manager or the first shift supervisor or any other complaints concerning plaintiff's allegations that defendants used excessive force on February 1, 2000. Plaintiff has not filed an appeal with the corrections complaint examiner concerning his allegations that defendants used excessive force on February 1, 2000.

OPINION

Under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), "[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).

Plaintiff's claim for excessive force is one covered by § 1997e(a). The language of 18 U.S.C. § 3636(g)(2) demonstrates Congress's intention to make the exhaustion requirement applicable to every kind of civil action challenging any aspect of prison life, whether relating to the physical conditions of the prison, medical care, distribution of mail, visiting privileges, cell

searches, the complaint process or intentional battery by guards. The only exception is the one specified by Congress: petitions for writs of habeas corpus (which have their own exhaustion requirements). This broad interpretation is the most natural reading of the language in the two statutes. It is also the one that accords with the common judicial practice of treating proposed suits from prisoners as falling into one of two categories: "conditions" suits, a category that covers every challenge to anything that happens in prison or jail, and habeas corpus actions, a category that covers any action implicating the fact or duration of confinement. See, e.g., Preiser v. Rodriguez, 411 U.S. 475, 498-99 (1973) (discussing difference between challenges that must be brought as petitions for writs of habeas corpus and those that may be brought as suits attacking conditions of confinement; latter category includes suits alleging the denial of permission to purchase certain religious publications, Cooper v. Pate, 378 U.S. 546 (1964); suits alleging the confiscation of legal materials, Houghton v. Shafer, 392 U.S. 639 (1968); and suits seeking damages for physical injuries sustained while in solitary confinement, Haines v. Kerner, 404 U.S. 519 (1972)). See also Farmer v. Brennan, 511 U.S. 825, 833 (1994) (discussing protection of inmates from other inmates as a condition of confinement subject to strictures of Eighth Amendment) (citing Wilson v. Seiter, 501 U.S. 294, 303 (1991)).

The Court of Appeals for the Seventh Circuit has adopted an expansive reading of §§ 1997e(a) and 3626(g). See Perez, 182 F.3d at 534 (holding that § 1997e applies to claim of

excessive force and reading statutory language in light of McCarthy v. Bronson, 500 U.S. 136 (1991), in which the Supreme Court held that when Congress used the phrase "prisoner petitions challenging conditions of confinement" in 28 U.S.C. § 636(b)(1)(B), it meant to include prisoner petitions relating both to continuous conditions and to isolated episodes of unconstitutional conduct, such as claim of excessive force). See also Booth, 206 F.3d at 295 ("Therefore, we believe that the expansive and somewhat overlapping language Congress employed in § 3626(g)(2) must be read — naturally and in the proper context — to encompass all prisoner petitions."); Freeman v. Francis, 196 F.3d 641, 643-44 (6th Cir. 1999) (claim of excessive force is covered by exhaustion requirements of § 1997e(a)); Garrett v. Hawk, 127 F.3d 1263 (10th Cir. 1997) (claims of excessive force and inadequate medical care covered by exhaustion requirements).

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 (emphasis added). Further emphasizing the importance of exhausting administrative remedies before filing suit, the court of appeals has made clear that "[t]here is no futility exception to § 1997e(a)," Perez,

182 F.3d at 537; see also Massey, 196 F.3d at 733, and that a prisoner's request for monetary damages that are unavailable under the administrative complaint system does not allow a prisoner to avoid 42 U.S.C. § 1997e's exhaustion requirement. See Perez, 182 F.3d at 537-38; see also Nyhuis v. Reno, 204 F.3d 65, 70 (3d Cir. 2000) (discussing circuit split on whether prisoner needs to exhaust when seeking money damages not available through prison grievance procedure).

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." Plaintiff filed a proper offender complaint pursuant to § DOC 310.09. Rather than making a decision on the merits of plaintiff's complaint, the institution complaint examiner returned plaintiff's complaint and directed him to submit an interview request form to the unit manager and first shift supervisor. Defendants point out that § DOC 310.11(7) provides that "The ICE may direct the inmate to discuss the issue with an appropriate institution staff member prior to the complaint investigation." Therefore, pursuant to § DOC 310.11(7), the institution complaint examiner had the authority to instruct plaintiff to resolve his complaint informally before using the inmate grievance procedure.

Plaintiff does not argue that he followed the examiner's instructions. Instead, plaintiff contends that the unit manager could not address his complaint because it related to security issues and that the first shift supervisor could not address his complaint because the incident occurred during the second shift. That plaintiff made an independent decision that the unit manager and first shift supervisor could not address his complaint does not excuse his failure to direct his concerns to them. If he had tried to resolve his complaint through the unit manager and first shift supervisor and was unable to do so, he could have submitted their response along with a new offender complaint. He failed to do so. Plaintiff also argues that he appealed the complaint examiner's decision to the warden, although he fails to submit any proof of that appeal. Regardless whether he wrote to the warden, such an appeal would not satisfy § DOC 310.04's requirement that the inmate follow each step of the inmate grievance system in order to fully exhaust his administrative remedies. Because plaintiff failed to exhaust his administrative remedies before filing this lawsuit, defendants' motion for summary judgment will be granted.

ORDER

IT IS ORDERED that the motion of defendants Matti and Govier for summary

judgment is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 19th day of October, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge