

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

RICHARD HOEFT,

Plaintiff,

v.

MEMORANDUM AND ORDER
05-C-351-S

CAPTAIN JENSEN,

Defendant.

Plaintiff Richard Hoeft was allowed to proceed on his First Amendment claim against defendant Captain Jensen. In his complaint plaintiff alleges that defendant Jensen opened his legal mail outside his presence.

On October 24, 2005 defendant moved for summary judgment on the ground that plaintiff failed to exhaust administrative remedies and in the alternative that defendant Jensen was not personally involved in the opening of plaintiff's legal mail outside his presence. The Court received plaintiff's response to defendant's motion on November 21, 2005. No further briefing is necessary.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendant's motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Richard Hoeft is incarcerated at the Stanley Correctional Institution, Stanley, Wisconsin (SCI). Defendant Casey Jensen is employed as a Captain at SCI and was assigned as Mailroom Supervisor from April 2004 to July 2005.

On September 7, 2004, November 7, 2004, April 8, 2005 and May 5, 2005 plaintiff's legal mail was inadvertently opened outside his

presence. He filed five administrative remedies concerning the opening of his legal mail. Two were not appealed because they were not adverse decisions. One was rejected. He exhausted his administrative remedies on the other two grievances. None of the grievances named defendant Jensen as the person that opened his legal mail.

Defendant Jensen never opened plaintiff's legal mail outside his presence. When Jensen received notification that mailroom staff had opened plaintiff's legal mail in error he advised them to be more careful.

MEMORANDUM

Defendant moves to dismiss plaintiff's complaint for failure to exhaust his administrative remedies. Pursuant to 42 U.S.C. § 1997e(a), no action shall be brought with respect to prison conditions by a prisoner confined in any jail, prison or other correctional facility until available administrative remedies are exhausted. Prisoners must file their complaints and appeals in the place and at the time the prison's administrative rules require. Pozo v. McCaughtry, 286 F. 3d 1022, 1025 (7th Cir. 2002)

In Perez v. Wisconsin Department of Corrections, 182 F.3d 532, 535 (7th Cir. 1999), the Court held as follows:

...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, even if the prisoner exhausts intra-prison remedies before judgment.

In this case although plaintiff exhausted his administrative remedies on some of his claims that his legal mail was opened outside his presence he never named defendant Jensen as the person responsible for the conduct. Accordingly, Perez requires a dismissal of the claim against defendant Jensen because plaintiff did not exhaust his administrative remedies on the claim against him prior to commencing this action.

In the alternative the Court will address the merits of plaintiff's complaint. An individual cannot be held liable under 42 U.S.C. § 1983 unless he caused or participated in the alleged deprivation of constitutional rights. Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). The undisputed facts indicate that defendant Jensen did not personally open plaintiff's legal mail outside his presence. Further, he never acquiesced in or approved the opening of plaintiff's legal mail outside his presence.

In addition, courts have held that this inadvertent opening of legal mail outside an inmate's presence is not a violation of an inmate's constitutional rights. See Brewer v. Wilkinson, 3 F.3d 816, 825 (5th Cir. 1993); Gardner v. Howard, 109 F. 3d 427, 431 (8th Cir. 1997). Accordingly, defendant is entitled to judgment in his favor and his motion for summary judgment will be granted.

Plaintiff is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his claim must

be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

ORDER

IT IS ORDERED that the defendant's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered DISMISSING plaintiff's complaint and all claims contained therein with prejudice.

Entered this 23rd day of November, 2005.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge