IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GLENN M. DAVIS,

Plaintiff,

v.

OPINION AND ORDER
05-C-374-C

CATHERINE J. FARRY,
Warden of New Lisbon Corr. Inst.,

Defendant.

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In May 2005, plaintiff Glenn M. Davis filed this civil action brought pursuant to 42 U.S.C. § 1983. Plaintiff contends that within the first six months after he was transferred to the New Lisbon Correctional Institution in December 2004, prison officials in the mail room opened seven pieces of his legal mail, all of which were clearly labeled as legal mail. Petitioner was granted leave to proceed on his First Amendment claim against defendant Farry, the warden of the New Lisbon Institution, to uncover the names of the persons directly responsible for violating his constitutional rights. 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 her motion, defendant has submitted an affidavit and documents relating to plaintiff's efforts to exhaust his remedies within the administrative complaint review system. I can consider this 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 defendant is correct: plaintiff has failed to properly exhaust his administrative remedies as to his First Amendment claim. Accordingly, I will grant defendant's motion to dismiss this case.

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 defendant's motion, I accept as true the factual allegations in plaintiff's complaint and take into account certain attachments to the complaint.

FACTUAL ALLEGATIONS

Petitioner Glenn M. Davis is a Wisconsin state inmate housed at the New Lisbon

Correctional Institution in New Lisbon, Wisconsin. Respondent Catherine J. Farry is Warden at New Lisbon Correctional Institution.

Plaintiff was convicted in 1997 and has been incarcerated at the New Lisbon facility since December 2004. Between December 2004 and May 2005, when petitioner filed this lawsuit, mail room staff opened seven pieces of his legal correspondence outside his presence, even though all seven pieces were clearly labeled as "legal mail."

Plaintiff complained about the situation "through normal, established institution and chain of command" at New Lisbon. In addition, plaintiff wrote to a judge in the Eastern District of Wisconsin and the legal director of the American Civil Liberties Union.

John Ray is employed as a corrections complaint examiner with the Wisconsin Department of Corrections and is the custodian of the regularly conducted business records of the Corrections Complaint Examiner's office. His examination of the records reveal that at no time while plaintiff was confined at New Lisbon Correctional Institution did he file any administrative complaints complaining that his legal mail was opened outside his presence.

DISCUSSION

A. Administrative Exhaustion

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.

Before inmates may begin a civil action, Wis. Admin. Code § DOC 310.04 requires

that they "file a complaint under § DOC 310.09 or 310.10, receive a decision on the complaint under § DOC 310.12, have an adverse decision reviewed under § DOC 310.13, and be advised of the secretary's decision under § DOC 310.14."

Defendant has put in documentation to show that plaintiff did not file any administrative complaints regarding the seven pieces of legal mail that were allegedly opened outside his presence since December 2004. In his brief, plaintiff contends that he filed an administrative complaint that was rejected, presumably one that contained a complaint about his legal mail. Plaintiff's description of that complaint is entirely unclear, but a rejected complaint does not satisfy an inmate's obligation to file a complaint that meet the state's requirements so that it is not rejected.

Plaintiff argues also that he complained about his opened legal mail "through normal, established institution and chain of command" at New Lisbon, in letters he sent to a judge and the American Civil Liberties Union and in letters he sent to dozens of individuals around the country allegedly describing the problems with the mail system at New Lisbon. Plaintiff appears to misunderstand the requirement to exhaust administrative remedies. The requirement to exhaust entails following the procedures set forth in Wis. Admin. Code § DOC 310.04 for filing administrative complaints and appealing adverse decisions to the Corrections Complaint Examiner and the Secretary of the Department of Corrections. Sending letters to prison and state officials or anyone else regarding the alleged wrongdoing

by mail room staff does not meet those requirements. Because defendant has shown that plaintiff failed to exhaust his administrative remedies with respect to the First Amendment claim he raised in this court, I will grant defendant's motion to dismiss this case.

B. Other Matters

On November 29, 2005, defendant requested that this court stay defendant's deadline to identify John Doe defendants for the plaintiff. Because this case will be dismissed defendant's request is moot.

ORDER

IT IS ORDERED that defendant Catherine Farry's motion to dismiss plaintiff Glenn M. Davis' claim that his First Amendment rights were violated when seven pieces of his legal mail were opened outside his presence is GRANTED.

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

Entered this 7th day of December, 2005.

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