IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

STEVEN D. STEWART,

ORDER

Plaintiff,

10-cv-360-bbc

v.

TIMOTHY GILBERG, JOSEPH HASSELL,
TRACY MARTIN, PHILLIP HENNEMAN,
LEONARD JOHNSON, THOMAS SCHMIDT,
BURTON COX and CINDY SAWINSKI

Defendants.

- -

In this prisoner civil rights case, plaintiff Steven D. Stewart is proceeding on four claims: (1) defendants Thomas Schmidt, Joseph Hassell, Tracy Martin, Sergeant Henneman and C.O. Johnson used excessive force against him by attacking him while he was restrained; (2) defendant Burton Cox acted with deliberate indifference to plaintiff's serious medical needs by failing to provide treatment for plaintiff's broken elbow and undone prolapse; (3) defendants Cindy Sawinski and Captain Gilberg drew blood after the incident; and (4) defendant Hassell threatened to murder plaintiff after plaintiff was found not guilty of a crime.

Before the court are three motions: defendants' motion for partial summary judgment, defendants' motion for sanctions, and plaintiff's motion for sanctions. Defendants have moved for partial summary judgment on claims one, three and four on the grounds that plaintiff failed to exhaust his administrative remedies as to those claims, a step required by 42 U.S.C. § 1997e(a). According to defendants, the only offender complaint plaintiff filed that was related to his excessive force claim was rejected as outside the scope of the inmate complaint review system and did not count as exhaustion. Moreover, defendants contend that plaintiff never filed offender complaints concerning the incidents relevant to claims three and four.

Defendants' motion for partial summary judgment raises familiar questions regarding the confusing and often contradictory interrelationship between the Wisconsin Department of Corrections' inmate complaint review system and disciplinary review process. Shaw v. Jahnke, 607 F. Supp. 2d 1005 (W.D. Wis. 2009). Once again, I will reject defendants' attempt to establish failure to exhaust after a prisoner files a grievance that is rejected because of ongoing disciplinary proceedings. Thus, defendants' motion must be denied with respect to claim one because defendants have failed to meet their burden to show that plaintiff has not exhausted his available administrative remedies. As for the other two claims at issue, defendants' motion must be denied for another reason: the parties dispute whether plaintiff filed offender complaints concerning the alleged blood draw and murder threats

against plaintiff. To resolve these disputes, I will hold an evidentiary hearing as prescribed in Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008).

The second and third motions under advisement relate to the documents the parties have submitted in support of their respective positions on defendants' partial summary judgment motion. Each side moves for sanctions against the other on the ground that the other side has submitted false or altered documents.

The factual disputes preventing summary judgment are also the focus of defendants' motion for sanctions. Plaintiff has submitting copies of offender complaints he says he filed concerning claims three and four, but defendants contend that one of these complaints was never filed and the other has been materially altered. They have submitted their own copy, which plaintiff says is false. Whether sanctions are warranted against plaintiff hinges on this factual dispute, so I will stay a decision on defendants' motion until after the hearing. I will deny plaintiff's motion for sanctions because the alleged alterations are not material.

From the parties' submissions, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

On March 8, 2006, while an inmate at the Wisconsin Secure Program Facility, plaintiff Steven D. Stewart filed Offender Complaint WSPF-2006-6681, alleging that

defendant correctional officers Joseph Hassell, Tracy Martin, Phillip Henneman, Leonard Johnson and Thomas Schmidt had used excessive force against him while he had been restrained earlier that day. Plaintiff received a conduct report in connection with that incident, and a disciplinary hearing was scheduled to review the circumstances. The reviewing authority for offender complaints, the inmate complaint examiner, received plaintiff's complaint on March 9, 2006, and rejected it approximately one week later on March 15, 2006, with the comment:

> The disciplinary hearing on this situation has yet to take place. It is not within the scope of the inmate complaint review system to investigate circumstances leading up to a conduct report and then determine whether or not that report should have been written. It is, however, one of the duties of the disciplinary committee, and the complainant will have the opportunity to present any defense at that time.

On March 23, 2006, plaintiff appealed the inmate complaint examiner's rejection of the complaint. The next day, the reviewing authority on the appeal affirmed the inmate complaint examiner's action. The disciplinary hearing and appeal of plaintiff's conduct report were concluded on April 5, 2006. Plaintiff did not appeal the results of the hearing or file any further complaints in connection with the alleged March 8, 2006, incident.

In March 2007, plaintiff filed another offender complaint (unrelated to the March 8th incident), alleging that Department of Corrections employees had stolen or tampered with letters he had mailed. This complaint has a "Date Signed" of March 14, 2007, and consists

of three paragraphs: the first describes plaintiff's basic claim; the second names people who witnessed plaintiff put out the mail in question; and the third states, "I keep a mail log for ever piece of mail I send out of the institution." The complaint was returned to plaintiff the next day on March 15, 2007, with a letter explaining that it was being returned because it was not signed and was not limited to one clearly identified issue.

DISPUTED FACTS

The parties dispute whether plaintiff has filed any offender complaints in connection with claims three and four. With respect to claim three, plaintiff has averred that he filed with the court an offender complaint signed and dated April 9, 2006, describing an altercation he alleges took place when nurse Cindy Sawinski and Captain Gilberg forced him to give a blood sample against his will. Plaintiff submitted a copy of a grievance he allegedly filed in which he states that Sawinski and Gilberg demanded that plaintiff give a blood sample and that Gilberg ordered two guards to hold plaintiff down so that Sawinski could draw his blood. The complaint also contains handwriting that indicates it was "returned by the complaint dept." Defendants aver that they have no record of ever receiving this complaint.

With respect to claim four, the parties do not dispute that plaintiff filed an offender complaint containing allegations of mail stealing and tampering. The parties do dispute,

however, whether that offender complaint includes a sentence at the end stating, "I was threaten with death by C.O. Hassell. Please process my complaint or show me how to do it." Defendants have averred that the offender complaint that they received lists the "Date of Incident or Denial of Request" as March 1, 2007, is not signed, and does not contain that sentence. The offender complaint that plaintiff says he filed includes his signature and lists the "Date of Incident or Denial of Request" as March 14, 2007.

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 Broadcast Group, Inc., 414 F.3d 686, 692 (7th Cir. 2005). If the nonmoving 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 they can find that 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 an offender complaint with the institution complaint examiner. Id. §§ DOC 310.09, 310.10 and 310.16(4). As a general rule, an offender complaint must be filed within 14 calendar days of the occurrence giving rise to the complaint. Id. § DOC 310.09(6). An institution complaint examiner must then acknowledge receipt of the offender complaint within five working days of receipt of the complaint. Id. § DOC 310.11(2). After reviewing the complaint, an institution complaint

examiner may reject it for failure to meet filing requirements, investigate it, recommend to the appropriate reviewing authority that the complaint be granted or dismissed or direct the prisoner to attempt to resolve the complaint informally before proceeding with a formal offender complaint. Id. §§ DOC 310.07(2), 310.09(4).

Institution complaint examiners may reject offender complaints at the institution level for the reasons set forth in § DOC 310.11(5). One such reason is if "[t]he issue raised is not within the scope of the [Inmate complaint review system] as defined in s. DOC 310.08." Id. § DOC 310.11(5)(h). Under § DOC 310.08, a complaint is outside the scope of the Inmate complaint review system when it raises an "issue related to a conduct report, unless the inmate has exhausted the disciplinary process in accordance with ch. DOC 303."

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. Id. § 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. Id. § 310.12(3). A prisoner may also appeal to a corrections complaint examiner if the prisoner disagrees with the decision of the reviewing authority. Id. § DOC 310.13. The corrections complaint examiner is then required to conduct an additional investigation when appropriate and make a

9recommendation to the Secretary of the Wisconsin Department of Corrections. Id. § 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. Id. § DOC 310.14.

A. Claim One: The Alleged Excessive Force Used against Plaintiff on March 8, 2006

Defendants contend that plaintiff failed to properly exhaust his administrative remedies as to his first claim because his only offender complaint on the matter was rejected as outside the scope of the inmate complaint review system. Defendants argue that under the Department of Correction rules in the Wisconsin Administrative Code outlining the inmate complaint review system, plaintiff's complaint was outside the scope of that system because it was filed before the conclusion of the disciplinary process arising from the same incident as the complaint.

According to defendants, plaintiff "simply needed to wait and resubmit the offender complaint when the disciplinary process concluded." Dfts.' Br. in Supp. of M. for Partial Summ. J., dkt. # 36, at 7-8). However, defendants do not cite any provision of the Wisconsin Administrative Code or interpretive case law that affirmatively allows inmates to resubmit complaints in these circumstances. I am not convinced that resubmission was so

simple. First, plaintiff's disciplinary hearing and appeal did not conclude until April 5, 2006, twenty-eight days after the incident. Defendants do not explain why resubmission at this time would not be rejected under § DOC 310.11(5)(d) for being submitted "beyond 14 calendar days from the date of the occurrence giving rise to the complaint."

Next, as explained in Shaw v. Jahnke, 607 F. Supp. 2d 1005 (W.D. Wis. 2009), Wis. Admin. Code § DOC 310.08(2)(a) cannot be read as a stand-alone provision simply instructing inmates to wait to file offender complaints until after any associated disciplinary process has finished. Section DOC 310.08(2)(a) must be read in conjunction with § DOC 310.08(3). (In light of the thorough discussion of this in Shaw, which the attorney general's office must have received as counsel for the defendants in that case, it is troubling that the same office has omitted any discussion of Shaw or § DOC 310.08(3) from its briefs in this case.). Under § DOC 310.08(3), after the disciplinary appeal process is finished, a prisoner may file a grievance only with respect to the *procedure* used during the disciplinary process. Because plaintiff's complaint of defendants' excessive force does not raise any such procedural issues, § DOC 310.08(3) would have barred plaintiff from resubmitting his complaint, contrary to defendants' assertion. In fact, § DOC 310.08(3) seems to say that inmates *may never* use the inmate complaint review system to complain about excessive use of force in situations relating to conduct reports. Madyun v. Cook, 08-cv-30-bbc, 2008 WL 4330896, *3 (W.D. Wis. May 23, 2008) (concluding that § DOC 310.08(3) prohibited

prisoner from filing grievance on excessive force because issue was related to conduct report and prisoner had raised it during disciplinary proceedings).

The rejection notice plaintiff received supports this interpretation. All it told plaintiff to do was present the concerns he raised in his complaint at the time of his disciplinary hearing and appeal the rejected complaint on the basis of its rejection, *not* its merits. At no point does the rejection notice, or any other notice filed with the court, state that an inmate can resubmit a complaint.

Finally, defendants' motion also fails because even if plaintiff's complaint was outside the scope of the inmate complaint review system, whether plaintiff ever filed an offender complaint or could have done so is irrelevant to determining whether plaintiff exhausted his administrative remedies under 42 U.S.C. § 1997e(a). The relevant inquiry would be whether plaintiff raised the issue at his disciplinary hearing and filed necessary appeals of the disciplinary committee's decision under § DOC 303.76. As pointed out in both § DOC 310.08(2)(a) and in the rejection notice the inmate complaint examiner sent to plaintiff, it is the disciplinary committee's duty "to investigate circumstances leading up to a conduct report," and it is at the disciplinary hearing that "the complainant [has] the opportunity to present any defense" to the conduct report, such as an allegation of excessive use of force. Defendants omitted any discussion or evidence regarding plaintiff's disciplinary hearing from their brief. Defendants have failed to meet their burden to prove that plaintiff did not

exhaust his administrative remedies. Their motion for summary judgment must therefore be denied.

B. Claims Three and Four: The Alleged Blood Draw and the Alleged Murder Threats

Claims three and four boil down to whether plaintiff filed offender complaints describing the incidents underlying these claims. Plaintiff asserts that he did file such complaints and points to two offender complaints as evidence. Plt.'s Aff., Dkt. # 44, Exhs. C & D. Defendants contend that plaintiff did not file any complaints about these alleged incidents. They aver that they never received any blood draw grievance and submit a different version of the grievance plaintiff alleges he filed about the murder threats, which is one paragraph shorter and makes no reference to the threats. Whether plaintiff exhausted these claims depends on who is telling the truth about these filings, a question of fact that cannot be resolved on summary judgment. As the Court of Appeals for the Seventh Circuit explained in Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008), 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. (Defendants do not suggest that, if plaintiff filed the complaints he says he did, the complaints would still fail to satisfy exhaustion requirements.)

C. Defendants' and Plaintiff's Motions for Sanctions

In addition to their motion for summary judgment, defendants have also filed a motion for sanctions against plaintiff on the ground that plaintiff materially altered his copy of an offender complaint to create a factual dispute, filling in information necessary to keep claim four from being dismissed for failure to exhaust administrative remedies. (Defendants move for sanctions only with respect to this allegedly altered complaint, leaving out any mention of the blood draw complaint that plaintiff says he filed and they say they never received.) As punishment for filing this allegedly falsified document, defendants suggest the court use its inherent authority to dismiss plaintiff's entire case. Plaintiff does not address the discrepancy between the two versions of the complaint, but rather counters defendants' motion for sanctions with one of his own. Plaintiff argues that the defendants have materially altered their versions of certain rejection letters from the inmate complaint examiner because their versions reflect Wisconsin's current Governor and Department of Corrections Secretary as well as plaintiff's current cell number, rather than listing the information as it existed at the time the letters were sent to him. Although plaintiff fails to respond directly to defendants' allegation that he falsified his copy of the offender complaint, he has filed his copy attached to his sworn affidavit and refers to the offender complaint in his sworn affidavit, including his allegations against Hassell, which appear in plaintiff's version but not defendants'. From these submissions I understand that plaintiff is declaring

under penalty of perjury that his is the true copy.

Regarding defendants' motion for sanctions, I will stay a decision on the matter until after the hearing on claims three and four. Whether the court finds plaintiff's March offender complaint to be materially altered depends on the testimony and evidence presented at that hearing and on the credibility and demeanor of the witnesses. Plaintiff should be aware that if the court finds that he filed a materially altered document, the court has the authority to dismiss all of plaintiff's claims.

However, I will deny plaintiff's motion for sanctions. While defendant's documents are undoubtedly wrong in that they do not accurately reflect how they looked when they were sent, these discrepancies are not material. Even if defendants willfully altered the documents to show a new governor, secretary, and inmate housing cell number, the alterations were harmless. The alterations neither help defendants' arguments in this case nor refute plaintiff's.

ORDER

IT IS ORDERED that

1. The motion for partial summary judgment filed by defendants Timothy Gilberg, Joseph Hassell, Tracy Martin, Phillip Henneman, Leonard Johnson, Thomas Schmidt, Burton Cox and Cindy Sawinski, dkt. # 35, is DENIED.

2. An evidentiary hearing will be held on May 20, 2011 at 9:00 am, to determine whether plaintiff Steven D. Stewart filed offender complaints alleging that defendants Cindy Sawinski and Timothy Gilberg drew blood and that defendant Joseph Hassell threatened to murder plaintiff.

3. A decision on defendants' motion for sanctions, dkt. # 52, is STAYED.

4. Plaintiff's motion for sanctions, dkt. # 54, is DENIED.

Entered this 2d day of May 2011.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge