

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

JEFFREY A. VOIGT,

Plaintiff,

v.

BRIAN MILLER, Security Director,
Stanley Correctional Institution,

Defendant.

OPINION AND ORDER

05-C-356-C

This is a civil action brought pursuant to 42 U.S.C. § 1983. Plaintiff Jeffrey A. Voigt, an inmate at the Stanley Correctional Institution in Stanley, Wisconsin, contends that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment. Specifically, plaintiff contends that defendant was deliberately indifferent to plaintiff's safety when defendant refused to arrange for plaintiff to remain separated from inmate Bearheart Weasley, who had attacked plaintiff in mid-February 2005. In an order dated July 25, 2005, I granted plaintiff leave to proceed in forma pauperis on this claim.

Presently before the court is defendant's motion to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6). Defendant contends that plaintiff failed to properly

exhaust his administrative remedies prior to filing suit as required by 42 U.S.C. § 1997e(a). In support of his motion, defendant has submitted an affidavit relating to plaintiff's efforts to exhaust his remedies within the Department of Corrections inmate complaint review system. Plaintiff submitted documents regarding his use of the inmate complaint system at the time he filed his complaint. I can consider the parties' documentation without converting the motion to dismiss into a motion for summary judgment because the documentation of a prisoner's use of the inmate complaint review system 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. Accordingly, I will grant defendant's motion to dismiss this case.

A motion to dismiss 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 defendant's motion, I accept as true the factual allegations in plaintiff's complaint.

FACTS

Plaintiff is an inmate at the Stanley Correctional Institution in Stanley, Wisconsin. Defendant is the security director of the institution.

On February 15, 2005, plaintiff was beaten by fellow inmate Bearheart Weasley and hospitalized for a grade 3 concussion, lacerations, loosened teeth and contusions. Several days after the attack, plaintiff sent defendant Miller a request to be separated from inmate Weasley. Plaintiff was temporarily placed in the segregation unit while the attack was investigated. However, plaintiff's request for separation from Weasley was denied.

On April 10, 2005, plaintiff wrote defendant Miller asking again to be separated from inmate Weasley. On April 29, 2005, defendant Miller wrote plaintiff, "I have received your correspondence stating you are trying to secure a SPN [separation request]. I am enclosing a DOC-1803 offender request for separation form. Please fill out completely and return it to me. Once I have received it, your concerns will be investigated." On May 1, 2005, plaintiff submitted the DOC-1803 form to defendant Miller.

On May 7, 2005, security staff informed plaintiff that he was being released from segregation to the general population. When plaintiff refused to return to the general population, he was punished with an additional sixty days in segregation. On May 31, 2005, plaintiff filed inmate complaint #SCI-2005-16862 stating that defendant Miller had not responded to his DOC-1803 separation request and that releasing him to general population, was unreasonable. At some point, plaintiff received a response to his complaint. Plaintiff

did not appeal the response to his complaint.

OPINION

42 U.S.C. § 1997e(a) provides that: “no action shall be brought with respect to prison conditions under §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 “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) (emphasis added). Wis. Admin. Code § DOC 310.04 sets out the procedure for exhaustion of claims involving prison conditions: “[B]efore an inmate may commence a civil action . . . the inmate shall file a complaint under s. DOC 310.09 or 310.10, receive a decision on the complaint under s. DOC 310.12, have an adverse decision reviewed under s. DOC 310.13, and be advised of the secretary's decision under s. DOC 310.14.”

In his brief, plaintiff admits that he did not appeal the disposition of his inmate complaint. However, he contends that his failure to appeal the decision is irrelevant because I allowed him to proceed on his claim in this court. Plaintiff misunderstands the screening process.

To be granted leave to proceed on a civil claim screened under 28 U.S.C. § 1915A, an inmate must simply state his “legal claim . . . together with some indication of time and place” in which an alleged constitutional violation occurred. Thomson v. Washington, 362 F.3d 969, 970 (7th Cir. 2004). Plaintiff met these requirements with respect to his Eighth Amendment claim. In the order granting him leave to proceed I stated, “This court will not dismiss petitioner’s case on its own motion for lack of administrative exhaustion, but if respondents believe that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).” Voigt v. Miller, 05-C-356-C, Order dated Jul. 25, 2005 at 2. Defendant has done just that.

Prison records show that plaintiff filed a complaint about defendant’s refusal to grant plaintiff a permanent separation from Weasley, but that he did not appeal the dismissal of that complaint. Therefore, this court cannot entertain plaintiff’s claims on the merits, but must dismiss the suit without prejudice. Ford v. Johnson, 362 F.3d 395, 401 (7th Cir. 2004).

ORDER

IT IS ORDERED that the motion of defendant Brian Miller to dismiss this case for

plaintiff's failure to exhaust his administrative remedies is GRANTED. The clerk of court is directed to enter judgment dismissing this case without prejudice.

_____ Entered this 19th day of September, 2005.

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