IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

TITUS HENDERSON,

ORDER

Plaintiff,

06-C-12-C

v.

MATTHEW FRANK; PETER HUIBREGTSE;
BRIAN KOOL; TRACEY GERBER; J. STARKY;
RUSSELL BAUSCH; ROBERT SHANNON;
TODD OVERBO; DICK VERHAGEN; and
RICHARD SCHNEITER,

Defendants.

- -

In an order dated March 6, 2006, I screened plaintiff Titus Henderson's complaint and granted him leave to proceed in forma pauperis on sixteen claims against various defendants. I denied plaintiff leave to proceed in forma pauperis on twenty other claims, including a claim that a prison official at the North Fork Correctional Institution in Sayre, Oklahoma violated his due process rights by placing him in segregated confinement on January 5, 2001. In addition, I stayed a decision on plaintiff's request for leave to proceed in forma pauperis with respect to his claim that defendant Brian Kool violated his First Amendment rights by denying him a promotion to level three on January 3, 2005 because,

in an earlier lawsuit in this court, I had dismissed the claim for plaintiff's failure to exhaust his administrative remedies. I gave plaintiff until March 9, 2006 to submit proof that he has exhausted his administrative remedies with respect to this claim.

Now plaintiff has submitted a letter to the court in which he asks the court to review the Supreme Court's recent decision in Wilkinson v. Austin, 125 S. Ct. 2384 (2005). I construe his request as a motion for reconsideration of the court's decision to deny him leave to proceed in forma pauperis on his due process claim. That request will be denied. In addition, plaintiff contends that he has attached documentation to his letter demonstrating that he has exhausted his administrative remedies with respect to his retaliation claim. Because the documentation he has submitted is the same documentation that I found insufficient for exhaustion purposes in his earlier lawsuit, I will deny plaintiff leave to proceed in forma pauperis on his retaliation claim.

A. Due Process Claim

In the March 6 screening order, I denied plaintiff leave to proceed on his due process claim concerning his placement in disciplinary segregation because such placement does not implicate a liberty interest protected by the due process clause. In support of this proposition, I cited two decisions of the Court of Appeals for the Seventh Circuit, Thomas v. Ramos, 130 F.3d 754 (7th Cir. 1997) and Wagner v. Hanks, 128 F.3d 1173 (7th Cir.

1997). Plaintiff's request for reconsideration and his citation of Wilkinson suggests that he believes that Wilkinson alters the analysis of his due process claim. He is wrong. In Wilkinson, the Court examined Ohio's procedures for placing inmates in its highest security, or "supermax," prison. After considering the conditions at the supermax facility, which were designed to eliminate virtually all human contact and sensory stimulation, the fact that placement at the facility was indefinite and rendered an otherwise qualified inmate ineligible for parole, the Court held that placement at the facility did constitute an atypical and significant hardship and therefore implicated a liberty interest. Wilkinson, 125 S. Ct. at 2394-95. Wilkinson did not address placement in disciplinary segregation. It did not overrule Wagner or undermine its rationale. Therefore, Wagner continues to govern plaintiff's due process claim.

In Wagner, 128 F.3d at 1176, the court of appeals made clear that "when the entire sanction is confinement in disciplinary segregation for a period that does not exceed the remaining term of the prisoner's incarceration, it is difficult to see how after Sandin it can be made the basis of a suit complaining about a deprivation of liberty." Plaintiff argues without explanation that Wagner is "inconsistent" with Sandin. I disagree. The court of appeals applied Sandin faithfully in Wagner and reached a decision consistent with Sandin's holding.

B. Exhaustion of Administrative Remedies

The documentation petitioner attached to his letter to show that he has exhausted his administrative remedies with respect to his claim that defendant Brian Kool denied him a promotion to level three at the Wisconsin Secure Program Facility on January 3, 2005 consists of the following:

> 1. Inmate complaint WSPF-2005-338, filed by plaintiff on January 3, 2005;
> 2. An attachment to the inmate complaint, also dated January 3, 2005;
> 3. Inmate complaint examiner Ellen Ray's report recommending dismissal of plaintiff's inmate complaint, dated January 10 2005;
> 4. Deputy Warden Peter Huibregtse's acceptance of Ray's recommendation and dismissal of plaintiff's inmate complaint, dated January 13, 2005;
> 5. Plaintiff's appeal of Huibregtse's decision to dismiss his complaint, dated January 19, 2005;
> 6. Corrections complaint examiner Sandra Hautamaki's report recommending dismissal of plaintiff's appeal, dated January 28, 2005; and
> 7. Administrator Richard Raemisch's decision accepting Hautamaki's decision on behalf of the Secretary of the Department of Corrections and dismissing plaintiff's appeal, dated January 31, 2005.

These are the same documents I reviewed in considering whether petitioner had exhausted his administrative remedies with respect to this claim in case no. 05-C-157-C. In that case, after reviewing these documents (in addition to another inmate complaint , WSPF-2204-37826, that plaintiff did not submit with his letter), I concluded that plaintiff had not exhausted his administrative remedies. In an order dated November 17, 2005, I summarized plaintiff's failure to exhaust in the following terms:

> If prison officials are to have any chance of resolving a prisoner's grievance

concerning alleged retaliatory conduct, it is imperative that the complaining inmate inform prison officials precisely of two things: the conduct of the prisoner that allegedly provoked the retaliation and what the defendant did that was retaliatory. These are the same essential factual allegations necessary in a federal action asserting retaliation to give the defendant sufficient notice of the claim so that he or she can defend against it. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir.2002) (minimal notice pleading requirement for retaliation claim is specification of protected activity and act of retaliation). A prisoner cannot have prison officials investigating one retaliatory motive or one retaliatory act in the administrative process and then claim another retaliatory motive or another retaliatory act in his federal lawsuit, because the internal investigation of plaintiff's complaint and the system's ability to resolve the matter and avoid litigation turn on these key assertions.

In this case, the facts reveal that plaintiff did not give prison officials the information they needed to investigate the claim of retaliation against defendant Kool that he raised in his lawsuit in this court, that is, that defendant Kool denied him a promotion to security level three because he said in a questionnaire that he had been transferred to the Wisconsin Secure Program Facility for filing a civil action against Redgranite prison officials. In offender complaint WSPF2007-37826, plaintiff complained that Kool had denied him a promotion to security level three "for saying 'I will continue to file lawsuits against corrupt W.S.P.F. staff.'" In offender complaint WSPF-2004-37826, plaintiff stated that defendant Kool had denied him a promotion to security level three on account of "CR#1357711." In a separate statement attached to inmate complaint WSPF-2005-338, plaintiff alludes to the possibility that defendant Kool denied him a promotion because Kool viewed plaintiff as a Nationalist Socialist Party member or "because of [plaintiff's] protected speech he didn't like about racist staff at W.S.P.F." In his appeal from the dismissal of offender complaint WSPF-2005-338, plaintiff shifts direction again, this time contending that Ellen Ray, the institution complaint examiner investigating complaint WSPF-2005-338, "dismissed [his] complaint to conspire with Unit Manager Kool to punish me for saying 'I filed lawsuits against staff at RGCI is the reason I'm at W.S.P.F.'" Although in this appeal plaintiff identifies the same constitutionally protected activity he alleges in this court, identifying the activity in an appeal did not satisfy plaintiff's administrative exhaustion obligations. Plaintiff had turned his attention to

Ellen Ray, identified a new retaliatory act and was claiming a conspiracy between Ray and defendant Kool.

Needless to say, plaintiff has not demonstrated that he has exhausted his administrative remedies with respect to this retaliation claim against defendant Kool. All he has done is submit the same documents I concluded were insufficient to show exhaustion in case no. 05-C-157-C. Although exhaustion of administrative remedies is an affirmative defense, the Court of Appeals for the Seventh Circuit has held that a court may raise an affirmative defense on its own if it is clear from the face of the complaint that the defense applies. Gleash v. Yuswak, 308 F.3d 758, 760- 61 (7th Cir. 2002). This is such an occasion. Therefore, plaintiff will be denied leave to proceed on this claim.

ORDER

IT IS ORDERED that

1. Plaintiff Titus Henderson's letter dated March 8, 2006 is construed as a motion for reconsideration and is DENIED; and

2. Plaintiff is DENIED leave to proceed in forma pauperis on his claim that defendant Kool denied him a promotion to level three on January 3, 2005 in retaliation for plaintiff's having written in a questionnaire that the reason for his transfer to the Wisconsin Secure Program Facility was his filing of lawsuits against staff at the Red Granite

Correctional Institution.

Entered this 21st day of March, 2006.

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