

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WALTER J.D. MOFFETT,

Plaintiff,

v.

OPINION AND ORDER

20-cv-21-wmc

DEBRA WILSON, *et al.*,

Defendants.

Pro se plaintiff Walter Moffett alleges that on January 21, 2016, when he was incarcerated at Columbia Correctional Institution (“Columbia”), officers pushed him out of his wheelchair. The court granted Moffett leave to proceed against eight defendants on Eighth Amendment excessive force and failure to intervene claims. Now before the court is defendants’ motion for summary judgment¹ on the ground that Moffett failed to exhaust his administrative remedies, and in the alternative, for a hearing. (Dkt. #22 and Dkt. #34.)

OPINION

Prisoners may not bring a federal claim about events in prison “until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). In other words, a prisoner must follow all the prison’s rules for completing its grievance process. *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002). This includes, in relevant part, compliance with instructions for filing an initial, administrative grievance. *Cannon v. Washington*, 418 F.3d 714, 718 (7th Cir. 2005).

¹ Defendants mistitled their motion as one for partial summary judgment. (*See* dkt. #22.)

This exhaustion requirement is mandatory to afford prison administrators a fair opportunity to resolve a grievance without litigation. *Woodford v. Ngo*, 548 U.S. 81, 88-89 (2006). However, a prisoner's failure to exhaust constitutes an affirmative defense, which defendant must accordingly prove. *Davis v. Mason*, 881 F.3d 982, 985 (7th Cir. 2018). In particular, at summary judgment, defendants must show that there is no genuine dispute of material fact as to plaintiff's failure to exhaust, and that they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Under the regulations in place in 2016, Wisconsin prisoners were required to start the complaint process by filing an inmate complaint with the institution complaint examiner ("ICE") within 14 days after the occurrence giving rise to the complaint. Wis. Admin. Code § DOC 310.09(6) (2016). The regulations provided that, among other requirements, each complaint must be submitted on a complaint form. *Id.* § DOC 310.09(1)(a) (2016).

Here, defendants are entitled to summary judgment because Moffett never filed any inmate complaints about the claims he raises in this lawsuit. In all of 2016, Moffett filed just three accepted inmate complaints, none of which allege excessive use of force or failure to intervene. In CCI-2016-19607, Moffett filed an inmate complaint described as a "co-pay" issue; in CCI-2016-20557, Moffett complained that he wanted his food tray brought to him; and in CCI-2016-20558, Moffett complained that he was subject to random searches when he was off unit. (Ex. 1000 (dkt. #25-1) 1.) He also filed a complaint on February 23, 2016, alleging that the prison did not give him his property and various problems with the prison conditions, but his submission was not accepted because, among

other deficiencies, he had not attempted to resolve the issue by contacting a unit manager. (Ex. 1001 (dkt. # 25-2) 1-2.) None of these complaints allege any excessive use of force or failure to intervene.

Moffett does not dispute that he failed to file any inmate complaints regarding the claims at issue in this action, and his two arguments for being relieved of that obligation both fail. *First*, he argues that he was denied access to the administrative process, as there were no inmate complaint forms available, and prison guards and staff promised to check into the problem, but apparently never did. He adds that he made many unsuccessful attempts to obtain inmate complaint forms between January 21, 2016, and June 2016. He asserts that he had one complaint form that was included with some of his other property that he received a few weeks after the alleged January incident, but he used that form to file complaints about the withholding of his property and prison conditions. Defendants respond that inmate complaints were available in Moffett's housing unit at the time of the alleged incident. In support, defendants provide the declaration of Wayne Stopla, Columbia's ICE who states that inmate complaint forms were available to Moffett and that other inmates in Moffett's unit filed complaints in January and February 2016. (Stopla Decl. (dkt. #35) ¶¶ 5-8.)

In fairness, inmates are required to exhaust only those administrative remedies that are available to them, and the exhaustion process may become unavailable when prison staff prevent an inmate from accessing those procedures. *See Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006) (“[A] remedy becomes ‘unavailable’ if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a

prisoner from exhausting.”). While Moffett provides dates when the complaint forms were allegedly unavailable, his assertion is contradicted by his own statements and the record, which show that he did file a complaint, albeit on a form that he says was already in his possession, during the time that he said complaint forms were unavailable. Further, his general statements that the forms were unavailable, unspecified prison employees failed to follow up on the lack of forms and he sought the forms many times provide insufficient detail to create a genuine dispute of fact about the availability of exhaustion procedures. *See Schultz v. Pugh*, 728 F.3d 619, 620 (7th Cir. 2013) (summary judgment was appropriate in favor of defendants because plaintiff failed to provide details about why he was unable to exhaust his administrative remedies); *see also Dale v. Lappin*, 376 F.3d 652, 655-56 (7th Cir. 2004) (explaining that prisoner who identified the prison employees from whom he requested exhaustion forms, as well as the form he requested, provided sufficient detail to create a genuine dispute of fact related to the availability of the exhaustion procedures).

Second, Moffett asserts that he submitted “hundreds of complaints” to various prison officials and staff in the chain of command. His unsupported assertion that he tried to informally raise the claims at issue here does not create a genuine dispute of fact. *See Bordelon v. Bd. of Educ. of the City of Chicago*, 811 F.3d 984, 989 (7th Cir. 2016) (“Rule 56 demands something more specific than the bald assertions of the general truth of a particular matter, rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted.” (quotation marks omitted)). Moreover, even assuming Moffett used informal procedures to raise his concerns, attempting to resolve an issue informally is not a substitute for filing a formal inmate complaint. *Burrell*

v. Powers, 431 F.3d 282, 284-85 (7th Cir. 2005).

Even so, the court will dismiss plaintiff's claims without prejudice. *Ford v. Johnson*, 362 F.3d 395, 401 (7th Cir. 2004) (dismissal for failure to exhaust is always without prejudice). This means plaintiff can refile these claims if he can successfully exhaust them, but he will likely find it impossible to file a proper grievance because the relevant events happened too long ago.

ORDER

IT IS ORDERED that:

- 1) Defendants' motion for summary judgment for failure to exhaust administrative remedies (dkt. #22) is GRANTED and plaintiff's claims are DISMISSED without prejudice.
- 2) Defendants' motion for a hearing (dkt. #34) is DENIED AS MOOT.
- 3) The clerk of court is directed to enter final judgment accordingly and close this case.

Entered this 19th day of December, 2023.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge