

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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PAUL HENDLER,

Plaintiff,

v.

MARC CLEMENTS,<sup>1</sup>

Defendant.

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ORDER

04-C-915-C

This is a civil action brought under 42 U.S.C. § 1983 in which plaintiff Paul Hendler alleges that defendant Marc Clements violated plaintiff's First Amendment rights by reading documents plaintiff had prepared and marked for his lawyer. Now before the court is defendant's motion to dismiss on the ground that plaintiff failed to exhaust his administrative remedies pursuant to 42 U.S.C. § 1997e(a). Because plaintiff did not properly file a complaint concerning the subject matter of this suit within the inmate complaint review system, I conclude he has not exhausted his administrative remedies.

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<sup>1</sup>From defendant's brief it appears that defendant spells his name Marc Clements. I have amended the caption to reflect the correct spelling.

In support of the motion to dismiss, defendant submitted documents relating to plaintiff's exhaustion efforts within the inmate complaint review system. In opposition to defendant's motion, plaintiff submitted similar additional documentation. I can consider this documentation without converting the motion to dismiss into a motion for summary judgement because the documentation of a prisoner's use of the inmate complaint review system is public record. Ramirez v Meli, No. 04-C-786-C, slip op. (W.D. Wis. May 2, 2005); see also General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997). From the documentation submitted by the parties and the allegations in the complaint, which I accept as true for the sole purpose of deciding this motion, I find these facts.

## FACTS

In a criminal case before another court, plaintiff faces a charge of first degree intentional homicide. To aid in the defense of this charge, plaintiff's defense attorney, Wright Laufenberg, asked plaintiff to provide him with any information he had regarding plaintiff's membership in a gang. Plaintiff prepared documents containing gang-related information including "bylaws." At the top of the page on which the bylaws were written, plaintiff wrote "Attention Lawyer Laufenberg," his criminal case number and an exhibit number. After preparing these documents, plaintiff was transferred from the Wisconsin

Resource Center in Winnebago, Wisconsin, to the Waupun Correctional Institution in Waupun, Wisconsin. All of his property was gathered together for transfer.

On June 22, 2004, following his arrival at the Waupun facility, plaintiff was issued conduct report No. 1621881-680, charging him with possession of gang-related materials in violation of Wis. Admin. Code § DOC 303.20. Following a disciplinary hearing held on July 1, 2004, plaintiff was found guilty of the rule violation and was ordered to spend 8 days in adjustment segregation and 360 days in program segregation. On July 6, 2004, plaintiff appealed this disciplinary decision to the warden. On August 17, the warden upheld the finding of guilt but modified the 360 days of program segregation to 360 days of disciplinary separation.

Meanwhile, on July 13, before the warden reached a decision on plaintiff's disciplinary hearing appeal, plaintiff filed offender complaint WCI-2004-22766, challenging the confiscation of the "exhibits" for his criminal case. Plaintiff attached conduct report No. 1621881-680 to his offender complaint and asked for a reversal of the finding of guilt. On August 6, 2004, the institution complaint examiner rejected this complaint as outside the scope of the inmate complaint review system, citing Wis. Admin. Code § DOC 310.08(3) and noting that the appeal process was not yet complete for conduct report No. 1621881-680.

On August 27, 2004, plaintiff requested a corrections complaint examiner review of

the rejection of his inmate complaint. That appeal was denied on September 9, 2004, on the ground that a corrections complaint examiner may not review rejected complaints under Wis. Admin. Code § DOC 310.13(3). Plaintiff did not file any other inmate complaint to challenge defendant's confiscation of his documents.

### OPINION

Plaintiff filed this action alleging several violations of his constitutional rights under the Civil Rights Act, 42 U.S.C. § 1983. After screening plaintiff's complaint pursuant to 28 U.S.C. § 1915A, I allowed plaintiff to proceed on one claim only, that defendant had violated plaintiff's First Amendment rights by reading legal documents marked for his lawyer.

The exhaustion provision of the Prison Litigation Reform Act of 1995, 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." 42 U.S.C. § 1997e(a). The Supreme Court has liberally interpreted the clause "with respect to prison conditions." Therefore, the exhaustion requirement "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2001).

This case is therefore covered by the exhaustion requirement of the Prison Litigation Reform Act.

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. Dixon v. Page, 291 F.3d 485, 488 (7th Cir. 2002). “[T]he 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, 733 (7th Cir. 1999). Failure to exhaust is an affirmative defense and the defendant therefore bears the burden of pleading and proving it. Massey, 196 F.3d at 735; Dale v. Lappin, 376 F.3d 652, 655 (7th Cir. 2004).

#### A. Wisconsin’s Inmate Complaint Review System

Wisconsin’s Administrative Code describes the inmate complaint review system applicable to inmates in adult penal institutions. Wis. Admin. Code § DOC 310.08(1) allows an inmate to raise “significant issues regarding rules, living conditions, staff actions affecting institutional environment, and civil rights complaints.” Chapter DOC 310 sets out rules and procedures for the filing and processing of prisoner complaints.

First, a prisoner must file an offender complaint with the institution complaint examiner. Wis. Admin. Code §§ DOC 310.09(8), DOC 310.11(1). The institution complaint examiner then investigates the complaint and either rejects it or directs the

complaint to the appropriate reviewing authority. Wis. Admin. Code § DOC 310.11.

Assuming the complaint is not rejected, the appropriate reviewing authority may dismiss, affirm or modify the complaint. Wis. Admin. Code § DOC 310.12(2). The prisoner has ten days in which to appeal the appropriate reviewing authority's decision to the corrections complaint examiner. The corrections complaint examiner reviews the appeal and recommends a decision to the Secretary of the Department of Corrections. Wis. Admin. Code § DOC 310.13. The Secretary of the Department of Corrections then makes the final decision on the complaint. Wis. Admin. Code § DOC 310.14.

The institution complaint examiner may reject a complaint if it has been brought for the purpose of harassment, does not invoke a significant issue, does not allege sufficient facts, is brought more than fourteen days after the occurrence giving rise to the complaint, raises issues not affecting the inmate personally, is moot, has already been addressed by the inmate complaint review system or is outside of the scope of the inmate complaint review system. Wis. Admin. Code § DOC 310.11(5). When a complaint is rejected by the institution complaint examiner, the prisoner has ten days to appeal the rejection to the appropriate reviewing authority who then *reviews only the grounds for rejection*. Wis. Admin. Code § DOC 310.11(6) (emphasis added). The appropriate reviewing authority's decision on this matter is final. Id.

Considering 42 U.S.C. § 1997e(a) in light of this system set out by the state of

Wisconsin, I find it clear that plaintiff has failed to exhaust his administrative remedies. Exhaustion occurs only if "the prisoner completes the administrative process by following the rules the state has established for that process." Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002). As the inmate complaint review system expressly provides a procedure for prisoners to raise civil rights complaints, plaintiff must use this procedure to address the issue raised in this case in order to meet the exhaustion requirement. In order to exhaust the administrative remedies in a case such as this, a prisoner must (1) *properly* file a complaint regarding the subject matter of the suit with the institution complaint examiner; (2) receive a decision from the appropriate reviewing authority; (3) file a timely appeal of the appropriate reviewing authority's decision with the corrections complaint examiner; (4) and receive a decision on that appeal from the Secretary of the Department of Corrections.

#### B. Appeals of Rejected Complaints

Defendant contends that plaintiff failed to exhaust his administrative remedies because he did not appeal the rejection of offender complaint WCI-2004-22766 to the appropriate reviewing authority. Defendant appears to be suggesting that an appeal of this rejection would have been sufficient for plaintiff to exhaust his remedies. This is incorrect. Wis. Admin. Code § DOC 310.08(2)(a) states that the inmate complaint review system may not be used to address an issue related to a conduct report unless the inmate has exhausted

the disciplinary process of chapter DOC 303. Plaintiff's offender complaint WCI-2004-22766 was improperly filed because plaintiff filed it before the appeal of his disciplinary hearing had been decided. It was rejected as outside the scope of the inmate complaint review system because it was premature. An appeal of the rejection would not have resulted in a review of the merits of his offender complaint.

The inmate complaint review system did provide a remedy for plaintiff. He could have filed his offender complaint after he had completed his appeal of the disciplinary proceedings. If plaintiff had then received an unsatisfactory decision from the appropriate reviewing authority, he would have been able to appeal to the corrections complaint examiner. Only after taking this appeal and obtaining a decision from the Secretary of the Department of Corrections would plaintiff have exhausted his remedies under the inmate complaint review system. “[A] prisoner who does not *properly* take each step within the administrative process has failed to exhaust state remedies, and thus is foreclosed by § 1997e from litigating.” Pozo, 286 F.3d at 1024 (emphasis added). Plaintiff made no effort to file a complaint with the institution complaint examiner after his disciplinary appeal was complete and therefore did not exhaust his administrative remedies.



ORDER

IT IS ORDERED that defendant Marc Clements's motion to dismiss for failure to exhaust administrative remedies as required by 42 U.S.C. § 1997e(a) is GRANTED. The clerk of court is directed to enter judgment dismissing this case without prejudice and close the file.

Entered this 26th day of May, 2005.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge