IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL HILL,

Plaintiff,

v.

STEVE ROBINSON, M. MOORE
and MICHAEL KLAWITTER,

Defendants.

ORDER

05-C-347-C

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Plaintiff Michael Hill is proceeding in this civil action under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), on his claim that defendants Steve Robinson, M. Moore and Michael Klawitter violated his First Amendment rights by placing him in segregated confinement in mid-April, 2005, in retaliation for his pursuing an administrative grievance against Klawitter. Presently before the court is defendants' motion to dismiss plaintiff's complaint for his failure to properly exhaust his administrative remedies prior to filing suit as required by 42 U.S.C. § 1997e(a).[1]

[1] Defendant's motion is styled as a motion to dismiss under Fed. R. Civ. P. 12(b)(1). The question whether a prisoner has exhausted his administrative remedies is not a jurisdictional question. Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Perez v.

In support of their motion, defendants have submitted an affidavit and several documents relating to plaintiff's efforts to exhaust his remedies within the administrative complaint review system. Plaintiff has submitted additional documents in opposition to the motion.[2] I can consider the parties' documentation of plaintiff's use of the grievance system without converting the motion to dismiss into a motion for summary judgment because such documentation is a matter of public record. 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). For the reasons stated below, I conclude that plaintiff has failed to properly exhaust his administrative remedies as to his First Amendment claim. Accordingly, I will grant defendants' motion and dismiss this case.

As a preliminary matter, I will address an argument plaintiff advances in his brief that

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Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999) (exhaustion a precondition to suit). In the Seventh Circuit, motions to dismiss for failure to exhaust under 42 U.S.C. § 1997e are treated as motions to dismiss under Fed. R. Civ. P. 12(b)(6). See, e.g., Barnes v. Briley, 420 F.3d 673 (7th Cir. 2005); Dixon v. Page, 291 F.3d 485 (7th Cir. 2002).

[2] Plaintiff submitted numerous documents that have no bearing on whether he exhausted his administrative remedies as to the claim advanced in this lawsuit, which is that defendants Robinson, Moore and Klawitter retaliated against him for filing a grievance against Klawitter by placing him in the segregation unit. I have disregarded these irrelevant documents, which included administrative complaints filed against prison officials who are not parties to this lawsuit and administrative complaints against some or all of the defendants in this lawsuit but concerned matters unrelated to the allegedly retaliatory act of placing plaintiff in the segregation unit.

Gary Thalacker, Gregory Goodhue, Michael Bartkneht, Terry Card and John Shook should be considered defendants in the present lawsuit and the court should find that plaintiff has exhausted his administrative remedies against them. If plaintiff wanted reconsideration of the screening order, he should have filed a motion to that effect, rather than raise it in his brief. However, even if plaintiff had brought a motion to reconsider following the entry of the screening order making the same argument, I would have denied it for the following reasons.

In the caption of his proposed complaint plaintiff listed only Robinson, Moore and Klawitter as defendants. On page 2 of the complaint, in section II. D, plaintiff filled in the name of the defendant as "Lt. M. Moore." In section II. E., plaintiff had an opportunity to list additional defendants and he listed Robinson and Klawitter. The only place in which the names Thalacker, Goodhue, Bartkneht, Card and Shook appear is section III of the complaint, which asks for information about previous lawsuits plaintiff had filed. Plaintiff listed Thalacker, Goodhue, Bartkneht, Card and Shook as defendants in matter 04-C-732-C, which he filed in this court in 2004. Nowhere in the body of his present complaint does he make any mention of Thalacker, Goodhue, Bartkneht, Card or Shook. Plaintiff has shown no reason to reconsider the decision in the screening order that the defendants are Moore, Robinson and Klawitter. I turn then to the motion to dismiss filed by defendants Moore, Robinson and Klawitter.

A motion to dismiss brought under Fed. R. Civ. P. 12(b)(6) will be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. Cook v. Winfrey, 141 F. 3d 322, 327 (7th Cir.1998) (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). For the purpose of deciding defendants' motion, I accept as true the factual allegations in plaintiff's complaint and take into account certain attachments to the complaint.

FACTUAL ALLEGATIONS

Plaintiff Michael Hill is a federal inmate incarcerated at the Federal Corrections Institution in Oxford, Wisconsin. At the Oxford facility, defendant Steve Robinson is a unit manager, defendant M. Moore is a lieutenant and defendant Michael Klawitter is a counselor.

Plaintiff filed his complaint in June 2005. He alleged that defendants Steve Robinson, M. Moore and Michael Klawitter put him in segregated confinement on April 14, 2005, in retaliation for his pursuing an administrative grievance against defendant Klawitter dated April 4, 2005.

The Bureau of Prisons has an internal 3-level grievance mechanism, which is set out in 28 C.F.R. 542.10. The procedure consists of the prisoner's completing forms and submitting them to the warden (BP-9), the regional director of the Bureau of Prisons (BP-10) and the Bureau of Prison's General Counsel (BP-11) according to the timetable set out

in 28 C.F.R. 542.14 and 542.15.

Vickie Bortz is employed as a Legal Administrative Assistant with the Federal Bureau of Prisons assigned to the Federal Correctional Institution in Oxford, Wisconsin. Her duties include responsibility for receiving all administrative remedies filed at the Oxford institution and loading them into a computer database. She has searched the prison's records and has found no administrative complaint filed by plaintiff prior to June 2005 in which he alleged he had been placed in segregated confinement for filing a complaint against defendant Klawitter on April 4, 2005.

On April 14, 2005, plaintiff wrote a letter to the Office of the Inspector General in the United States Department of Justice. Plaintiff's letter was entitled "Notice. Complaint Against Federal Bureau Prison Staff," and stated in part that defendants Moore and Robinson threatened to put him in the segregation unit if he did not withdraw his April 4 administrative complaint against defendant Klawitter.

On August 12, 2005, plaintiff filed a regional administrative remedy appeal challenging an April 14, 2005 incident report that defendant Moore had written against plaintiff. In this appeal, plaintiff appears to be suggesting that Moore wrote the incident report in retaliation for plaintiff's having filed a complaint against Klawitter on April 4, 2005. As of August 29, 2005, the appeal was still pending at the regional office.

DISCUSSION

The exhaustion provisions of the 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), state 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 phrase "'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." 18 U.S.C. § 362(g)(2).

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; the 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). The court of appeals has held also that "if 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. The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures." Massey, 196 F.3d at 733.

The Bureau of Prisons has established an Administrative Remedy Program for a federal prisoner "to seek formal review of a complaint which relates to any aspect of his imprisonment." 28 C.F.R. 542.10. The procedure consists of the prisoner's completing the appropriate BP-9, BP-10 and BP- 11 forms, and submitting them to the warden, the regional director of the Bureau of Prisons, and the Bureau of Prisons' General Counsel, according to the timetable set out in 28 C.F.R. 542.14 and 542.15.

Although plaintiff agrees that he must exhaust his administrative remedies before he can file suit in federal court, he argues that "there is nothing in said case law that specifically states the B.O.P. Grievance System has to be used." Plt.'s Br., dkt. #14, at 2. Plaintiff contends that there are "other forms and styles of remedies that can be used to exhaust" administrative remedies. Plaintiff suggests that one such form is to file complaints with the inspector general at the Department of Justice as he did on April 14, 2005, but this suggestion is unpersuasive. The Administrative Remedy Program "applies to all inmates in institutions operated by the Bureau of Prisons, to inmates designated to contract Community Corrections Centers (CCCs) under Bureau of Prisons responsibility, and to former inmates for issues that arose during their confinement." 28 C.F.R. 542.10; see also McCoy v. Gilbert, 270 F.3d 503, 507 (7th Cir. 2001) (federal prisoner exhausts administrative remedies only after completing steps set forth in 28 C.F.R. 542.10).

This April 14 letter to the inspector general did not satisfy plaintiff's exhaustion obligation. The facts reveal that plaintiff did not raise a retaliation claim in the

administrative complaint system regarding defendants' alleged act of placing him in the segregation unit in retaliation for his April 4, 2005, complaint against Klawitter. Plaintiff cannot contend that he exhausted his administrative remedies by filing his August 12, 2005, administrative appeal alleging that Moore retaliated against him by writing an incident report, for three reasons.

First, the claim plaintiff raised in his August 12 grievance is not the same claim plaintiff raises in the present lawsuit. In the present lawsuit, plaintiff's claim is that defendants retaliated against him by placing him in the segregation unit because he filed an administrative complaint against Klawitter. To exhaust his administrative remedies as to this claim, plaintiff would have to file an administrative grievance raising this exact retaliation claim and subsequently appeal any adverse rulings, as provided for in the administrative procedures. Second, plaintiff filed the August 12 grievance after plaintiff initiated this lawsuit. See, e.g., Massey, 196 F.3d at 733 (plaintiff must exhaust administrative grievance system prior to filing suit in federal court). Last, the August 12 grievance concerned defendant Moore only, so even if it met all the requirements of the grievance system, it would not serve to exhaust administrative remedies as to defendants Robinson and Klawitter.

Because defendants have shown that plaintiff failed to exhaust his retaliation claim against defendants Robinson, Moore and Klawitter, I will grant defendants' motion to dismiss this case.

ORDER

IT IS ORDERED that the motion of defendants Robinson, Moore and Klawitter to dismiss plaintiff Michael Hill's claim that defendants violated plaintiff's First Amendment rights by placing him in segregated confinement in retaliation for his pursuing an administrative grievance against defendant Klawitter is GRANTED.

The clerk of court is directed to enter judgment dismissing this case without prejudice.

Entered this 5th day of December, 2005.

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