IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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STEVEN E. GERRARD,

Plaintiff,

v.

GEORGE M. DALEY, M.D.,

Defendant.

OPINION & ORDER
00-C-355-C

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In this proposed civil action for monetary relief, plaintiff Steven E. Gerrard contends that defendant George M. Daley, M.D., violated his rights under the Eighth Amendment and state law by failing to authorize the necessary medical testing to diagnose plaintiff with cancer before it was no longer treatable. Plaintiff is an inmate at Fox Lake Correctional Institution in Fox Lake, Wisconsin. Jurisdiction is present. See 28 U.S.C. §§ 1331, 1343 and 1367.

Plaintiff has paid the full fee for filing his complaint. However, because he is a prisoner and defendant is a "governmental entity or officer or employee of a governmental entity," this court is required to screen the complaint, identify the claims and dismiss any claim that is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. §§ 1915A(a), (b). In

addition, this court must dismiss the complaint if the litigant is a prisoner and he has failed to exhaust available administrative remedies. See 42 U.S.C. § 1997e(a). In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972).

ALLEGATIONS OF FACT

Plaintiff Steven E. Gerrard is an inmate at Fox Lake Correctional Institution in Fox Lake, Wisconsin. Defendant George M. Daley, M.D. is the director of the Bureau of Health Services for the Wisconsin Department of Corrections.

In late 1997, plaintiff began experiencing back pain, neurological symptoms in his leg, pain in his scrotum, blood in his stool, incontinence and diarrhea. Also, plaintiff began losing weight. Dr. Jose T. Lloren, a physician at the institution, evaluated plaintiff and sought defendant Daley's authorization for plaintiff to undergo a MRI scan of his back or an evaluation by a neurosurgeon at the University of Wisconsin Hospital and Clinics. On or about March 19, 1998, defendant Daley refused to authorize the recommended tests, stating that there had been "minimal changes." Defendant Daley did not examine plaintiff. In a letter dated April 8, 1998, Dr. Paul Hartlaub, plaintiff's family doctor and an assistant professor at the University of Wisconsin Medical School, requested that defendant Daley authorize a MRI

scan or a neurosurgeon evaluation. In the letter, Dr. Hartlaub stated that plaintiff's "symptoms and history . . . lead me to worry that he may have colon cancer or other tumor." In a letter dated May 27, 1998, Peter M. Koneazy, the legal director of the American Civil Liberties Union of Wisconsin, requested that defendant Daley review plaintiff's condition in light of the medical opinions of Dr. Lloren and Dr. Hartlaub. Koneazy warned defendant Daley that plaintiff's symptoms "may suggest serious medical conditions, including cancer, requiring immediate attention."

On July 27, 1998, Dr. Lloren submitted a second request for defendant Daley's authorization for plaintiff to be examined by a neurosurgeon. On July 30, 1998, defendant Daley denied the request without explanation. Dr. Lloren continued to examine plaintiff regularly. On October 15, 1998, he noted in plaintiff's progress notes that plaintiff had lost 13 pounds in two to three weeks.

On October 20, 1998, plaintiff was transferred to Whiteville Correctional Facility in Whiteville, Tennessee. While at Whiteville, plaintiff was examined by Dr. Robert V. Coble, who ordered a blood test and biopsy. On November 26, 1999, plaintiff was transferred because of the results of his biopsy; he did not know the results of the test. On November 30, 1999, plaintiff was transported to the University of Wisconsin Hospital. At the hospital, Dr. John Pellett told plaintiff that his biopsy was positive for adenocarcinoma, a malignant cancer.

Because of defendant Daley's refusal to authorize medical tests, plaintiff's condition was not detected until the cancer had spread to such an extent that it is not treatable. (Plaintiff is not complaining of deficiencies in his present palliative care.) The cancer has spread to plaintiff's vital organs and bones. It is estimated that plaintiff will live six to twelve more months. Had the cancer been detected earlier, it could have been surgically removed and plaintiff would have had a good chance of a full recovery.

OPINION

Under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), "[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 term "prison conditions" is defined in 18 U.S.C. § 3626(g)(2), which provides that "the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." 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).

The Seventh Circuit has adopted an expansive reading of the applicability of § 1997e(a), stating "if a prison has an internal grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim. 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 (emphasis added). Further emphasizing the importance of exhausting administrative remedies before filing suit, 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 42 U.S.C. § 1997e's exhaustion requirement. See Perez, 182 F.3d at 537-38; see Nyhuis v. Reno, 204 F.3d 65, 70 (3d Cir. 2000) (discussing circuit split on whether prisoner needs to exhaust when seeking money damages not available through prison grievance procedure).

In dicta in Perez, 182 F.3d at 538, Judge Easterbrook set forth a hypothetical situation that might fall into a narrow exception to § 1997e's exhaustion requirement

> in which the harm is done and no further administrative action could supply *any* 'remedy.' Suppose a prisoner breaks his leg and claims delay in setting the bone is cruel and unusual punishment. If the injury has healed by the time suit begins, nothing other than damages could be a 'remedy,' and if the administrative process cannot provide compensation then there is no administrative remedy to exhaust.

But see Nyhuis, 204 F.3d at 69 n.3 ("A subsequent panel for the Seventh Circuit Court of Appeals cast doubt on the extent of this exception, calling it dicta and not applying it to the case at bar.") (citing Massey, 196 F.3d at 734). Although Judge Easterbrook's hypothetical makes good sense, it is hard to square it with the strict approach the court of appeals has taken to prisoner suit exhaustion requirements. Why would a healed broken leg be any different from a beating by a guard who is no longer employed, an allegedly illegal transfer to another prison from which the prisoner has now been returned or any other event unlikely to be repeated?

A strong argument can be made that plaintiff's claim is similar to the hypothetical prisoner because he has not alleged ongoing medical problems that defendants are not addressing; in fact, he alleges that his cancer is no longer treatable. Nevertheless, all of the reasons for requiring administrative exhaustion are present in plaintiff's case. If plaintiff had informed prison authorities of his allegations of defendant Daley's alleged deliberate indifference at any point after defendant Daley first refused to authorize certain medical tests, the officials would have been able to investigate the allegations, reexamine defendant Daley's denial and order the appropriate medical tests, if any. As a result, prison officials would have had the first

opportunity to correct their own errors. At the least, filing a claim might have helped to narrow the dispute or to develop the factual record. And finally, allowing the complaint system to work without judicial intervention would encourage development of an effective system. See Perez, 182 F.3d at 537-38; see also Nyhuis, 204 F.3d at 74.

Plaintiff has failed to submit proof that he exhausted his administrative remedies on his Eighth Amendment claims against defendant. It may be the case that plaintiff complained through the internal grievance process about defendant Daley's denials. I will give plaintiff two weeks to submit proof of administrative exhaustion on his claims. If plaintiff has not yet pursued an internal complaint, it will be necessary to dismiss his suit. The dismissal will be without prejudice so that he may refile if he can accomplish exhaustion. It may be that the Department of Corrections will deny his complaint as untimely. Wis. Admin. Code DOC § 310.09(3) provides that "[a]n inmate shall file a complaint within 14 calendar days after the occurrence giving rise to the complaint, except that the institution may accept a late complaint for good cause." Plaintiff's case may well fit into the definition of good cause, given the seriousness of the claim and the likelihood that submitting a timely administrative complaint would not be the first thing a person would think about when diagnosed with terminal cancer. The requirements give the department the authority to hear untimely complaints and the department's interest in having an effective complaint system gives it the incentive to do so.

ORDER

IT IS ORDERED that a decision whether to grant plaintiff Steven E. Gerrard's request for leave to proceed on his claims against defendant George Daley is STAYED until August 7, 2000 in order for plaintiff to submit proof of administrative exhaustion. If by August 7, 2000, plaintiff fails to submit proof that he exhausted his administrative remedies before filing his proposed complaint, I will dismiss his complaint without prejudice and direct the clerk of court to close the file.

Entered this 24th day of July, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge