IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PARISH GOLDEN,

Plaintiff, ORDER

v. 11-cv-616-bbc

MARK S. STUTLEEN, CO II RAUSCH,
JESS FRISCH, CHAD BIEMERET
and CHAD DEBROUX,

Defendants.

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Plaintiff Parish Golden has filed a motion for reconsideration of an order dated April 5, 2012, dkt. #52, along with a notice of appeal of the same order. Presumably, plaintiff intended the notice of appeal to be contingent on a denial of his motion for reconsideration. I am denying the motion because plaintiff has failed to show that it was error to dismiss the case.

In the April 5 order, I granted defendants' motion for summary judgment on the ground that plaintiff filed his lawsuit before completing the prison grievance process. Ford v. Johnson, 362 F.3d 395, 398 (7th Cir. 2004); Perez v. Wisconsin Department of Corrections, 182 F.3d 532 (7th Cir. 1999). Plaintiff objects to the following discussion

included in that order:

> In his response brief, plaintiff does not dispute defendants' contention that he had not completed the grievance process when he filed this lawsuit. Instead, he relies on grievances he says he tried to file "between January 27, 2011 and August 29, 2011," but which never made it to the examiner because prison officials were interfering with his mail. He cites cases such as Kaba v. Stepp, 458 F .3d 678, 684 (7th Cir. 2006), and Dale v. Lappin, 376 F.3d 652, 645-56 (7th Cir. 2004), in which the court held that a prisoner does not have any "available" remedies under § 1997e(a) if prison officials prevent him from filing a grievance.
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> Defendants deny that anyone interfered with plaintiff's grievances, but even if I accept plaintiff's version of the facts, cases such as Kaba and Dale cannot help him. Unlike the prisoners in those cases, plaintiff *was* able to file a grievance successfully. He fails to explain why he did not seek judicial relief during the time of the alleged interference but then decided to file this lawsuit immediately after the examiner accepted his grievances. At that point, he had an available administrative remedy and he decided not to see it through before filing this case. Thus, plaintiff failed to comply with the plain language of § 1997e(a), which means I must dismiss his case for his failure to exhaust his administrative remedies before filing this lawsuit.

Dkt. #52, at 4-5.

Plaintiff says that he relied on Dole v. Chandler, 438 F.3d 804, 808-09 (7th Cir. 2006), rather than Dale v. Lappin, 376 F.3d 652, 645-56 (7th Cir. 2004), in his summary judgment brief. However, this makes no difference to his claim because both Dole and Dale stand for the proposition that "a remedy becomes 'unavailable' if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting." Dole, 438 F.3d at 809 (citing Dale, 376 F.3d at 656). Again,

the distinction between this case and cases such as Dole, Dale and Kaba is that "plaintiff *was* able to file a grievance successfully." Dkt. #52, at 5.

In the alternative, plaintiff says that "he filed his lawsuit before he was able to get his grievances [acc]epted." Plaintiff does not cite any evidence for the proposition, but the copies of the grievances submitted by defendants show that they were accepted the same day he filed them, August 30, 2011. Dkt. #43, exhs. B, C and D. Plaintiff's complaint in this court is dated August 30, 2011 as well, so it is possible that he mailed his complaint before his grievances were accepted. However, if that is the case, it does not help his argument. Under Wis. Admin. Code § DOC 310.11(2), the examiner has five working days to acknowledge a grievance. Plaintiff should have waited at least that long after filing his grievance before giving up on the process and filing a lawsuit.

Plaintiff also challenges the court's discussion of a potential new lawsuit:

> Under Ford, 362 F.3d at 401, all dismissals for lack of exhaustion are without prejudice, so plaintiff is free to refile this lawsuit once he has completed the grievance process. From the grievances materials filed by defendants, it appears that plaintiff has now received a final decision on his August 30 and November 3 grievances.
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> However, before plaintiff decides to file a new lawsuit with the same allegations, he should consider whether any of his claims would be subject to dismissal a second time. Although plaintiff received a decision on the merits regarding his mail interference claim, his excessive force claim was rejected as untimely. Woodford, 548 U.S. 81 (generally, if grievance is rejected as untimely, federal lawsuit is subject to dismissal under § 1997e(a)). Plaintiff says that he tried to file a grievance on February 23, 2011, but the grievance

> never made it because of interference by correctional officers. However, even that is true, his grievance would still be untimely. Plaintiff alleges that the incident occurred on January 27, 2011, but the deadline for filing a grievance is 14 days after the incident, Wis. Admin. Code § DOC 310.09(6), so February 23 is still too late.

Dkt. #52, at 5-6.

Plaintiff's argument regarding this discussion is difficult to follow, but whatever point he is trying to make, I need not resolve it now. Any statements by this court regarding a future suit are dicta, which means they are not binding. If plaintiff believes that he has now exhausted all available administrative remedies, he is free to file a new lawsuit.

ORDER

IT IS ORDERED that plaintiff Parish Golden's motion for reconsideration, dkt. #54, is DENIED.

Entered this 1st day of May, 2012.

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