

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

LONNIE L. JACKSON,

Plaintiff,

v.

DR. PATRICK J. MURPHY, DR. DAVID BURNETT,
RN J. KLETTKE, SHARON ZUNKER, AMY SMITH,
RN WENDY CARIVOU, ISMAEL OZANNE and
HOLLY GUNDERSON,

Defendants.

ORDER

10-cv-425-slc¹

In this prisoner civil rights lawsuit, Lonnie Jackson contends that defendants failed to treat his medical conditions, including hearing problems, itching and rashes. Now before the court is defendants' motion for partial summary judgment for plaintiff's failure to exhaust his administrative remedies with respect to his claim that defendants Patrick Murphy and Wendy Carivou failed to adequately treat the hearing problems in plaintiff's right ear. (Defendants do not move for summary judgment on plaintiff's claims that other defendants failed to treat his right ear or that defendants Murphy and Carivou and J. Klettke

¹ For the purpose of issuing this order, I am assuming jurisdiction over the case.

failed to treat his itching and rashes.)

Defendants submit evidence that plaintiff never filed a timely grievance related to hearing loss in his right ear or failure to receive treatment for such hearing loss. In response, plaintiff points to the same two grievances he relied on to oppose summary judgment in his related case, Jackson v. Raemisch, Case No. 10-cv-212, dkt. #20, at 6-9. According to plaintiff, he filed a grievance on October 13, 2008 and another in October 2009 after the first grievance had been “lost.” The October 2009 grievance was rejected as untimely. Plaintiff’s assertions create a factual dispute about whether he filed these grievances. However, the scope of this factual dispute is limited. Neither his alleged 2008 grievance nor his 2009 grievance relate to ongoing medical care. Instead, they address only the alleged injury to his right ear that he says caused his hearing loss and the lack of immediate medical care for his injury. Thus, at most, plaintiff’s averments could put into dispute whether he exhausted his claim that he did not receive immediate medical attention for the injury he received to his right ear.

However, not only is the scope of this factual dispute limited; it has been resolved. In Jackson v. Raemisch, 10-cv-212-bbc, a hearing was held on whether plaintiff filed the October 2008 grievance. The parties introduced evidence on the issue. Ultimately, I found that plaintiff never filed the October 2008 grievance, only the October 2009 grievance. For the purpose of deciding defendant’s motion for partial summary judgment in this case, I take

judicial notice of the finding that plaintiff never filed the October 2008 grievance. From this I find that the only grievance plaintiff filed that may have raised his concerns about a hearing loss in his right ear was not filed until October 2009 and was rejected as untimely. Therefore, plaintiff failed to exhaust his administrative remedies and defendants are entitled to summary judgment on this matter.

Defendants stated at the hearing that they intend to move to dismiss the remaining claims as a sanction for falsification of evidence related to plaintiff's attempt to prove that he had filed an October 2008 grievance. The merits of that motion will be decided once the parties have fully briefed it.

ORDER

IT IS ORDERED that motion for partial summary judgment filed by defendants Dr. Patrick J. Murphy, Dr. David Burnett, RN J. Klettke, Sharon Zunker, Amy Smith, RN Wendy Carivou, Ismael Ozanne and Holly Gunderson on their defense that plaintiff failed to exhaust his administrative remedies, dkt. # 22, is GRANTED. Plaintiff's claim that defendants Wendy Carivou and Patrick J. Murphy failed to treat hearing problems in his right ear is DISMISSED without prejudice to plaintiff's refiling those claims after he

exhausts his administrative remedies.

Entered this 29th day of March, 2011.

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