IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LANCE SLIZEWSKI,

Plaintiff,

OPINION AND ORDER

10-cv-665-bbc

v.

JIM SCHWOCHERT, JOHN SHANDA
DANIEL WESTFIELD, GARY KASZA
and BARRY BRINKER,

Defendants.

- -

Plaintiff Lance Slizewski, a prisoner at Oshkosh Correctional Institution, is proceeding on a claim that defendants Jim Schwochert, John Shanda, Daniel Westfield, Gary Kasza and Barry Brinker improperly recorded two telephone calls between plaintiff and his attorney while plaintiff was incarcerated at the Dodge Correctional Institution. Presently before the court is a motion filed by defendants Schwochert, Shanda and Westfield seeking summary judgment on the ground that plaintiff failed to exhaust his administrative remedies prior to filing suit as required by 42 U.S.C. § 1997e(a). (Defendants Kasza and Brinker did not join this motion. Defendant Brinker has filed his own motion to dismiss for lack of personal jurisdiction, which is still being briefed. For the remainder of the opinion, I will refer to

Schwochert, Shanda and Westfield collectively as "defendants.")

The question raised by defendants' motion is whether plaintiff's complaint must be dismissed under § 1997e(a) because he filed his appeal after the 10-day deadline and failed to explain in his appeal that it was late because he did not have an appeal form. Because defendants have failed to meet their burden to show that plaintiff had notice of a requirement to explain his reasons for filing an untimely appeal, I am denying their motion.

From the affidavits submitted by the parties, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

Plaintiff Lance Slizewski is a Wisconsin inmate housed at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. On August 8, 2010, while incarcerated at the Bayfield County jail, plaintiff wrote to the Dodge Correctional Institution's reviewing authority for inmate complaints, the inmate complaint examiner, alleging that two of his telephone calls with his attorney had been recorded improperly while he was incarcerated at Dodge Correctional Institution. (The parties do not explain why plaintiff was transferred from Dodge Correctional Institution to the Bayfield County jail.) Plaintiff did not use a grievance form.

Inmate complaint examiner Joanne Bovee responded to plaintiff's letter on August 17,

2010 by sending him the proper form to file a grievance, a DOC-400 form entitled "Offender Complaint." On August 20, 2010, plaintiff mailed the completed DOC-400 form to Bovee. Plaintiff's complaint, 2010-17655, was received by Bovee on August 25, 2010. The same day, Bovee recommended that plaintiff's complaint be dismissed on its merits. On August 26, 2010, defendant James Schwochert (the warden) accepted Bovee's recommendation and dismissed plaintiff's complaint.

On September 1, 2010, plaintiff received defendant Schwochert's decision to dismiss plaintiff's grievance. Under the signature line, the decision states: "A complainant dissatisfied with a decision may, within 10 calendar days after the date of the decision, appeal that decision by filing a written request for review with the Corrections Complaint Examiner on form DOC-405."

Defendant Schwochert's decision did not include DOC-405 and plaintiff was not able to obtain copies of the form at the Bayfield County jail. To request a copy, plaintiff wrote to the Department of Corrections. On September 9, 2010, plaintiff received the Offender Complaint Appeal from the Department of Corrections.

The next day, on September 10, 2010, plaintiff completed the Offender Complaint Appeal and gave it to jail officials to send to the appropriate reviewing authority, the corrections complaint examiner. In the appeal, plaintiff said that he was not satisfied with the decision to dismiss his claim on its merits because his constitutional rights were violated.

He did not provide any explanation for not mailing the appeal sooner. the Bayfield County jail staff mailed plaintiff's appeal on September 16, 2010.

On September 20, 2010, the corrections complaint examiner acknowledged receipt of plaintiff's appeal. On October 29, 2010, corrections complaint examiner Welcome Rose recommended that plaintiff's appeal be dismissed as untimely, stating:

> Wisconsin Administrative Code, s. DOC 310.13(1), requires appeals to be received and accepted at the Corrections Complaint Examiner's Office within ten calendar days after the reviewing authority's decision. Noting the complain [sic] was decided on 0826/10 [sic], the appeal was not received until 09/20/10, and further noting the complainant offers no good cause for the late submission, it is recommended this appeal be dismissed as untimely.

On November 1, 2010, the Office of the DOC Secretary accepted Rose's recommendation and dismissed plaintiff's appeal.

OPINION

The 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Failure to exhaust is an affirmative defense that the defendants have the burden of pleading and proving. Jones v. Bock, 549 U.S. 199, 212 (2007); Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir.

2002). Once the defendants raise failure to exhaust as a defense, district courts lack discretion to decide claims on the merits unless the exhaustion requirements have been satisfied. Woodford v. Ngo, 548 U.S. 81, 83-85 (2006); Dixon v. Page, 291 F.3d 485, 488 (7th Cir. 2002).

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). This 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 administrative rules require." Pozo, 286 F.3d at 1025. The purpose of these requirements is to give the prison administrators a fair opportunity to resolve the grievance without litigation. Woodruff, 548 U.S. at 88-89.

Under the Wisconsin administrative code, prisoners start the grievance process by filing an offender complaint with the institution complaint examiner. Wis. Admin. Code §§ DOC 310.09, 310.10 and 310.16(4). As a general rule, an offender complaint must be filed within 14 calendar days of the occurrence giving rise to the complaint. Id. § DOC 310.09(6). An institution complaint examiner must then acknowledge receipt of the offender complaint within five working days of receipt of the complaint. Id. § DOC 310.11(2). After reviewing the complaint, an institution complaint examiner may reject it for failure to meet filing

requirements, investigate it, recommend to the appropriate reviewing authority that the complaint be granted or dismissed or direct the prisoner to attempt to resolve the complaint informally before proceeding with a formal offender complaint. Id. §§ DOC 310.07(2), 310.09(4). Once the institution complaint examiner makes a recommendation that the grievance be granted or dismissed on its merits, the appropriate reviewing authority may dismiss or affirm the grievance or return it for further investigation. Id. § DOC 310.12. A prisoner may also appeal to a corrections complaint examiner if the prisoner disagrees with the decision of the reviewing authority. Id. § DOC 310.13.

In their opening brief, defendants argue that plaintiff's complaint should be dismissed because he failed to file an appeal of the denial of his grievance "within 10 calendar days after the date of the decision." Wis. Admin. Code § DOC 310.13(1). The decision is dated August 26, 2010, but plaintiff's appeal was not mailed until September 16, 2010, well over 10 days later, and the examiner rejected the appeal as untimely. Generally, a prisoner's lawsuit must be dismissed if he fails to meet the deadlines of the grievance system. Woodford v. Ngo, 548 U.S. 81 (2006).

In his response brief and supporting affidavit, plaintiff argues that he filed his appeal as soon as he could. He received the decision on September 1, but the examiner did not include an appeal form. He obtained the form on September 9 and gave it to officials at the jail on September 10. When a prisoner is unable to comply with the grievance rules through

no fault of his own, he does not have any "available" remedies under § 1997e(a) and his case cannot be dismissed for failure to exhaust. Shaw v. Jahnke, 607 F. Supp. 2d 1005, 1010 (W.D. Wis. 2009) ("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."). Thus, the court of appeals has held on multiple occasions that a prisoner has no available remedies when prison officials prevent him from exhausting his administrative remedies. Dole v. Chandler, 438 F.3d 804, 809 (7th Cir. 2006) (no available remedy when prison officials lost grievance); Dale v. Lappin, 376 F.3d 652, 654-6 (7th Cir. 2004) (officials refused to provide grievance forms); Lewis v. Washington, 300 F.3d 829, 833 (7th Cir. 2002) (officials refused to decide grievance). If plaintiff's grievance was late because prison officials failed to give him an appeal form, dismissal under § 1997e(a) would not be appropriate.

Defendants shift gears in their reply brief, arguing that plaintiffs' complaint should be dismissed not because his appeal was late, but because he failed to explain in his appeal *why* he waited so long to file it. They cite Wis. Admin. Code § DOC 310.13(2), which states: "Upon good cause, the [examiner] may accept for review an appeal filed later than 10 calendar days after receipt of the decision." Although they seem to agree that an inability to obtain an appeal form would satisfy the "good cause" standard, they argue that § 310.13(2)

required plaintiff to include that reason in his appeal.

In a footnote in their reply brief, defendants suggest an alternative argument that plaintiff did not give jail officials his appeal until September 15, 2010, Dfts.' Br., dkt. #32, at 2 n.1, but the evidence they cite does not support this proposition, so I must treat as undisputed plaintiff's averment that the appeal left his hands on September 10. Further, under the prison mailbox rule, plaintiff's appeal is deemed filed as soon as he gave it to jail officials. Dole, 438 F.3d at 812-13. Thus, the sole question is whether plaintiff's failure to provide "good cause" in his appeal requires dismissal of this case. Arguably, defendants waived this argument by raising it for the first time in their reply brief. However, even if I consider it, defendants' motion must be denied because they have failed to show that plaintiff had any reason to believe that he was required to explain in his appeal why he was filing it late.

The appeal form itself would not have given plaintiff notice of such a requirement. Although the form includes a statement about a 10-day deadline, it does not tell the prisoner what he should do it if he misses that deadline for reasons beyond his control. In fact, the form does not provide a space for explaining "good cause" for an untimely appeal or otherwise include any mention of this issue.

The regulations state that "good cause" may excuse an untimely appeal, but this cannot carry the day for defendants for multiple reasons. First, it is far from clear whether

plaintiff knew about the regulations or had access to them. Normally, it may be reasonable to assume that a Wisconsin prisoner has notice of Wisconsin prison regulations, but this case is different because plaintiff was in a county jail rather than a state prison during the relevant time. In Romanelli v. Suliene, Case No. 07-cv-19-bbc, 2008 WL 4587110, *6 (W.D. Wis. Jan. 10. 2008), I concluded that the burden was on the defendants to show that the prisoner knew about the rule he allegedly failed to follow. See also Russell v. Unknown Cook County, Sheriff's Officers, 2004 WL 2997503 at *4-5 (N.D. Ill. Dec. 27, 2004) (defendants must establish that they gave plaintiff notice of grievance procedure); Burgess v. Garvin, 2004 WL 527053 at *5 (S.D.N.Y. Mar. 16, 2004) (holding that "procedural channels . . . not made known to prisoners . . . are not an 'available' remedy in any meaningful sense . . . [Congress] cannot have meant that prisoners would be expected to exhaust remedies of which they were kept ignorant."). Because the record is silent regarding plaintiffs' knowledge of the regulations and defendants have the burden on this issue, this reason alone requires denial of defendants' motion.

Even if I assume that plaintiff had notice of the regulations, this would not help defendants. First, § DOC 310.13(2) is ambiguous because it does not expressly instruct prisoners to explain in their appeal form what they should do when their appeal is late. It says only that an examiner may accept a late grievance "upon good cause." These three words leave unanswered the nature or scope of the requirements on the prisoner. Compare 20 Ill.

Admin. Code § 504.810 ("[I]f an offender can demonstrate that a grievance was not timely filed for good cause, the grievance shall be considered.")

The ambiguity is made worse by an apparent conflict between § DOC 310.13(1) and (2). Section § DOC 310.13(1) says that a prisoner must file his appeal "within 10 calendar days *after the date of the decision*." However, § DOC 310.13(2) says that the examiner may accept an appeal upon good cause if the appeal is "filed later than 10 calendar days *after receipt of the decision*." If subsection (2) is controlling, a showing of good cause is not necessary if the prisoner files the appeal within 10 days of receiving the initial decision. Because it is undisputed that plaintiff did not receive the decision until September 1 and he filed his grievance on September 10, his appeal is timely under subsection (2), at least under one reasonable interpretation.

"Compliance with prison grievance procedures . . . is all that is required by the PLRA to 'properly exhaust.' The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." Jones, 549 U.S. at 218. In other words, if a particular requirement is in not in the rules, prison officials may not reject a grievance on that ground later, at least without giving the prisoner an opportunity to comply. Hurst v. Hantke, 634 F.3d 409, 411 (7th Cir. 2011) (prisoner not required to submit evidence showing good cause when that requirement not spelled out in

grievance procedures and "[t]he prison never gave the plaintiff an opportunity" to supply evidence; "a remedy is not available if essential elements of the procedure for obtaining it are concealed."); Riccardo v. Rausch, 375 F.3d 521, 524 (7th Cir. 2004) ("If Illinois wants grievances to be more detailed, it must adopt appropriate regulations and inform prisoners what is required of them.") A corollary of this rule is that when prison officials fail to "clearly identif[y]" the proper route for exhaustion in their rules, they cannot later fault the prisoner for failing to predict the correct choice. Westefer v. Snyder, 422 F.3d 570, 580 (7th Cir. 2005). The Court of Appeals for the Second Circuit has held similarly that dismissal for failure to exhaust is not appropriate when a prisoner fails to complete the grievance process because of a reasonable but mistaken interpretation of a grievance policy. Giano v. Goord, 380 F.3d 670, 679 (2d Cir.2004). The burden is on the Department of Corrections to make grievance procedures clear and easy to follow. In this case, given the ambiguous language of the regulations, any plaintiff mistake by plaintiff was a reasonable one. Further, because prison officials never gave plaintiff an opportunity to demonstrate good cause for his appeal, his failure to do so cannot be a ground for dismissal of this case.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants

Jim Schwochert, John Shanda, and Daniel Westfield, dkt. #25, is DENIED.

Entered this 11th day of July, 2011.

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