

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

LAMONT D WALKER,

Plaintiff,

v.

LESLEY BAIRD and C.O. PALMER,

Defendants.

OPINION and ORDER

10-cv-656-slc

On January 7, 2011, this court granted plaintiff leave to proceed *in forma pauperis* on his Eighth Amendment claim that defendants Lesley Baird and C. O. Palmer were deliberately indifferent to plaintiff's serious risk of self-harm. That same day, the parties consented to my jurisdiction pursuant to 28 U.S.C. § 636(c)(1).

Now before the court is defendants' motion for summary judgment on the ground that plaintiff failed to exhaust his administrative remedies on his claims. I will grant defendants' motion for summary judgment and dismiss plaintiff's claims without prejudice because he has failed to exhaust his administrative remedies.

UNDISPUTED FACTS

On July 1, 2010, while incarcerated at the Columbia Correctional Institution, plaintiff Lamont D. Walker submitted Offender Complaint CCI-2010-14323, alleging that Palmer and Baird were deliberately indifferent to his psychological needs. In that complaint, he alleged that because Palmer and Baird had refused to address plaintiff's psychological issues, he had attempted suicide.

Inmate Complaint Examiner Mary Leiser responded on July 1, 2010, returning the complaint to plaintiff. She advised him that he first needed to attempt to resolve the issue by contacting the Psychological Services Supervision and the Segregation Complex Manager. Walker re-submitted his complaint on July 7, 2010. Leiser again told him he had to attempt to resolve the issue as she had previously advised him and to submit written documentation of his efforts. On July 12, 2010, Walker submitted his complaint again with a note stating that he had written Radtke about the issue, but he submitted no written documentation.

On July 14, 2010, Leiser investigated Walker's offender complaint, noting that Walker had failed to attempt to resolve his complaint as directed. She recommended the complaint be dismissed because Walker had not cooperated and had not supplied the necessary information.

On July 21, 2010, Cynthia Thorpe, the Regional Coordinator for the Bureau of Health Services (the "reviewing authority" for Walker's complaint), accepted Leiser's recommendation and dismissed Walker's complaint. Under the applicable regulation, Walker had ten calendar days to file his appeal of this decision.

The Corrections Complaint Examiner's office received Walker's appeal of Thorpe's decision on October 13, 2010. On October 20, 2010, Corrections Complaint Examiner Welcome Rose found that the Walker's appeal was untimely. She found that although Walker asserted that he had previously sent his appeal on July 22, 2010 (before his time to file had expired), there was no proof or evidence to support this assertion. Because Rose found no good cause for Walker's late submission, she recommended that the appeal be dismissed as untimely. Based on Rose's findings and recommendation, Timothy Lundquist, the deputy secretary of the Wisconsin Department of Corrections, dismissed Walker's offender complaint.

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,”¹ which includes following instructions for filing the initial grievance,² as well as filing all necessary appeals,³ “in the place, and at the time, the prison's administrative rules require.”⁴ 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 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

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

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

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

⁴ *Pozo*, 286 F.3d at 1025

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, Walker did not appeal the decision of the July 21, 2010 decision of the reviewing authority to the Corrections Complaint Examiner with his ten day time limit. His appeal of that decision was not received in the Correction Complaint Examiner's office until October 13, 2010. Walker has presented no evidence to dispute this fact. Because Walker failed to properly exhaust his administrative remedies before he filed this federal lawsuit, the court must grant defendants' motion for summary judgment and dismiss his claim without prejudice. 42 U.S.C. § 1997e(a); *see also Ford v. Johnson*, 362 F.3d 395, 401 (7th Cir. 2004) (dismissal for failure to exhaust is always without prejudice).

ORDER

IT IS ORDERED that :

1. Defendants' motion for summary judgment, dkt. #24, is GRANTED.
2. Plaintiff's claim that defendants violated his Eighth Amendment rights is DISMISSED without prejudice for plaintiff's failure to exhaust his administrative remedies.

Entered this 6th day of May, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge