IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BRADLEY ALLEN JONES,

Plaintiff, OPINION and ORDER

v. 10-cv-44-bbc

DARREL KUHL,

Defendant.

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In this prisoner civil rights case brought under 42 U.S.C. § 1983, plaintiff Bradley Allen Jones was granted leave to proceed on his claim that defendant Darrel Kuhl failed to protect him from Bruce Withorn, a violent federal prisoner who was housed temporarily at the Columbia County jail. Defendant has moved for summary judgment, arguing that he was not personally involved in classifying Withorn or allowing him to have access to other prisoners and did not know that Withorn was violent before he attacked plaintiff. In addition, defendant contends that plaintiff failed to exhaust his administrative remedies. Plaintiff did not file any materials opposing the motion for summary judgment, despite receiving two extensions of time. He did, however, file another motion for an extension of

time, which he calls a "motion to stay proceedings," and he also filed a motion for leave to amend his complaint. In his proposed complaint, he leaves out his claim against Darrel Kuhl and instead asserts claims against six other prison officials, including two officials working during Withorn's booking and four officials involved in later searching Withorn's cell for a shank. I will deny plaintiff's motion to stay proceedings and motion for leave to amend his complaint and grant defendant's motion for summary judgment.

I. MOTION TO STAY PROCEEDINGS

Initially, after defendant filed his summary judgment motion on October 28, 2010, plaintiff was given until November 29, 2010 in which to file his opposition materials. Instead of filing those materials, plaintiff waited until one week before the due date to ask for an extension of time on the ground that he could not receive a particular document he believed would help his case. He was given three additional weeks. On the due date, he wrote a letter to the court instead of filing opposition materials, again seeking an extension of time because he was about to be relocated to another prison. Plaintiff was given another three weeks to file his materials. He was to file his materials at the latest by January 10, 2011.

Plaintiff missed that deadline, and instead waited another nine days to write a motion to stay proceedings, this time explaining that he is enrolled in an earned release program that

has blocked his access to legal materials. He adds that his transfer to a new prison has made him lose the assistance of an "experienced jailhouse lawyer" who was helping him at the previous prison. He adds that he "needs this time to complete the ERP program, which will make him a more valued member to society" and he will be able to seek counsel "upon release" in July 2011. None of plaintiff's explanations justify giving him yet another extension of time in this case. He has had plenty of time to prepare his summary judgment materials; indeed, despite his many problems, plaintiff found the time to file an amended complaint. Plaintiff's motion to stay proceedings will be denied.

II. MOTION FOR LEAVE TO AMEND

Next, plaintiff seeks leave to amend his complaint to remove his claim against defendant Kuhl and instead proceed against separate officials for their alleged deliberate indifference to the threat Withorn posed against him. Under Fed. R. Civ. P. 15(a)(2), a plaintiff seeking leave to amend his complaint beyond the initial stages of a case and without the opposing party's consent must obtain the court's leave, which should be given "freely . . . when justice so requires." In determining whether this standard is met, courts consider a number of factors, including whether the amendment would be futile or cause unfair prejudice or whether the party waited too long to ask for the amendment. Foman v. Davis, 371 U. S. 178, 182 (1962); Sound of Music v. Minnesota Mining & Manufacturing Co.,

477 F.3d 910, 922-23 (7th Cir. 2007).

In this case, plaintiff may not amend his complaint because he waited too long. Although defendant filed an answer in this case in May 2010, plaintiff waited until December 20, 2010 to ask to amend his complaint, nearly two months after defendant had filed a summary judgment motion, well after expert disclosures and dispositive motions were due and only two months before the deadline for discovery. As defendant points out, plaintiff offers no good reason to scrap the schedule and start over in this case at this late stage. Plaintiff says he seeks to amend in light of "new evidence" that others were directly responsible for failing to keep Withorn out of general population. However, he relies on documents he received five months before he filed his motion for leave to amend his complaint. Plaintiff's last-minute effort to change the nature of his case cannot be allowed; I will deny his motion for leave to amend his complaint.

III. MOTION FOR SUMMARY JUDGMENT

As explained above, plaintiff did not oppose defendant's motion for summary judgment in which defendant argues both that plaintiff failed to exhaust and that defendant was not deliberately indifferent to a serious risk that plaintiff would be harmed. Indeed, plaintiff's attempt to remove Kuhl from his proposed amended complaint suggests that he may wish to drop his claim against Kuhl. If he did, it would have to be with prejudice now

that defendant has briefed his motion for summary judgment. Fed. R. Civ. P. 41(a)(2) (unilateral voluntary dismissal of defendant after answer has been filed must be "on terms that the court considers proper."). Because it is not clear whether plaintiff wanted to dismiss his claim with prejudice, he would have to be given an opportunity to tell the court one way or the other before his case were dismissed under Rule 41(a)(2). However, it is not necessary to wait for such a response before dismissing plaintiff's claim because defendant's motion for summary judgment is now under advisement and it leads to the same result.

Because defendant's motion for summary judgment was unopposed, his proposed findings of fact must be treated as undisputed. I find the following facts to be material and undisputed.

UNDISPUTED FACTS

On May 24, 2007, Bruce Withorn was taken to the Columbia County jail from the Federal Correctional Institution in Oxford, Wisconsin. Withorn was housed in A-Block at the jail, where plaintiff Bradley Allan Jones was also housed. After several days in the block, Withorn started telling prisoners that he had a shank, so plaintiff and other prisoners filled out a form stating that Withorn was threatening prisoners with a shank and gave the form to the jail's staff. Officers searched Withorn's cell and person for a shank but found none. About one week after the search, Withorn fought with plaintiff and used a shank during the

fight. Plaintiff was cut and bruised during the fight. Before the fight, defendant Darrel Kuhl had no personal knowledge of Withorn and did not know any reason why Withorn might be violent. Kuhl is the jail administrator of the jail and he was not involved in Withorn's transfer, intake, classification, cell assignment or search for a shank, nor was he present during the fight.

The jail's grievance system requires prisoners to grieve issues to the sergeant and later appeal the decision through the chain of command (first the lieutenant, then the jail administrator, then the sheriff). Plaintiff filed a written grievance to the sergeant on August 10, 2007 complaining about a "deliberate indifference to [his] safety regarding the assault on [him]." On August 18, 2007, plaintiff wrote the lieutenant complaining about "the way jail staff responded to the attack." On August 20, 2007, plaintiff wrote the jail administrator, complaining about "the way jail staff responded to the attack." On August 27, 2007, plaintiff wrote the sheriff, again complaining about "the way jail staff responded to the attack." On August 28, Kuhl denied plaintiff's grievance to Kuhl as well as his grievance to the sheriff, explaining that, with respect to both grievances, plaintiff was seeking compensatory and punitive damages and "the Sheriff's Office is unable to assist him in recovering compensatory or punitive damages. He should either contact the appropriate court for this legal action himself or solicit an attorney to assist him." Dkt. #1-5. Plaintiff never filed any grievance to the Columbia County jail specifically about defendant's alleged

role in the incident.

DISCUSSION

A. Failure to Exhaust

Defendant contends that plaintiff failed to exhaust his administrative remedies, which means the question must be addressed before considering any claims on the merits. Perez v. Wisconsin Department of Corrections, 182 F.3d 532, 535 (7th Cir. 1999) (district court lacks discretion to resolve claim on merits before resolving question of exhaustion when defendant raises it).

Because failure to exhaust is an affirmative defense, defendant bears the burden to prove that plaintiff failed to exhaust all available administrative remedies. Jones v. Bock, 549 U.S. 199, 211-12 (2007). To meet this burden, defendant must show that plaintiff failed to comply with whatever administrative review process was in place in the jail. In this case, the jail requires prisoners to first submit a general request form to a sergeant, then submit the grievance to the lieutenant, then the jail administrator, then the sheriff. According to defendant, plaintiff failed to comply with these rules because he filed his grievance with the sheriff before his grievance with the jail administrator had been decided. However, that argument is not persuasive.

First, it is not clear whether the jail required plaintiff to take a claim such as his all

the way up the chain of command. The administrator told plaintiff that because his claim was for compensatory and punitive damages, he needed to take his claim to court. Plaintiff was told this even though his request for relief had not been addressed by the sheriff, a fact the administrator knew because in the same letter the administrator undertook to deny both the grievance addressed to him and the one addressed to the sheriff. Thus, at the very least there is some confusion about the proper route for exhaustion. The court of appeals has held that when prison officials fail to "clearly identif[y]" the proper route for exhaustion, they cannot later fault the prisoner for failing to predict the correct choice. Westefer v. Snyder, 422 F.3d 570, 580 (7th Cir. 2005).

To the extent the administrator was simply wrong about the route plaintiff should take, this also undermines an exhaustion defense. Dale v. Lappin, 376 F.3d 652, 656 (7th Cir. 2004) (dismissal not appropriate when prisoner failed to complete grievance process because of misinformation provided by prison officials). By telling plaintiff that it was time to take up his concerns in court, the defendant indicated to plaintiff that he had exhausted. Defendant cannot now turn around and tell plaintiff that he should have known better. Cf. Lewis v. Washington, 300 F.3d 829, 834-35 (defendant may be estopped from asserting exhaustion defense if prison officials made statements that plaintiff "could have reasonably interpreted as an assurance that he did not have to" follow administrative rules).

Next, defendant points to the scope of the grievance as proof that plaintiff failed to

exhaust. In other words, even if plaintiff exhausted some deliberate indifference claim, he did not exhaust any claim against *defendant*. Although it is true that plaintiff did not identify Kuhl by name, that would matter only if the jail's rules required naming each individual. Defendant does not identify any such requirement. Strong v. David, 297 F.3d 646, 649 (7th Cir. 2002) (administrative system may impose pleading requirements more strict than mere "notice-pleading"). Otherwise, the "default" notice rule applies:

> When the administrative rulebook is silent, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. As in a notice-pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming.

Strong, 297 F.3d at 650. In plaintiff's original complaint, he complained about the "deliberate indifference to [his] safety regarding the assault on [him]." His grievances up the chain of command seemed to narrow his concerns to the failure of prison officials to "respond" to the assault on him; however, because the jail's grievance system involved "appealing" up the chain of command, there is no reason to think higher-ups would not have the letters written to lower officials to review. There might be a reason if the jail had a rule requiring a prisoner to identify the full scope of his claim in each grievance up the chain or preventing the chain from sharing information, but defendant does not identify any such rule. Thus, it is reasonable to infer that each individual had notice that plaintiff was concerned generally with the prison's failure to protect him from Withorn.

I conclude that defendant has failed to show that plaintiff failed to exhaust his administrative remedies and will therefore deny defendant's motion for summary judgment as to this defense.

B. Deliberate Indifference

With that I turn to considering the merits of plaintiff's claim, which can be disposed of quickly. At this stage of the proceedings, plaintiff was required to set forth specific facts sufficient to allow a reasonable jury to find that defendant acted with deliberate indifference to a serious risk that Withorn would harm someone in general population. Fed. R. Civ. P. 56; Farmer v. Brennan, 511 U.S. 825, 833-34 (1994); Brown v. Budz, 398 F.3d 904, 913 (7th Cir. 2005); Billman v. Indiana Dept. of Corrections, 56 F.3d 785, 788-89 (7th Cir. 1995). Plaintiff has failed to do so. The undisputed facts show that defendant did not know anything about Withorn or have any reason to think he was particularly dangerous and that he was not involved in any way in Withorn's placement in the same block as plaintiff or his stay there until the attack.

ORDER

IT IS ORDERED that

1. Plaintiff Bradley Allen Jones's motion to stay proceedings, dkt. #72, is DENIED.

2. Plaintiff's motion for leave to amend his complaint, dkt. #65, is DENIED.

3. Defendant Darrel Kuhl's motion for summary judgment, dkt. #49, is DENIED with respect to defendant's defense that plaintiff failed to exhaust his administrative remedies and GRANTED with respect to plaintiff's claim that defendant violated his Eighth Amendment rights by failing to protect him from Withorn. The clerk of court is directed to close this case and enter judgment for defendant.

Entered this 31st day of January, 2011.

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