IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BOBBY J. JOHNSON, JR.,

Plaintiff,

v.

SGT. INGUM; CAPTAIN STITCH and C/O BERNS,

Defendants.

OPINION AND ORDER

03-C-0592-C

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This is a civil action brought pursuant to 42 U.S.C. § 1983. Plaintiff Bobby J. Johnson Jr., an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, contends that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment. Specifically, plaintiff contends that defendants were deliberately indifferent to his serious medical needs when they failed to provide him with his asthma inhaler at the onset of an asthma attack he suffered while incarcerated at Prairie du Chien Correctional Institution. In an order dated November 14, 2003, I granted plaintiff leave to proceed in forma pauperis on this claim.

Presently before the court is defendants' motion to dismiss plaintiff's complaint

pursuant to Fed. R. Civ. P. 12(b)(6). Defendants contend that plaintiff failed to properly exhaust his administrative remedies prior to filing suit as required by 42 U.S.C. § 1997e(a). In support of their motion, defendants have submitted an affidavit and several documents relating to the plaintiff's efforts to exhaust his remedies within the Department of Corrections inmate complaint review system. Plaintiff did not submit 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 the 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 properly exhaust his administrative remedies as to his Eighth Amendment claim. Accordingly, I will grant defendants' motion to dismiss this case.

A motion to dismiss will be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. Cook v. Winfrey, 141 F.3d 322, 327 (7th Cir.1998) (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). For the purpose of deciding defendants' motion, I accept as true the factual allegations in plaintiff's complaint. Also, I am considering the exhibits that defendants submitted regarding plaintiff's use of the inmate complaint review system, which

are summarized below.

FACTS

On May 12, 2003, plaintiff filed an inmate complaint, alleging that on May 9, 2003 defendants Ingum, Stitch and Burns were deliberately indifferent to his serious medical needs when they failed to provide him with his asthma inhaler at the onset of an asthma attack he suffered while incarcerated at Prairie du Chien Correctional Institution. On May 15, the Institution Complaint Examiner sent plaintiff an ICE receipt indicating that his complaint had been received. This receipt also set out the timetable for the complaint procedure. "A recommendation on the complaint will be made and submitted to the appropriate reviewing authority within 20 working days of acknowledgement [sic]. A decision will be made by the appropriate reviewing authority within 10 working days following receipt of the recommendation unless extended for cause." Defs.' Exh. A at 9. At some point after the Institution Complaint Examiner sent this receipt, plaintiff gave a statement regarding the events of May 9 to a corrections officer investigating the complaint. On June 13, the Institution Complaint Examiner sent plaintiff a report with its recommendation that the reviewing authority dismiss his complaint. On June 25, the reviewing authority sent plaintiff a report stating that it had accepted the Institution Complaint Examiner's recommendation and that his complaint was dismissed. The report

also included information on the time limits for appeal of the reviewing authority's decision to the Corrections Complaint Examiner. "A complainant dissatisfied with a decision may, within 10 calendar days after the decision, appeal that decision by filing a written request for review with the Corrections Complaint Examiner on forms supplied for that purpose." Defs.' Exh. A at 7. At some point, plaintiff was transferred from Prairie du Chien Correctional Institution to the Wisconsin Secure Program Facility in Boscobel, Wisconsin.

On October 15, 2003, nearly four months after the reviewing authority had dismissed his complaint, plaintiff filed an appeal with the Corrections Complaint Examiner. On the appeal form, plaintiff attempted to explain why he was filing so late.

> After [the corrections officer] took the statement I never heard back so I wouldn't be able to write a CCE. It has been several months since the incident, but I still never recieved [sic] word or anything from the institution after that statement. I was refused anything that I asked for at the time. I was refused [the] law library, attorney call, and this all stopped me from being able to get a CCE wrote or know what I was supposed to do. It also don't say in the 303 or anything else how long the security . . . had to get back to me about the investigation. I also was transferred to [the Wisconsin Secure Program Facility] so this makes [me] unable to recieve [sic] information from [Prairie du Chien Correctional Institution] about the investigation[.] [T]hat is why this CCE is filed. Defs.' Exh. A at 4.

Under Wis. Admin. Code § DOC 310.13(2), the Corrections Complaint Examiner can accept an appeal filed later than the 10-day limit if a petitioner can show good cause. On October 16, after acknowledging receipt of plaintiff's appeal, the Corrections Complaint Examiner recommended dismissal of plaintiff's appeal as untimely. Examiner Sandra

Hautamaki wrote, "Though complainant claims his complaint was further investigated by security and he never heard back from them, and also claims he was prevented from filing an appeal, I do not find good cause for this late appeal. Appeal forms are accessible to all inmates." Defs.' Exh. A at 2. On October 25, the Secretary of Corrections adopted the recommendation of the Corrections Complaint Examiner and plaintiff's appeal was officially dismissed as untimely.

OPINION

The 1996 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, 733 (7th Cir.1999). Also, the court of appeals has held 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. Wis. Admin. Code § DOC 310.07.

The facts reveal that plaintiff's appeal was dismissed because it was not filed with the Corrections Complaint Examiner within 10 calendar days of the adverse decision by the reviewing authority. "[U]nless [a] prisoner completes the administrative process by following the rules the state 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 two arguments in opposition to defendants' motion. First, he argues that, although his appeal was untimely, he is entitled to the good cause exception to the 10-day rule. To support this argument, plaintiff makes the same arguments that he made to the Corrections Complaint Examiner at the time he filed his appeal. Specifically, plaintiff contends that he was never verbally informed of the reviewing authority's decision to dismiss his complaint and that he was denied access to the law library and a telephone, which prevented him from filing an appeal. In addition, plaintiff alleges that his transfer from

Prairie du Chien Correctional Institution to the Wisconsin Secure Program Facility during the investigation of his complaint made it difficult for him to receive information regarding the status of the investigation. All of these arguments were considered and rejected by the Corrections Complaint Examiner as failing to create a good cause basis for an untimely appeal. It is not this court's place to review Corrections Complaint Examiner recommendations. The only question is whether plaintiff has properly exhausted all of his administrative remedies. As I have noted, to exhaust remedies a prisoner must file complaints and appeals in the place and at the time that the prison's administrative rules require. Pozo, 286 F.3d at 1025. Plaintiff did not file a timely appeal with the Corrections Complaint Examiner; therefore, he did not properly exhaust his administrative remedies. The fact that the Corrections Complaint Examiner had the discretion to accept plaintiff's untimely appeal for good cause, and chose not to exercise that discretion, does not excuse plaintiff from following the rules. If it did, then the incentive that § 1997e(a) provides for prisoners to use the state process would disappear. Id.

Plaintiff suggests that the Wisconsin Department of Corrections purposefully prevented him from filing a timely appeal, but the facts do not support this argument. The initial receipt and all of the several reports detailing the status of plaintiff's complaint, including the fact that the reviewing authority had decided to dismiss it, were addressed to plaintiff at the Wisconsin Secure Program Facility. An appeal form was "accessible to all

inmates." Plaintiff's failure to file an appeal with the Corrections Complaint Examiner for almost four months simply raises questions about his own diligence.

For his second argument, plaintiff contends that he should be excused from exhausting his administrative remedies because of the inadequacy of the grievance procedure used by the Department of Corrections. He argues that "the administration couldn't have corrected the situation, based on the fact that the injuries had already been sustained by the victim and finalized. . . ." Unfortunately for plaintiff, "the [Prison Litigation Reform Act] does not condition the applicability of the exhaustion requirement on the effectiveness of the administrative remedy available in a given case." Massey, 196 F.3d at 733. 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 cannot avoid § 1997e's exhaustion requirement by showing that monetary damages are unavailable under the administrative complaint system. 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 a judgment in his favor, he was required to complete the process of administrative review.

ORDER

IT IS ORDERED that defendants' motion to dismiss this action with prejudice is GRANTED because plaintiff failed to properly exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a).

Entered this 4th day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge