

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WESLEY NEAL, JR.,

Plaintiff ,

Civil Case No. 20-12498
Honorable Linda V. Parker

v.

N. FRONCZAK, WILLIS CHAPMAN,
and MONA GOLSON,

Defendants.

**OPINION AND ORDER ADOPTING MAGISTRATE JUDGE'S JULY 29,
2021 REPORT & RECOMMENDATION AND GRANTING MOTION FOR
SUMMARY JUDGMENT BY DEFENDANTS CHAPMAN AND GOLSON**

Plaintiff, a Michigan Department of Corrections prisoner, commenced this pro se lawsuit against Defendants on September 3, 2020, alleging that he was denied access to the prison law library in violation of his constitutional rights. On March 22, 2021, Defendants Willis Chapman and Mona Golson filed a motion for summary judgment on the basis of exhaustion. (ECF No. 16.) The late Honorable Arthur J. Tarnow, to whom the case was then assigned, referred the motion to Magistrate Judge David R. Grand for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

On July 29, 2021, Magistrate Judge Grand issued a report and recommendation (“R&R”) recommending that the Court grant the motion. (ECF

No. 30.) In the R&R, Magistrate Judge Grand recommends not only the dismissal of Plaintiff's claims against Chapman and Golson on exhaustion grounds but also Plaintiff's claims against *all* Defendants related to Plaintiff's second grievance at issue: MRF-20-05-730-28e ("MRF-730"). (*Id.* at Pg ID 234.) At the conclusion of the R&R, Magistrate Judge Grand advises the parties that they may object to and seek review of the R&R within fourteen days of service upon them. (*Id.* at Pg ID 234-35.) He further specifically advises the parties that "[f]ailure to file specific objections constitutes a waiver of any further right to appeal." (*Id.* at Pg ID 234)

Neither party filed objections to the R&R. However, on October 8, 2021, Plaintiff sent a letter to the Clerk of the Court inquiring about the status of his claim against Defendant Fronczak, which Magistrate Judge Grand found exhausted in Plaintiff's grievance labeled MRF-20-02-182-14e (the "MRF-182 Grievance"). Thereafter, Magistrate Judge Grand issued a scheduling order (ECF No. 33) and Plaintiff and Defendant Fronczak appear to have been engaging in discovery. The matter was reassigned from Judge Tarnow to the undersigned on February 16, 2022, pursuant to Administrative Order 22-AO-007.

The Court has carefully reviewed the R&R and concurs with the conclusions reached by Magistrate Judge Grand. As Plaintiff concedes in his October 8 letter, his claim in MRF-730 was untimely and therefore unexhausted. (ECF No. 31 at Pg ID 236.) With respect to the exhaustion of that grievance as it relates to

Fronczak, ordinarily a district court should not sua sponte raise and consider an affirmative defense like exhaustion, *see Fitch v. Gonzales*, 425 F. App'x 440, 441 (6th Cir. 2011), and Defendant Fronczak was not identified as one of the movants seeking summary judgment on exhaustion grounds, (*see* ECF No. 16 at Pg ID 83 (“MDOC Defendants Willis Chapman and Mona Colson . . .bring this motion”)); *id.* at Pg ID 87 (setting forth the issues to be presented and asking, only: “Should this Court grant summary judgment for Chapman and Golson and dismiss them from this lawsuit?”); *id.* at Pg ID 97 (“Neal filed only two Step II grievances relevant to this lawsuit, and those grievances *exhausted claims against only Fronczak*”); *id.* at Pg ID 99 (in conclusion, stating that Plaintiff had failed to exhaust his remedies “against MDOC Defendants Golson and Chapman” and seeking summary judgment and dismissal of “Golson and Chapman from this lawsuit”).) Nevertheless, the Sixth Circuit has held that a district court may sua sponte dismiss a claim against one defendant based on an affirmative defense where co-defendants raised the issue and therefore put the plaintiff on notice that he had to come forward with evidence to show that the defense was inapplicable. *See Thomas v. Mahoning Cnty. Jail*, No. 16-3495, 2017 WL 3597428, at *2 (6th Cir. Mar. 21, 2017); *see also Moore v. Westcomb*, No. 2:20-cv-179, 2021 WL 1851130, at *2 (W.D. Mich. May 10, 2021). Moreover, the dismissal of any claim

raised in MRF-730 does not appear to substantively impact the claim Plaintiff is asserting against Defendant Fronczak here. The Court therefore adopts the R&R.

Accordingly,

IT IS ORDERED that the Motion for Summary Judgment on the Basis of Exhaustion (ECF No. 16) is **GRANTED** and Plaintiff's claims against Defendants Chapman and Golson are **DISMISSED**. Willis Chapman and M. Golson are **TERMINATED AS PARTIES** to this action.

IT IS SO ORDERED.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: February 22, 2022

I hereby certify that a copy of the foregoing document was mailed to counsel of record and/or pro se parties on this date, February 22, 2022, by electronic and/or U.S. First Class mail.

s/Aaron Flanigan
Case Manager