

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

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MARCUSS CHILDS,

Plaintiff,

OPINION and ORDER

11-cv-500-bbc

v.

CYNTHIA M. THORPE, DAVID BURNETT,  
KEN ALDER, DALIA SULIENE, JAMES LABELLE,  
CARLO GAANAN, LILLIAN TENEBRUSCO,  
BELINDA SCHRUBBE, JOHN DOES 1-3,

Defendants.  
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In this civil action for monetary and injunctive relief under 42 U.S.C. § 1983, plaintiff Marcuss Childs is proceeding pro se on the claims that several defendants employed by the Wisconsin Department of Corrections failed to provide him adequate medical treatment, in violation of the Constitution and state medical negligence law. Before the court is defendants' motion for partial summary judgment, in which they contend that plaintiff failed to exhaust his administrative remedies with respect to defendant Carlo Gaanan. (Initially, defendants contended that plaintiff failed to exhaust his administrative remedies against all defendants with the exception of defendant Dalia Suliene. In their reply brief, defendants concede that plaintiff exhausted his administrative remedies against all

defendants except defendant Gaanan. Dkt. #22 at 1.)

After considering the undisputed facts and the parties' arguments, I conclude that defendants have not met their burden to establish that plaintiff failed to exhaust his administrative remedies with respect to defendant Gaanan. Therefore, I will deny defendants' motion for partial summary judgment.

From the parties' proposed findings of fact and the record, I find the following facts to be material and undisputed. (I note that defendants did not attempt to dispute the facts plaintiff proposed in his affidavit regarding his attempts to exhaust his administrative remedies. Instead, defendants filed a three-sentence reply brief conceding that plaintiff has exhausted his administrative remedies with respect to some defendants and stating in a conclusory manner that plaintiff failed to exhaust his claims against defendant Gaanan. ) According to this court's summary judgment procedures, I have accepted as true any facts proposed by plaintiff that defendants did not dispute properly. Helpful Tips for Filing a Summary Judgment Motion, #3; Procedure to be Followed on Motions for Summary Judgment, II.C., dkt. #15.

#### UNDISPUTED FACTS

On June 23, 2010, plaintiff Marcuss Childs submitted an inmate complaint alleging that defendant Carlo Gaanan failed to provide him adequate medical treatment for his hernia. Dkt. #21, Ex. A. That same day, Mary Leiser, Columbia Correctional Institution's

complaint examiner, returned plaintiff's complaint materials to him. Dkt. #21, Ex. B. In a letter accompanying the returned complaint, Leiser instructed plaintiff to attempt to resolve the issue informally, pursuant to Wis. Admin. Code § DOC 310.09(4), by contacting Ms. Alsum, the health services manager. Dkt. #21, Ex. B. Leiser reminded plaintiff to contact Alsum by writing to her on a DOC-761 "Interview/Information Request" form. Id. Leiser instructed plaintiff to resubmit his complaint with written documentation of his attempts to resolve the issue informally with Alsum. Id.

On June 25, 2010, plaintiff resubmitted his complaint against defendant Gaanan. Dkt. #21, Ex. C. Plaintiff told Leiser that he had attempted to contact Alsum, but received no response. Dkt. #21. He did not submit written documentation of his attempt to resolve the issue informally with Alsum. Accordingly, Leiser again returned plaintiff's complaint unfiled. Dkt. #21, Ex. C. Leiser instructed plaintiff to write to Alsum on a DOC-761 form and then resubmit the complaint along with written documentation of his attempt to handle the issue informally with Alsum. Id.

On June 27, 2010, plaintiff wrote a letter to Alsum regarding his complaint against defendant Gaanan. Dkt. #21, Ex. D. Alsum responded in writing, noting that plaintiff was scheduled to see a doctor. She did not address the substance of plaintiff's complaint. Plaintiff resubmitted his complaint against Gaanan along with a copy of Alsum's written response to Leiser. He never received any acknowledgment or response regarding this third complaint. Dkt. #21.

## OPINION

Under 42 U.S.C. § 1997e(a), a prisoner must exhaust all available administrative remedies before filing a lawsuit in federal court, meaning that the prisoner must “file complaints and appeals in the place, and at the time, the prison’s administrative rules require.” Burrell v. Powers, 431 F.3d 282, 285 (7th Cir. 2005) (citing Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002)). To satisfy exhaustion requirements, the prisoner must give the prison grievance system “a fair opportunity to consider the grievance,” which requires that the complainant “compl[y] with the system’s critical procedural rules,” Woodford v. Ngo, 548 U.S. 81, 95 (2006), and that the grievance “contain the sort of information that the administrative system requires.” Strong v. David, 297 F.3d 646, 649 (7th Cir. 2002). Section 1997e(a) requires more than simply notifying the prisoner grievance system once; a prisoner must take any administrative appeals available under the administrative rules. Burrell, 431 F.3d at 284-85. Because exhaustion is an affirmative defense, defendants bear the burden of establishing that plaintiff failed to exhaust. Jones v. Bock, 549 U.S. 199, 216 (2007).

Wisconsin inmates have access to an administrative grievance system governed by the procedures set out in Wis. Admin. Code §§ DOC 310.01-310.18. Under these provisions, prisoners start the complaint process by filing an inmate complaint with the institution complaint examiner within 14 days of the occurrence giving rise to the complaint. Wis.

Admin. Code §§ DOC 310.09(6). The institution complaint examiner must review and acknowledge receipt of the complaint in writing within five working days. Id. at § 310.11(2). Before accepting an otherwise sufficient complaint, the institution complaint examiner may return the complaint and direct the inmate to attempt to resolve the complaint informally. Id. at § 310.09(4).

The institution complaint examiner may reject a complaint for any of the reasons listed under § 310.11(5). For example, if the inmate submitted a complaint solely for the purpose of harassing a department of corrections employee, § 310.11(5)(a), or if the inmate does not allege sufficient facts, § 310.11(5)(c), then the institution complaint examiner may reject the complaint. Id. at § 310.11(5). An inmate may appeal a rejected complaint within ten calendar days. Id. at § 310.11(6). No such provision appears to exist with respect to returned complaints.

Further, no provision in the code explains what prisoners should do to follow up on complaints that are never acknowledged, as required by § 310.11(2). Section 310.12(3) provides that an inmate may appeal to the corrections complaint examiner if the inmate does not receive the decision within 30 working days after the institution complaint examiner acknowledges receipt of the complaint. This provision, however, applies only when the institution complaint examiner acknowledges receipt of the complaint under § 310.11(2). If the institution complaint examiner fails to acknowledge receipt of an inmate's submitted complaint, the inmate is left with no formal administrative remedy to pursue.

In this case, plaintiff was granted leave to proceed on claims that (1) defendants failed to provide him adequate medical treatment in violation of the Constitution and (2) defendants breached their duty of care and plaintiff suffered injury as a result in violation of state medical negligence law. Although defendants argued initially that plaintiff submitted no complaints related to his claims against defendant Gaanan, defendants concede in their reply brief that plaintiff submitted two complaints regarding his allegations against Gaanan. Defendants contend that “It is clear from the record that [plaintiff’s] complaint against Dr. Gaanan was rejected twice because he had not complied with proper procedures.” Dkt. #22, at 1. However, the record does not support defendants’ argument. Rather, the undisputed evidence demonstrates that plaintiff’s complaints were returned with instructions to attempt to resolve the issue informally, pursuant to Wis. Admin. Code § DOC 310.09(4), and not rejected pursuant to § 310.11(5). As noted above, no provision exists for appealing a returned complaint.

More important, plaintiff avers that after attempting to resolve the issue informally, as requested by Leiser, he submitted the complaint against Gaanan for a third time. Plaintiff says that Leiser never acknowledged receipt of this complaint. At summary judgment, a fact proposed by a party will be accepted by the court as undisputed unless the opposing party properly responds and establishes that the fact is in dispute. Defendants did not respond to plaintiff’s proposed fact that he submitted a third complaint against Gaanan that was never acknowledged or responded to by Leiser. Therefore, it is undisputed that plaintiff

submitted a third complaint regarding Gaanan's treatment.

With respect to the two returned complaints, there existed no procedure from which plaintiff could have appealed. Additionally, because Leiser failed to respond to his third attempted submission, as required by § 310.11(2), plaintiff had no further administrative remedy to pursue. Thus, it appears that plaintiff has exhausted the administrative remedies available to him with respect to defendant Gaanan.

Not only did defendants fail to respond to plaintiff's allegations regarding his submission of a third complaint against Gaanan, defendants make no effort to explain how plaintiff could have exhausted his administrative remedies under the circumstances. Accordingly, I find that defendants have not met their burden of proving that plaintiff failed to exhaust his administrative remedies. Therefore, I am denying their motion for summary judgment.

#### ORDER

IT IS ORDERED that the motion for partial summary judgment, filed by defendants Cynthia M. Thorpe, David Burnett, Ken Alder, Dalia Suliene, James LaBelle, Carlo Gaanan,

Lillian Tenebrusco, Belinda Schrubbe and John Does 1-3, dkt. #16, is DENIED.

Entered this 12th day of March, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge