IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TITUS HENDERSON,

Plaintiff,

v.

VICKI SEBASTIAN, GERALD BERGE, MATTHEW FRANK and CATHERINE BROADBENT,

Defendants.

OPINION AND ORDER

04-C-0039-C

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This is a civil action for monetary relief brought pursuant to 42 U.S. C. § 1983. In an order dated April 6, 2003, I granted plaintiff Titus Henderson leave to proceed on his claims that defendants Vicki Sebastian and Catherine Broadbent violated his First Amendment right to freely exercise his religion and the Religious Land Use and Institutionalized Persons Act (RLUIPA) by denying him copies of two Taoist texts and forcing him to submit to Christianity as part of a behavior modification program. In addition, I granted plaintiff leave to proceed on his claim that defendants Matthew Frank and Gerald Berge violated the Establishment Clause by using tax dollars to purchase the Christian television network "Trinity Broadcast Network: Sky Angel." Now before the court

is defendants' motion to dismiss plaintiff's free exercise and RLUIPA claims for failure to exhaust administrative remedies. In addition, defendants request dismissal of the entire action pursuant to a total exhaustion rule.

In support of their motion to dismiss, defendants submitted documents relating to plaintiff's exhaustion efforts within Wisconsin's inmate complaint review system. Plaintiff submitted additional documents in opposition to the motion. I can consider the parties' documentation without converting the motion to dismiss into a motion for summary judgment because documentation of a prisoner's use of the inmate complaint review system is a matter of public record. Menominee Indian Tribe of Wisconsin v. Thompson, 161 F. 3d 449, 455 (7th Cir. 1998); General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997). For the reasons stated below, I conclude that plaintiff has failed to exhaust his administrative remedies as to his free exercise and RLUIPA claims. Accordingly, I will grant defendant's motion to dismiss those claims. However, plaintiff's case will not be dismissed in its entirety. I do not believe that the Prison Litigation Reform Act mandates dismissal of actions containing both exhausted and unexhausted claims and to do so would be inefficient, punitive and inconsistent with the objectives of the Act.

OPINION

A. Governing Law

The exhaustion provision of the 1996 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." 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 "[e]xhaustion of administrative remedies, as required by § 1997e, is a condition precedent to suit" and district courts lack discretion to decide claims on the merits unless the exhaustion requirement has been satisfied. Dixon v. Page, 291 F.3d 485, 488 (7th Cir. 2002); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999). The court of appeals has held also 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." Massey v. Helman, 196 F.3d 727, 733 (7th Cir. 1999). In order to exhaust administrative remedies, an inmate must follow the rules that the state has established governing the administrative process. Dixon, 291 F.3d at 491;

Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002).

Wisconsin inmates must comply with the exhaustion procedures set out in Wis. Admin. Code §§ DOC 310.01-310.18. Under these provisions, an inmate complaint must "contain only one issue per complaint and shall clearly identify the issue." Wis. Admin. Code § DOC 310.09(1)(e). Upon receipt of a complaint, an inmate complaint examiner may investigate it, return the complaint forms for failure to meet filing requirements or recommend a decision to the appropriate reviewing authority. Wis. Admin. Code § DOC 310.07(2). If the examiner rejects the complaint, an inmate may modify it to comply with filing requirements but may not appeal the rejection. Wis. Admin. Code § DOC 310.13(3). If the examiner makes a recommendation, the reviewing authority is to dismiss, affirm or return the complaint for further investigation. Wis. Admin. Code § DOC 310.12. An inmate who is dissatisfied with the decision of the reviewing authority may appeal that decision to the corrections complaint examiner, who is to conduct additional investigation where appropriate and make a recommendation to the secretary of the Wisconsin Department of Corrections. Wis. Admin. Code § DOC 310.13. Within forty-five days after a recommendation has been made, the secretary must accept it in whole or with modifications, reject it and make a new decision or return it for further investigation.

B. Defendants' Argument

Defendants concede that plaintiff exhausted administrative remedies with respect to his establishment clause claim through offender complaint No. WSPF-2003-30386, in which plaintiff alleged as follows:

> On Channel 28, Christianity is being used as program chan[n]el selected by the Program Director. This selection of only Christian programs violates my 1st Amendment right t[o] the Establishment Clause.

Defendants contend, however, that this is the only inmate complaint that plaintiff filed that relates to his allegations in this action.

B. Plaintiff's Response

1. Free Exercise and RLUIPA claim was incorporated into WSPF-2003-30386

In response to defendants' challenge, plaintiff raises a number of creative but ineffective arguments. One of plaintiff's arguments is that his free exercise and RLUIPA claims were so closely related to his establishment clause claims that they were incorporated into complaint WSPF-2003-30386. This argument ignores the Department of Corrections' mandate that an inmate "clearly" identify the relevant issue in his complaint; implied grievances do not meet this standard. Moreover, there is no merit to plaintiff's argument that these claims are closely related. The single commonality is that they both involve

religion. However, plaintiff's establishment clause claim is based on the fact that a Christian television network is available at the prison while his free exercise claim is based on the denial of religious texts and alleged forced submission to Christian teachings.

From petitioner's brief, it appears that he is confused about the distinction between the establishment clause and the free exercise clause because he uses the terms interchangeably. As a pro se litigant, he is not expected to understand how these clauses differ; however, it may help him in developing his arguments in the future if he understands the distinction. Generally speaking, the establishment clause creates a limitation on the government. It prohibits government from acting in ways that have the purpose or effect of endorsing one religion or religion in general over any other religion or no religion at all. By contrast, the free exercise clause creates an individual right. It provides a person with limited protection to exercise the religion of his choosing without government interference. For example, plaintiff's claim that the facility provides a Christian television network but no other comparable network for other religions arises under the establishment clause because these allegations suggest that the facility is endorsing Christianity. This claim does not arise under the free exercise clause because plaintiff's ability to practice Taoism is not affected by the existence of Christian television programming, which he can watch or not watch as he chooses.

Plaintiff contends that if complaint examiners had investigated his claims about the

television station, they would have discovered his claims about being denied certain religious texts and being forced to submit to Christian teachings. Investigation is discretionary under the inmate grievance review system. Wis. Admin. Code §§ DOC 310.07(2) and 310.13. In any event, the procedures provide for investigation of the subject of the complaint; they do not call for an examiner to discover whether the inmate filing the grievance has any other factually and legally distinct claims for which he seeks redress but does not mention in his complaint.

Finally, even if plaintiff's free exercise and RLUIPA claims had somehow been integrated, his complaint would have violated the department of corrections rule that an inmate complaint contain only one issue. Wis. Admin. Code § DOC 310.09(1)(e).

2. Exhaustion through WSPF-2003-18203

Alternatively, plaintiff contends that he exhausted his administrative remedies in inmate complaint WSPF-2003-18203, in which he alleged:

> I've recently requested that the property staff send my level 3 property as permitted in level Program Handbook. The past 4-5 weeks I requested my property + offered to return some of my legal property to receive my level 3 property but I've been denied to do so. I'm requesting my property as level 3 stated in the Handbook.

The inmate complaint examiner recommended that the complaint be dismissed after

advising plaintiff to follow procedures requiring him to specify exactly what property he would like. The reviewing authority dismissed the complaint and petitioner appealed, arguing as follows:

> I'm appealing complaint #18203. Institution Handbook stated that prisoners will receive Level 3 property. The Institution Property C.O.II Wetter has refused to send inventory slip to examine so prisoner know exactly what to ask for. I've sent 2 request a week asking C.O. II Esser, C.O. II Slaney, C.O. II McCormick + Sgt. Murray to send property: 1. Level 3 hygiene, 1 lotion or oil (new), 2.) Personal books + papers allowed level 3, 3.) DOC 303 manual. I can't explain no simple than I have just presented to you. They've known some of my property is missing. I will be filing W.S.A. 893.35 Action to Recovery Personal Property. I've asked for property for the last 3 months, March, April, May + June.

A deputy secretary of the department of corrections accepted the recommendation of the corrections complaint examiner and upheld the denial.

Again, plaintiff's argument ignores the requirement that inmate complaints identify the relevant issue "clearly." Wis. Admin. Code § DOC 310.09(1)(e); see also Strong v. David, 297 F.3d 646, 649 (7th Cir. 2002) ("grievances must contain the sort of information that the administrative system requires"). In this instance, plaintiff did not say in his complaint either that he wanted material that was religious in nature or that his ability to practice his religion was burdened because he did not have certain religious materials. His true problem seems to be a disagreement with property officials about whether it is sufficient

to request all the property that he was allowed to have at his level of confinement or whether he must list each item he wants individually. There is nothing in plaintiff's grievance that would give an inmate complaint examiner any notice that his ability to exercise his religion was implicated in any way by the officers' refusal to give him his property until he complied with request procedures. Accordingly, this grievance is not sufficient to show exhaustion of plaintiff's free exercise and RLUIPA claims.

3. Decisions by defendants Sebastian and Broadbent cannot be challenged in inmate complaints

Next, plaintiff argues that he could not have brought his claims about being denied Taoist texts and being forced to submit to Christianity through the inmate grievance system because Wis. Admin. Code § DOC 310.08(2)(b) provides that an inmate may not use the review system to challenge a program review committee's decision. The program review committee is the body that makes custody classification determinations and placement recommendations. Wis. Admin. Code § DOC 302.17. Section 310.08(2)(b) thus bars inmates from challenging security classification and placement determinations through the inmate grievance system. Defendants Sebastian and Broadbent were the director and facilitator respectively of a behavioral modification program. Plaintiff is simply mistaken that the behavioral modification program and the program review committee are one and

the same or even related. As defendants note, the only similarity is that both contain the word "program" in the title. Defendants Broadbent's and Sebastian's alleged refusal to provide plaintiff with Taoist texts and whatever actions they may have taken in forcing plaintiff to submit to Christianity are not decisions of the program review committee. See Wis. Admin. Code § DOC 302.17 (outlining various actions program review committee makes).

4. Unwritten policy of inmate complaint examiner Beerkicher

Plaintiff's next argument is that he was barred from bringing his free exercise and RLUIPA claims because inmate complaint examiner Beerkicher had an unwritten policy of accepting only brief complaints. Even if such a policy was being enforced, it is not clear why plaintiff believes that it prevented him from bringing his claims. Both are capable of being stated briefly: "Sebastian and Broadbent have refused my request for certain Taoist texts and are subjecting me to accept Christian teachings in the behavioral modification program." If plaintiff means to suggest that he was unable to present these claims together in one grievance or with his claim regarding the Christian cable network, he is correct. But he is prevented from combining these claims under Wis. Admin. Code § DOC 310.09(e), not because of any unwritten policy of complaint examiner Beerkicher. Nonetheless, the limitation that an inmate may raise only one issue in each complaint does not render

administrative review unavailable for plaintiff's free exercise and RLUIPA claims, even when that limitation is coupled with the restriction that inmates are allowed to submit only two complaints each week unless they obtain permission to bring more. Plaintiff could have exhausted these claims by simply submitting them in separate grievance forms.

5. Exhaustion through Jones' El

Finally, plaintiff suggests that somehow the settlement agreement in Jones 'El v. Berge, 00-C-421-C bears on the exhaustion question. Plaintiff's claims are distinct from those that were accepted for class certification in Jones' El. Jones 'El v. Berge, 00-C-421-C, February 16, 2001 (certifying class of all present and future inmate at the Wisconsin Secure Program Facility on Eighth Amendment conditions of confinement claim and Fourth Amendment privacy claim). Even if they were not, plaintiff's only recourse would be through the settlement agreement; in other words, he would not be allowed to maintain this separate lawsuit but instead would be required to bring his grievance to the appointed monitor, who would bring an enforcement action if he believed it was appropriate.

D. Total Exhaustion Rule

Because there is no indication that plaintiff exhausted his claims that defendants Broadbent and Sebastian denied him certain Taoist texts or his claim that they forced him

to submit to certain Christian teachings, these claims will be dismissed. Defendants have gone a step further and requested dismissal of the entire suit. In support of this request, they cite Graves v. Norris, 218 F.3d 884 (8th Cir. 2000), in which the Court of Appeals for the Eighth Circuit held with little discussion that when an inmate fails to exhaust some of his claims, section 1997e(a) requires dismissal of the entire action, including any exhausted claims. But see Kozohorsky v. Harmon, 332 F.3d 1141, 1144 (8th Cir. 2003) (district court abused its discretion in denying plaintiff's motion to amend complaint to delete unexhausted claims).

Since the court's ruling in Graves, courts have split on the issue. Following the Eighth Circuit's lead, the Court of Appeals for the Tenth Circuit and District Courts in the Northern and Southern Districts of California and in the district of Maine have concluded that total exhaustion is necessary. Ross v. County of Bernalillo, 365 F.3d 1181 (10th Cir. 2004); Mubarak v. California Dept. of Corrections, 315 F. Supp. 2d 1057 (S.D. Cal. 2004); Ellison v. California Dept. of Corrections, 2003 WL 21209659, at *2 (N.D. Cal. May 19, 2003); Donovan v. Magnusson, 2004 WL 1572598, at *2 (D. Me. June 7, 2004). After a lengthy analysis of the relevant language, legislative history and statutory purpose, the Court of Appeals for the Second Circuit reached the opposite conclusion. Oritz v. McBride, ___ F.3d ___, 2004 WL 1842644, at *6-12 (2d Cir. Aug. 18, 2004). A number of district courts have rejected the total exhaustion requirement. See, e.g., Blackmon v. Crawford, 305 F.

Supp. 2d 1174, 1178 (D. Nev. 2004); Alexander v. Davis, 282 F. Supp. 2d 609, 612 (W.D. Mich. 2003). At least one court has held that when an inmate mixes exhausted and unexhausted claims in a single suit, the appropriate course is to allow the inmate an opportunity to amend his complaint. Robley v. Anderson, 2004 WL 742089, at *3 (D. Minn. Mar. 4, 2004).

The total exhaustion issue appears to be one of first impression in this circuit. Although the Court of Appeals for the Seventh Circuit has not addressed the total exhaustion question directly, it has upheld partial dismissals where an inmate has failed to exhaust some of the claims in his suit but has satisfied the exhaustion requirement with respect to the remaining claim. See, e.g., Dixon, 291 F.3d 485 (affirming partial dismissal for failure to exhaust); Lewis v. Washington, 300 F.3d 829 (7th Cir. 2002) (affirming dismissal of one claim for failure to exhaust and remanding for exhaustion determination about another). I view the court's tacit rejection of a total exhaustion requirement in § 1983 actions as consistent with the Second Circuit's holding. I believe that partial dismissal is the proper course to take addressing a suit containing both exhausted and unexhausted claims.

1. Plain Language

Those courts holding that dismissal of mixed claims is necessary rely heavily on the text of § 1997e(a). This section 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." (emphasis added). In Mubarak, 315 F. Supp. 2d at 1060, the court reasoned that "the 'total exhaustion' approach is supported by the plain meaning of the PLRA's exhaustion provision and strong policy interests . . . . Use of the term 'action' instead of 'claim' evidences an intent to disallow mixed complaints."

Other courts have characterized this linguistic interpretation as a "thin reed" on which to base such a weighty conclusion. Alexander, 282 F. Supp. 2d at 610. More important, it does not necessarily follow that just because an action was brought improperly, it must be dismissed rather than cured. See Oritz, 2004 WL 1842644, at * 7. Section 1997e(c) describes the circumstances under which dismissal is appropriate under the act but says nothing about dismissal of mixed actions. 42 U.S.C. § 1997e(c)(1) (dismissal appropriate where action is "frivolous, malicious, fails to state a claim on which relief can be granted or seeks monetary relief from a defendant who is immune from such relief"). Although the term "action" has been construed in the context of other statutes to mean "suit," see 28 U.S.C. § 1915(g), it is significant that it has been used interchangeably with "claim" within this particular section of the PLRA:

> (1) The court shall . . . dismiss any action brought with respect to prison conditions under section 1983 of this title . . . if the court is satisfied that the action is frivolous, malicious, fails to

> state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.
> (2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

42 U.S.C.A. § 1997e(c)(1) and (2). Thus, I cannot conclude that by using the word "action," Congress expressed a clear intent to require dismissal of otherwise viable claims for which administrative remedies have been exhausted simply because an inmate brought them together with other claims that he had not first exhausted.

2. Contrast to habeas corpus

In concluding that the Act mandates total exhaustion, the Court of Appeals for the Tenth Circuit relied less heavily on the language of § 1997e(a) than did the Eighth Circuit Court of Appeals in Graves. Ross, 365 F.3d at 1189. Instead, its holding derived from analogy to the total exhaustion requirement in habeas corpus. Id. The analogy is not particularly apt; exhaustion in the habeas context arose out of concerns of comity, Ex parte Hawk, 321 U.S. 114, 117 (1944), whereas considerations of efficiency are largely responsible for the exhaustion requirement under the PLRA, Porter v. Nussle, 534 U.S. 516, 524 (2002). Where exhaustion operates in different contexts to effectuate different

objectives, it is not necessarily likely that it will follow the same contours in both.

In Rose v. Lundy, 455 U.S. 509 (1982), the Court held that a district court must dismiss a petition for a writ of habeas corpus if it contains both exhausted and unexhausted claims. Starting with the proposition that "[t]he exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings," the Court reasoned that "[a] rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error. Id. at 518-19. The Court noted that the rule would promote state court familiarity with constitutional issues and effectuate more thoroughly developed factual records for review. Id. at 519. After observing that the exhausted and unexhausted claims were highly intertwined, the court reasoned that the total exhaustion requirement would "relieve the district courts of the difficult if not impossible task of deciding when claims are related, and will reduce the temptation to consider unexhausted claims." Id.

As the Court of Appeals for the Second Circuit has noted, the appeal to notions of comity is not nearly as compelling in this context because "prisoners are not required to press their claims in state courts and prison administrators generally limit their review to determining whether prison policy has been violated." Oritz, 2004 WL 1842644, at *10 (additional citations omitted). Traditional notions of comity involve two courts with

concurrent powers of review, Rose, 455 U.S. at 518; a prison inmate review system is not a court of concurrent authority. In addition, inmates are required to bring their complaints within just two weeks of the alleged violation. Wis. Admin. Code § 310.09(6). Except in instances of ongoing violations, an inmate would not be able to file his unexhausted claims for review within the prison grievance system after his suit is dismissed for lack of total exhaustion. Certainly, it does not comport with notions of comity to encourage the submission of procedurally defective complaints to another reviewing authority.

In addition, because inmate complaint examiners limit their review to violations of prison rules, a total exhaustion requirement would not promote greater familiarity with constitutional law. Moreover, review of inmate complaints is generally rather cursory and therefore, less likely to develop the factual record in any meaningful way. See Oritz, 2004 WL 1842644, at *10 ("prison officials are generally not required to adhere to rules of evidence or other standards employed by courts of law in an attempt to assure accurate fact-finding"). Finally, as the court reasoned in Oritz, § 1983 actions frequently raise a number of claims that are factually and legally distinct, unlike habeas petitions which "are usually about a singular event — the petitioner's conviction in state court." Id.

3. Statutory purpose

As noted above, the primary purpose of the exhaustion requirement under the Prison

Litigation Reform Act is to promote efficiency. A total exhaustion requirement could have the opposite effect by encouraging inmates to bring each claim in a separate suit to avoid potential dismissal of their exhausted claims. As noted above, subsequent exhaustion will not be an option in most instances because of the limitation that inmate complaints be received within fourteen calendar days of the underlying incident. Thus, dismissal will likely result in nothing more than refiling, in which case, the court will need to screen claims it has already analyzed, the defendants will be responsible for submitting another answer and the plaintiff will be liable for another filing fee. All this duplicative effort is far from efficient. Moreover, given that most inmate claimants are also indigent, the second filing fee is a particularly punitive penalty. See Rose, 455 U.S. at 522 (Blackmun, J., concurring) (total exhaustion rule acts as a "trap for the uneducated and indigent pro se prisoner-applicant").

Because the Court of Appeals for the Seventh Circuit has at least tacitly approved partial dismissals and because I conclude that dismissal of "mixed" actions is neither mandated by § 1997e(a) nor consistent with its objective, I will not dismiss plaintiff's exhausted claim that defendants Matthew Frank and Gerald Berge violated the Establishment Clause by using tax dollars to purchase the Christian television network "Trinity Broadcast Network: Sky Angel."

ORDER

IT IS ORDERED that the motion to dismiss for failure to exhaust administrative remedies of defendants Vicki Sebastian, Gerald Berge, Matthew Frank and Catherine Broadbent is GRANTED with respect to plaintiff Titus Henderson's claims that Vicki Sebastian and Catherine Broadbent violated his First Amendment right to freely exercise his religion and the Religious Land Use and Institutionalized Persons Act by denying him copies of two Taoist texts and forcing him to submit to Christianity as part of the behavior modification program and those claims are DISMISSED. Defendants' motion is DENIED with respect to plaintiff's claim that defendants Matthew Frank and Gerald Berge violated the Establishment Clause by using tax dollars to purchase the Christian television network "Trinity Broadcast Network: Sky Angel."

Entered this 25th day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge