IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NATHANIEL ALLEN LINDELL,

Plaintiff,

v.

ORDER

05-C-003-C

PETER HUIBREGTSE; GARY BOUGHTON; STEVEN HOUSER; CAPTAINS STEVE SCHUELER, THOMAS CORE, KURT LINJER, GILBERG and GARY BLACKBOURN; C.O. LANGE and SGT. CARPENTER,

Defendants.

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On October 19, 2005, judgment was entered dismissing this civil action because plaintiff failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). Now plaintiff Nathaniel Lindell has filed a timely motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). In his motion, plaintiff raises challenges to both the October 19 order and to the court's original screening order in this case, issued on March 8, 2005. I will address each in turn.

A. Failure to Exhaust

Plaintiff challenges the court's decision to dismiss his case on two grounds. First, he challenges the court's finding that he failed to appeal conduct report #1230298 to the warden of the Waupun Correctional Institution and second, he contends that he did not need to raise his conspiracy claim explicitly through the disciplinary process because the alleged conspiracy was "obvious."

1. Evidence of Exhaustion

In dismissing plaintiff's claim that his equal protection rights were violated by the issuance of conduct report #1230298, I found that plaintiff had not appealed conduct report #1230298 to the warden of the Waupun Correctional Institution, as required by prison administrators' reasonable application of Wis. Stat. § DOC 303.76(7)(a). Plaintiff argues that he "did file such an appeal, without result," as he averred in an affidavit submitted in opposition to plaintiff's motion to dismiss. Pl. Aff., dkt. #21, at 1, and that it was error to ignore his testimony on this point. I disagree. Plaintiff's testimony alone was insufficient to demonstrate that he properly exhausted his administrative options.

The record reveals that on June 30, 2005, defendants filed a motion to dismiss plaintiff's case for failure to exhaust under 42 U.S.C. § 1997e(a), accompanied by documentation of plaintiff's use of the inmate complaint review system and the prison disciplinary process. This documentation did not include any appeal of conduct report

#1230298 filed with the warden of the Waupun Correctional Institution.

Because I needed to consult disciplinary records in order to rule on defendants' motion, in an order dated September 23, 2005, I converted the motion to dismiss to a motion for summary judgment. I provided the parties with an opportunity to supplement the record of plaintiff's use of the disciplinary system by submitting any additional documentation relevant to the question of exhaustion. Plaintiff did not submit any such documentation.

Defendants' evidence consisted of the affidavit of Ellen Ray, an inmate complaint examiner employed by the Department of Corrections, who is custodian of the regularly kept records of inmate complaints filed at the Wisconsin Secure Program Facility. Ray has access to records generated and maintained by the prison pertaining to inmates incarcerated at the facility. Attached to Ray's affidavit is a letter dated April 17, 2001 from the warden of the Wisconsin Secure Program Facility to plaintiff, directing plaintiff to file his appeal of conduct report #1230298 with the warden of the Waupun Correctional Institution. Also attached is the complete record of inmate complaint SMCI-2001-12299, in which plaintiff challenged the decision of the Wisconsin Secure Program Facility warden not to hear his appeal of the conduct report issued at the Waupun Correctional Institution. Plaintiff filed the complaint on April 24, 2001. On May 9, 2001, plaintiff appealed the decision to dismiss the complaint. His final appeal was denied on June 2, 2001.

Exhaustion of administrative remedies is both a precondition to suit and an affirmative defense that defendants have the burden of pleading and proving. Dale v. Lappin, 376 F.3d 652, 655 (7th Cir. 2004); Westefer v. Snyder, 422 F.3d 570, 577 (7th Cir. 2005). Plaintiff contends that because his affidavit contradicts the documents provided by defendants, their motion to dismiss should be denied and his case should proceed to trial. He is mistaken. As a precondition to suit, exhaustion is a question for the court to resolve; it is not a jury question.

Defendants made a prima facie showing that plaintiff failed to exhaust his administrative remedies when (1) they submitted the complete record of plaintiff's use of the inmate complaint system and the prison disciplinary process with respect to conduct report #1230298 and (2) the records did not contain an appeal directed to the warden of the Waupun Correctional Institution. Plaintiff has not rebutted defendants' documentary evidence by merely alleging that he submitted a document of which apparently neither he nor defendants have any record. See, e.g., Albiero v. City of Kankakee, 246 F.3d 927, 933 (7th Cir.2001) (in context of summary judgment, self-serving affidavits without factual support in record do not create genuine issue of fact). Therefore, I will deny plaintiff's motion to reconsider dismissal with respect to his claim that his equal protection rights were violated by the issuance of conduct report #1230298.

2. Conspiracy

Plaintiff challenges the decision to dismiss his claim that defendants Linjer, Boughton, Huibregtse, Lange, Gilberg, Carpenter and Blackbourn conspired to harm him by issuing conduct reports #1335594 and #1351662. When I granted plaintiff leave to proceed on this claim, I explained:

> In pleading a conspiracy, it is sufficient for a petitioner to indicate "the parties, general purpose, and approximate date, so that the defendant has notice of what he is charged with." Walker v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002). Although petitioner will need to prove that there was "an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage'" to succeed on his claim, Hampton, 600 F.2d at 621 (citing Rotermund v. United States Steel Corp., 474 F.2d 1139 (8th Cir. 1973)), it is not necessary that he plead the overt act in order to state a valid claim. Walker, 288 F.3d at1007.

Order dated Mar. 8, 2005, dkt. #2, at 14. Plaintiff's complaint in this lawsuit met the pleading requirements outlined in Walker. However, before bringing suit, plaintiff was required to raise his conspiracy claim to prison officials through the prison grievance process. Because he failed to do so, I dismissed his suit. Plaintiff contends now that his conspiracy claim was "obvious" and therefore did not need to be stated to prison officials.

The purpose of the exhaustion requirement is to allow prison officials the opportunity to correct their mistakes and resolve prisoners' complaints without judicial intervention. In

order to exhaust a claim under the Prison Litigation Reform Act, a state prisoner must make his complaint as directed by the administrative system of the state in which he is incarcerated. In Wisconsin, complaints may be exhausted in one of two ways. Complaints regarding disciplinary matters are exhausted when they are raised at a disciplinary hearing and on appeal, as detailed in Wis. Admin. Code Ch. DOC 303. Complaints regarding all other matters are exhausted when they are raised and appealed through the inmate complaint system, as detailed in Wis. Admin. Code Ch. DOC 310.

The degree of factual specificity required in an inmate grievance varies from state to state. In Wisconsin, complaints raised through the inmate complaint system must "clearly identify" the problem for which an inmate seeks redress. Wis. Admin. Code § DOC 310.09(1)(e). Wisconsin Administrative Code Chapter DOC 303 does not describe explicitly the standards for raising a complaint through the prison disciplinary process; however, there is no reason that a complaint raised through the prison disciplinary process would require a lesser pleading standard than one raised through the inmate complaint system. Therefore, it is reasonable to apply the standard for general inmate complaints to inmate complaints raised in the disciplinary process.

Although plaintiff contends that the alleged prison conspiracy of which he complains was "obvious," it was not obvious to the court from the records of plaintiff's disciplinary

hearings and appeals. In order to "clearly identify" the alleged conspiracy, at a minimum plaintiff was required to allege that one or more prison officials had joined forces to deprive him of specific rights. He did not do so and therefore did not exhaust his conspiracy claim with respect to conduct reports #1335594 and #1351662.

B. Screening Order

In the screening order issued on March 8, I denied plaintiff leave to proceed in forma pauperis on six of his seven claims, including his claims that his Fourteenth Amendment due process rights were violated when he was disciplined for failing to comply with a regulation that is too vague to allow a reasonable person to comply with it and that his First Amendment right to freely exercise his religion and his rights under the Religious Land Use and Institutionalized Persons Act were violated when he was disciplined for his violation of a regulation that is overbroad. Plaintiff challenges the dismissal of these claims, stating that the court "disregarded and dismissed" his claims by "basically concluding that defendants can do anything they want and use any rule to do it so long as they claim [the rules] suppress gang activity." In dismissing plaintiff's overbreadth and vagueness claims, I discussed at length the reasons why his arguments failed to state a legal claim. Plaintiff's present motion

is simply reargument, which I will not address further.

ORDER

IT IS ORDERED that plaintiff's motion to alter or amend judgment is DENIED.

Entered this 15th day of November, 2005.

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