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United States District Court, N.D. California.

Ernesto G. LIRA, Plaintiff,
v.
DIRECTOR OF CORRECTIONS OF THE STATE OF CALIFORNIA; et al., Defendants.

No. C 00–905 SI (PR).
|
May 17, 2002.

JUDGMENT

ILLSTON, J.

***1** This action is dismissed without prejudice because plaintiff did not exhaust his administrative remedies before filing the complaint.

IT IS SO ORDERED AND ADJUDGED.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Ernesto G. Lira, an inmate currently housed at Pelican Bay State Prison, filed this *pro se* civil rights action under 42 U.S.C. § 1983. Defendants now move for judgment on the pleadings or, alternatively, for summary judgment and Lira opposes the motion. The court finds no triable issues of material fact exist and defendants are entitled to judgment as a matter of law. The court therefore will grant defendants' motion for summary judgment. The court also considers and denies plaintiff's motion for appointment of counsel.

BACKGROUND

Lira's complaint alleges that his due process rights were violated when he was labeled a gang associate and placed in administrative segregation ("ad seg") because there was not sufficient reliable evidence to support the decision. His complaint also alleges that his due process rights were violated at the many periodic reviews that have occurred since his original placement in ad seg. The following facts are undisputed, unless otherwise noted.

On December 28, 1995, while he was housed at Deuel Vocational Institute ("Deuel"), Lira received a California Department of Corrections form "Order And Hearing For Placement In Segregated Housing." In the order, correctional lieutenant Olmstead wrote that he had been informed by the investigative services unit that Lira was "a validated Northern Structure associate. Per the aforementioned, your continued presence in the RC/GP poses a threat to the safety of staff and inmates alike, and to the security of this facility." Plaintiff's Declaration In Support Of Motion In Opposition To Defendants' Motion For Judgment On The Pleadings Or Alternatively, Motion For Summary Judgment ("Lira Decl."), Exh. 5. Lieutenant Olmstead ordered Lira into ad seg "pending review/evaluation of case factors." *Id.* Lira checked the box on the Segregated Housing Order form that stated "I understand that I have a right to a hearing concerning my placement in segregated housing and I hereby waive that right." *Id.,* part III. On January 4, 1996, Lira appeared before the Deuel institutional classification committee for the initial review of his placement in ad seg. The committee elected to retain him in ad seg pending review of his prison gang membership. Lira has remained in ad seg since then, although now he is housed in ad seg at Pelican Bay State Prison, to which he was transferred in September 1996.[1] Lira received many periodic reviews of his retention in ad seg since 1995, but none of those periodic reviews has resulted in his removal from ad seg.

Lira filed an inmate grievance concerning his placement in ad seg. In his grievance filed on July 29, 1996, Lira described his problem: "The following is my appeal for this lock up order '114D' dated 12–28–95 and the so call validation chronos being used." Lira Decl., Exh. 1, p. 1 (spelling as in original). In the "action requested" portion of the form, he wrote "# 1. To be released from ad./seg. and returned to G./P, # 2 Remove all these 128–B from my C.D .C. file. # 3. Be given a program and left alone to do my time, Im to old to play games, never have." *Id.* (spelling and grammar as in original). By the time the appeal reached the director's level, the issue was described by the reviewer as "[w]hether or not the institution's denial of appellant's request to release him to the general population and remove all gang related

information from his Central File (C–File) is appropriate." Lira Decl., Exh. 1, Director's Level Review dated January 24, 1997, p. 1. The director's level decision denied the appeal. *Id.*

***2** Lira filed other inmate grievances, but never appealed them to the director's level of review.

VENUE AND JURISDICTION

Venue is proper in the Northern District of California under 28 U .S.C. § 1391 because a substantial part of the events or omissions giving rise to the claims occurred at Pelican Bay State Prison in Del Norte County, which is located within the Northern District. This court has federal question jurisdiction over this action brought under 42 U.S.C. § 1983. *See* 28 U.S.C. § 1331.

LEGAL STANDARD FOR SUMMARY JUDGMENT

Defendants have moved for summary judgment on the affirmative defense that Lira failed to exhaust administrative remedies before filing this action. *See Wyatt v. Terhune,* 280 F.3d 1244, 1245. Where, as here, the moving party bears the burden of proof at trial, he must come forward with evidence which would entitle him to a directed verdict if the evidence went uncontroverted at trial. *See Houghton v. Smith,* 965 F.2d 1532, 1536 (9th Cir.1992). He must establish the absence of a genuine issue of fact on each issue material to his affirmative defense. *Id.* at 1537; *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986) (a fact is material if it might affect the outcome of the suit under governing law, and a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.") Once the moving party has come forward with this evidence, the burden shifts to the non-movant to set forth specific facts showing the existence of a genuine issue of fact on the defense.

A verified complaint may be used as an opposing affidavit under Rule 56, as long as it is based on personal knowledge and sets forth specific facts admissible in evidence. *See Schroeder v. McDonald,* 55 F.3d 454, 460 & nn. 10–11 (9th Cir.1995) (treating plaintiff's verified complaint as opposing affidavit where, even though verification not in conformity with 28 U.S.C. § 1746, plaintiff stated under penalty of perjury that contents were true and correct, and allegations were not based purely on his belief but on his personal knowledge).

The court's function on a summary judgment motion is not to make credibility determinations or weigh conflicting evidence with respect to a disputed material fact. *See T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987). The evidence must be viewed in the light most favorable to the nonmoving party and the inferences must be drawn in the light most favorable to the nonmoving party. *See id.* at 630–31.

DISCUSSION

A. *Exhaustion*

The Prison Litigation Reform Act of 1995, Pub.L. No. 104–134, 110 Stat. 1321 (1996) ("PLRA"), amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], 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." 42 U.S.C. § 1997e(a). Even if an inmate seeks only money damages, he must complete the prison administrative grievance process that can provide some sort of relief on the complaint stated. *See Booth v. Churner,* 532 U.S. 731, 739–41 (2001).[2]

***3** The State of California provides its inmates and parolees the right to appeal administratively "any departmental decision, action, condition or policy perceived by those individuals as adversely affecting their welfare." *See* Cal.Code Regs. tit. 15, § 3084.1(a). In order to exhaust available administrative remedies within this system, a prisoner must proceed through several levels of appeal: (1) informal resolution, (2) formal written appeal on a CDC 602 inmate appeal form, (3) second level appeal to the institution head or designee, and (4) third level appeal to the Director of the California Department of Corrections. *See id.* § 3084.5; *Barry v. Ratelle,* 985 F.Supp. 1235, 1237 (S.D.Cal.1997). Some relief is available under the California prison administrative grievance system for aggrieved prisoners.

The exhaustion requirement applies to all claims in a complaint; it is not enough to exhaust administrative remedies as to one claim and then use that exhaustion as a jurisdictional hook to have many unexhausted claims considered in a federal civil rights action. "When multiple prison condition claims have been joined, as in this case,

the plain language of § 1997e(a) requires that all available prison grievance remedies must be exhausted as to all of the claims." *Graves v. Norris,* 218 F.3d 884, 885 (8th Cir.2000); *Rivera v. Whitman,* 161 F.Supp.2d 337, 340–43 (D.N.J.2001) (dismissing without prejudice § 1983 prisoner action containing exhausted and unexhausted claims because plain language of § 1997e(a), as well as the legislative intent and policy interests behind it, compel a "total exhaustion" rule). *But see Johnson v. True,* 125 F.Supp.2d 186, 188 (W.D.Va.2000).

It is undisputed that Lira only filed a director's level appeal and received a response thereto on his 1996 administrative grievance; he did not do so for any other grievance. Because Lira only exhausted administrative remedies as to the 1996 administrative grievance, the scope of the 1996 administrative grievance must be determined. Lira defined the scope of the 1996 administrative grievance when he wrote that he was appealing "this lock up order '114D' dated 12–28–95 and the so call validation chronos being used." Lira Decl., Exh. 1, p. 1 (spelling as in original). He wrote that he wanted to be released from ad seg to the general prison population and to have erroneous CDC–128 chronos expunged from his file. *Id.* Lira did not directly challenge any of the periodic reviews that had occurred up until that date. His grievance was limited to his placement in ad seg.

Lira's 1996 administrative grievance did not challenge the propriety of any of the periodic reviews that occurred after the grievance was filed. Those later periodic reviews—conducted by many different defendants—form the basis for portions of his due process claim in this action. His complaint in this action claims he was denied due process in the original decision to place him in ad seg, as well as at the periodic reviews that occurred in 1996 through 1999. Complaint, p. 60 (alleging that defendants violated Lira's right to due process in that they (1) placed him in ad seg wrongfully, (2) failed to give him an opportunity to be heard, and (3) "failed to provide meaningful 120 day classification reviews"). Most of the periodic reviews occurred at Pelican Bay, after his transfer there in September 1996. *See* Complaint, ¶¶ 12—32. For example, Lira alleges that he received his initial review at Pelican Bay on September 27, 1996 by defendants Stokes, Bolles, and Heaps, *see* Complaint, ¶ 13. He does not allege that those defendants did anything wrongful before that date, yet his 1996 administrative grievance predates that initial review and could not have exhausted a later-arising claim. These defendants (and many other defendants) are named as defendants and have liability exposure only because of their alleged denial of due process to Lira when they conducted periodic reviews.[3] On the undisputed fact that only the 1996 administrative grievance was exhausted, the court concludes that Lira has not exhausted his claims that he was denied due process during the later periodic reviews.

***4** Lira argues that he "would have been precluded from raising and/or submitting the same issue that was previously adjudicated at the director's level review" in the appeal of his 1996 grievance. Opposition, p. 17. That may be true, but it is irrelevant: the later periodic reviews of his ad seg housing were not within the scope of the 1996 grievance and appeal. Lira has not presented any evidence to support his speculation that a later grievance on separate allegedly wrongful acts—i.e., the later periodic reviews—would have been barred by the grievance challenging his original wrongful placement in ad seg. In fact, Lira did file grievances after his 1996 administrative grievance and those later grievances were not rejected as repetitive. *See* Lira Decl., Exhs. 2 and 3.

Lira also argues that exhaustion was not required because damages were not available for a claim such as his. This argument is unpersuasive. Exhaustion of all "available" remedies is mandatory; those remedies need not meet federal standards, nor must they be "plain, speedy and effective." *Porter v. Nussle,* 122 S.Ct. 983, 988 (2002); *Booth v. Churner,* 532 U.S. at 739–40 & n. 5. Even when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit. *Id.* at 741. A prisoner "seeking only money damages must complete a prison administrative process that could provide some sort of relief on the complaint stated, but no money." *Id.* at 734. That the administrative procedure cannot result in the particular form of relief requested by the prisoner does not excuse exhaustion because some sort of relief or responsive action may result from the grievance. *See id.* at 736–41; *see also Porter,* 122 S.Ct. at 988 (purposes of exhaustion requirement include allowing prison to take responsive action, filtering out frivolous cases, and creating administrative records).

Several of defendants' arguments also do not persuade the court. First, defendants' argument that Lira did not exhaust his claim for monetary relief because he did not seek monetary relief in his administrative grievance is unpersuasive because the Supreme Court specifically rejected this construction of § 1997e(a) in *Booth,* 532 U.S. at 739: "one 'exhausts' processes, not forms of relief." Second, defendants' argument that Lira must exhaust by filing a grievance naming the specific persons he ultimately seeks to sue goes too far, as an inmate may not know all the names of the defendants until after he files a civil action and conducts discovery, in which case, he

would have to dismiss his action and file anew under defendants' reasoning. Finally, the court rejects the notion that the PLRA exhaustion requirement should be treated similarly to the habeas exhaustion requirement. The comity interest, the abuse of the writ doctrine, and the successive petition rules that support the habeas exhaustion requirement simply are not present in non-habeas actions such as this.

***5** Defendants have established the absence of a genuine issue of fact on the administrative exhaustion defense. Lira did not pursue his administrative grievance to the highest level available under the prison administrative grievance and appeal system for all his claims *before* filing this action as required by 42 U.S.C. § 1997e(a). The plain language of § 1997e(a) makes exhaustion a precondition to filing in federal court: "No action shall be brought ... until such administrative remedies as are available are exhausted." Even viewing the evidence in the light most favorable to Lira and drawing the inferences therefrom in his favor, no reasonable jury could return a verdict in favor of Lira and against any defendant. Defendants are entitled to summary judgment.

This action is being decided on the summary judgment motion rather than the motion for judgment on the pleadings because it is necessary to go beyond the pleadings to consider the parties' evidence regarding the exhaustion of administrative remedies. Because defendants prevail on their threshold argument that Lira did not exhaust before filing this action, the court will not proceed to decide the other issues raised by defendants but will wait until if and when plaintiff files a new action containing after he exhausts his administrative remedies.

B. *Lira's Motion For Appointment Of Counsel*

Lira has moved for the appointment of counsel to represent him in this action. A district court has the discretion under 28 U.S.C. § 1915(e)(1) to designate counsel to represent an indigent civil litigant in exceptional circumstances. This requires an evaluation of both the likelihood of success on the merits and the ability of the plaintiff to articulate his claims *pro se* in light of the complexity of the legal issues involved. *See Wilborn v. Escalderon,* 789 F.2d 1328, 1331 (9th Cir.1986). Neither of these factors is dispositive and both must be viewed together before deciding on a request for counsel under section 1915(e)(1).

Here, exceptional circumstances requiring the appointment of counsel are not evident. Based on the record before it, there is no likelihood of success on the merits because Lira did not exhaust his administrative remedies. The complaint also does not raise particularly difficult legal claims. Lira's motion for appointment of counsel therefore is DENIED.

CONCLUSION

Defendants' motion for summary judgment is GRANTED (Docket # 43). Judgment will be entered in defendants' favor and against plaintiff. The decision in this action does not forever terminate Lira's ability to seek redress for the wrongs he allegedly suffered. Lira may return to court to file a new action and pursue his legal remedies if he ever exhausts his administrative remedies.

Plaintiff's motion for appointment of counsel is DENIED. (Docket # 57.)

The clerk shall close the file.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2002 WL 1034043

Footnotes

1 Defendants filed two exhibits under seal with their motion for summary judgment. The exhibits were memoranda documenting information received from inmates who told prison staff details about prison gang activities and membership. The court granted defendants' request for *in camera* review of confidential documents used to determine that Lira was affiliated with NS. Lira objected to the filing of the documents under seal and the *in camera* review procedure at the time he filed his opposition to defendants' motion for summary judgment. The court has considered Lira's arguments and rejects his request to make the sealed documents available to him. Defendants have adequately shown that confidential information in the documents, if disclosed, would create a risk to the safety of other prisoners and the institution.

2 Even though *Booth* was decided after Lira filed this action, it applies to him. When the Supreme Court applies a rule of federal law to the parties before it, as it did in *Booth,* that rule is the controlling interpretation of federal law and must be

given full effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the announcement of the rule. *Harper v. Virginia Dep't of Taxation,* 509 U.S. 86, 94–99 (1993).

3 The periodic reviews are not simply an opportunity for a committee to revisit and decide anew whether an inmate's original placement was correct; their purpose is to consider whether the inmate should remain in ad seg. With this different purpose, the defendants who conduct periodic reviews could have liability wholly separate from that of the defendants who make the original decision to place an inmate in ad seg. For example, if an inmate was placed in ad seg on information that was deemed reliable in 1995, but something happened in 1997 to undermine the reliability of the information (e.g., the informants who identified the inmate as a prison gang member, recanted, and said they had framed him), there would have been sufficient evidence to support the original decision, but not to support the continued retention in ad seg after the 1997 evidentiary problem arose. Persons who conducted periodic reviews thereafter and decided that the wrongly accused inmate should remain in ad seg without any evidence to support his retention there could be liable for a due process violation.