IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

LEE R. CROUTHERS,

Plaintiff,

v. MEMORANDUM and ORDER

DANIEL J. BENIK, PAM WALLACE, S. JOLES, CAPTAIN JENSEN, JOANNA HOODWANIC, SHEILA PATTON, SALLY SEDLOCEK and OFFICER McCOY, 05-C-635-S

Defendants.

Plaintiff Lee R. Crouthers was allowed to proceed on his equal protection claim against defendants Sheila Patton, Sally Sedlocek, Joanna Hoodwanic, S. Joles and Officer McCoy, on his Eighth Amendment claim against defendants Daniel C. Benik and Pam Wallace and on his First Amendment claim against defendant Captain Jensen. In his complaint he alleges that he was denied a job in the kitchen because of his race and was denied medical treatment for his kidney stones. He also alleges that defendant Jensen interfered with his out going mail.

On January 24, 2006 defendants moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof. Plaintiff's opposition to this motion was filed on March 13, 2006. No further briefing is required.

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 defendants' motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Lee R. Crouthers is an inmate at the Stanley Correctional Institution, Stanley, Wisconsin (SCI). Defendant Daniel Benik was the warden at SCI and defendant Pamela Wallace is the current warden. Defendant Sharon Joles is the Food Service Administrator at SCI. Defendants Joanna Hoodwanic, Sheila Patton and Sally Sedlocek are Food Service employees at SCI. Defendants Captain Jensen and Officer McCoy are correctional officers at SCI.

On December 9, 2004 inmate Crouthers was offered a position in Food Services at SCI as Trayline Entry Food Service Worker. On February 10, 2005 inmate Shawn Kaliszewski accepted a position as Trayline Entry PM. He had previously worked as a trayline worker preparing special diets from May 21, 2004 through July 20, 2004.

On March 17, 2005 a notice of Job Opening for the position of Cook II Special Diets PM was posted. On March 19, 2005 a notice of Job Opening for an Assistant Cook, Special Diets AM/PM was posted. Inmate Kasliszewski was selected to fill the job of Cook II Special Diets PM because of his previous experience and work history. On March 24, 2005 plaintiff accepted the position as Assistant Cook, Special Diets AM/PM.

Various criteria were used by Food Service staff to evaluate an inmate worker's qualifications for each posting. Among the criteria used for evaluation was past work performance, length of time working in food service, attitude and communication skills

with staff and disciplinary history. Length of service carries less weight than the other factors.

Plaintiff did not exhaust his administrative remedies on his Eighth and First Amendment claims. He exhausted his administrative remedies on his equal protection claim.

MEMORANDUM

Plaintiff also claims he was denied his equal protection rights by the defendants. To prevail on his equal protection claim plaintiff must establish that the defendants treated him differently from similarly situated persons and did so purposefully because of his race or religion. Dewalt v. Carter, 224 F. 3d 607, 618 (7th Cir. 2000). The decision to hire inmate Kaliszewski instead of plaintiff for the position of Cook II Special Diets P.M. was because of his prior experience in preparing special diet trays. There is no evidence that race was a factor in the decision. Accordingly defendants are entitled to judgment in their favor on plaintiff's equal protection claim.

Defendant claims that plaintiff's First and Eighth Amendment claims should be dismissed for his failure to exhaust 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.

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.

Perez requires dismissal of plaintiff's Eighth and First Amendment claims because he did not exhaust his administrative remedies prior to commencing this action. Accordingly, plaintiff's Eighth and First Amendment claims will be dismissed without prejudice for failure to exhaust administrative remedies.

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

ORDER

IT IS ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants against plaintiff DISMISSING his equal protection claim with prejudice and his First and Eighth Amendment claims without prejudice.

Entered this 16th day of March, 2006.

BY THE COURT:

_s/_____
JOHN C. SHABAZ
District Judge