

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

LLOYD T. SCHUENKE,

Plaintiff,

v.

ORDER

11-cv-518-bbc

WILLIAM POLLARD, BELINDA SCHRUBBE,
PAUL SUMNIGHT, GAIL WALTZ,
and JANE/JOHN DOE,

Defendants.

Plaintiff Lloyd Schuenke, a prisoner at the Oshkosh Correctional Institution, has submitted a proposed complaint alleging that prison medical staff at the Waupun Correctional Institution failed to treat his toenail fungus. In his complaint he stated that he did not file any inmate grievances about the lack of treatment. In a September 15, 2011 order, I directed plaintiff to show cause why the case should not be dismissed for his failure to exhaust his administrative remedies.

Now plaintiff has responded, arguing that it was futile for him to attempt exhaustion. First, he states that in another case of his, 10-cv-788-bbc, defendant Belinda Schrubbe provided affidavit testimony dated March 10, 2011, indicating that she had reviewed portions of plaintiff's medical record. Plaintiff argues that this means that she was fully aware of his toenail problems and needed to be seen by a doctor. Also, he states that he has

been seen by medical personnel six times since March 1, 2011, for other medical issues, and that every time he brought up his toenail problems, the personnel told him “because they were not the one who recommended/referred [plaintiff] to be seen by a doctor, there was nothing that they could/would do for [him] at that point in time.” Finally, he states that because he was transferred from the Waupun Correctional Institution to the Oshkosh Correctional Institution in August 2011, he can no longer pursue his administrative remedies.

The Court of Appeals for the Seventh Circuit has made it clear that “[p]rison officials may not take unfair advantage of the exhaustion requirement, [] and a remedy becomes ‘unavailable’ if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting.” Dole v. Chandler, 438 F.3d 804, 809 (7th Cir. 2006). However, none of plaintiff’s statements seem to have anything to do with the unavailability of the grievance process at the time he filed his complaint. If anything, all these statements seem to do is further elaborate plaintiff’s claims against medical staff. To the extent plaintiff suggests that his administrative remedies are unavailable because he was transferred to the Oshkosh Correctional Institution, plaintiff’s current place of incarceration is irrelevant. On July 21, 2011, when plaintiff filed his complaint, he was still at the Waupun Correctional Institution. He was required to exhaust his administrative remedies *before* filing his complaint. 42 U.S.C. § 1997e(a) (“No 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."). Accordingly, this case will be dismissed without prejudice for plaintiff's failure to exhaust his administrative remedies.

Finally, plaintiff has filed a motion to submit evidence and provide the identity of the Doe defendant. This motion will be denied as moot, but I note that one piece of evidence plaintiff has submitted is a toenail, which plaintiff states was surgically removed in September 2011. It was unnecessary for plaintiff to submit his toenail to the court as it would serve no purpose at this point in the proceedings, even had I allowed plaintiff to proceed on his claims. The court will return this item to plaintiff.

ORDER

IT IS ORDERED that

1. This case is DISMISSED without prejudice for plaintiff Lloyd Schuenke's failure to exhaust his administrative remedies.

2. Plaintiff's motion to submit evidence and identify the Doe defendant, dkt. #8, is DENIED as moot.

Entered this 22d day of November, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge