

STATE OF MICHIGAN
COURT OF APPEALS

TRACY HAMMOND/ALL OTHERS
SIMILARLY SITUATED,

UNPUBLISHED
January 22, 2015

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

No. 318793
Ingham Circuit Court
LC No. 13-000884-CZ

Defendant-Appellee.

Before: MURPHY, P.J., and METER and SERVITTO, JJ.

PER CURIAM.

Plaintiff is a prisoner and a kosher Jew being housed at the Carson City Correctional Facility. Before the events that gave rise to this case, defendant provided kosher meals that included meat and animal byproducts. However, in 2013, defendant notified prisoners that they would be instituting vegan meals for kosher prisoners. Plaintiff sued, alleging, among other things, that the imposition of vegan meals violated his right to the free exercise of his religion. The trial court found that plaintiff had failed to exhaust his administrative remedies and consequently dismissed his suit. He appeals as of right. We affirm.

The Michigan prisoner litigation reform act (PLRA), MCL 600.5501 *et seq.*, “sets forth certain requirements that apply when a prisoner brings a civil action concerning prison conditions.” *Anderson v Myers*, 268 Mich App 713, 715; 709 NW2d 171 (2005) (internal quotation marks and citation omitted). This includes the requirement that “[a] prisoner shall not file an action concerning prison conditions until the prisoner has exhausted all available administrative remedies.” MCL 600.5503(1).

On or about July 26, 2013, defendant posted notice that kosher prisoners would be served vegan meals beginning in September 2013. Defendant’s policy directive (PD) 05.03.150 ¶ PP provided, in pertinent part:

The Vegan menu shall comply with Kosher and Halal religious tenets. A prisoner who believes the Vegan menu does not meet his/her religious dietary needs may request an alternative menu. An alternative menu will be developed and provided only with approval of the Deputy Director and only if it is determined that the Vegan menu does not meet the religious dietary needs of the prisoner.

Plaintiff evidently complied with this provision, petitioning defendant's deputy director as well as its food service program manager. However, on the same day that plaintiff avers he petitioned these agents of defendant, he also filed his complaint. This did not provide defendant adequate time to respond to plaintiff's request for an alternative menu. Consequently, he did not exhaust his remedy under this policy directive.

As noted, MCL 600.5503(1) required plaintiff to exhaust all available administrative remedies before initiating a lawsuit. The grievance process provided for in PD 03.02.130 was also available to plaintiff. Although plaintiff filed a "step I" grievance, he also could have filed two additional grievances, essentially appealing his step I grievance. PD 03.02.130 ¶¶ BB-GG. In sum, because plaintiff failed to exhaust all the administrative remedies available to him, his suit was barred under MCL 600.5503(1).¹

Plaintiff's various procedural arguments do not lead to a contrary conclusion. Plaintiff first argues that defendant failed to file a responsive pleading to plaintiff's complaint in accordance with MCR 2.110(B)(1), MCR 2.111(C), and MCR 2.111(F)(2) and (3). Defendant did not file a standard response to plaintiff's complaint. Rather, the trial court issued an ex parte temporary restraining order enjoining defendant from instituting the vegan menu and ordered defendant to show cause why a preliminary injunction should be entered. Defendant responded to this order in a brief.

Defendant notes § 5509 of the PLRA, MCL 600.5509, which provides, in pertinent part:

(3) A defendant may waive the right to reply to an action brought by a prisoner. Notwithstanding any other law or rule of procedure, a waiver under this subsection does not constitute an admission of the allegations contained in the complaint. Relief shall not be granted to the plaintiff unless a reply has been filed.

(4) The court may require a defendant to reply to a complaint in a civil action concerning prison conditions if it finds that the plaintiff is likely to prevail on the merits.

Defendant argues that pursuant to the above provisions, because the trial court did not require a responsive pleading, defendant was not required to provide one. Defendant argues further that its response brief adequately responded to the trial court's show-cause order.

We agree with defendant's contentions. Defendant apparently waived the right to respond to plaintiff's complaint under MCL 600.5509(3). The trial court then entered a temporary restraining order and required defendant to show cause why a preliminary injunction

¹ Plaintiff also argues that the trial court erred in failing to grant his motion for reconsideration because he showed that he had in fact exhausted his administrative remedies given his petitions for an alternative menu pursuant to PD 05.03.150 ¶ PP. For the reasons set forth above, this argument is without merit.

should not be entered. Defendant's brief in opposition then responded to the trial court's order. Plaintiff does not suggest that the brief was an inappropriate response to that order. Under these circumstances, defendant's failure to file a responsive pleading to plaintiff's complaint was proper.

Plaintiff next argues that "the trial court's adverse ruling procedurally removed his ability to" move for class certification under MCR 3.501(B)(1)(a). We disagree. The trial court dismissed plaintiff's complaint because it found that he had not exhausted his administrative remedies. This logically foreclosed plaintiff from continuing the litigation process, which included moving for class certification. No error occurred under these circumstances. Plaintiff also argues, in conjunction with his class-certification argument, that he was deprived of the opportunity to amend his complaint under MCR 2.118(A)(1) because defendant failed to file a responsive pleading. First, the failure to file the responsive pleading was proper, as discussed above. Moreover, the trial court properly found that plaintiff had failed to exhaust his administrative remedies. Because plaintiff was not entitled to maintain a suit at all, he was not entitled to the opportunity to amend.

Plaintiff argues next that the trial court judge failed to refer his motion to disqualify her to the chief judge pursuant to MCR 2.003(D)(3)(a)(i). MCR 2.003(D)(3)(a) provides that "the challenged judge shall decide" a motion to disqualify him or her. MCR 2.003(D)(3)(a)(i) provides that if the judge denies the motion, "in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo[.]" Here, the trial court judge did not respond to plaintiff's motion for disqualification. Plaintiff argues that the trial court thus was without constitutional authority to rule on the motion for reconsideration, which he filed on the same day he filed his motion to disqualify.

This issue is without merit. Indeed, defendant filed both the motion for disqualification and the motion for reconsideration on the same day, and he did not state in the motion to disqualify that the current trial judge should not rule upon the motion for reconsideration. He provides no authority for his assertion that the failure by the court to address the motion to disqualify "rendered the trial court without constitutional authority to rule on the motion to reconsider" Moreover, in his appellate brief, plaintiff provides no authorities regarding the standards for disqualification. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (discussing an appellant's duty to develop his arguments). Finally, we note that the relief plaintiff apparently seeks is an invalidation of the ruling on the motion for reconsideration, but the motion was clearly without merit given the failure to exhaust all administrative remedies. Under the circumstances, we find no basis for a reversal or remand.

Plaintiff also argues that defendant impermissibly took contrary positions when it first rejected his grievance as "non-grievable" and then argued before the trial court that plaintiff should have petitioned defendant for an alternative menu and given defendant a chance to respond. Plaintiff's grievance broadly stated that the planned change to a vegan menu was unconstitutional without stating how this injured plaintiff. Plaintiff failed to state how the change applied to him in accordance with PD 03.02.130 ¶ F. Thus, it was appropriately rejected. However, PD 05.03.150 ¶ PP provided a separate avenue for seeking redress of any harm caused by the vegan menu, apart from the normal grievance process set forth in PD 03.02.130. Thus,

defendant's assertions that his grievance was non-grievable and that he should have petitioned for an alternative menu and given defendant a chance to respond were not inconsistent.

Plaintiff also notes "[o]ther relative factors to this argument." He calls our attention to various sections of the PLRA that require a trial court to dismiss a prisoner's suit if it determines that it is "frivolous." Plaintiff argues that the trial court did not find that his suit was frivolous. Although this is true, this does not negate the conclusion that plaintiff failed to exhaust his administrative remedies.

Affirmed.

/s/ William B. Murphy

/s/ Patrick M. Meter

/s/ Deborah A. Servitto