

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

ANDREW S. SATO
A.K.A. TIMOTHY TIKKURI,

Plaintiff,

v.

SHERIFF DAVID CLARKE and
DAVID "DOE" (LAST NAME UNKNOWN R.N.)
at the Milwaukee County Jail,

Defendants.

ORDER

03-C-0185-C

In this lawsuit, plaintiff has been allowed to proceed on a claim that defendant David "Doe," a Registered Nurse at the Milwaukee County jail, denied him medical care for a fractured wrist for 12 days beginning on September 5, 2001. He has been allowed to proceed against defendant Sheriff David Clarke for the sole purpose of discovering the identity of defendant Doe. The case is now before the court on defendants' motion to dismiss for plaintiff's failure to exhaust his administrative remedies as required under 42 U.S.C. § 1997e.

In deciding a motion to dismiss for failure to exhaust, a court may take judicial notice

of public records, such as inmate grievance records, without converting the motion to dismiss into a motion for summary judgment. Henson v. CSC Credit Services, 29 F.3d 280, 284 (7th Cir. 1994). In addition, the court may look to the well-pleaded allegations of the complaint. From the parties' submissions and the complaint, I find the following facts.

FACTS

At 3:00 p.m. on September 5, 2001, plaintiff reported to the nurse on duty at the Milwaukee County jail that he had hurt his wrist and the nurse replied that the injury was a "non medical emergency." The next morning, plaintiff could not move his fingers. He notified the nurse on duty that he had hurt his wrist and the nurse gave plaintiff a medical slip to complete, stating again that it was a "non medical emergency." When a doctor at the jail finally saw plaintiff on or about September 17, 2001, the doctor treated him for a fractured wrist.

Brian Mascari is a captain at the Milwaukee County Sheriff's Department in the Office of Professional Standards. He has reviewed the jail files from September 5, 2001 to the present and cannot find any complaint filed by plaintiff "alleging medical malpractice, negligence, or deliberate indifference to his medical care." Plaintiff has in his possession a copy of a form 1299-1 titled "Milwaukee County Jail Inmate Grievance Form." It is dated September 8, 2001 at 9:25 a.m. and contains the following description of plaintiff's

grievance:

I filled out a medical form on 9-5-01 because I think my hand is broken. I am in severe pain and no one is doing anything about it. I cannot move my hand or fingers. I told numerous jail staff and medical personal (sic) and I have not heard anything in three days. My hand hurts really bad. Could you please find someone to help me, cause I think my hand is broken. I am in constant pain.

At the top of the form, there are instructions providing the procedures to be followed when filing a grievance which state: "Inmate must state the names of the person(s) involved, when describing the nature of the problem. Inmate must return the Grievance to the Deputy involved for a response." At the bottom of the form, there is a section for the deputy to complete. The deputy must check a box stating "Yes" or "No" to the statement "Deputy attempted to resolve problem." In addition, the deputy must initial the document in the space provided on the form. Finally, the deputy is instructed as follows: "If resolved, forward to the Sergeant assigned to the POD for filing. If NOT resolved, complete Part II and attach to grievance. Place in Jail Administration mailbox, prior to end of your shift."

The deputy's portion of plaintiff's copy of the grievance form is not initialed and no box is checked in response to the "Yes" or "No" inquiry.

DISCUSSION

The Court of Appeals for the Seventh Circuit has held that exhaustion is an

affirmative defense that the defendants have the burden of pleading and proving. Massey v. Helman, 196 F.3d 727, 735 (7th Cir. 1999). Defendants have put in evidence to prove that the Milwaukee County jail files do not include a record of any grievance plaintiff may have filed about defendant David Doe's failure to respond to plaintiff's alleged serious medical needs, but this evidence is not dispositive. Plaintiff has submitted evidence of his own suggesting that he completed an inmate grievance form that may never have been turned in or may have been turned in and then lost or misplaced in the jail's files.

Unfortunately, even accepting as true plaintiff's allegation that he completed and turned in the grievance form dated September 8, 2001, plaintiff's evidence confirms, rather than disproves, his failure to exhaust his administrative remedies as required under 42 U.S.C. § 1997e.

Under 42 U.S.C. § 1997e(a), a plaintiff must exhaust those administrative remedies that are available to him. To exhaust administrative remedies, "a person must follow the rules governing filing and prosecution of a claim." Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). Although defendants did not submit any evidence to show precisely what procedures an inmate housed at the Milwaukee County jail must follow in order to exhaust his administrative remedies, the form plaintiff submitted specifies the initial procedure. It states explicitly that the inmate must "state the names of the person(s) involved, when describing the nature of the problem." Plaintiff did not do that. He wrote

his complaint in general terms, contending that he “told numerous jail staff and medical personal (sic) [about his injury] and I have not heard anything in three days.”

Even now, plaintiff does not know defendant Doe’s full name, but at least at the time he filed his complaint in this court he knew that defendant Doe’s first name is David. Under the jail’s inmate grievance procedure, plaintiff was required to identify the person or persons whose actions he was challenging. Despite this requirement, plaintiff did not mention David Doe.

In Ray v. Kertes, 285 F.3d 287 (3d Cir. 2002), the Court of Appeals for the Third Circuit discussed Congress’s two primary concerns in enacting § 1997e(a).

First, Congress expressed a desire to lessen the burden frivolous prison claims placed on federal courts. See, e.g., 141 Cong. Rec. 26,548 (1995) (“Frivolous lawsuits filed by prisoners tie up the courts, waste valuable legal resources, and affect the quality of justice enjoyed by law-abiding citizens.”) (statement of Sen. Dole); . . . Second, Congress wished to reinforce the power of prison administrators to control prison problems, minimizing the “interference” of federal courts in matters of prison administration. See, e.g., Alexander [v. Hawk], 159 F.3d [1321], 1326 n. 11 [(11th Cir.1998) (“Congress desired ‘to wrest control of our prisons from the lawyers and the inmates and return that control to the competent administrators appointed to look out for society’s interests as well as the legitimate needs of prisoners.’ ”) (quoting 141 Cong. Rec. 26,553 (1995) (statement of Sen. Kyl)). . . .(citations omitted).

Although plaintiff’s dispute is with defendant David “Doe” and defendant’s alleged deliberate refusal to arrange immediately for any kind of treatment for plaintiff’s injury, plaintiff did not mention defendant David Doe in his inmate grievance or Doe’s

determination that plaintiff's situation was a "non medical emergency," which is the heart of plaintiff's claim. Rather, plaintiff states only that "no one" of the "numerous jail staff and medical personal (sic)" responded to his complaints about his medical condition in three days. For prison officials in charge of investigating grievances, this information would not have been sufficient to allow them to pinpoint and correct the problem plaintiff raises in this lawsuit, which is defendant David Doe's alleged callous and indifferent response to plaintiff's injury. Because plaintiff disregarded the rules for filing a grievance as required on the inmate grievance form by failing to identify as nearly as possible the defendant he now sues in this action, I conclude that he has failed to exhaust his administrative remedies in the manner required under 42 U.S.C. § 1997e. Accordingly, defendants' motion will be granted and this case will be dismissed.

ORDER

IT IS ORDERED that defendants' motion to dismiss for plaintiff's failure to exhaust his administrative remedies is GRANTED. The clerk of court is directed to enter judgment

dismissing this case without prejudice for plaintiff's failure to exhaust his administrative remedies.

Entered this 21st day of November, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge