IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JUSTIN MICHAEL TRUCKEY,

OPINION AND ORDER

Plaintiff,

10-cv-414-bbc

v.

JANEL NICKEL, DYLON RADTKE,
PATRICK BRANT, YANA ZANON,
THOMAS TIMM and CHERIE BERRETT,[1]

Defendants.

- -

Prisoner and pro se plaintiff Justin Michael Truckey is proceeding on the following claims under 42 U.S.C. § 1983:

> (1) defendants Thomas Timm and Cherie Berrett failed to prevent another prisoner from sexually assaulting plaintiff in 2009 and 2010, in violation of the Eighth Amendment;
>
> (2) defendant Janel Nickel is subjecting plaintiff to a substantial risk of serious harm by housing him near the prisoner who sexually assaulted him, in violation of the Eighth Amendment;

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[1] Plaintiff used titles instead of first names with respect to some of the defendants in his complaint. In addition, he spelled defendant Berrett's last name with one "t" instead of two. I have amended the caption to reflect the defendants' full names with correct spelling, as identified in their acceptance of service. Dkt. #7.

(3) defendants Patrick Brant and Yana Zanon issued a conduct report to plaintiff after he complained about the sexual assault, in violation of the First Amendment and Eighth Amendment;

(4) defendant Radtke found plaintiff guilty of lying and engaging in sexual conduct, in violation of the First Amendment, the Eighth Amendment and the due process clause.

Defendants have filed a motion for summary judgment, dkt. #13, arguing that plaintiff failed to exhaust his administrative remedies as to claims (1) and (2) and that he has failed to state a claim upon which relief may be granted as to claims (3) and (4). Plaintiff concedes that claim (2) should be dismissed for his failure to exhaust his administrative remedies, Plt.'s Br., dkt. #17, at 2, and he does not develop an argument regarding claims (3) and (4). Accordingly, plaintiff's complaint will be dismissed as to claims (2), (3) and (4). Bonte v. U.S. Bank, N.A., 624 F.3d 461, 466 (7th Cir. 2010) (plaintiff's failure to respond to arguments in motion to dismiss constitutes waiver); County of McHenry v. Insurance Co. of the West, 438 F.3d 813, 818 (7th Cir. 2006) ("When presented with a motion to dismiss, the non-moving party must proffer some legal basis to support his cause of action.") (internal quotations omitted).

This leaves the question whether plaintiff exhausted his administrative remedies as required by 42 U.S.C. § 1997e(a) with respect to his claim that defendants Timm and Berret failed to prevent another prisoner from sexually assaulting him in 2009 and 2010, in violation of the Eighth Amendment. In his verified complaint, plaintiff alleges that the

assaults occurred between October 2009 and "early January 2010." Cpt. ¶¶ 5-10, dkt. #1. In support of their motion, defendants have submitted the affidavit of Thomas Gozinske, a records custodian for prisoner grievances, who avers that plaintiff did not file a grievance about the alleged sexual assaults until June 11, 2010. Gozinske Aff. ¶ 11, exh. B, dkt. #15. Under Wis. Admin. Code § DOC 310.09(6), "[a]n inmate shall file a complaint within 14 calendar days after the occurrence giving rise to the complaint, except that the institution complaint examiner may accept a late complaint for good cause." The inmate complaint examiner rejected plaintiff's grievance as untimely because he filed it more than 14 days after the events at issue and the warden upheld the rejection on appeal. Wis. Admin. Code § DOC 310.11(5)(d) (grievance examiner may reject complaint if "[t]he inmate submitted the complaint beyond 14 calendar days from the date of the occurrence giving rise to the complaint and provides no good cause for the ICE to extend the time limits").

"To exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require." Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). See also Woodford v. Ngo, 548 U.S. 81, 90 (2006) ("[P]roper exhaustion demands compliance with an agency's deadlines."). A failure to follow these rules may require dismissal of the prisoner's case. Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999).

Plaintiff does not deny that he failed to file a grievance before June 11, 2010.

However, he says that the reason for the delay was that he was trying to resolve his complaint informally and he did not receive a "final response" until June 7, 2010. Plt.'s Br., dkt. #17, at 2. He cites Wis. Admin. Code § DOC 310.09(4), which states that, "[p]rior to accepting the complaint, the [inmate complaint examiner] may direct the inmate to attempt to resolve the issue."

Plaintiff's argument has multiple problems. First, his reliance on § DOC 310.09(4) seems misplaced because that regulation does not require prisoners to resolve their complaints informally in every instance but only when an examiner directs them to do so. Plaintiff does not suggest that the grievance examiner or anyone else told him he needed to resolve his problem informally before filing a grievance. Compare Hudson v. Radtke, No. 08-cv-458-bbc, 2009 WL 1597259, *4 (W.D. Wis. 2009) (concluding that prisoner's grievance was timely in part because warden had told him to resolve his problem through "the chain of command" before filing his grievance).

Second, the record shows that plaintiff did not take *any* action, formal or informal, on his problem until well after the 15-day deadline. Neither plaintiff's brief nor his affidavit provides a timeline, but I can consider the allegations in the complaint because he swore under penalty of perjury that they were true. Ford v. Wilson, 90 F.3d 245, 246-47 (7th Cir. 1996) ("By declaring under penalty of perjury that the complaint was true, and by signing it, [plaintiff] converted the complaint, or rather those factual assertions in the complaint that

complied with the requirements for affidavits . . . into an affidavit."). In particular, plaintiff alleges that he did not report being sexually assaulted to anyone until March 11, 2010. Cpt. ¶ 13, dkt. #1. An attempt to resolve a problem informally might *stay* the 15-day deadline, but plaintiff cites no authority for the proposition that an informal complaint *resets* the deadline, even when the prison made his first informal complaint more than 15 days after the incident. If that were the law, the deadlines would be meaningless. A prisoner could wait months or years before asking for an informal resolution and then claim that a subsequent grievance was timely because he filed it immediately after informal efforts failed.

In the case of sexual assault, a failure to come forward right away could be excused by psychological trauma or a reasonable fear about the repercussions of speaking out. Woodford, 548 U.S. at 118. (Stevens, J., dissenting). In this case, however, plaintiff does not identify any reason in his brief for failing to complain sooner. More important, he did not identify a reason in his initial grievance or his administrative appeal for waiting two months after the last alleged assault before contacting prison officials. Under these circumstances, I cannot conclude that the examiners acted contrary to law when they rejected plaintiff's grievance as untimely. Accordingly, I must dismiss for failure to exhaust administrative remedies plaintiff's claim that defendants Timm and Berrett violated his Eighth Amendment rights by failing to prevent sexual assaults that occurred between October 2009 and January 2010.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Janel Nickel, Dylon Radtke. Patrick Brant, Yana Zanon, Thomas Timm and Cherie Berrett, dkt. #13, is GRANTED.

2. The following claims are DISMISSED without prejudice for plaintiff Justin Michael Truckey's failure to exhaust his administrative remedies:

> (a) defendants Timm and Berrett failed to prevent another prisoner from sexually assaulting plaintiff in 2009 and 2010, in violation of the Eighth Amendment;
>
> (b) defendant Janel Nickel is subjecting plaintiff to a substantial risk of serious harm by housing him near the prisoner who sexually assaulted him, in violation of the Eighth Amendment.

3. The following claims are DISMISSED with prejudice for plaintiff's failure to state a claim upon which relief may be granted:

> (a) defendants Brant and Zanon issued a conduct report to plaintiff after he complained about the sexual assault, in violation of the First Amendment and Eighth Amendment;
>
> (b) defendant Radtke found plaintiff guilty of lying and engaging in sexual conduct, in violation of the First Amendment, the Eighth Amendment and the due process clause.

4. The clerk of court is directed to enter judgment in favor of defendants and close

this case.

Entered this 10th day of January, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge