

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

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DAMIEN GREEN,

Plaintiff,

OPINION and ORDER

v.

10-cv-485-slc

DARCI BURRESON, *et al.*,

Defendants.

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In an order entered on January 21, 2011, the court granted plaintiff Damien Green's request to proceed on his Eighth Amendment claims that the defendants were deliberately indifferent to his severe testicular pain and that defendant Dr. Suliene denied him prescription medication. On July 14, 2011, defendants moved for partial summary judgment on Green's claim of deliberate indifference to his testicular pain because Green had failed to exhaust his administrative remedies on that claim. Green's brief in opposition to the motion was to be filed by July 29, 2011. Prior to that date he filed some letters with exhibits attached. On July 28, 2011, defendants filed a reply brief.

Almost a month later, Green and another inmate filed affidavits in opposition to the motion for summary judgment. Defendants have moved to strike these affidavits as untimely. I am granting this motion and striking the affidavits because Green filed them too late. This doesn't change the outcome of the motion for partial summary judgment because these affidavits do not contain information material to the issue to be decided in this order.

Because Green has not shown that he has exhausted his administrative remedies on his claim that defendants were deliberately indifferent to his severe testicular pain, that claim will be dismissed without prejudice. Green's claim that Dr. Suliene denied him prescription medication remains before this court.

## FACTS

On June 15, 2010, while incarcerated at the Columbia Correctional Institution, plaintiff Damien Green filed an offender complaint stating that the Health Services Unit Staff refused to allow him to see the doctor for pain and swelling in his testicles and penis. The complaint was returned to Green on June 18, 2010 with the direction that he attempt to resolve the issue with the Health Services Manager Lori Alsum and to provide written documentation that he had done so. Green was advised that if he could not resolve his issue in this manner, then he could re-submit his complaint with the written documentation. Lastly, he was advised that he must wait at least five days after CCI staff received his request before proceeding to the next level.

Green filed two offender complaints dated July 10, 2010, complaining of testicle pain. These complaints were returned to him on July 12, 2010, with the same advice given to him regarding his previous complaint. An undated offender complaint concerning testicular pain was returned to Green on July 14 with the same advice. On Jul 18, 2012, Green submitted an offender complaint about testicular pain. Again he was advised to attempt to resolve his complaints with Alsum and to document these attempts in any renewed complaint.

On July 18, 2010, Green submitted an offender complaint about having to pay a co-payment after being seen for testicular pain five times. The complaint was returned on July 22, 2010, advising Green to attempt the resolve the issue with Alsum. Green submitted an undated offender complaint claiming that his testicles hurt. That complaint was returned to him on July 22, 2010 with the same advice. On July 27, 2010, two undated offender complaints concerning testicular pain were returned to Green stating that he could not file more than two complaints a week.

Green never followed up by reporting—let alone documenting—any attempts to resolve his complaints with Alsum. Instead, he simply filed or refiled a total of fourteen complaints in July about his testicular pain. Having failed to obtain consideration of his attempted complaints, three times—on July 20, 2010, August 4 and 6, 2010—Green mailed some of his complaint forms (with appeals forms, DOC-405) directly to the Corrections Complaint Examiner’s Office (CCE). CCE returned these documents to Green because none of his complaints had been processed by CCI, as required by the administrative code. The CCE advised Green that he had the option of refileing his complains with the institution complaint examiner (ICE). Green did not do so. On August 25, 2010, Green filed his lawsuit in this court.

#### OPINION

Under 42 U.S.C. § 1997e(a), a prisoner must exhaust all available administrative remedies before filing a lawsuit in federal court. *Dixon v. Page*, 291 F.3d 485, 488 (7th Cir. 2002). This means that the prisoner must “properly take each step within the administrative process,”<sup>1</sup> which includes following instructions for filing the initial grievance,<sup>2</sup> as well as filing all necessary appeals,<sup>3</sup> “in the place, and at the time, the prison's administrative rules require.”<sup>4</sup> Thus, if prison officials reject a grievance for failing to comply with a procedural requirement and they decline to address the merits of the grievance, the general rule is that the prisoner has not

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<sup>1</sup> *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002)

<sup>2</sup> *Cannon v. Washington*, 418 F.3d 714, 718 (7th Cir. 2005)

<sup>3</sup> *Burrell v. Powers*, 431 F.3d 282, 284-85 (7th Cir. 2005)

<sup>4</sup> *Pozo*, 286 F.3d at 1025

exhausted his administrative remedies and any lawsuit the prisoner later files must be dismissed. *See. Dixon*, 291 F.3d 485 (prisoner did not exhaust when, after he did not receive relief he was promised, he did not appeal to next level of review); *Lewis v. Washington*, 300 F.3d 829 (7th Cir. 2002) (prison officials failure to respond to prisoner's previous grievances did not exempt him from having to appeal the grievance they did respond to); *Pozo*, 286 F.3d at 1025. In determining whether a plaintiff exhausted his available administrative remedies, defendants have the burden to prove that the plaintiff failed to comply with § 1997e(a). *Jones v. Bock*, 549 U.S. 199 (2007).

Wisconsin inmates have access to an administrative grievance system governed by the procedures set out in Wis. Admin. Code §§ DOC 310.01 through 310.18. Under these provisions, prisoners start the complaint process by filing an inmate complaint with the institution complaint examiner. An institution complaint examiner may investigate inmate complaints, reject them for failure to meet filing requirements or recommend to the appropriate reviewing authority (the warden or designee) that the complaint be granted or dismissed. Wis. Admin. Code § DOC 310.07(2). If the institution complaint examiner recommends that the complaint be granted or dismissed on its merits, then the appropriate reviewing authority may grant, dismiss, or return the complaint for further investigation. Wis. Admin. Code § DOC 310.12.

If an inmate disagrees with the decision of the reviewing authority, then he has just ten calendar days within which to appeal that decision to a corrections complaint examiner, who is to conduct 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 after receiving 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.

In this case, as detailed in the fact section, Green did not properly file, resolve or appeal his grievances prior to filing his federal lawsuit. Prisoners must properly exhaust their administrative remedies by completing the administrative review process in accordance with the applicable procedural rules. *Pozo*, 286 F. 3d at 1035. Because Green has not shown that he followed the procedures required of him to exhaust his administrative remedies concerning his claim of deliberate indifference to his testicular pain before filing this case claim, that claim will be dismissed without prejudice. *Cannon*, 418 F. 3d at 718.

#### ORDER

IT IS ORDERED that :

1. Defendants' motion for partial summary judgment, dkt. 67, is GRANTED.
2. Plaintiff Damine Green's claim that defendants violated his Eighth Amendment rights by being deliberate indifferent to his testicular pain DISMISSED without prejudice for plaintiff's failure to exhaust his administrative remedies. Plaintiff's claim that defendant Dalia Suliene remains in the case.

Entered this 14<sup>th</sup> day of September, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER  
Magistrate Judge