IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TODD A. LODHOLZ,

Plaintiff,

v.

STEPHEN M. PUCKETT,
CORRECTIONS CORPORATION OF AMERICA,
KAY HIGGINS,
JOHN DOE(S),

Defendants.

OPINION AND ORDER

03-C-0350-C

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This is a civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Plaintiff contends that defendants Stephen M. Puckett, Kay Higgins and various John Does violated his Eighth Amendment rights by being deliberately indifferent to his serious medical needs while he was incarcerated at the North Fork Correctional Facility in Oklahoma. Defendants Puckett and Higgins have moved to dismiss the case on the ground that plaintiff failed to exhaust his administrative remedies. Additionally, defendant Higgins has requested dismissal of plaintiff's claims against her on the ground that this court lacks personal jurisdiction over her and defendant Corrections Corporation of America has moved to

dismiss the case for failure to state a claim upon which relief can be granted. With this variety of motions to be resolved, the first question is the order in which the motions must be decided.

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), provides 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." In Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999), the court of appeals held that it was improper for a district court to dismiss the case on its merits instead of ruling first on a defendant's motion to dismiss for failure to exhaust his administrative remedies. See also Massey v. Helman, 196 F.3d 727 (7th Cir. 1999). Although the court of appeals has not said which matter must be resolved first when both exhaustion and lack of personal jurisdiction are raised on a motion to dismiss, the general rule is that questions of jurisdiction come first. See, e.g., Leroy v. Great Western United Corp., 443 U.S. 173, 180 (1979) (stating that court without personal jurisdiction lacks power to exercise control over parties). Therefore, I will start with defendant Puckett's motion to dismiss the claim against him for plaintiff's failure to exhaust his administrative remedies. Second, I will consider defendant Higgins's motion to dismiss for lack of personal jurisdiction and will not decide her motion to dismiss for failure to exhaust unless I determine that this court has personal

jurisdiction over her. Last, I will address defendant Corporation of America's motion to dismiss for failure to state a claim upon which relief may be granted.

I conclude that I must grant defendant Puckett's motion because plaintiff did not exhaust his administrative remedies with respect to his claim against defendant Puckett. However, I will deny defendant Higgins's motion to dismiss for lack of personal jurisdiction because I am transferring this case to Oklahoma where Higgins resides. Because this court lacks personal jurisdiction over Higgins, I will leave to the Oklahoma court the decision whether Higgins is entitled to dismissal of the claims against her on the ground that plaintiff failed to exhaust his administrative remedies. Finally, I conclude that the motion to dismiss filed by defendant Corrections Corporation of America must be denied, because it is a necessary party to produce the identities of the John Doe defendants.

In deciding a motion to dismiss for failure to exhaust, a court may take judicial notice of public records 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) (citing General Electric Capital Corporation v. Lease Resolution Corporation, 128 F.3d 1074, 1080-81 (7th Cir. 1997)). In deciding whether a party has made the necessary showing of personal jurisdiction, a court may rely on the allegations of the complaint and also may receive and weigh affidavits submitted by the parties. See Nelson v. Park Industries, Inc., 717 F.2d 1120, 1123 (7th Cir. 1983). Finally, in deciding a motion to

dismiss for failure to state a claim upon which relief may be granted, a court must construe the complaint liberally in favor of the plaintiff, taking as true all well-pleaded factual allegations and all reasonable inferences which may be drawn from them. Leahy v. Board of Trustees of Community College Dist. No. 508, 912 F.2d 917, 921 (7th Cir. 1990).

For the sole purpose of deciding the issues of exhaustion as to defendant Puckett, personal jurisdiction as to defendant Higgins and failure to state a claim as to defendant Corrections Corporation of America, I find that the well-pleaded allegations of the complaint, affidavits and admissible public records submitted by defendants show the following.

## FACTUAL BACKGROUND

Plaintiff Lodholz is a Wisconsin state prisoner presently confined at the Fox Lake Correctional Institution in Fox Lake, Wisconsin. Defendant Puckett is the director of offender classification of the Wisconsin Department of Corrections, a government agency located in Madison, Wisconsin. Defendant Corrections Corporation of America is a private prison corporation. At all relevant times, it was a party to a contract with the Wisconsin Department of Corrections for the transfer and housing of convicted felons at the North Fork Correctional Facility in Sayre, Oklahoma. Defendant Kay Higgins is employed by defendant Corrections Corporation of America as a social worker at the North Fork

Correctional Facility. The John Doe defendants are employees of defendant Corrections Corporation of America who work at the North Fork facility.

Defendant Higgins has not had a residence in Wisconsin and has not conducted any business transactions with persons in the state of Wisconsin.

On September 1, 1999, plaintiff was incarcerated at the Kettle Moraine Correctional Institution. Around that time, he learned that the Program Review Committee intended to transfer him to the North Fork Correctional Facility in Oklahoma. In a document titled "Request for Review of Assessment and Evaluation or Program Review Action," plaintiff asked for reconsideration of the transfer decision. In support of his request, he wrote,

> I have medical problems documented in my file and I saw Dr. Horn on 10-6-99 and she put in paperwork for me to have appointments scheduled in Madison to see orthopedic specialists and neurosurgeons. I have shrinking cartilage around my L2 and L5 back vertebrae which causes a pinched nerve, which causes an agonizing pain and throb down the back of my left leg and when the leg is moved or bent it only magnifies the pain. I also have a high triglyceride level in my blood I'm on medication for and my medication for that ailment is being changed! My parents are going to be filing divorce papers for me and I will be having hearings to attend concerning my divorce! My wife will argue the proceedings. I'm requesting a change in my out of state transfer to Oklahoma. I'm requesting to be kept here at KMC so that I can be seen by the specialists and surgeons. I've been put on light duty for work assignments and I have the lightest duty utility job in the unit. I'm requesting that a hold be put on my transfer status until after the doctors' appointments and divorce proceedings are handled and resolved. Thank you very much.

In response to the request for review, defendant Puckett affirmed the original action, writing:

> Your request for a review of your last A&E/PRC action was undertaken. No

> changes will be made to your custody or placement at this time. These assignments are appropriate based on factors outlined in 302.14, 302.16 and if applicable, 302.145. However, your concerns can be addressed again at your next scheduled PRC. I urge you to discuss these matters with your social worker and bring them before the PRC at recall. In addition, you may also discuss program alternatives with your social worker to submit to the PRC for consideration at your next recall.

Sometime between September 1, 1999 and April 5, 2000, plaintiff was transferred to Oklahoma. While he was confined at the North Fork facility, plaintiff's medication was increased because of his emotional distress. Plaintiff's medical needs were not met while he was confined at the North Fork Correctional facility. Plaintiff told his social worker about this situation but she recommended that he stay confined in Oklahoma.

On April 5, 2000, the Program Review Committee reviewed plaintiff's designation to Oklahoma and did not make a change. For this reason, plaintiff completed another "Request for Review of Assessment and Evaluation or Program Review Action" form in which he wrote,

> I am requesting to be reassigned back to WI because I am serving a sentence for misdemeanor theft and according to Oklahoma state statutes I was not supposed to be brought down to NFCF. I'm also requesting minimum for work release because I have no escape "charges" on record and I have only had 1 minor since being incarcerated! I am asking to be reassigned to WI. & brought back. Thank you.

On April 26, 2000, defendant Puckett affirmed the Program Review Committee's decision, writing, "You will be returned when a replacement is found for you."

John Ray is employed by the State of Wisconsin as a Corrections Complaint Examiner. He has access to and is the custodian of records for appeals filed by inmates dissatisfied with decisions on their complaints filed with Wisconsin's Inmate Complaint Review System. Ray has examined the regularly conducted business records of his office and has determined that plaintiff filed no inmate complaint in which he alleged that he was not treated for a neurological and orthopedic condition in 1999.

Plaintiff did not file a grievance concerning the facts relating to his complaint. In his complaint, he explains his failure to grieve the facts as follows:

> Pursuant to Admin. Code DOC 310-08 Scope of complaint review system. (2) An inmate may not use the ICRS to raise the following issues: (b) A program review committee decision.

Inmates at the North Fork Correctional Facility have available to them a formal grievance process to request action by prison staff on a number of different issues, including medical treatment.

## OPINION

### A. Defendant Puckett's Motion to Dismiss

In his complaint, plaintiff alleged that defendant Puckett violated plaintiff's Eighth Amendment rights when he refused to intercede on plaintiff's behalf to prevent his transfer to Oklahoma. In an order dated July 16, 2003, I denied plaintiff leave to proceed on that

claim. However, I construed the allegations of the complaint generously and granted plaintiff leave to proceed on a possible claim that while he was confined at the North Fork facility, he advised defendant Puckett that his serious medical needs were not being met and that Puckett was deliberately indifferent to those needs.

Now defendant Puckett has moved to dismiss plaintiff's claim against him on the ground that plaintiff has failed to exhaust his administrative remedies. In this circuit, exhaustion is an affirmative defense that the defendants have the burden of pleading and proving. Massey, 196 F.3d at 732. Defendant Puckett has met that burden.

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), states 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." Moreover, the Court of Appeals for the Seventh Circuit has held 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.

The facts reveal that plaintiff failed to file any inmate complaint that would have put Puckett on notice that plaintiff was not getting medical treatment for a serious medical need

while he was confined at the North Fork facility. Plaintiff concedes in his complaint that he has not availed himself of a grievance procedure. However, he argues that he was not required to exhaust his administrative remedies because: 1) § 1997e(a) does not apply to private correctional facilities such as the North Fork Correctional Facility; and 2) the administrative grievance system was futile because an inmate may not challenge an action or decision of the Program Review Committee.

Plaintiff's argument that § 1997e(a) does not apply to private correctional facilities is misplaced. The relevant provision reads,

> (a) Applicability of administrative remedies
>
> > No 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.

Plaintiff contends that § 1997(a), which defines the term "institution" to exclude private correctional facilities, should be read to exclude licensed private correctional facilities, such as the North Fork Correctional Facility, from the scope of the Prison Litigation Reform Act. He cites Speener v. Gudmanson, 2000 WI APP 78, 234 Wis. 2d 461, 610 N.W.2d 136, to support this proposition.

Plaintiff misunderstands the relevance of Speener. In Speener, a Wisconsin state court of appeals interpreted the *Wisconsin* Prisoner Litigation Reform Act and concluded that

the definition of "correctional institution" did not include out-of-state correctional facilities. Id. at ¶ ¶8-10. However, because plaintiff is suing defendant Puckett in federal court for alleged violations of his constitutional rights, the applicable law is the *federal* act, which is different from Wisconsin's act. The term "institution" is nowhere used in § 1997e(a). If Congress intended to exclude private correctional facilities from the reach of § 1997e(a), it would have used the defined term "institution," which explicitly excludes private licensed facilities. See 42 U.S.C. § 1997(a). Speener does not control this case and § 1997e(a) requirement extends to persons incarcerated in private correctional facilities.

Next, plaintiff argues that any grievance he may have filed would have been futile because Wis. Admin. Code § 310.08 excludes decisions of a program review committee from review under the inmate complaint review system. However, the program review committee decisions to transfer plaintiff or retain him at an out-of-state facility are not at issue in this case. The issue is whether defendant Puckett was deliberately indifferent to plaintiff's medical needs during plaintiff's Oklahoma incarceration. This is a matter that the inmate complaint review system could review.

Plaintiff cannot accuse defendant Puckett of being deliberately indifferent to his medical needs when he has never given notice of such needs to defendant Puckett. One of the purposes of the administrative exhaustion requirement in prisoner civil rights cases is to give correctional officers the opportunity to resolve the perceived problem before courts

become involved. See, e.g., Smith v. Zachery, 255 F.3d 446, 450-51 (7th Cir. 2001), cert. denied, 535 U.S. 906 (2002). Plaintiff was required to communicate through Wisconsin's administrative grievance system his claim that he was suffering serious medical needs. He admits that he failed to do so. Therefore, I will grant defendant Puckett's motion to dismiss.

B. Higgins's Motion to Dismiss

Defendant Kay Higgins has moved for dismissal on the ground that this court lacks personal jurisdiction over her and on the ground that plaintiff has failed to exhaust his administrative remedies on his medical care claim. As I noted earlier, I will first address the question whether this court can exercise personal jurisdiction over Higgins and will address the exhaustion issue only if personal jurisdiction exists.

Defendant Higgins argues that she cannot be sued in this state on plaintiff's claim of wrongdoing because 1) Wisconsin's long-arm statute, § 801.05, does not authorize plaintiff's suit and 2) she has not had the required "minimum contacts" with the state of Wisconsin that would subject her to suit within the state. On a motion to dismiss for lack of personal jurisdiction, the burden of proof rests on the party asserting jurisdiction. Nelson, 717 F.2d at 1123. All disputes concerning the relevant facts are resolved in favor of the party asserting the personal jurisdiction. See id.

Defendant has averred that she does not have a residence in Wisconsin and that she

does not conduct any "business transactions" within the state. Plaintiff has put in no evidence to counter this averment. Instead, he argues in his brief that "[d]efendant Higgins had many dealings with [the Wisconsin Department of Corrections'] main office in Madison, WI[,] having to do with the recommendations and decisions concerning the placement and welfare of [Wisconsin] prisoners." This is a statement that could not be considered even if it were made in an affidavit because plaintiff has not established how he might have personal knowledge of Higgins's interactions with the state of Wisconsin. It is not enough to subject Higgins to suit in Wisconsin for plaintiff to allege that her work with Wisconsin inmates housed in Oklahoma came about because of a contract between the state of Wisconsin and her employer, Corrections Corporation of America. Calder v. Jones, 465 U.S. 783, 790 (1984).

Furthermore, plaintiff has failed to show how defendant Higgins might be subject to jurisdiction in this state under Wisconsin's long-arm statute, Wis. Stat. § 801.05. Possibly plaintiff is saying that defendant Higgins's acts in Oklahoma caused him a local injury, pursuant to § 801.05(4). However, the statute requires that the injury be inflicted to a person or property within "this state" and plaintiff has made no showing that Higgins's alleged indifference to his medical needs caused any harm that lasted beyond the duration of his incarceration in Oklahoma. Therefore, plaintiff has failed to meet the burden of showing that this court has personal jurisdiction over defendant Higgins.

However, I believe that transfer is more appropriate than outright dismissal of Higgins from the case. Although serious questions exist about the viability of plaintiff's entire case, since it may be subject to dismissal for failure to exhaust his administrative remedies on his medical care claim, I cannot decide the question. This court lacks personal jurisdiction over defendant Higgins and defendant Corrections Corporation of America has not moved to dismiss for failure to exhaust.

Under 28 U.S.C. § 1631, if it is in the interest of justice, a court must transfer such action or appeal to any other court in which the action could have been brought if it finds that there is a want of jurisdiction. See Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 818 (1988) (stating that courts have authority to transfer under 28 U.S.C. § 1631 despite lack of jurisdiction). Because I have dismissed defendant Puckett from the action, all of plaintiff's remaining claims are based on events that allegedly occurred in Oklahoma. Furthermore, defendant Higgins and the John Doe defendants are employees of defendant Corrections Corporation of America and are all likely residents of Oklahoma. It will be more efficient to transfer the action to Oklahoma than to dismiss defendant Higgins and then wait for the same motions to be filed by the Doe defendants.

C. Corrections Corporation of America

In his complaint, plaintiff alleged that defendant Corrections Corporation of America was liable to him because it violated Okla. Stat. tit. 57, § 563.2, which prohibits a private prison contractor from accepting out-of-state prisoners convicted of a misdemeanor, and under the theory of *respondeat superior*. In this court's July 16, 2003 order, I told plaintiff that he could not sue defendant Corrections Corporation of America under a theory of *respondeat superior* under 42 U.S.C. § 1983. In addition, I declined to exercise supplemental jurisdiction over plaintiff's Oklahoma state law question. However, because there were unnamed John Doe defendants whose identities would be known to the corporation that hired them, I granted plaintiff leave to proceed against defendant Corrections Corporation of America for the sole purpose of allowing plaintiff to discover the identities of the Doe defendants.

Defendant Corrections Corporation of America now moves for dismissal on the ground that plaintiff has alleged no constitutional claim against it. It argues that it was improper for this court to retain it as a defendant for the sole purpose of identifying the John Doe defendants. According to defendant, Duncan v. Duckworth, 644 F.2d 653 (7th Cir. 1981), holds that a likelihood of personal involvement is required to save a party from dismissal in a § 1983 action.

Defendant misreads the holding of Duncan. In Duncan, the issue was complicated by the plaintiff's failure to use fictitious names to refer to unknown defendants in the

complaint. Id. at 656. The Court of Appeals for the Seventh Circuit recognized that if the plaintiff had properly used fictitious names in the complaint, the district court would have been required to order the disclosure of the names instead of dismissing the complaint so that the plaintiff could serve his complaint on the John Doe defendants. Id.; Maclin v. Paulson, 627 F.2d 83, 87-88 (7th Cir. 1980). In this case, plaintiff has properly used fictitious names in his complaint.

Furthermore, the court of appeals concluded that Duckworth's dismissal from the Duncan case was proper both because it was unlikely that he was personally involved in causing plaintiff constitutional harm and because it was unlikely that he would have knowledge of the identities of the unknown defendants. In particular, the court of appeals noted that "Duckworth's presence is not needed to insure that those more directly involved will be identified." Duncan, 644 F.2d at 656.

Defendant Corrections Corporation of America has not yet identified the Doe defendants. Therefore, I cannot conclude that its presence in this action is "not needed" to insure the identification of the unknown defendants. Therefore, I will deny its motion to dismiss.

ORDER

IT IS ORDERED that

1. Defendant Stephen M. Puckett's motion to dismiss is GRANTED and defendant Puckett is DISMISSED from this case.

2. Defendant Corrections Corporation of America's motion to dismiss is DENIED.

3. Defendant Higgins's motion to dismiss the complaint for lack of personal jurisdiction is DENIED.

4. Pursuant to 28 U.S.C. § 1631, I am transferring this action to the United States District Court for the Western District of Oklahoma.

5. The clerk of court is directed to transmit the record of this case to the United States District Court for the Western District of Oklahoma.

Entered this 24th day of November, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge