

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

LEONARD A. CROSS,

Plaintiff,

v.

THOMAS KARLEN, Warden, Jackson
Correctional Institution; and DENTAL
STAFF at Jackson — unknown at this
time,

Defendants.

OPINION and
ORDER

03-C-142-C

This is a civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Leonard A. Cross is a Wisconsin prisoner presently confined at the Jackson Correctional Institution in Black River Falls, Wisconsin. Plaintiff contends that defendants Thomas Karlen and the as yet unidentified dental staff at the Jackson Correctional Institution were deliberately indifferent to his serious dental needs in violation of the Eighth Amendment. The case is before the court on defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for plaintiff's failure to exhaust his administrative remedies.

In support of their motion to dismiss for failure to exhaust administrative remedies,

defendants submitted documents relating to plaintiff's exhaustion efforts within Wisconsin's inmate complaint review system. Plaintiff submitted additional documents in opposition to the motion. I can consider the parties' documentation without converting the motion to dismiss into a motion for summary judgment because documentation of a prisoner's use of the inmate complaint review system is a matter of public record. See Menominee Indian Tribe of Wisconsin v. Thompson, 161 F. 3d 449, 455 (7th Cir. 1998); General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997). For the reasons stated below, I conclude that plaintiff has failed to exhaust his administrative remedies as to his Eighth Amendment claims. Accordingly, I will grant defendant's motion to dismiss this case.

OPINION

The exhaustion provisions of the 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), state 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 phrase “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.” 18 U.S.C. § 3626(g)(2).

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, 733 (7th Cir. 1999). The court of appeals has held also that “if a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim.” Massey, 196 F.3d at 733. In Wisconsin, before an inmate may begin a civil action, he must file a complaint with the inmate complaint examiner under §§ DOC 310.09 or 310.10, receive a decision on the complaint from the appropriate reviewing authority under § DOC 310.12, have an adverse decision reviewed by the corrections complaint examiner under § DOC 310.13, and be advised of the secretary’s decision under § DOC 310.14. See Wis. Admin. Code § 310.07.

In support of their motion to dismiss, defendants have submitted the affidavit of John Ray, a corrections complaint examiner for the Wisconsin Department of Corrections. Ray avers that plaintiff has filed 14 inmate complaints since he has been incarcerated at the Jackson Correctional Institution, only two of which concern the allegations at issue in this

lawsuit. According to Ray, the first complaint, JCI-2002-34124, was dismissed because it was not timely filed and not timely appealed and the second complaint, JCI-2003-6934, was never appealed. “[U]nless [a] prisoner completes the administrative process by following the rules the state has established for that process, exhaustion has not occurred.” Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002). Therefore, defendants argue, this case must be dismissed for plaintiff’s failure to exhaust.

Plaintiff advances several arguments in opposition to defendants’ motion. First, he maintains that on several occasions he attempted to exhaust his administrative remedies and points to four exhibits attached to his response to defendants’ motion to dismiss. The first is a copy of a letter dated February 10, 2003, titled “Final Notice to Warden and Dental Staff.” See Plt.’s Resp. Br., dkt. #13, at Ex. 2-A. In this letter, plaintiff describes how his frequent requests for dental treatment have been ignored and threatens to bring a lawsuit if his dental needs are not treated quickly. Next, there is a letter dated February 20, 2003 that plaintiff sent to “Jodi K. ICE.” In it, plaintiff complains about the inadequate dental care he has received at the Jackson prison. See id. at Ex. 2-E. The third and fourth exhibits are copies of the inmate complaint examiner’s decision dismissing complaint JCI-2003-6934 and the reviewing authority’s decision affirming the dismissal. See id. at Exs. 2-G and 2-F (each dated February 25, 2003). The reviewing authority’s decision states that inmates have 10 calendar days in which to appeal an adverse decision to the corrections complaint

examiner. Although these documents show that plaintiff complained to prison officials about his inadequate dental treatment, none of them raises a question regarding defendants' assertion that plaintiff never appealed the dismissal of his inmate complaint to the corrections complaint examiner, as required by the state's administrative regulations. As the court of appeals noted in Pozo, 286 F.3d at 1024, "a prisoner who does not properly take each step within the administrative process has failed to exhaust state remedies, and thus is foreclosed by § 1997e(a) from litigating." With regard to inmate complaint number JCI-2002-34124, plaintiff does not contest defendants' assertion that it was not timely filed or appealed. See id. at 1025 (to exhaust administrative remedies, inmate must comply with state's administrative time limits).

Plaintiff also argues that "[e]xhausting administrative remedies at this Institution is a joke" because "every [inmate complaint] is dismissed and nothing is ever done." Plaintiff's frustration is shared by many prisoners. However, 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. Finally, after defendants filed their reply brief in support of their motion to dismiss, which should have ended the briefing on the motion, plaintiff filed a surreply brief that was not docketed because plaintiff is not entitled to an extra kick at the cat. However, even if plaintiff were entitled to file his surreply, it would not do him any good. In it, he argues that

he exhausted completely inmate complaint JCI-2002-34124 but offers no documentation to rebut defendants' evidence that this particular complaint and appeal were rejected as untimely. Moreover, plaintiff's complaint JCI-2002-34124 appears to deal with the allegedly inadequate dental treatment plaintiff received while incarcerated at the Dodge Correctional Institution, a claim on which plaintiff was denied leave to proceed for his failure to state a claim upon which relief may be granted.

Because I conclude that plaintiff failed to properly exhaust his administrative remedies on his Eighth Amendment claim against defendant Thomas Karlen and the Doe dental staff defendants at the Jackson Correctional Institution, I will grant defendants' motion to dismiss this case. The dismissal will be without prejudice because it appears that the inmate complaint relevant to plaintiff's Eighth Amendment claims against defendants (number JCI-2003-6934) was never appealed to the corrections complaint examiner. According to § DOC 310.13(2), a corrections complaint examiner may accept a late appeal for good cause, meaning it is still possible, if unlikely, that plaintiff can exhaust his administrative remedies. However, I note that if plaintiff attempts to file a late appeal of complaint JCI-2003-6934 with the corrections complaint examiner and the examiner stands on the state's administrative time limits, plaintiff will have failed to exhaust his remedies on the Eighth Amendment claims at issue in this case and he will be barred from filing the same claims again in this court.

ORDER

IT IS ORDERED that defendants' motion to dismiss is GRANTED. Plaintiff's Eighth Amendment claims against defendant Thomas Karlen and the Doe dental staff defendants at the Jackson Correctional Institution are dismissed without prejudice for plaintiff's failure to exhaust his administrative remedies. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 14th day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge