

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

SCOTT REIDELL,

Plaintiff,

v.

CO RON GRAY, in his
individual capacity,

Defendant.

OPINION AND
ORDER
05-C-667-C

Plaintiff Scott Reidell, a prisoner at the New Lisbon Correctional Institution, is proceeding in this action on his claims that defendant Gray used excessive force against him in violation of the Eighth Amendment when he let plaintiff fall as plaintiff stepped out of the van in a hospital parking lot and then retaliated against plaintiff for filing an offender complaint about the matter in violation of the First Amendment. Presently before the court is defendant's motion to dismiss plaintiff's retaliation claim pursuant to Fed. R. Civ. P. 12(b)(6). Defendant contends that plaintiff failed to properly exhaust his administrative remedies pertaining to the retaliation claim prior to filing suit as required by 42 U.S.C. § 1997e(a).

In support of his 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 retaliation claim. Accordingly, I will grant defendant's motion to dismiss this claim.

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

Plaintiff Scott Reidell is a Wisconsin state inmate presently housed at the New Lisbon Correctional Institution in New Lisbon, Wisconsin. Defendant Gray is a corrections officer

at the New Lisbon Correctional Institution.

Plaintiff was incarcerated at the Jackson Correctional Institution when the events giving rise to this lawsuit transpired. On August 3, 2004, plaintiff was transported from the Jackson facility to the University of Wisconsin hospital. Plaintiff was restrained at his waist and ankles, when waist restraints would have been sufficient. Because plaintiff was wearing ankle restraints, he slipped as he stepped out of the van in the hospital parking lot. As he slipped, defendant “released his hold” on plaintiff. Plaintiff fell and injured his back. Plaintiff was allowed to see a nurse for his back pain while he was at the hospital.

On August 5, 2004, plaintiff filed an offender complaint against defendant regarding the incident when he fell as he stepped out of the van. Defendant retaliated against plaintiff for filing the offender complaint by writing a conduct report against plaintiff. There is no record in the Department of Corrections’ Inmate Complaint Tracking System of plaintiff’s having filed a complaint concerning the alleged retaliation.

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.”

There is no record in the Department of Corrections' Inmate Complaint Tracking System that plaintiff filed a complaint alleging defendant Gray's retaliatory conduct and that he either attained relief or appealed any adverse decision to a Corrections Complaint Examiner and to the Secretary of the Department of Corrections. Plaintiff argues in his brief that

Defendants was on notice when plaintiff filed his I.C.E complaints, and a notice of claim was filed. If the defs. claimed that they never received one then they need to recheck.

These statements are confusing. It is not clear which “I.C.E complaints” plaintiff is referring to and filing a “notice of claim” with the Wisconsin Attorney General pursuant to Wis. Stat. § 893.82 would be insufficient to satisfy the exhaustion requirement under 42 U.S.C. § 1997e. One thing is clear: plaintiff has provided no evidence (such as a copy of his inmate complaint) that he filed a complaint pertaining to his retaliation claim and appealed any adverse decisions in accordance with the appeal procedures. Because defendant has shown that plaintiff failed to exhaust his administrative remedies with respect to his First Amendment retaliation claim and plaintiff has not put that showing into dispute, I will grant defendant's motion to dismiss this claim.

ORDER

IT IS ORDERED that defendant CO Ron Gray's motion to dismiss plaintiff Scott Reidell's claim that his First Amendment rights were violated when defendant retaliated against him for filing an offender complaint is GRANTED.

Entered this 9th day of May, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge