COURT OF APPEALS
DECISION
DATED AND FILED

September 11, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 96-1824

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JAMES MUNROE,

PLAINTIFF-APPELLANT,

V.

KENNETH MORGAN, CHRIS ELLERD, CAPT. MOLNAR, TIM PETERSON, OFFICER FOOR, OFFICER KOCH, JOHN DOE LABORATORY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

PER CURIAM. James Munroe appeals from an order dismissing his action against several employees at the Racine Correctional Institution. His complaint alleges that the defendants violated several state laws and his constitutional right to due process in their issuance and handling of a conduct

report. The trial court dismissed Munroe's action for failure to state a claim for which relief could be granted because: (1) he failed to exhaust applicable administrative remedies with respect to his state-law claims; and (2) the existence of an adequate post-deprivation remedy, in the form of an action for certiorari review, defeated his constitutional due-process claims.

Munroe argues on appeal that he was improperly deprived of the opportunity to "develop[] a record in response to [the] motion to dismiss," and that the trial court erred in dismissing his complaint. We reject his arguments and affirm the order.

The facts are not in dispute. Munroe, an inmate at the Racine Correctional Institution, was required to submit to a random urine test for intoxicating drugs. The test results were positive and he was issued a conduct report charging him with violating WIS. ADM. CODE § DOC 303.59.[1] After a hearing, the prison disciplinary committee found Munroe guilty of using intoxicants and imposed a penalty of (among other things) eight days' adjustment segregation and 120 days' program segregation. Munroe appealed to the warden, who affirmed the adjustment committee's decision. He then filed this action.

As indicated, Munroe's *pro se* complaint, liberally construed, alleges a variety of state-law and federal constitutional violations. Specifically, he alleges that the defendants violated their statutory duty to provide him with a copy of his urine-test results and failed to provide an adequate staff advocate for him at the hearing. He also claims that the members of the disciplinary committee failed to

[1] WISCONSIN ADM. CODE § DOC 303.59, entitled "Use of intoxicants," provides in relevant part: "When a test of a specimen of an inmate's ... urine ... indicates use of an intoxicating substance ... the inmate is guilty of an offense."

"cite" the evidence against him and to accurately state their findings and the reasons underlying the disposition of the conduct report, and that the warden "had a duty" to reverse the committee's action. Finally, he asserts that these procedural violations abridged his constitutional right to due process of law.

In determining whether a complaint should be dismissed for failure to state a claim, "'the facts pleaded and all reasonable inferences drawn from the pleadings must be taken as true.'" ***Casteel v. McCaughtry***, 176 Wis.2d 571, 578, 500 N.W.2d 277, 280-81 (1993) (citation omitted). We review the legal sufficiency of the complaint *de novo*, without deference to the trial court. ***Irby v. Macht***, 184 Wis.2d 831, 836, 522 N.W.2d 9, 11 (1994).

With respect to Munroe's state-law claims, the law is well settled that exhaustion of administrative remedies is a prerequisite to filing suit when the administrative process offers adequate relief. *See* ***Nodell Inv. Corp. v. City of Glendale***, 78 Wis.2d 416, 424-26, 254 N.W.2d 315-16 (1977); *see also* ***Ass'n of Career Employees v. Klauser***, 195 Wis.2d 602, 611, 536 N.W.2d 478, 484 (Ct. App. 1995).[2] Munroe argues that his appeal to the warden satisfies the exhaustion requirement. As the State points out, however, his complaint does not allege that

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[2] In a statute that became effective after the events leading up to Munroe's action, the legislature codified this requirement with respect to prisoners. It states in relevant part:

> No prisoner ... may commence a civil action or special proceeding against an officer, employe or agent of the department of corrections in his or her official capacity or as an individual for acts or omissions committed while carrying out his or her duties ... or while acting within the scope of his or her office, employment or agency until the person has exhausted any administrative remedies that the department of corrections has promulgated by rule.

Section 801.02(7), STATS., *as created by* 1995 Wis. Act 27.

he pursued his challenge to the adjustment committee's procedures through the Inmate Complaint Review System (ICRS).[3] Various avenues were open to Munroe to pursue his procedural challenges to the committee's decision. *See* WIS. ADM. CODE §§ DOC 310.03, 310.04(3). Because he failed to exhaust those administrative remedies, the trial court properly dismissed his state-law claims.

Munroe also argues that the trial court erred in granting the State's motion to dismiss before he had an opportunity to respond to the motion or to amend his complaint. He states that had he received such an opportunity, he could have informed the court of his attempts to exhaust his administrative remedies. First, a motion to dismiss tests the sufficiency of the complaint. It is not an opportunity to argue the merits or develop the record. ***Evans v. Cameron***, 121 Wis.2d 421, 426, 360 N.W.2d 25, 28 (1985). Second, while federal cases have held that a court cannot *sua sponte* dismiss an action without providing the plaintiff notice and an opportunity to be heard,[4] we consider them inapposite because Munroe had an opportunity to respond to the State's motion to dismiss. As the State points out, its motion put Munroe on notice of the defects in his complaint two months before the trial court ruled on the motion, and he could

[3] While the appendix to Munroe's brief contains a copy of an inmate complaint and the notification of its dismissal, such information does not appear in the record and Munroe does not state that he appealed the dismissal of that complaint through the ICRS. *See* WIS. ADM. CODE § DOC 310.025.

[4] *See, e.g.*, ***Murphy v. Lancaster***, 960 F.2d 746, 748 (8th Cir. 1992); ***Ricketts v. Midwest Nat'l Bank***, 874 F.2d 1177, 1183-85 (7th Cir. 1989); ***Jefferson Fourteenth Assoc. v. Wometco de Puerto Rico, Inc.***, 695 F.2d 524, 526-27 (11th Cir. 1983).

have either responded to the motion or amended his complaint in that time. He did neither.[5]

While Munroe's complaint does not expressly refer to the Federal Civil Rights Act, 42 U.S.C. § 1983, he repeatedly alleges that the defendants' actions violated his constitutional rights. And while exhaustion of administrative remedies is not a prerequisite to a § 1983 action for a denial of procedural due process for Munroe's claim, ***Casteel v. Vaade***, 167 Wis.2d 1, 20-21, 481 N.W.2d 476, 484 (1992), such a claim will not lie if the State's conduct was random and unauthorized and if an adequate state remedy exists.[6] ***Casteel v. Kolb***, 176 Wis.2d 440, 445-46, 500 N.W.2d 400, 402 (Ct. App. 1993); ***Lewis v. Young***, 162 Wis.2d 574, 580-81, 470 N.W.2d 328, 331 (Ct. App. 1991).

Munroe's complaint centers on the conduct of the disciplinary proceedings brought against him, and the crux of his claim is that the defendants failed to follow applicable provisions of the administrative code in conducting those proceedings. Such conduct is random and unauthorized within the meaning of ***Casteel***, ***Lewis*** and similar cases. And because Munroe's due process challenge to the committee's decision is cognizable in a state-law certiorari proceeding, ***State ex rel. Meeks v. Gagnon***, 95 Wis.2d 115, 119, 289 N.W.2d 357, 361 (Ct.

[5] Even if he had amended his complaint to one seeking certiorari review of the committee's decision, such an action must be commenced within six months. ***Firemen's Annuity & Benefit Fund v. Krueger***, 24 Wis.2d 200, 205, 128 N.W.2d 670, 673 (1964). The committee's decision was issued on April 5, 1995, and Munroe commenced this action on November 17, 1995, more than seven months later.

[6] Subsequent to Munroe's claim, Congress passed legislation requiring exhaustion of administrative remedies for prisoner claims based on 42 U.S.C. § 1983. *See* 42 U.S.C. § 1997e(a), *as amended by* Act of Apr. 26, 1996, 42 U.S.C.S. § 1997e(a) (Law. Co-op. Supp. 1997).

App. 1980), the trial court properly concluded that an adequate state remedy exists.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.