Wolfel et al v. Collins et al Doc. 100

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Dennis Wolfel, *et al.*,

Plaintiffs,

v. **Case No. 2:07–cv–1296**

Terry Collins, *et al.*, **Judge Michael H. Watson**
Magistrate Judge King

Defendants.

OPINION AND ORDER

This matter is before the Court for consideration of the parties' Objections, ECF Nos. 89 and 90, to the Magistrate Judge's October 7, 2010 Report and Recommendation, ECF No. 87. The Court also considers Plaintiff's Motion for Rule 11 Sanctions. ECF No. 83.

I.

Plaintiff is a state inmate who claims that he was denied placement in requested housing at the London Correctional Institution ["LoCI"] on account of a policy of the Ohio Department of Rehabilitation and Correction ["ODRC"] intended to achieve racial balance among inmates. In particular, Plaintiff alleges that in 2004 "black inmates were placed in [a housing unit requested by Plaintiff] upon their arrival at [LoCI] ahead of white inmates on the placement waiting list." Compl. ¶ 13, ECF No. 4. Plaintiff filed a grievance regarding the matter and challenged the racial balance policy. On appeal,

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Plaintiff alleges, the Chief Inspector condoned the policy. *Id.* at ¶¶ 15, 18, 19. In September 2007, Plaintiff requested to be placed on the waiting list for another housing unit. He was again placed on a waiting list. *Id.* at ¶ 21.

In this action, Plaintiff challenges the racial balance policy[1] as "unconstitutional on its face and as applied . . . ." *Id.* at ¶¶ 21–22. Plaintiff filed a Motion for Partial Summary Judgment, ECF No. 23, on his claims. Defendants responded with a Motion for Summary Judgment, ECF No. 37, seeking dismissal of the Complaint on the basis that Plaintiff had not exhausted his administrative remedies as required by the Prison Litigation Reform Act ["PLRA"], 42 U.S.C. § 1997e(a).[2]

The Magistrate Judge held a hearing on the issue of exhaustion of remedies. It was during that hearing that it became clear that this case centers on two separate instances of placement on waiting lists for a housing assignment; one instance occurred in 2004 and the other instance occurred in 2007. In the Report and Recommendation, the Magistrate Judge found it undisputed that Plaintiff had

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[1]The policy states, in pertinent part:

> It is the policy of the Ohio Department of Rehabilitation and Correction to create an atmosphere of racial equality in the correctional institutions by minimizing even the appearance of segregation. The fostering and creation of integrated housing and job assignments should be accomplished to enhance rehabilitation efforts and serve the security interests of the institution. Inmates shall be assigned without regard to the inmate's race, ethnicity or national origin.

[2]The PLRA provides in pertinent part as follows:

> No 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.

42 U.S.C. § 1997e(a).

exhausted administrative remedies with respect to the events of 2004 but that Plaintiff had not utilized the grievance process with respect to the events of 2007. Report and Recommendation 5, ECF No. 87.

The Magistrate Judge rejected Plaintiff's contention that the PLRA's exhaustion requirement did not foreclose his claim relating to the events of 2007. In particular, the Magistrate Judge concluded that the issue was in fact grievable, that Plaintiff's exhaustion of remedies in connection with the 2004 incident did not satisfy the exhaustion requirement in connection with the 2007 incident, and that pursuit of a grievance in 2007 would not have been futile. *Id.* at 6–8.

The Magistrate Judge recommended that the motion for summary judgment for failure to exhaust be denied in connection with Plaintiff's placement on a waiting list in 2004 but granted in connection with Plaintiff's placement on a waiting list in 2007. *Id.* at 8. The Magistrate Judge also noted that the Defendants' Answer, ECF No. 9, contained no defense to the claim relating to the events of 2004 based on the statute of limitations. *Id.* at 2 n.2.

Both Plaintiff and Defendants have filed Objections to the Report and Recommendation. *See* Pl.'s Objections and Defs.' Objections, ECF Nos. 89 and 90. The Court considers the matter de novo. *See* 28 U.S.C. § 636(b).

II.

A. Plaintiff's Objection

Plaintiff objects to the Magistrate Judge's recommendation that his claim arising from the events of 2007 be dismissed for failure to exhaust administrative remedies

under the PLRA. Plaintiff again argues, as he did before the Magistrate Judge, that his challenge to the racial balance policy is not a matter appropriate for resolution through the inmate grievance procedure. In support of this argument, Plaintiff relies on a comment made in October 2007 by the Chief Inspector in response to a grievance filed by another inmate, former co-Plaintiff Anthony Soto, in connection with his removal from a work assignment:

> You complain that a staff member had you removed from your job for racial balance. You state this is unfair and unconstitutional. In reviewing the Inspector's disposition he did find merit in your complaint, and you were to be reclassified back into your previous job. Your complaint that racial balance is unconstitutional is not a matter that can be grieved using the inmate grievance procedure. Should you wish to pursue that issue, it would [be] advisable to use the legal system to address the complaint . . . .

Pl.'s Mot. for Partial Summ. J. Ex. C, ECF No. 23. According to Plaintiff, this comment establishes both that the issue was not a proper subject for grievance and that "it would be futile for plaintiff to complete another three rounds through the three tiers of the Ohio prison grievance procedure on the use of the racial balance policy . . . ." Objection, ECF No. 89, at 7. The Court disagrees.

First, Plaintiff's own grievance in 2004 was entertained by ODRC officials. Second, based on this exhibit, it appears that the removal of former co-Plaintiff Soto from his job was in fact reversed as a result of his grievance. The comment of the Chief Inspector simply cannot be read as a "flat rule declining jurisdiction . . . , " *Hartsfield v. Vidor*, 199 F.3d 305, 308 (6th Cir. 1999), so as to excuse the exhaustion requirement on the basis of futility. As the Magistrate Judge observed, "a subjective belief on the part of an inmate as to what the outcome of his grievance might be will not serve to

relieve him of his obligation to exhaust available administrative remedies." Report and Recommendation 8, citing *Boyd v. Corrections Corp. of America*, 380 F.3d 989, 998 (6th Cir. 2004).

Finally, Plaintiff contends that he has satisfied the spirit, if not the letter, of the exhaustion requirement of the PLRA. According to Plaintiff, the allegedly wide circulation throughout the prison system of a "3-page Legal Memorandum . . . regarding the unconstitutionality of the of the racial balance policy" afforded ODRC officials the opportunity to remedy the allegedly unconstitutional policy. Because it is just that sort of notice and opportunity that is intended to be preserved by the PLRA's exhaustion requirement, Plaintiff argues, he should not be required to also pursue the inmate grievance procedure in connection with the 2007 incident. However, the PLRA requires the actual exhaustion of available administrative remedies. As the Magistrate Judge noted, Ohio's inmate grievance procedure expressly provides that grievances may include "complaints regarding policies, procedures, conditions of confinement. . . ." Ohio Admin. Code §5120-9-31(A). This Court agrees that this procedure was available to Plaintiff in connection with the events of 2007. Plaintiff's failure to utilize that procedure precludes his pursuit in this action of his claim based on those events.

Plaintiff's Objection, ECF No. 89, is therefore overruled. The recommendation of the Magistrate Judge in this regard is ADOPTED and AFFIRMED.

B. Defendants' Objection

Defendants object to the Magistrate Judge's recommendation that their Motion for Summary Judgment, as it relates to the events of 2004, be denied. Defendants

specifically contend that Plaintiff failed to timely file that claim and that the Court should have dismissed the claim sua sponte.[3] Defendants specifically note that this claim arose in February 2004, but that the Complaint, ECF No. 4, was submitted for filing only in December 2007.

State statutes of limitations and tolling principles apply to claims under Section 1983. *Wilson v. Garcia*, 471 U.S. 261, 268–69, 275 (1985). For civil rights actions filed in Ohio under §1983, the statute of limitations is two (2) years from the date the cause of action accrued. O.R.C. §2305.10; *Browning v. Pendleton*, 869 F.2d 989, 992 (6th Cir. 1989) (en banc). Generally, the defense of statute of limitations must be affirmatively pled. In this case, however, the statute of limitations was not raised as a defense in the Answer,[4] ECF No. 9. Defendants argue, nevertheless, that Plaintiff's claim in connection with the events of 2004 should be dismissed as untimely.

In making this argument, Defendants rely on the PLRA, which, *inter alia*, requires a court to sua sponte review a prisoner complaint at the outset of the action and dismiss any portion of the complaint that "fails to state a claim upon which relief may be granted. . . ." 28 U.S.C. §1915A(B)(2); 42 U.S.C. §1997e(c)(1). *See also Jones v. Bock*, 549 U.S. 199, 215 (2007).

In the action presently before the Court, an initial screen as required by the

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[3] Plaintiff contends that Defendants' Objection was not timely filed. The Report and Recommendation was issued on October 7, 2010, and the parties were advised that objections were due within fourteen (14) days thereafter. *Id.* at 9. However, calculating the time in accordance with Fed. R. Civ. P. 6(a), (d) and this Court's Electronic Filing Policies and Procedures Manual, at 13, timely objections were due on October 25, 2010—the date on which Defendants' Objection, ECF No. 90, was filed. Defendants' Objection is therefore not untimely.

[4] Defendants have filed a separate Motion for Leave to File an Amended Answer, ECF No. 91.

PLRA was performed shortly after the action was filed. Initial Screen of the Complaint, ECF No. 5. That screening, which permitted Plaintiff's equal protection claims to proceed, made no mention of the timeliness of the claims asserted. However, it was not clear on the face of the Complaint that Plaintiff's claims were barred by the statute of limitations. Indeed, the lack of clarity in Plaintiff's Complaint has been a prominent feature of this litigation. Moreover, Defendants cite to no authority for the proposition that the PLRA imposes on a court an on-going obligation to sua sponte and continuously evaluate the sufficiency of an inmate's action even after counsel has entered an appearance on behalf of the defendants. Defendants' Objection to this aspect of the Report and Recommendation is overruled. The recommendation of the Magistrate Judge in this regard is ADOPTED and AFFIRMED.

C. Plaintiff's Motion for Imposition of Rule 11 Sanctions

The Court also considers Plaintiff's September 28, 2010 Motion for Imposition of Rule 11 Sanctions, ECF No. 83.[5] The motion relates to the issue of exhaustion in this case and what Plaintiff perceives as Defendants' inconsistent positions on the issue. Plaintiff notes that the Answer admits that Plaintiff filed informal and formal grievances regarding his housing placement. Answer ¶¶ 16–18, ECF No. 9. Defendants' Motion for Summary Judgment, however, argued that Plaintiff had not exhausted administrative remedies as required by the PLRA. Plaintiff argues that this inconsistency warrants the imposition of sanctions under Fed. R. Civ. P. 11.

Under Rule 11, a pleading presented to a court carries an implied certification

[5] Defendants have not filed a response to the motion.

that, inter alia, "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the allegations and other factual contentions have evidentiary support . . . ." Fed. R. Civ. P. 11(b)(3). The United States Court of Appeals for the Sixth Circuit has held that "the test for the imposition of Rule 11 sanctions [is] . . . whether the individual's conduct was reasonable under the circumstances." *Union Planters Bank v. L&J Development Co.*, 115 F.3d 378, 384 (6th Cir. 1997) (internal quotations and citations omitted).

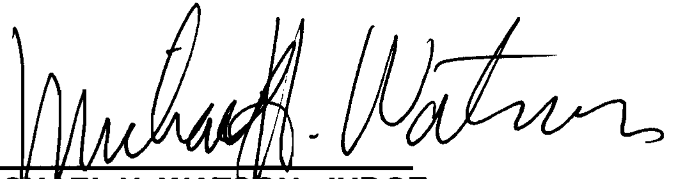
In this case, given the lack of clarity with respect to the nature of Plaintiff's claims, the Court concludes that Defendants' varying positions on the issue of exhaustion was not unreasonable. Thus, the Court finds no basis for the imposition of sanctions under Rule 11 as a result of the perceived inconsistency between Defendants' Answer and their Motion for Summary Judgment. The Plaintiff's motion for the imposition of sanctions is therefore DENIED.

III.

Plaintiff's Objection, **ECF No. 89**, and Defendants' Objection, **ECF No. 90**, are **DENIED**. The Magistrate Judge's Report and Recommendation, **ECF No. 87**, is **ADOPTED** and **AFFIRMED** in its entirety. Defendants' Motion for Summary Judgment, **ECF No. 37**, is **DENIED in part and GRANTED in part**. As the motion relates to the events of 2004, the motion is **DENIED**; as the motion relates to the events of 2007, the motion is **GRANTED**.

Plaintiff's Motion for Rule 11 Sanctions, **ECF No. 83**, is **DENIED**.

IT IS SO ORDERED.



MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT