

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

WAYNE J. HART, JR.,

Plaintiff,

v.

MICHAEL THURMER, SUSAN KIMBALL,
PAUL SUMNIGHT, JOHN DOE 1-50 and
JANE DOE 1-50,

Defendants.

OPINION AND ORDER

11-cv-604-bbc

This is a civil action for monetary relief, brought under 42 U.S.C. § 1983 by plaintiff Wayne J. Hart, an inmate at the Waupun Correctional Institution. He is proceeding in forma pauperis and pro se in this action on claims that 1) defendant Paul Sumnicht violated his rights under the Eighth Amendment by failing to provide adequate medical care for his hernia; 2) defendant Susan Kimball violated his rights under the Eighth Amendment by refusing to permit plaintiff to visit the health services unit after he showed her his protruding hernia; 3) defendants Jane Doe and John Doe violated his rights under the Eighth Amendment by withholding his pain medication following his emergency hernia surgery.

This case is before the court on defendants' motion for summary judgment for plaintiff's failure to exhaust his administrative remedies. Dkt. #21. In addition, plaintiff has filed a motion for summary judgment, dkt. #31, and a proposed amended complaint,

dkt. #32.

Plaintiff is not entitled to amend his complaint as a matter of course, because it was filed almost three months past the deadline for amendments under Fed. R. Civ. P. 15(a)(1). Although leave to amend should be given freely, plaintiff's proposed amendments would be futile and complicate this case unnecessarily. Soltys v. Costello, 520 F.3d 737, 743 (7th Cir. 2008). The only substantial new allegations in the complaint are generic assertions that officers are harassing plaintiff for filing this lawsuit and denying him his "full library time." Proposed Am. Cpt., dkt. #31, at 4-5. These claims would fail to meet the notice pleading requirements of Fed. R. Civ. P. 8. Moreover, these new claims are brought against persons not named in the original complaint and who could not be added to this case because there are no common questions of law or fact between the claims in the original complaint and those that plaintiff seeks to assert against the new defendants. Fed. R. Civ. P. 20 ("Persons . . . may be joined in one action as defendants if: (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action.") Plaintiff's motion for leave to amend the complaint will be denied.

Defendants' motion for summary judgment will be granted because the undisputed facts show that plaintiff did not exhaust his administrative remedies before filing this action. Plaintiff's motion for summary judgment will be denied as moot in light of the grant of summary judgment to defendants.

From the parties affidavits filed in support of the motion for summary judgment, I find that the following facts are undisputed.

UNDISPUTED FACTS

On August 12, 2010, plaintiff filed Offender Complaint WCI-2010-16730. Rose Aff., dkt. #23-1, at 1. In the grievance, he stated that on July 26, 2010, he asked defendant Kimball to visit the health services unit for an emergency because he was not feeling well and was “vomitting-up bile,” but defendant told him he had the flu and should just go lie down.

On August 19, 2010, the inmate complaint examiner rejected plaintiff’s grievance as untimely, id. at 3, finding that the grievance was filed more than 14 days after the incident, outside the time for filing a grievance specified by § DOC 310.09(6). The examiner also found that plaintiff had asserted no cause for the late filing and nothing in the filing showed that plaintiff had been prevented from using the inmate review process.

On August 30, 2010, plaintiff appealed to the reviewing authority, Michael Misner, arguing that the examiner should have extended his filing deadline by six days, because he had been suffering from a medical emergency for six days between the July 26 incident and his surgery on August 1, 2010. Id. at 7. The appeal was rejected on September 14, 2010. Id. at 9. Without explanation, Misner found that the examiner had acted appropriately in rejecting the grievance under § DOC 310.11(5), which permits an examiner to reject a grievance that is filed late and provides no good cause to extend the deadline.

OPINION

The exhaustion provision of the Prison Litigation Reform Act states 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.” 42 U.S.C. § 1997e(a). The Court of Appeals for the Seventh Circuit has held that “a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits.” Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999). Moreover, “[t]o exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prisons’ administrative rules require.” Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002).

Before filing a civil action, Wisconsin inmates must file a complaint with the inmate complaint examiner under §§ DOC 310.09 or 310.10; receive a decision on the complaint from the appropriate reviewing authority under § DOC 310.12; have an adverse decision reviewed by the corrections complaint examiner under § DOC 310.13; and be advised of the Secretary's decision under § DOC 310.14. Wis. Admin. Code § DOC 310.07. Inmates are required to file their “complaint within 14 calendar days after the occurrence giving rise to the complaint, except that the institution complaint examiner may accept a late complaint for good cause.” Wis. Admin. Code § DOC 310.09(6). An institutional complaint examiner “may reject a complaint” when “the inmate submitted the complaint beyond 14 calendar days from the date of the occurrence giving rise to the complaint and provides no good cause

for the ICE to extend the time limits.” Wis. Admin. Code § DOC 310.11(5).

Defendants argue that plaintiff has not exhausted his administrative remedies because the only grievance that he filed relating to the three issues on which he is proceeding was Offender Complaint WCI-2010-16730, which was dismissed as untimely. In support of their motion, defendants submitted an affidavit from Welcome Rose, who is employed as a corrections complaint examiner by the Wisconsin Department of Corrections. In her affidavit, Rose avers that she searched the records of inmate grievances and found only grievance WCI-2010-16730 (the grievance that plaintiff filed on August 12, 2012).

Plaintiff argues that defendant Kimball prevented him from filing a timely grievance about her conduct on July 26, 2010. In addition, he has filed with the court several additional grievance forms about defendant Kimball’s conduct and the quality of defendant Sumnicht’s medical care. Neither his argument nor his exhibits create a genuine dispute about whether plaintiff exhausted his administrative remedies. Before addressing the arguments specifically, I note that plaintiff has not denied defendants’ assertion that he failed to file any grievances alleging that correctional officers withheld his medication, so that claim must be dismissed.

A. “Good Cause” for Filing the Grievance Late

Plaintiff does not deny that his August 12, 2010 complaint was late. Instead, he argues that defendant Kimball prevented him from filing the grievance. Plaintiff argues that he had to wait a week after the July 26 incident before complaining about his illness again

because Kimball worked double shifts that full week and she would have ignored any further complaints. However, as the Supreme Court and the Court of Appeals for the Seventh Circuit have explained, prisoners must attempt to exhaust their remedies, even if they believe that such exhaustion would be futile. Booth v. Churner, 532 U.S. 731, 741 n.6 (2001); Perez, 182 F.3d at 537 (prisoner's perception that exhaustion would be futile does not excuse him from exhaustion requirement). Moreover, plaintiff's argument misses the point. He was required to file his grievance within 14 days. Even if further complaints about his illness were futile, nothing prevented him from filing a grievance about Kimball's July 26 refusal to let him go to the Health Services Unit.

Although plaintiff has not raised this argument before this court, he did argue to Misner on appeal that he should be given a six-day extension of time to file the grievance because he was sick from July 26, 2010 until August 1, 2010. Misner did not address this argument in his written ruling on the appeal. Although "a remedy is not available within the meaning of the Prison Litigation Reform Act to a person physically unable to pursue it," the plaintiff must present evidence to the district court to support his contention that he filed "a grievance as soon as it was reasonably possible for him to do so." Hurst v. Hantke, 634 F.3d 409, 412 (7th Cir. 2011). By not raising this argument before this court or filing any evidence to support it, plaintiff has forfeited the argument.

Moreover, the argument would not have succeeded even if plaintiff had raised it. He alleges in his complaint in this case that the incident with defendant Kimball occurred on July 26, 2010, which means his grievance had to be filed by August 9. He also alleges that

he was discharged from the hospital on August 2. He does not explain either in his complaint or elsewhere why his recovery from the surgery would have prevented him from filing the grievance before the August 9 deadline.

B. Additional Inmate Grievances

Plaintiff has also filed with the court three additional “Offender Complaint” forms. The first two, dated April 19, 2010 and May 19, 2010, contain complaints about the quality of Sumnicht’s medical care. The third is another grievance about Kimball’s conduct on July 26. Dkt. #28. The third grievance is dated August 12, 2010, but the “date received” box shows September 8, 2010. In this third complaint, plaintiff stated that he had good cause for being late because he had been “in the recovery stage” from his hernia surgery. These three forms do not create a genuine dispute of material fact about whether plaintiff exhausted his administrative remedies, for several reasons.

To oppose a motion for summary judgment, plaintiff must cite evidence that may be admissible at trial. Fed. R. Civ. P. 56(c)(2). The prison has no record of these grievances, and the forms do not appear to have been filed with the prison. The two grievance forms complaining about Sumnicht have not been marked as received or given a complaint file number or code number. Dkts. ##28-1, 28-2. On the third form, a complaint number and “September 8, 2010” are typed in the appropriate boxes, but the complaint number is the same number as in plaintiff’s previous complaint, which had already been denied. Plaintiff filed the three grievance forms without an accompanying affidavit or declaration

authenticating the documents and stating that he filed these grievances with the prison.

In any case, the grievance forms alone are not sufficient to create a dispute about whether plaintiff exhausted his administrative remedies, because plaintiff has not explained the outcomes of these grievances. To establish a genuine dispute about whether he completed the administrative review process, plaintiff needed to provide evidence either that he received an adverse decision and appealed it within 10 days, § DOC 310.13(1), or that the prison did not respond to his complaint within 30 days. § DOC 310.12(3). Because plaintiff presented no evidence about whether he received a decision on the three grievances, the undisputed evidence is that he did not exhaust his administrative remedies. Pozo, 286 F.3d at 1025 (exhaustion not accomplished because plaintiff failed to file timely appeal).

Last, plaintiff's explanation of the delay in the third grievance form does not show that he had good cause to file a grievance a month late. Even if plaintiff was unable to file a grievance for some time after his hernia surgery, he was required to file "as soon as it was reasonably possible for him to do so." Hurst, 634 F.3d at 412. Plaintiff alleges in his complaint in this case that he was discharged from the hospital on August 2, 2012, but this second inmate grievance about Kimball was not filed (if it was filed) until September 8, 2012. Plaintiff has not argued before this court that he filed this grievance as soon as he was reasonably capable of doing so after his surgery. He presented no evidence about the extent of his surgery or the limitations it presented. Therefore, he has forfeited this argument.

Plaintiff's case will be dismissed under § 1997e(a) because he has not established a genuine dispute about whether he exhausted his administrative remedies. The dismissal is

without prejudice. It does not preclude plaintiff from pursuing relief in state court, which might not apply the same exhaustion requirements with respect to his claims. Ford v. Johnson, 362 F.3d 395, 401 (7th Cir. 2004) (holding for that reason that “all dismissals under § 1997e(a) should be without prejudice”). However, plaintiff has no further recourse in federal court because his claims are now barred by § 1997e(a), so the dismissal without prejudice constitutes a final appealable order. Maddox v. Love, 655 F.3d 709, 716 (7th Cir. 2011) (order dismissing § 1983 claims for failure to exhaust administrative remedies is appealable where there are no further remedies that plaintiff can pursue).

ORDER

IT IS ORDERED that

1. The motion for summary judgment, dkt. #21, filed by defendants Michael Thurmer, Sergeant Kimball and Paul Sumnicht is GRANTED.
2. Plaintiff Maurice Smith’s motion for summary judgment, dkt. #31, is DENIED.
3. Plaintiff’s motion to amend the complaint is DENIED.
4. This case is DISMISSED without prejudice. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 18th day of October, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge