

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

DEON BOLDEN,

Plaintiff,

v.

DAVID CROSS,

Defendant.

OPINION and ORDER

11-cv-855-bbc

In this civil action under 42 U.S.C. § 1983, plaintiff Deon Bolden is proceeding on a claim that defendant Officer David Cross violated his rights under the Eighth Amendment by failing to protect him from injuries caused by his cellmate while he was incarcerated at the Waupun Correctional Institution.

Now before the court is defendant's motion for summary judgment on the ground that plaintiff failed to exhaust his administrative remedies. After considering the undisputed facts and the parties' arguments, I conclude that plaintiff failed to exhaust his administrative remedies through the prison grievance system. Therefore, I am granting defendant's motion and dismissing this case without prejudice.

From defendant's proposed findings of fact and the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

At all times relevant to this case, plaintiff Bolden was a prisoner at the Waupun Correctional Institution, where defendant Cross worked as a correctional officer. On May 17, 2010, plaintiff was injured during a fight with his cellmate and was transferred to the emergency room of Waupun Memorial Hospital. It was determined at the hospital that plaintiff had incurred a small avulsion fracture in his right thumb. The physician at the hospital recommended that plaintiff wear a metal and foam splint on his thumb for the next four to six weeks. On May 21, plaintiff was discharged from the hospital and returned to the Waupun Correctional Institution. There are no records from the hospital relating to restricting the use of plaintiff's right hand or thumb. According to the discharge summary on a "preliminary report," the physician at the hospital recommended that plaintiff use his thumb "as tolerated."

On May 22, 2010, plaintiff wrote a health service request for medical services unrelated to his thumb. On May 23 and May 24 2010, plaintiff wrote interview and information requests. Also on May 24, the health services unit x-rayed plaintiff's thumb, concluded that it was healed and told him that he no longer needed to wear the splint. (It is not clear from the record whether plaintiff continued to wear the splint or some other bandage after May 24. He avers that he continued to experience significant pain in his thumb for several more weeks.) On May 25, 2010, plaintiff wrote another health service request asking for a health care record review.

On June 15, 2010, plaintiff signed an offender complaint and filed it with the prison's

inmate complaint examiner's office, complaining about defendant's actions during the May 17 altercation between himself and his cellmate. He stated in the complaint that he had written letters and requests to Captain Core, Captain Gempeler and Captain Holm regarding the incident and had asked them to investigate defendant's actions.

On June 24, 2010, the complaint examiner rejected the offender complaint as untimely because it had been filed beyond the 14-calendar day limit. On June 26, 2010, plaintiff submitted a "Request for Review of Rejected Complaint," stating that the reason his offender complaint was late was because he "had a right fracture thumb[,] . . . had to wear a finger metal splint for 4-6 weeks . . . [and] could not write the offender complaint form until [his] right thumb heal[ed]. . . ." Dkt. #20-2.

On July 6, 2010, the prison's reviewing authority determined that the complaint was rejected properly by the inmate complaint examiner.

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). Because exhaustion is an affirmative defense, defendant bears 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). The institution complaint examiner may reject a complaint for any of the reasons listed under § 310.11(5), including that the inmate submitted the complaint beyond 14 calendar days from the date of the occurrence giving rise to the complaint and provided no good cause for an extension of the time limit.

In this case, plaintiff was granted leave to proceed on his claim that defendant Cross failed to protect him from his cellmate’s attack on May 17, 2010. To submit a timely grievance related to the May 17 altercation, plaintiff had 14 days, until May 31, 2010, to sign and submit an offender complaint. Plaintiff’s grievance was signed on June 15, 2010, 29 days after the date of the incident.

Defendant contends that he is entitled to summary judgment because plaintiff failed to submit his offender complaint within the 14-day deadline. Plaintiff does not deny that

his offender complaint was late. However, he contends that he was physically incapable of preparing an offender complaint before June 15 because his broken thumb made it difficult for him to write without experiencing severe pain.

When a prisoner is physically incapable of utilizing a prison grievance system, there are no administrative remedies “available” to the prisoner within the meaning the Prison Litigation Reform Act. Hurst v. Hantke, 634 F.3d 409, 412 (7th Cir. 2011) (“[A] remedy is not ‘available’ within the meaning of the Prison Litigation Reform Act to a person physically unable to pursue it.”). In such situations, a prisoner must file a grievance “as soon as it [is] reasonably possible for him to do so.” Id.

The problem for plaintiff is that he has failed to show any genuine issue of fact regarding whether he was physically incapable of filing an offender complaint within the 14-day deadline or whether he filed his offender complaint “as soon as it was reasonably possible for him to do so.” Although plaintiff had a small fracture in the thumb of his writing hand that required him to wear a splint, he was able to complete two health service request forms and two information and interview request forms within four days of returning from the hospital. None of these requests mention or indicate that plaintiff was having difficulty writing. Additionally, his untimely offender complaint refers to numerous letters he allegedly sent after he returned from the hospital but before he filed the complaint. (The offender complaint does not specify the exact dates that those letters were sent.) Plaintiff contends that although he was capable of writing between May 20 and May 25, he could no longer write after May 25. However, the medical evidence in the record does not support

this (the health services unit concluded that plaintiff's thumb had healed by that point) and, even if that is true, plaintiff does not explain why he could not have submitted his offender complaint before May 25. In light of these facts, there is no reason to believe that plaintiff was incapable of filing an offender complaint until June 15, 2010.

Because plaintiff was late in filing his offender complaint about the subject matter of this lawsuit that was rejected by the institution complaint examiner, he did not exhaust his administrative remedies. Accordingly, his claim against defendant must be dismissed on that ground.

ORDER

IT IS ORDERED that defendant David Cross's motion for summary judgment, dkt. #17, is GRANTED. This case is DISMISSED without prejudice for plaintiff Deon Bolden's failure to exhaust his administrative remedies.

Entered this 16th day of July, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge