IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TITUS HENDERSON,

Plaintiff, ORDER

v. 04-C-39-C

GERALD BERGE,
MATTHEW FRANK,

Defendants.

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In an order entered in this case on April 6, 2004, I granted plaintiff's request for leave to proceed in forma pauperis on his claims that 1) defendants Vicki Sebastian and Catherine Broadbent violated plaintiff's First Amendment right to freely exercise his religion and his rights under 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 a behavior modification program. In addition, I granted plaintiff's request for leave to proceed on his claim against defendants Matthew Frank and Gerald Berge that they violated the Establishment Clause by using tax dollars to purchase the Christian television network "Trinity Broadcast Network: Sky Angel." Subsequently, defendants moved to dismiss plaintiff's free exercise and RLUIPA claims on the ground that plaintiff had failed to exhaust

his administrative remedies with respect to these claims. In addition, defendants moved to dismiss the entire action pursuant to a "total exhaustion rule." In an order dated August 25, 2004, I dismissed plaintiff's free exercise and RLUIPA claims on the ground that plaintiff had failed to exhaust his administrative remedies on these claims. However, I denied defendants' motion to dismiss the case in its entirety after concluding that the Prison Litigation Reform Act does not mandate dismissal of actions containing both exhausted and unexhausted claims and that to impose a total exhaustion rule would be inefficient, punitive and inconsistent with the objectives of the act. Now defendants have moved for modification of the August 25, 2004 order to include a finding that the order is appealable under 28 U.S.C. § 1292.

28 U.S.C. § 1292 states in relevant part,

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

As I noted in the decision denying defendants' motion to dismiss the case in its entirety, the Court of Appeals for the Seventh Circuit has upheld partial dismissals of lawsuits in a number of instances in which an inmate has failed to exhaust some of the claims in his suit but has satisfied the exhaustion requirement with respect to other claims. See, e.g., Dixon v. Page, 291 F.3d 485 (7th Cir. 2002); Lewis v. Washington, 300 F.3d 829

(7th Cir. 2002). This practice suggests strongly that the court of appeals would not agree with defendants that a total exhaustion rule promotes the purpose of the Prison Litigation Reform Act "to limit inmate litigation to only those claims properly brought." The court of appeals views the exhaustion requirement as an affirmative defense that may be waived. Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002); Massey v. Helman (Massey I), 196 F.3d 727, 735 (7th Cir. 1999). In other words, it believes that the purposes of the act will be served even when defendants overlook the exhaustion requirement; see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999). Finally, because the court of appeals has made clear its view in Ford v. Johnson, 362 F.3d 395 (7th Cir. 2004), that all dismissals under § 1997e(a) should be without prejudice, a total exhaustion rule would run counter to notions of judicial efficiency. Dismissal of exhausted *claims* will achieve a speedier and less costly result for the court and the parties than a dismissal without prejudice to the plaintiff's promptly refiling his exhausted claims.

I conclude that although there is a difference of opinion in various courts on the question whether a total exhaustion rule promotes the purposes of the Prison Litigation Reform Act, the Seventh Circuit's opinion is settled. A prompt appeal from this court's August 25, 2004 order will not materially advance the ultimate termination of this litigation, but will serve only to delay it. Defendants will be free to appeal this decision after plaintiff's one remaining claim has been resolved.

ORDER

IT IS ORDERED that plaintiff's motion for modification of the August 25, 2004 order to include a finding that the order is appealable under 28 U.S.C. § 1292 is DENIED.

Entered this 21st day of September, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge