IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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THOMAS W. REIMANN,

Plaintiff,

v.

DAVID ROCK, JOHN PAQUIN,
MS. TIERNEY, CATHERINE FERREY
and LIZZIE TEGELS,

Defendants.

ORDER

05-C-501-C

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In an order dated October 21, 2005, I screened plaintiff's complaint and allowed him to proceed on three claims:

1) Defendant David Rock violated plaintiff's Eighth Amendment rights by failing to implement a soft restraint restriction when plaintiff is transported outside the prison;

2) Defendants Catherine Ferrey and Lizzie Tegels transferred plaintiff from the New Lisbon Correctional Institution to the Jackson Correction Institution in retaliation for plaintiff's threats to exercise his First Amendment right to file a lawsuit regarding non-delivery of his mail; and

3) Defendants John Paquin and Ms. Tierney transferred plaintiff from the Jackson Correctional Institution to the Stanley Correctional Institution in retaliation for plaintiff's exercise of his First Amendment right to file inmate grievances.

Now plaintiff has filed the following documents:

1) A proposed "Verified Amended Civil Rights Complaint with a Jury Demand" (Dkt. #10);

2) A "Motion for Reconsideration" of this court's screening order of October 21, 2005 (Dkt. #11);

3) A letter dated October 26, 2005, which I construe as a motion for an order directing prison officials to pay the remainder of plaintiff's filing fee from his release account (Dkt. #13); and

4) A "Motion for Injunction and Affidavits in Support" dated October 27, 2005 (Dkt. #14).

Also before the court is plaintiff's "Motion for Injunction and Affidavit in Support" dated August 24, 2005 (Dkt. #3).

It is problematic that plaintiff has filed both a motion to amend his complaint and a motion for reconsideration of the court's screening order of his original complaint. As plaintiff is aware, when I screened his original complaint, I identified and carefully considered the constitutional merit of each of his claims based upon the factual allegations

in that complaint. If plaintiff wants me to reconsider my rulings with respect to one or more of those claims, it will be necessary for me to re-examine the factual assertions in his original complaint and apply the law to those allegations relating to each claim under scrutiny. It would be pointless to engage in this exercise if it is plaintiff's intention to file an amended complaint, when an amended complaint takes the place of the original complaint. If plaintiff wishes to pursue his amended complaint, I will be required under the Prisoner Litigation Reform Act to identify the claims in that complaint and dismiss any claim that is frivolous, malicious or is not a claim upon which relief may be granted. 28 U.S.C. §§ 1915A(a), (b). In other words, if plaintiff wishes this court to consider his proposed amended complaint, his motion for reconsideration of the order screening his original complaint would become moot.

Because it is not clear what plaintiff's intentions are, I will allow him two weeks in which to advise the court whether he wishes the court to consider the merits of his proposed amended complaint. If plaintiff responds to this question in the affirmative, then I will treat the proposed amended complaint as the sole operative pleading in this case and take it under advisement for screening under § 1915A. In addition, I will deny as moot plaintiff's motion for reconsideration of the original screening order. Alternatively, plaintiff may notify the court that he is withdrawing his proposed amended complaint. If he does that, I will take his motion for reconsideration of the original screening order under advisement. In the

meantime, I will extend the time within which defendants must file an answer to plaintiff's complaint. No answer will be due until 20 days after the court screens plaintiff's amended complaint or rules on plaintiff's motion for reconsideration, whichever motion plaintiff chooses to pursue.

I turn then to plaintiff's motion for an order directing prison officials to pay the remainder of his filing fee from his release account (Dkt. #13). According to plaintiff, he would like to pay the full amount of his filing fee from his release account so that he can "stock up on canteen items" and "head off any potential conflict" that might arise if the fee is deducted from his regular account.

Unfortunately for plaintiff, Wisconsin state law restricts use of an inmate's release account funds for any purpose prior to the inmate's release. Wis. Stat. § 814.29(1m)(d); Wis. Admin. Code § DOC 309.466(s). Although the state of Wisconsin has taken the position that the 1996 Prison Litigation Reform Act supersedes this state law for the purpose of making an initial partial payment of a federal court filing fee, nothing in the act requires a warden to agree to give a prisoner release account funds to pay the remainder of the fee simply because the prisoner wants the bill paid from his release account. The only money that the state need take from a state prisoner's release account is money that fits within the formula specified in 28 U.S.C. § 1915. After the initial partial payment has been paid, § 1915(b)(2) controls the release of the remainder of the filing fee from a prisoner's account.

It provides that the balance of the fee is to be paid in installments figured at 20% of "the preceding month's income." If this income includes interest earned on money in a release account, it may be that payment of the installments will have to come in part or in full from the inmate's release account. However, if the money exists in plaintiff's regular account, it will be taken from that account. There is no basis in the law for directing prison officials to take that money from plaintiff's release account. Therefore, plaintiff's motion for an order directing prison officials to pay the remainder of his filing fee from his release account will be denied.

Finally, plaintiff has filed two motions for an injunction (Dkt. ## 3 and 14), which are supported by identical affidavits from William Grunwald, Todd Walker, Brandon Lane and plaintiff. The separate motions for an injunction are nearly identical, but the latter filed motion, dkt. #14, includes allegations of harm continuing up to the day plaintiff signed the motion on October 27, 2005. Therefore, I will consider plaintiff's second motion and deny the first motion as moot.

In his second motion for a preliminary injunction, plaintiff seeks an order enjoining defendant Rock from forcibly reducing the methadone he is prescribed for chronic pain. He avers that on August 11, 2005, when he saw Rock and expressed his view that he was decreasing plaintiff's methadone doses too quickly, Rock said, "I don't care. I don't care if you suffer. I don't care if you sue me, I don't care if you go without medication. That's why

I work here: because I don't care." Previously, on July 23 and 26, 2005, plaintiff had a leg cramp and experienced severe and unrelenting pain which, in his view, is caused by a drastically reduced regimen of pain medication. Inmate Brandon Lane heard plaintiff moaning on July 23 and then heard him fall. When Lane asked plaintiff what had happened, plaintiff told Lane that his leg had gone out on him because his medication was taken away from him. Inmate Grunwald was taken off his prescription for anxiety medication when he arrived at the Stanley Correctional Institution because it might be habit forming. Inmate Joseph Frey was not allowed to take a prescription he had been given for morphine following back surgery. Instead, he was offered an ineffective analgesic. Defendant Rock "essentially laughed" at inmate Todd Walker when Walker told him he was supposed to be on long term narcotic therapy for a back injury. Plaintiff has offered to take methadone in liquid form if defendant Rock has any complaint that plaintiff might be abusing it and walk to the health services unit to get it three times a day, but Rock never responded to plaintiff.

The problem with plaintiff's motion for emergency injunctive relief is that it concerns a matter on which plaintiff has not been allowed to proceed because he failed to exhaust his administrative remedies before bringing suit. In the cover letter accompanying plaintiff's proposed amended complaint, plaintiff admits that he had not exhausted his administrative remedies on this claim before he filed his complaint. He argues, however, that although he

is procedurally barred from pursuing allegations that he was denied medical care in violation of the Eighth Amendment before August 11, 2005 (the day after he signed his original complaint), he should be allowed to pursue allegations of mistreatment after August 11 to the present. This argument is unavailing. 42 U.S.C. § 1997(e) makes exhaustion a *precondition* to suit. Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999). This means that exhaustion must be complete *before* the lawsuit is filed. This case was filed on August 15, 2005. If plaintiff has now fully exhausted his administrative remedies with respect to inmate complaint SCI-2005-22612, he is free to file a new lawsuit raising his deliberate indifference claim against defendant Rock. Forms for filing a complaint may be obtained from the clerk of court on plaintiff's request.

ORDER

IT IS ORDERED that

1. Plaintiff's "Motion for Injunction and Affidavits in Support" dated August 24, 2005 (Dkt. #3), is DENIED as moot.

2. Plaintiff's October 27, 2005 "Motion for Injunction and Affidavits in Support" (Dkt. #14) is DENIED because the claim raised in the motion is not a claim on which plaintiff has been permitted to proceed in this case.

3. Plaintiff's motion for an order directing prison officials to pay the remainder of

plaintiff's filing fee from his release account (Dkt. #13) is DENIED.

4. Plaintiff may have until November 23, 2005, in which to advise the court whether he wishes the court to consider his proposed amended complaint or whether he will stand on his original complaint. If plaintiff advises the court that he will stand on his original complaint, I will take under advisement his motion for reconsideration and deny his motion to amend as moot. If plaintiff advises the court that he wishes the court to consider his proposed amended complaint, I will deny his motion for reconsideration as moot and take his amended complaint under advisement for screening. If, by November 23, 2005, plaintiff fails to respond to this order, I will automatically disregard his motion for reconsideration and take his proposed amended complaint under advisement.

5. Defendants may have an enlargement of time until 20 days after the court rules on plaintiff's motion for reconsideration or his motion to amend in which to serve and file an answer.

Entered this 10th day of November, 2005.

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