IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIE C. SIMPSON,

Plaintiff,

v.

JANEL NICKEL, TIMOTHY DOUMA, PHILIP KINGSTON, WILLIAM NOLAND, MATTHEW J. FRANK,

Defendants.

OPINION AND ORDER

05-C-232-C

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This is a civil action for declaratory and monetary relief brought pursuant to 42 U.S.C. § 1983. In his complaint, plaintiff Willie Simpson, a prisoner at the Columbia Correctional Institution in Portage, Wisconsin, contends that defendants retaliated against him for exercising his First Amendment free speech rights. In particular, plaintiff contends that defendants wrote and upheld a conduct report against him in which he was accused of lying about staff. The alleged lies were contained in letters plaintiff attempted to mail out of the institution and in a lawsuit he filed in the Portage County, Wisconsin circuit court. In those letters and lawsuit, plaintiff accused staff of assaulting and sodomizing inmate McLaurin. Plaintiff argues that the conduct report was written not because he lied, but

rather in retaliation for his having written the letters and filed the lawsuit. The case is now before the court on defendants' motion to dismiss for plaintiff's failure to exhaust his administrative remedies, as required under 42 U.S.C. § 1997e(a).

In support of their motion, defendants have submitted an affidavit and numerous documents relating to plaintiff's use of the inmate complaint review system and the prison disciplinary process. Documentation of a prisoner's use of the inmate complaint review system is a matter of public record. For that reason, it falls under an exception to the general rule disallowing a court from considering matters outside the pleadings when ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Therefore, I can consult inmate complaint records without converting the motion to dismiss into a motion for summary judgment. Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 455 (7th Cir. 1998); General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997) ("courts . . . permit a district court to take judicial notice of matters of public record without converting a motion for failure to state a claim into a motion for summary judgment").

Documentation of a prisoner's disciplinary proceedings is not a matter of public record. Ordinarily, if the court were to consider such documents to resolve a motion to dismiss, the motion would have to be converted to one for summary judgment. However, in circumstances such as those presented here, documentary evidence supporting a motion

to dismiss may be considered even though the documents are not matters of public record. This is because "documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim." Menominee Indian Tribe of Wisconsin, 161 F.3d at 455 (citing Wright v. Associated Ins. Cos., 29 F.3d 1244, 1248 (7th Cir. 1994)). In this case, defendants attached documentation of plaintiff's disciplinary review process to their motion to dismiss. Further, plaintiff not only referred explicitly to those documents in the complaint, he attached the documents to his complaint in support of his claim that the disciplinary action taken against him was retaliatory. Because the documents are central to plaintiff's retaliation claim, they may be considered as part of the pleadings. Also, for the sole purpose of deciding defendants' motion to dismiss, I accept as true the allegations in plaintiff's complaint.

FACTS

On February 19, 2004, plaintiff and other inmates filed a group complaint against several officers at the Columbia Correctional Institution asserting that on February 18, 2004, they had witnessed the officers sexually assault, sodomize and batter inmate Freddie McLaurin. On February 22, 2004, plaintiff filed a John Doe complaint in state court alleging that a crime had been committed against inmate McLaurin. On February 24, 2004, plaintiff wrote to the Attorney General of Wisconsin, alleging that Columbia Correctional

Institution officers committed a crime against inmate McLaurin.

The Department of Corrections appointed defendant Timothy Douma to investigate the matter. Douma appointed defendant Nickel to conduct an internal investigation of plaintiff's complaints. Additionally, the Department of Corrections assigned Captain Laliberte, an outside investigator from Oak Hill Correctional Institution, to investigate the incident. Laliberte concluded that there had been no assault on McLaurin.

On April 2, 2004, defendant Nickel wrote plaintiff a conduct report for violating Wis. Admin. Code § DOC 303.271, lying about staff, and § DOC 303.28(c), disruptive conduct. On April 16, 2004, an adjustment committee held a full due process disciplinary hearing on the conduct report against plaintiff. Plaintiff declined to attend the hearing. However, he was represented by a staff advocate. According to the "Record of Witness Testimony" for the hearing, L. Lipinski, plaintiff's staff advocate, submitted a written statement on plaintiff's behalf. Nevertheless, the adjustment committee found plaintiff guilty of lying about staff and disruptive conduct. Plaintiff appealed the committee's decision to defendant Kingston on April 18, 2004. In his appeal, plaintiff contended that the conduct report was written in retaliation for his having filed his complaint against the officers in state court and with the attorney general. On May 7, 2004, defendant Kingston modified the disciplinary committee's decision, dismissing the disruptive conduct charge and affirming the committee's decision that plaintiff had lied about staff. In the "Warden's Response" portion

of a form titled "Appeal of Adjustment Committee or Health Officer's Decision," defendant Kingston wrote,

> The body of the conduct report and relating hearing record support the finding of guilt for 303.271 (lying about staff). The charge of 303.28 (c) is not supported and I/M Simpson is found not guilty of this charge. Appeal information presented is without merit as conduct report, supported by outside investigation results, clearly documents violation of 303.271. The disposition is proper given the serious nature of this offense. Prior conduct record considered in sentencing decision.

OPINION

The 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), 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." The Court of Appeals for the Seventh Circuit has held that "[e]xhaustion of administrative remedies, as required by § 1997e, is a condition precedent to suit" and that district courts lack discretion to decide claims on the merits unless the exhaustion requirement has been satisfied. Dixon v. Page, 291 F.3d 485, 488 (7th Cir. 2002); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999).

"[I]f a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative

system before filing a claim." Massey v. Helman, 196 F.3d 727, 733 (7th Cir. 1999). Exhaustion has not occurred unless an inmate follows the rules that the state has established governing the administrative process. Dixon, 291 F.3d at 491; Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). An inmate must "properly take each step within the administrative process" or else he is foreclosed by 42 U.S.C. § 1997(e) from bringing a suit. Pozo, 286 F.3d at 1024.

Wisconsin inmates have access to administrative grievance procedures for issues related to conduct reports. They are set forth in Wis. Admin. Code §§ DOC 303.75 and 303.76. Under these provisions, when a prisoner receives a conduct report, he is given either a formal or informal hearing, depending on the seriousness of the reported conduct and whether the inmate waives a formal due process hearing. Wis. Admin. Code §§ DOC 303.75, 303.76(1)(c), (d). An inmate may appeal a decision from a due process hearing to the warden within ten days of the hearing or the time the inmate receives a copy of the decision, whichever is later. Wis. Admin. Code § DOC 303.76(7).

In support of their motion to dismiss, defendants argue that plaintiff waived the right to assert on appeal that the conduct report issued against him was retaliatory because he did not raise his retaliation claim as a defense at the disciplinary hearing. In support of this argument, defendants cite Wisconsin state law holding that a prisoner's failure to raise an issue at an initial disciplinary hearing constitutes waiver of the issue on appeal. Defendants'

argument is unpersuasive for two reasons.

First, defendants have not made a showing that plaintiff failed to raise his retaliation claim at the initial hearing. True, the facts reveal that plaintiff failed to appear at his disciplinary hearing. However, the record of the disciplinary hearing shows that an advocate wrote a statement on plaintiff's behalf. I do not know what the statement said. Defendants did not submit the advocate's statement so as to rule out any possibility that plaintiff raised a retaliation defense at his disciplinary hearing.

Second, it is federal law that governs this court's decision on a motion to dismiss for failure to exhaust administrative remedies, and that law is not in agreement with the state law on which defendants rely. In Conyers v. Abitz, 416 F.3d 580, 584-585 (7th Cir. 2005), the court of appeals held that exhaustion has occurred if an inmate's claim is decided on the merits on appeal, even when it could have been dismissed on procedural grounds. Also, in Ford v. Johnson, 362 F.3d 395, 397 (7th Cir. 2004), the court of appeals held that a procedural default in state proceedings constitutes a failure to exhaust "only if the state tribunal explicitly relies on that default." Id. at 397.

The facts in this case reveal that when defendant Kingston decided plaintiff's appeal, he did not refuse to consider plaintiff's retaliation argument on the ground that plaintiff had failed to raise the claim at the disciplinary hearing. Instead, he considered the appeal on its merits, noting that plaintiff's "appeal information presented is without merit." In other

words, when all inferences are drawn in plaintiff's favor, it appears that defendant Kingston considered and rejected as meritless plaintiff's argument that the conduct report was retaliatory and found instead that there was sufficient evidence presented at the hearing for the hearing officer to conclude that plaintiff lied about staff. Because defendants have failed to sustain their burden of proving that plaintiff failed to exhaust his administrative remedies with respect to his claim that he was given a conduct report in retaliation for his having filed a complaint in state court on February 22, 2004 and a letter with the attorney general on February 24, 2004, defendants' motion to dismiss must be denied.

ORDER

IT IS ORDERED that the motion of defendants Janel Nickel, Timothy Douma, Philip Kingston, William Noland and Matthew J. Frank to dismiss plaintiff's retaliation claim against them for his failure to exhaust his administrative remedies is DENIED.

Entered this 29th day of September, 2005.

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