

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

SHAROME ANDRE POWELL,

Plaintiff,

v.

PHIL KINGSTON and
TIM DOUMA,

Defendants.

ORDER

05-C-112-C

Plaintiff Sharome Andre Powell is proceeding pro se and in forma pauperis in this action on his claim that for a period of approximately 45 days beginning in mid-October 2004, and later for another 31-day period, he was placed on a “bag meal restriction” that was nutritionally inadequate, in violation of his Eighth Amendment rights. On May 3, 2005, defendants moved to dismiss plaintiff’s complaint on the ground that he failed to exhaust his administrative remedies. Plaintiff was given until May 23, 2005, in which to oppose the motion. Now plaintiff has filed a motion for an extension of time in which to oppose the motion and a motion for leave to file an amended complaint. Those motions are before the court.

It is unclear precisely what kind of change to his original complaint plaintiff wants to effect through his motion to amend. He appears to be asking to clarify that his claim in this lawsuit is that when he was on bag lunches, he received “inadequate calories.” However, this claim already has been identified by this court as the only possible claim plaintiff may have that implicates his Eighth Amendment rights. Therefore, there is no need for plaintiff to amend his complaint to make it explicit that he is challenging the nutritional adequacy of the content of his bag meals. If plaintiff were to prove that the number of calories contained in the bag meals were so far below the number of calories a man of his size must have to maintain proper health that plaintiff faced a serious risk of harm to his health, then he will succeed in proving the first of two prongs of his Eighth Amendment claim. (The other prong concerns proof of the defendants’ deliberate indifference to the serious risk of harm plaintiff allegedly faced.)

Defendants contend in support of their motion to dismiss that plaintiff never filed an inmate complaint about the nutritional adequacy of the contents of his bag meals. Instead, plaintiff complained only that he had been kept on the bag meal restriction beyond the time limit set out in the Wisconsin Administrative Code. This latter claim is not a claim on which plaintiff has been allowed to proceed in this lawsuit. Plaintiff states that he needs an extension of time to oppose defendants’ motion to dismiss so that he can research how many calories are needed to maintain proper health given his age, height, gender, activity

level and “body build.” However, this discovery is irrelevant to the question whether plaintiff exhausted his administrative remedies on his claim that his bag meals were nutritionally adequate. Either plaintiff did or did not use the inmate complaint review system to complain to prison officials about the nutritional value of his food in the bag meals. If he did not raise this claim and appeal any adverse decisions in accordance with the procedures set out in the administrative code, this court will be required to grant defendants’ motion to dismiss. Also, it is irrelevant whether plaintiff is attempting now to exhaust his administrative remedies with respect to his claim. 42 U.S. C. § 1997(e) makes exhaustion a *precondition* to suit. Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999). This means that exhaustion must be complete before the lawsuit is filed.

ORDER

IT IS ORDERED that

1. Plaintiff’s motion to amend his complaint is DENIED as unnecessary; and
2. Plaintiff’s motion for an enlargement of time in which to oppose defendants’

motion to dismiss is DENIED.

Entered this 18th day of May, 2005.

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