

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

-----  
RICHARD L. GRENNIER,

Plaintiff,

v.

MATTHEW FRANK,

Defendant.

-----

ORDER

05-C-81-C

Plaintiff is proceeding pro se and in forma pauperis in this civil action on his claim that defendant Matthew Frank violated his constitutional rights by classifying him as a sex offender and requiring him to complete sex offender treatment before he can be paroled in violation of the due process clause of the Fourteenth Amendment. Defendant has moved to dismiss plaintiff's complaint for plaintiff's failure to exhaust his administrative remedies before bringing this action and on the ground that plaintiff fails to state a claim under the due process clause because he does not have a protectible liberty interest at stake. In support of his motion, defendant has filed copies of "Program Review Inmate Classification Summaries" relating to plaintiff as well as documentation of plaintiff's use of the inmate complaint review system. In opposition to the motion, plaintiff has filed copies of a number

of parole board actions, copies of his judgments of conviction, a copy of a letter plaintiff sent by certified mail to defendant Frank in September of 2004; additional documentation of his use of the inmate complaint procedure and a copy of the rules governing inmate complaint procedures. In addition, plaintiff has filed the affidavit of a Paul S. Malmstrom.

According to Fed. R. Civ. P. 12(b),

[i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Both parties in this case have submitted matters outside the pleadings in connection with the motion to dismiss. Much of the material is documentation of plaintiff's use of the inmate complaint review system which is a matter of public record that may be considered without converting a motion to dismiss into a motion for summary judgment. See Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 455 (7th Cir. 1998) (citing General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997)). However, the parties also submitted classification summaries and documentation of parole board actions that would not appear to be matters of public record but which may be relevant to a determination of both questions raised in defendant's motion to dismiss. Therefore, I do not intend to exclude these submissions and will convert

defendant's motion to a motion for summary judgment.

Because the parties did not anticipate that this matter would be treated as one for summary judgment, I will give them additional time in which to submit all evidence pertinent to the motion. However, I will not require them to prepare proposed findings of fact as required by this court's Procedures to be followed on Motions for Summary Judgment. The question whether plaintiff has a protectible liberty interest at stake is largely a legal question and the determination whether plaintiff exhausted his administrative remedies will be decided on the basis of the parties' submissions showing what plaintiff did to challenge his classification, and the denial of parole and what matters he brought to defendant's attention through the inmate complaint review system.

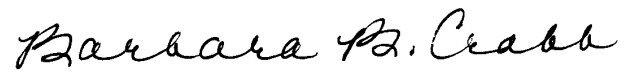
#### ORDER

IT IS ORDERED that defendant's motion to dismiss is converted to a motion for summary judgment. The parties may have until July 22, 2005, in which to serve and file any

additional evidentiary materials relevant to the question of exhaustion of administrative remedies they deem appropriate.

Entered this 1st day of July, 2005.

BY THE COURT:

Handwritten signature of Barbara B. Crabb in cursive script.

---

BARBARA B. CRABB  
District Judge