

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

STEVEN A. CONWAY

Plaintiff,

OPINION AND ORDER

v.

02-C-0025-C

JON LITSCHER and
Unknown DOC Medical Staff,

Defendants.

This is a civil action for injunctive relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Steven A. Conway contends that while he was housed at the Kenosha Correctional Center in Kenosha, Wisconsin, defendants violated his Eighth Amendment rights by denying him medical treatment for hepatitis C because he was scheduled to be released from prison within 18 months. On March 6, 2002, plaintiff was granted leave to proceed in forma pauperis on this claim. On April 2, 2002, plaintiff was released from prison.

Presently before the court is defendants' motion to dismiss, in which they argue that plaintiff failed to exhaust his administrative remedies and that his claim is moot because he requested injunctive relief only and is no longer incarcerated.

Defendants have submitted documents relating to plaintiff's exhaustion of administrative remedies in support of their motion. Documentation of a prisoner's use of the inmate complaint review system is a matter of public record. For this reason, a court may take judicial notice of the documents without converting the motion to dismiss into a motion for summary judgment. See Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 455 (7th Cir. 1998) (citing General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997)).

Because plaintiff has failed to exhaust his administrative remedies, I will grant defendants' motion to dismiss. As a result, it is unnecessary to address defendants' alternative argument that plaintiff's claim is moot.

OPINION

Plaintiff argues that (1) he "exhausted remedies 'available' per 1997e," when he wrote to Secretary Litscher directly; (2) exhaustion is not required when the relief sought is injunctive; (3) exhaustion is not required when he has a valid excuse that his health needs required immediate treatment; and (4) exhaustion is not required unless the attorney general "certifies remedies are in substantial compliance with accepted standards." See Plt.'s Reply, dkt. #9. Plaintiff is incorrect as to each of these assertions.

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), provides that "[n]o 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.” The Court of Appeals for the Seventh Circuit has held that “a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits.” Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Porter v. Nussle, 534 U.S. 516 (2002)(PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes).

The court of appeals has made clear that “[t]here is no futility exception to § 1997e(a),” Perez, 182 F.3d at 537; see also Massey, 196 F. 3d at 733, and that a prisoner’s request for monetary damages that are unavailable under the administrative complaint system does not allow a prisoner to avoid § 1997e’s exhaustion requirement, see Perez, 182 F.3d at 537-38. “The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures.” Massey, 196 F.3d at 733. Even if plaintiff suspected that his inmate complaint and appeals would not lead to an immediate judgment in his favor, he was required to complete the process of administrative review.

Wis. Admin. Code § DOC 310.04 requires that before commencing a civil action, an

inmate “shall file a complaint under s. DOC 310.09 or 310.10, receive a decision on the complaint under s. DOC 310.12, have an adverse decision reviewed under s. DOC 310.13, and be advised of the secretary’s decision under s. DOC 310.14.” The regulations require that the complaint be filed within 14 calendar days after the occurrence giving rise to the complaint, but allow the inmate complaint investigator to accept a late complaint for good cause. See Wis. Admin. Code § DOC 310.09(3). According to § DOC 310.11(11), the inmate’s complaint is to be examined by the inmate complaint investigator, who investigates the complaint and recommends a decision to the appropriate reviewing authority. Within five working days after receipt of the inmate complaint investigator's report, the appropriate reviewing authority (defined in § DOC 310.03(3) as “the warden, bureau director, administrator or designee who is authorized to review and decide an inmate complaint”) is to issue a written decision. See Wis. Admin. Code § DOC 310.12(1). If, however, the complainant does not receive the reviewing authority’s decision within 23 working days of the receipt of the complaint by the inmate complaint investigator, § DOC 310.12(3) provides that the complaint is considered denied and can be appealed immediately. An inmate has 10 calendar days after the date of the decision to file a written request for review with the corrections complaint examiner and the corrections complaint examiner has discretion to accept a late appeal under certain circumstances “if the elapsed time has not made it difficult or impossible to investigate the complaint.” Wis. Admin. Code § DOC

310.13(1), (3). The corrections complaint examiner makes a written recommendation that is forwarded to the secretary, who determines within 10 days of receiving the recommendation whether to accept the recommendation, adopt the recommendation with modifications, reject the recommendation or return the recommendation to the corrections complaint examiner for further investigation. See Wis. Admin. Code § DOC 310.13(7), 310.14.

Because plaintiff concedes that the only step he took in the administrative exhaustion process was writing defendant Litscher directly, he has not exhausted his administrative remedies as required under the Wisconsin Administrative Code and the Prison Litigation Reform Act. Accordingly, I will grant defendants' motion to dismiss. As a result, it is unnecessary to address defendants' argument that plaintiff's claim is moot because he is no longer incarcerated.

ORDER

IT IS ORDERED that

1. The motion to dismiss filed by defendants Jon Litscher and Unknown DOC Medical Staff is GRANTED for failure to exhaust administrative remedies; and

2. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 18th day of June, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge