IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LONNIE L. JACKSON,

Plaintiff,

v.

JASON SMITH, JEFFREY JABER,
JON HIBBARD, LORI MEITZEN,
TROY EHNERT, RANDY J. SPRANGERS,
HANS KUSTER, WENDY CARIVOU
and DOUG DEMOTTS,

Defendants.

OPINION and ORDER

10-cv-212-bbc

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Plaintiff Lonnie L. Jackson is a prisoner who is proceeding on claims that (1) defendants Randy J. Spranger, Jason Smith, Jeffrey Jaber, Lori Meitzen and Jon Hibbard used excessive force against him when placing him in temporary lockup; (2) defendant Randy J. Spranger violated plaintiff's equal protection rights by treating him more severely during the excessive force incident because of his race and sexual orientation; (3) defendant Randy J. Spranger used the force he did against plaintiff in retaliation for plaintiff's speaking to an officer about the prison's rules; (4) defendants Doug Demott and Troy Ehnant performed an illegal strip search on plaintiff and defendant Hans Kuster allowed the search to be performed; and (5) defendant Wendy Carivou failed to provide plaintiff adequate

medical care for his injured wrist and leg after the excessive force incident.

Before the court is defendants' motion for summary judgment for plaintiff's failure to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). Defendants contend that plaintiff did not file a timely grievance regarding the October 9, 2008 incident and that, even if plaintiff had done so, he did not follow up with prison officials as he should have when he did not receive a response to his grievance. Because the parties dispute whether plaintiff filed a grievance in October 2008 and because the prison does not require prisoners to follow up on lost grievances, I will deny defendants' motion for summary judgment. Because a factual dispute exists, I will hold an evidentiary hearing on the matter, as prescribed in Pavey v. Conley, 544 F.3d 739,742 (7th Cir. 2008). From the parties' submissions I find the following facts to be material and undisputed.

UNDISPUTED FACTS

On October 9, 2008, while a prisoner at Oshkosh Correctional Institute, defendants Randy J. Spranger, Jason Smith and Lori Meitzen placed plaintiff Lonnie L. Jackson placed into temporary lockup status, allegedly using excessive force and causing extensive bruising. Plaintiff was not given medical attention for his bruising and for injuries to his wrist and right ear.

On September 1, 2009 plaintiff submitted an Interview/Information Request

regarding "the status of my ICE I filed back on 10-13-08 concerning use of force and hearing loss to my right ear and still have not heard anything." In his request he said that on November 13, 2008, he attempted to followup on his grievance but received no response. (The parties dispute whether plaintiff filed the October 13, 2008 grievance he says he did. Plaintiff avers that on October 13, 2008 he filed a prisoner grievance alleging "use of excessive force, injury to right ear, wrist, and left leg injury" during the October 9, 2008 incident and that he placed his three-page grievance in his cell door for 9:00 p.m. mail pick-up. Defendants aver that the prison has no record of ever receiving that grievance. On September 1, 2009, institution complaint examiner Program Assistant Angelia Kroll responded to plaintiff, stating "I see no such [grievance] on file." In response, on October 5, 2009 plaintiff wrote a letter to Kroll stating, "I would like to know what I do when a ICE is declared lost and not processed, since the 14 day time limit has pass[ed] to file another what is my option at this point?" On October 6, 2009, Kroll responded, "File the [grievance] again and put your good cause for filing it late right in the [grievance]. The ICE will review it and make a determination.")

Taking Kroll's advice, on October 7, 2009, plaintiff filed grievance number WCI-2009-22538 regarding the October 9, 2008 incident. He said he had good cause for the late filing because his previous grievance on the October 9, 2008 incident had been lost. An inmate complaint examiner acknowledged receipt of the the grievance on October 8, 2009.

Eight days later, on October 16, 2009, the grievance was rejected for having been filed beyond the 14-day time limit. On October 23, 2009 plaintiff appealed the rejection. On October 26, 2009 the appeal reviewer ruled that the rejection was appropriate because it was filed beyond the 14-day time limit.

OPINION

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that she is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1412 (7th Cir. 1989). "A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party." Brummett v. Sinclair Broad. Group, Inc., 414 F.3d 686, 692 (7th Cir. 2005). If the non-moving party fails to establish the existence of an essential element on which that party will bear the burden of proof at trial, summary judgment for the moving party is proper. Celotex, 477 U.S. at 322.

Under the Prison Litigation Reform Act, a prisoner must exhaust all available administrative remedies before filing a lawsuit in federal court. 42 U.S.C. § 1997e(a). Once defendants raise failure to exhaust as a defense, district courts lack discretion to decide claims on the merits unless the exhaustion requirements have been satisfied. Perez v.

Wisconsin Department of Corrections, 182 F.3d 532, 535 (7th Cir. 1999). Generally, to comply with § 1997e(a), a prisoner must "properly take each step within the administrative process." Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). This includes following instructions for filing the initial grievance, Cannon v. Washington, 418 F.3d 714, 718 (7th Cir. 2005), as well as filing all necessary appeals, Burrell v. Powers, 431 F.3d 282, 284-85 (7th Cir. 2005), "in the place, and at the time, the prison administrative rules require." Pozo, 286 F.3d at 1025. The purpose of these requirements is to give the prison administrators a fair opportunity to resolve the grievance without litigation. Woodford v. Ngo, 548 U.S. 81, 88-89 (2006).

Wisconsin prisoners have access to an administrative grievance system governed by the procedures set out in Wis. Admin. Code §§ DOC 310.01-310.18. Under these provisions, prisoners start the grievance process by filing a grievance with the institution complaint examiner. Wis. Admin. Code §§ DOC 310.09, 310.10 and 310.16(4). As a general rule, a grievance must be filed within 14 calender days of the occurrence giving rise to the grievance. Wis. Admin. Code § 310.09(6). An institution complaint examiner must then acknowledge receipt of the grievance within five working days of receipt of the grievance. Wis. Admin. Code § 310.11(2). An institution complaint examiner may investigate prisoner grievances, reject them for failure to meet filing requirements, recommend to the appropriate reviewing authority (the warden or the warden's designee)

that the grievance be granted or dismissed or direct the prisoner to attempt to resolve the grievance informally before filing a formal grievance. Wis. Admin. Code §§ DOC 310.07(2), 310.09(4). Once the institution complaint examiner makes a recommendation that the grievance be granted or dismissed on its merits, the appropriate reviewing authority may dismiss or affirm the grievance or return it for further investigation. Wis. Admin. Code § DOC 310.12. If a prisoner does not receive a recommendation from the institution complaint examiner within 30 days after the institution complaint examiner acknowledges receipt of the grievance, the prisoner may appeal to the corrections complaint examiner. Wis. Admin. Code § 310.12(3). A prisoner may also appeal to a corrections complaint examiner if the prisoner disagrees with the decision of the reviewing authority. Wis. Admin. Code § DOC 310.13. The corrections complaint examiner is then required to conduct an additional investigation when appropriate and make a recommendation to the Secretary of the Wisconsin Department of Corrections. Wis. Admin. Code § DOC 310.13. Within ten working days following receipt of the corrections complaint examiner's recommendation, the Secretary must accept the recommendation in whole or with modifications, reject it and make a new decision or return it for further investigation. Wis. Admin. Code § DOC 310.14.

Defendants' primary argument is that plaintiff did not file a timely grievance regarding the October 9, 2008 incident. At summary judgment, courts must view the facts

in the light most favorable to the nonmoving party, Healy v. City of Chicago, 450 F.3d 732, 738 (7th Cir. 2006). Plaintiff has adduced evidence that he filed a grievance in 2008 that would have been timely. Defendants contend that plaintiff should not be believed and argue that he offers no credible documentary evidence supporting his claim. According to the defendants, it "strains credulity" to believe that plaintiff filed a grievance in 2008, but credibility determinations are beyond the court's purview on a motion for summary judgment. To put it simply, a reasonable factfinder *could* believe plaintiff, even if his story seems unlikely under the circumstances of this case. Therefore, summary judgment cannot be granted.

Defendants' alternative argument is that, even if plaintiff were telling the truth that he filed a grievance in 2008, he still failed to exhaust because he had two additional available remedies: he could have timely re-filed his 2008 grievance or appealed the lack of a response to the corrections complaint examiner. Defendants' focus on what else plaintiff "could" have done when his grievance was lost misses the mark. "In determining whether a particular remedy was 'available' to a prisoner who failed to exhaust, the Court of Appeals for the Seventh Circuit has held that the key question is whether the prisoner or an official was at fault for the failure to complete the grievance process properly." Romanelli v. Suliene, No. 3:07-cv-19-bbc, 2008 WL 4587110, *5 (W.D.Wis. Jan. 10, 2008) (citing Kaba v. Stepp, 458 F.3d 678, 684-87 (7th Cir. 2006)). In other words, when a prisoner fails to complete

the grievance process because of an error by the prison officials, his suit is not subject to dismissal for failure to exhaust. For example, in Dole v. Chandler, 438 F.3d 804, 809-10 (7th Cir. 2006), prison officials never responded to a prisoner's grievance because they lost it. When the prisoner filed a federal lawsuit, the defendants argued that the case should be dismissed for the prisoner's failure to exhaust because he could have filed another grievance. The court flatly rejected this argument, concluding that the prisoner had "already given the prison administrative process an opportunity to resolve his complaint" and "the misstep . . . was entirely that of the prison system." Id. at 810. In this case, if plaintiff did file a grievance in 2008, he cannot be held accountable simply because he "could" have taken additional steps when the grievance was lost. Defendants may not benefit from the prison system's mistakes.

Even if exhaustion required plaintiff to pursue any avenue he "could" have once his grievance was lost, defendants' theory fails for another reason. They have not shown that either of the alternative avenues they suggest was truly available to plaintiff. Regarding the first remedy, timely re-filing the grievance, defendants state, "If an inmate files an offender [grievance] and does not receive a receipt from the institution complaint examiner, the inmate is on notice that the offender [grievance] was not received at the institution complaint examiner office." Therefore, "under the inmate complaint procedures [plaintiff] should have timely re-filed his [grievance] when a documented acknowledgment was not

forthcoming." Defendants fail to cite any support for their position that a prisoner is on notice when the prisoner does not receive an acknowledgment from the institution complaint examiner.

Additionally, the requirement that an institution complaint examiner acknowledge receipt of the grievance within five working days places the responsibility on the institution complaint examiner to acknowledge the grievance; it does not place a responsibility on a prisoner to follow up when an institution complaint examiner fails to follow procedure. This five-day rule is addressed to the responsibilities of the institution complaint examiner; it has no bearing on the action or inaction of a prisoner. Further, defendants fail to cite any regulation or policy that explains what prisoners can do if they do not receive a receipt acknowledging their grievance. Through my independent research I was unable to find any regulation establishing a procedure for re-filing grievances when a prisoner does not receive an acknowledgment from the institution complaint examiner or imposes a time limit on doing so. A prisoner will not be held accountable for failing to follow an "inmate complaint procedure" that is not reasonably available to him.

Defendants assert further that plaintiff could have appealed to the corrections complaint examiner. According to defendants, "The inmate complaint instructions also clearly inform the inmate, that, if an inmate receives no response after thirty days elapses from acknowledgment of his [grievance], he may appeal the disposition of his matter directly

to the corrections complaint examiner at the Department of Corrections central office." However, there is no evidence that plaintiff's grievance was ever acknowledged. The provision applies only to delays of more than 30 days after "acknowledgment" of the grievance. No provision explains what prisoners should do to follow up on grievances that are never acknowledged.

Perhaps plaintiff could have done more to follow up on his grievance, but if he did file a grievance in 2008 and that grievance was lost, he did all he was required to do under the current administrative rules. If defendants want prisoners whose grievances are allegedly lost or misplaced to re-file a new grievance or to appeal to the corrections complaint examiner even when the grievance is never acknowledged, they must make that known to the prisoner through a written procedure. It does not appear that any administrative remedy is available at this time to advise prisoners of the steps they should take if they believe that their grievance has been lost or misplaced.

Lastly, defendants assert that at the very least, plaintiff failed to exhaust with regards to his claim against defendant Carivou because even taking into account his alleged 2008 grievance, plaintiff never complained about defendant Carivou's role in the incident or alleged any wrongdoing on her part. This is incorrect. In considering what facts or pleadings a prisoner's grievance should contain, the court must look to the appropriate administrative system requirements. Wis. Admin. Code § DOC 310; Strong v. David, 297 F.3d 646, 649

(7th Cir. 2002). When the administrative requirements are silent, as the Wisconsin Administrative Code is, "a [grievance] suffices if it alerts the prison to the nature of the wrong for which redress is sought." Id. at 650. The regulations do not require prisoners to specify defendants by name in their grievances. They require only that a prisoner provide enough information in the grievances to alert prison officials to the nature of the wrongs for which the prisoner seeks address. Wis. Admin. Code DOC § 310.09; Strong, 297 F. 3d at 650. Although plaintiff's grievance did not name defendant Carivou by name, he did describe her alleged wrongdoing. He says that he stated in his 2008 grievance that "All reports written said I refused medical attention and was not injured when that was false." According to plaintiff, he also said in his grievance that his wrist was swollen and bruised and that he had scrapes and cuts to both his legs. Thus, plaintiff put the prison on notice that he was denied medical care following the excessive force incident. This is all he was required to do.

Because the 2008 grievance that plaintiff allegedly filed sufficiently identifies the issues giving rise to his claims in this case, defendants' motion for summary judgment must be denied. This does not mean the question of exhaustion may now be put aside. A factual dispute exists as to whether plaintiff did in fact file a grievance in 2008. As the Court of Appeals for the Seventh Circuit explained in Pavey v. Conley, if a factual dispute arises with respect to an exhaustion claim, the district court must hold an evidentiary hearing during which the judge will make a factual determination regarding the disputed facts. Pavey, 544

F.3d at 742. An evidentiary hearing is appropriate in this case because it will allow this court to hear testimony and receive evidence relating to the alleged 2008 grievance and assess the credibility of the witnesses.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Jason Smith, Jeffrey Jaber, Jon Hibbard, Lori Meitzen, Troy Ehnert, Randy J. Sprangers, Hans Kuster, Wendy Carivou and Doug Demotts, dkt. # 26, is DENIED.

FURTHER, IT IS ORDERED that any evidentiary hearing will be held on March 25, 2011, at 9:00 a.m., to determine whether plaintiff Lonnie L. Jackson did file a grievance in 2008 concerning the force used against him when he was placed in temporary lockup, the allegedly improper reasons for the severe treatment, the illegal strip search performed on him and the failure to provide him adequate medical care for his injured wrist and leg after the excessive force incident.

Entered this 17th day of February, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge