

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

RODOSVALDO C. POZO,

Plaintiff,

v.

PETER HUIBREGTSE, SGT. RICHARD MATTY,
ROBERT HABLE and HEALTH SERV.
ADMINISTRATOR,

Defendants.

OPINION and ORDER

11-cv-56-bbc

Plaintiff Rodosvaldo Pozo, a prisoner at the Wisconsin Secure Program Facility, located in Boscobel, Wisconsin, is proceeding on a claim that defendant prison officials have subjected him to severely cold conditions in his cell and taken away his warm clothing, in violation of the Eighth Amendment. Plaintiff has filed a motion for preliminary injunctive relief. In a June 7, 2011 order, I stayed a ruling on this motion in order for the parties to provide supplemental briefing on a number of issues. One of the questions raised by the parties' previous filings was whether plaintiff exhausted his administrative remedies. Upon further briefing by the parties, I conclude that plaintiff has failed to exhaust his administrative remedies and will dismiss the case without prejudice.

Under 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.” The exhaustion requirement is mandatory, Woodford v. Ngo, 548 U.S. 81, 85 (2006), and “applies to all inmate suits,” Porter v. Nussle, 534 U.S. 516, 524 (2002).

Plaintiff now seems to acknowledge that he failed to properly exhaust his administrative remedies with respect to inmate complaint WSPF-2010-26652, his grievance about the cold conditions. He states that the later stages of the inmate complaint process were exhausted “after he filed the lawsuit.” This is reflected in the inmate complaint documents submitted by defendants, which show that plaintiff’s appeal to the corrections complaint examiner was still pending when he filed his complaint in this court.

Plaintiff attempts to sidestep the exhaustion requirement by arguing that prison staff impeded his exhaustion attempts by rejecting his complaints, but the evidence he presents to bolster this argument shows merely that staff denied his “Interview/Information Request” forms complaining about the cold conditions. He provides no evidence indicating that he was impeded in pursuing the formal inmate grievance procedures. Indeed, the record shows that he *was* allowed to pursue administrative remedies but he then jumped the gun by filing his complaint in this court before fully exhausting the administrative process.

Plaintiff argues also that he should be allowed to proceed under an “imminent danger” exception to the exhaustion requirement. Generally, “there is no exception for prisoners who allege imminent danger in order to be excused from having to pay the entire filing fee at the time the suit is brought.” Fletcher v. Menard Correctional Center, 623 F.3d 1171, 1173

(7th Cir. 2010). Having stated that, I note that the Court of Appeals for the Seventh Circuit has recognized that the exhaustion requirement may not apply where the danger to a prisoner is so pressing that the existing administrative procedures cannot reasonably be described as “available” to the prisoner. Id. (“Suppose the prison requires that its officials be allowed two weeks to respond to any prisoner grievance and that before the two weeks are up there can be no action taken to resolve it. An administrative remedy could not be thought available to a prisoner whose grievance was that he had been told that members of the Aryan Brotherhood were planning to kill him within the next 24 hours and the guards were refusing to take the threat seriously.”) However, plaintiff’s allegations are simply not of the same character as those contemplated by the court of appeals in Fletcher, such as where a prisoner faces impending violent death. Plaintiff does not suggest that the prison grievance system is unequipped to consider his fairly standard conditions of confinement case—he just simply disagrees with the examiners’ decisions. Unfortunately, he is required to wait until the final decision by the Office of the Secretary in order to bring his disagreement with those decisions to this court.

Because I am dismissing this case due to plaintiff’s failure to exhaust his administrative remedies, all pending motions will be denied as moot. Because plaintiff appears to have exhausted his administrative remedies following the initiation of this lawsuit, he is free to immediately file a new lawsuit about the cold cell conditions. However, plaintiff should be warned about two matters. First, with every submission, plaintiff tries to amend his complaint to change or add defendants. Before plaintiff files a new lawsuit, he should

think about which prison officials he believes are responsible for violating his constitutional rights. Second, it appears from plaintiff's submission that he may no longer be housed in the unit with cold cell conditions. If this is the case, he should be aware that he may no longer qualify to proceed in forma pauperis under the imminent danger standard.

ORDER

IT IS ORDERED that

1. This case is DISMISSED without prejudice for plaintiff Rodosvaldo Pozo's failure to exhaust available administrative remedies before filing the lawsuit.
2. Plaintiff's pending motions for preliminary injunctive relief, dkt. #1, and for leave to amend his complaint, dkt. #44, are DENIED as moot.
3. The clerk of court is directed to enter judgment in defendants' favor and close this case.

Entered this 2d day of August, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge