IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES R. SCHULTZ,

OPINION AND ORDER

Plaintiff,

10-cv-581-bbc

v.

JEFFREY PUGH, REED RICHARDSON,
MICHAEL KASTEN, ERIC JOHNSON,
JOHN SEVERSON, DOUGLAS DeMARS,
KENNETH MILBECK and BRADLEY HOOVER,

Defendants.

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Pro se plaintiff James R. Schultz is proceeding on five claims in this prisoner civil rights case:

(1) defendants Eric Johnson and John Severson used excessive force against him, in violation of the Eighth Amendment;

(2) defendants Douglas DeMars, Reed Richardson and Michael Kasten disciplined him for discussing Johnson's and Severson's use of force, in violation of the First Amendment;

(3) defendants Kasten and Jeffrey Pugh have ordered him to refrain from speaking about the use of force, in violation of the First Amendment;

(4) defendant Richardson refuses to allow him to use an ambulatory aid, in violation of the Americans with Disabilities Act and the Eighth Amendment;

(5) defendants Kenneth Milbeck and Bradley Hoover punished him because of his involvement with Piety Global International, Inc. and because he possessed information critical of prison officials.

Now before the court are the parties' cross motions for summary judgment on the question whether plaintiff exhausted his administrative remedies as required by 42 U.S.C. § 1997e(a). Neither side advances an argument about claim #5 in their briefs or affidavits, so I will not consider whether plaintiff has exhausted his administrative remedies with respect to that claim. Sublett v. John Wiley & Sons, Inc., 463 F.3d 731, 736 (7th Cir. 2006) ("As a general matter, if the moving party does not raise an issue in support of its motion for summary judgment, the nonmoving party is not required to present evidence on that point, and the district court should not rely on that ground in its decision."). With respect to the remaining claims, I conclude that plaintiff has exhausted his administrative remedies as to his claim of excessive force, but that his remaining claims must be dismissed.

OPINION

Defendants' record custodian has identified four grievances plaintiff filed that are relevant to the first four claims, Gozinske Aff., dkt. #29, and plaintiff does not suggest that he filed others. Defendants argue that plaintiff failed to exhaust his administrative remedies with respect to any of the four claims because he did not appeal the decisions after the inmate complaint examiner dismissed or rejected each of his grievances.

The Wisconsin Administrative Code sets out the process for a prisoner to complete the grievance process, which includes the filing of multiple appeals. Wis. Admin. Code. § DOC 310.07 (prisoner first files grievance with inmate complaint examiner; prisoner may appeal adverse decision to corrections complaint examiner and then to department secretary). 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), which 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's administrative rules require." Pozo, 286 F.3d at 1025 (emphasis added). 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).

It is undisputed that plaintiff did not appeal any of his grievance decisions. Thus, his claims must be dismissed unless an appeal was not "available" to him within the meaning of § 1997e(a). Kaba v. Stepp, 458 F.3d 678, 684 (7th Cir. 2006). "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." Shaw v. Jahnke, 607 F. Supp. 2d 1005, 1010 (W.D. Wis. 2009) (internal quotations omitted).

I begin with Offender Complaint SCI-2005-9680. That grievance is difficult to read, but the parties agree that it raises the same issue as claim #1, defendant Johnson's and Severson's alleged use of excessive force. In response to that grievance, the inmate complaint examiner wrote the following:

> The inmate was called to the ICE office and Administrative Directive 11.5 was explained to him. In addition to that, the provisions of DOC 303.271, Wis. Admin. Code, were also reviewed. He was also informed that, because the investigative process is regulated by state law and collective bargaining agreements (which protect the privacy and due process rights of staff) no further information would be given to him. The inmate chose to pursue the complaint and provided a detailed written description of the events he claimed happened. Based on that statement and the sensitive nature of this incident, it is being forwarded to the Security Director and Security Supervisor for further review and action. Consequently, no further action will be taken by this office.

This response did not make it clear to plaintiff what his next step should be. Defendants say that plaintiff was required to appeal the decision if he wished to preserve his right to bring a claim in federal court, but a reasonable interpretation of the decision is that plaintiff's grievance is being referred to staff outside the grievance system and that there is nothing left for plaintiff to do but wait for the investigation to be completed. Why would plaintiff appeal a decision that had not been made yet?(Defendants do not discuss the results of the investigation or argue that plaintiff failed to take appropriate steps after the investigation was completed, so I do not consider that question.)

A prisoner does not have available administrative remedies if he fails to complete the

grievance process because of misinformation provided by prison officials, if prison officials provide conflicting or confusing instructions or if they discourage an appeal by promising to correct the problem. Westefer v. Snyder, 422 F.3d 570, 580 (7th Cir. 2005) (when prison officials fail to "clearly identif[y]" proper route for exhaustion, they cannot later fault prisoner for failing to predict correct choice); Dale v. Lappin, 376 F.3d 652, 656 (7th Cir. 2004) (dismissal not appropriate when prisoner failed to complete grievance process because of misinformation provided by prison officials); Thornton v. Snyder, 428 F.3d 690, 696 (7th Cir. 2005) ("Prisoners are not required to file additional complaints or appeal favorable decisions."). Any one of these exceptions to the exhaustion rule could apply to this case. Accordingly, I conclude that plaintiff has exhausted his administrative remedies with respect to his claim that defendants Johnson and Severson used excessive force against him.

With respect to the other three grievances, the inmate complaint examiner did not inform plaintiff that the grievance was being investigated. Rather, the examiner dismissed one complaint because she found no violations. The other two were rejected rather than dismissed on the merits, one because the examiner concluded that the grievance was moot after plaintiff withdrew it and one because the examiner concluded that plaintiff had included more than one issue, in violation of Wis. Admin. Code § 310.09(1)(e). Thus, with respect to these three grievances, plaintiff cannot argue successfully that the examiner lulled him into believing that the grievance process was complete.

Plaintiff raises several alternative arguments, but none are persuasive. First, he argues that, regardless what the examiner told him, any grievances about "staff abuse" are "outside" the grievance system. He cites DAI Policy #310.00.01 in support of this argument, dkt. #34-2, but he does not quote any language from the policy and my own review of it did not uncover any support for his position. In fact, Wis. Admin. Code § DOC 310.08(1) states expressly that a prisoner may use the complaint review system to raise issues about "staff actions."

Second, plaintiff argues that he did not appeal the decisions "for fear of reprisal." In Kaba, 458 F.3d at 684-85, the court suggested that threats of retaliation could excuse a prisoner's failure to complete the grievance process, but the prisoner must show that prison officials were engaging in conduct that would "deter a prisoner of ordinary firmness" from filing a grievance. In this case, plaintiff cannot meet that test because he does not point to any specific actions of any prison official that would lead him to believe reasonably that he would suffer retaliation as a result of filing an appeal.

Third, plaintiff argues that the examiner was wrong to conclude that one of his grievances included more than one issue. That argument is a nonstarter because, even if plaintiff is correct, he failed to complete the grievance process by not appealing the examiner's decision as required by Wis. Admin. Code § DOC 310.11(6).

Finally, plaintiff argues that defendants "breach[ed] the confidentiality" of the inmate

complaint review system by providing his grievances to the court. He cites Wis. Admin. Code § 310.16 (1), which states that the "department shall ensure that complaints filed with the inmate complaint review system are confidential." This argument fails because plaintiff waived any confidentiality concerns about his grievances, at least with respect to this court, when he filed this lawsuit. Wis. Admin. Code § DOC 310.16(5) ("An inmate waives confidentiality by making known any aspect of the complaint to persons outside the ICRS."). Because defendants have the burden to show that plaintiff failed to exhaust his administrative remedies under § 1997e(a), they were entitled to submit proof to the court to support their arguments. If plaintiff believes that any confidential information is in the court record, he is free to file a motion to seal those documents if he can show that he satisfies the federal standard for doing so. United States v. Foster, 564 F.3d 852, 853 (7th Cir. 2009).

With respect to those claims that are being dismissed for plaintiff's failure to exhaust, plaintiff asks that they "be dismissed without prejudice to allow him to exhaust his administrative remedies and refile under the relation back doctrine." Plt.'s Mot., dkt. #38, at 1. I can grant the first part of plaintiff's request because all dismissals under § 1997e(a) are without prejudice. Ford v. Johnson, 362 F.3d 395, 401 (7th Cir. 2004). It is not clear what plaintiff means by asking to "refile under the relation back doctrine." To the extent plaintiff wishes to refile his unexhausted claims in *this* case at a later date, I cannot grant that

request. Plaintiff will have to file a new lawsuit if and when he exhausts his administrative remedies as to the dismissed claims.

Plaintiff has filed another motion in which he asks to supplement his claim to include additional requests for relief. Dkt. #37. That motion will be granted.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Jeffrey Pugh, Reed Richardson, Michael Kasten, Eric Johnson, John Severson, Douglas DeMars, Kenneth Milbeck and Bradley Hoover, dkt. #27, is GRANTED and plaintiff James Schultz's motion for summary judgment, dkt. #38, is DENIED as to the following claims:

(a) defendants DeMars, Richardson and Kasten disciplined plaintiff for discussing Johnson's and Severson's use of force, in violation of the First Amendment;

(b) defendants Kasten and Pugh have ordered plaintiff to refrain from speaking about the use of force, in violation of the First Amendment;

(c) defendant Richardson refuses to allow plaintiff to use an ambulatory aid, in violation of the Americans with Disabilities Act and the Eighth Amendment.

These claims are DISMISSED WITHOUT PREJUDICE for plaintiff's failure to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a).

2. Defendants' motion is DENIED and plaintiff's motion is GRANTED with respect to the question whether plaintiff exhausted his administrative remedies on his claim that defendants Johnson and Severson used excessive force against him.

3. Plaintiff's complaint is DISMISSED as to defendants Pugh, Richardson, Karsten, and DeMars.

4. Plaintiff's motion for leave to supplement the request for relief in his complaint, dkt. #37, is GRANTED.

Entered this 18th day of February, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge