IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KENNETH E. KING,

Plaintiff, OPINION AND ORDER

v. 06-C-257-C

DAVID L. DITTER,

Defendant.

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In this civil action for declaratory and monetary relief, plaintiff Kenneth King, a prisoner at the Columbia Correctional Institution in Portage, Wisconsin, contends that defendant David Ditter, his former prison job supervisor, lowered his pay and ultimately fired him because of his race and in retaliation for statements he made and grievances he filed criticizing Ditter's managerial practices. Now before the court is defendant's unopposed motion to dismiss plaintiff's equal protection claim because plaintiff failed to exhaust his administrative remedies with respect to that claim as he was required to do under 42 U.S.C. § 1997e(a). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999). Because plaintiff concedes that he did not exhaust his administrative remedies with respect to his equal protection

claim, the motion will be granted.

I draw the following factual allegations from plaintiff's complaint and from documents submitted by defendant showing plaintiff's use of the inmate complaint system. 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) (district court may "take judicial notice of matters of public record without converting a motion for failure to state a claim into a motion for summary judgment").

FACTUAL ALLEGATIONS

A. Parties

Plaintiff Kenneth E. King is an inmate at the Columbia Correctional Institution in Portage, Wisconsin. From December 2004 to February 2006, he was employed at the prison by Badger State Industries (BSI). (Badger State Industries is a prison industry program operated by the State of Wisconsin. The division located at the Columbia Correctional Institution offers printing and copying services.)

Defendant David Ditter has been a supervisor at Badger State Industries since October 2005.

B. Plaintiff's Employment at Badger State Industries

From December 2004 until September 2005, plaintiff worked without incident under

the supervision of Badger State Industries supervisor Brian Franson. Plaintiff received regular promotions and pay increases until he reached maximum pay of $1.00 an hour.

In mid-October 2005, defendant and Franson exchanged jobs. Several weeks later, defendant announced at a shop meeting that certain jobs would no longer be eligible for the maximum pay range. Defendant stated, "There will be reductions, I'm just letting you know."

Several days after the shop meeting, defendant called plaintiff into his office after hearing that plaintiff and another inmate, Robert Wirth, had "mouth[ed] off" to a staff member about the schedule changes defendant had implemented and had told other inmates that the new work hours were illegal and that defendant could be sued. Defendant told plaintiff that he "better stop" and that plaintiff should come to him directly with any complaints instead of "mouth[ing] off" to other staff members.

The following week, defendant reduced plaintiff's pay from $1.00 an hour to $.92 an hour, falsely stating that plaintiff had been making mistakes and having problems with his fellow employees. When plaintiff "voiced his displeasure and disagreement" with defendant's decision to reduce his pay, defendant told him, "I'm tired of your shit. If you keep mouthing off I'll fire your ass." Out of fear of being fired, plaintiff agreed to the pay reduction.

Plaintiff is black. In early 2005, a white inmate named Michael Whip and a Hmong

inmate named Da Vang were placed in disciplinary segregation and given conduct reports for engaging in disruptive conduct while working. When Whip and Vang returned to work, their pay was not reduced. In early 2006, Whip and another inmate, Gordo Davis engaged in a "loud, disruptive argument" and "came close to exchanging blows." Defendant Ditter called Whip and Davis to his office for a discussion but did not decrease their pay.

On February 9, 2006, defendant called plaintiff to his office and reprimanded him for allegedly "messing up" two print jobs. As a consequence, defendant reduced plaintiff's pay to $.65 an hour. Plaintiff was humiliated. Approximately five minutes after plaintiff left defendant's office, defendant called him back. Defendant said that he had heard plaintiff tell other inmates that defendant was racist. Defendant told plaintiff, "You're done," and fired him on the spot.

Later that day, plaintiff filed an inmate complaint numbered CCI 2006-3911, in which he alleged that defendant had retaliated against him "for exercise of [his] First Amendment rights." Plaintiff did not allege that defendant had treated him more harshly than non-black inmates.

On February 11, 2000, plaintiff filed an inmate complaint numbered CCI-2006-4084, in which he alleged that two white inmates, Mark Humphrey and Steven Wolfe, made mistakes on a printing job and were treated less harshly than plaintiff by defendant. Plaintiff's complaint makes no reference to either Humphrey or Wolfe.

OPINION

The 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), provides 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 Court of Appeals for the Seventh Circuit has held that "[e]xhaustion of administrative remedies, as required by § 1997e, is a condition precedent to suit" and that district courts lack discretion to decide claims on the merits unless the exhaustion requirement has been satisfied. Dixon v. Page, 291 F.3d 485, 488 (7th Cir. 2002)

"[I]f 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." Massey, 196 F.3d at 733 (7th Cir. 1999). Exhaustion has not occurred unless an inmate follows the rules that the state has established governing the administrative process. Dixon, 291 F.3d at 491; Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). An inmate must "properly take each step within the administrative process" or else he is foreclosed by 42 U.S.C. § 1997(e) from bringing a suit. Pozo, 286 F.3d at 1024.

Deciding this motion presents no real challenge because the parties agree on the

operative facts: plaintiff did not file inmate grievances relating to defendant Ditter's alleged differential treatment of him and inmates of other races because "plaintiff never intended on his claim being converted into a racial discrimination claim, and that is not his claim." Dkt. #11, at 2. When a court screens the complaint of a pro se prisoner under 28 U.S.C. § 1915A, the court is required to construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). When this court screened plaintiff's complaint, it appeared that he was raising an equal protection claim by alleging that defendant was "racist" and had treated other, non-black inmates better than he treated plaintiff. However, it is not the court's job to invent claims a litigant does not wish to raise. Because plaintiff did not intend to bring an equal protection claim and therefore has not exhausted his administrative remedies with respect to such a claim, defendant's motion to dismiss plaintiff's equal protection claim will be granted.

ORDER

IT IS ORDERED that defendant David Ditter's motion to dismiss plaintiff Kenneth

King's equal protection claim is GRANTED.

Entered this 15th day of August, 2006.

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