

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

GREGORY S. ORTIZ,

Plaintiff,

v.

OPINION AND ORDER

11-cv-195-wmc

BRIAN KOOL, CHRISTINE BEERKICHER,
CO III COOK, "JANE" WALTERS, PETER
ERICKSSON, CAPTAIN BRANDT, CAPTAIN
LESATZ, and "JOHN" SWIEKATOWSKI,

Defendants.

In this prisoner civil rights suit, the court previously allowed plaintiff Gregory S. Ortiz to proceed on two claims of retaliation against various officials and correctional officers at the Green Bay Correctional Institution and the Wisconsin Secure Program Facility. Before the court is defendants' partial motion for summary judgment for failure to exhaust administrative remedies. (Dkt. #24.) Specifically, defendants contend that Ortiz failed to exhaust his claim that defendants Ericksson, Brandt, Lesatz and Swiekatowski retaliated against him in July and August 2008. The court agrees and will grant defendants' motion for partial summary judgment dismissing these defendants.

FACTS¹

I. Procedural Posture

The court allowed Ortiz to proceed on two retaliation claims. The first claim is against defendants Erickson, Brandt, Leatz and Swiekatowski -- all employed during the relevant time period at Green Bay Correctional Institution. Ortiz alleges that these defendants fabricated a conduct report and placed Ortiz in administrative confinement because he refused to inform on other inmates. The other retaliation claim, not relevant to the present motion, concerns retaliation by defendants Cook, Kool and Waters -- all Wisconsin Secure Program Facility employees -- because of Ortiz's support of a fellow inmate's claim of staff battery and misconduct. Defendants move for summary judgment on the first claim of retaliation at GBCI on the basis of Ortiz's failure to exhaust his administrative remedy.

II. Inmate Complaint History

Ortiz alleges that on July 20, 2008, defendant Brandt threatened him with retaliation if he failed to inform on fellow inmates involved in drug and gang activity. (Compl. (dkt. #1) ¶ 25.) On August 6, Ortiz was issued a conduct report number 1969208. (*Id.* at ¶ 27.) At an August 8 hearing, defendant Stevens found Ortiz guilty and sentenced him to one year in segregation. (*Id.* at ¶ 28.) Ortiz then submitted an "appeal of adjustment committee or hearing officer's decision," raising procedural challenges to defendant Steven's decision on

¹ Plaintiff takes issue with defendants' alleged failure to file proposed findings of fact in support of their motion for summary judgment. As defendants correctly point out, however, the court's preliminary pretrial conference order does not require proposed findings of fact for summary judgment motions based solely on exhaustion grounds. (Dkt. #23 at p.4.)

the conduct report. (Affidavit of Gregory Ortiz (“Ortiz Aff.”), Ex. 6 (dkt. #30-6).) The appeal is signed “8-15-08” but the “date appeal received” is “8-22-08.” (*Id.*) On August 22, 2008, the appeal was denied as untimely. (*Id.*)

On September 2, 2008, Ortiz submitted an offender complaint. (Ortiz Aff., Ex. 1 (dkt. #30-1).) In the complaint, Ortiz contends that his appeal of the conduct report decision was “intentionally delayed by an unknown party after I mailed it via institution mail and was considered untimely by the time it arrived at the warden’s office.” (*Id.*) Ortiz also raises the same procedural issues raised in his appeal. The offender complaint, identified as GBCI-2008-23628, was received and acknowledged on September 4. (Ortiz Aff., Ex. 2 (dkt. #30-2).) That same day, the complaint was rejected because Ortiz had failed to complete the appeal process from the conduct report and, therefore, his offender complaint was outside of the scope of DOC 310.08(2)(a). (Ortiz Aff., Ex. 3 (dkt. #30-3).)

On September 16, 2008, Ortiz filed a “request for review of rejected complaint,” referenced #476295. (Ortiz Aff., Ex. 4 (dkt. #30-4).) In this document, Ortiz complained about the delay in receipt of his appeal of the conduct report. He asked that his offender complaint be returned to the Institution Complaint Examiner (“ICE”) for further consideration. On September 18, the review authority acknowledged receipt of Ortiz’s appeal of the ICE’s rejection. (Ortiz Aff., Ex. 5 (dkt. #30-5).)

OPINION

The 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), provides 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.” The Court of Appeals for the Seventh Circuit has held that “[e]xhaustion of administrative remedies, as required by 42 U.S.C. § 1997e, is a condition precedent to suit” and that district courts lack discretion to decide claims on the merits unless the exhaustion requirement has been satisfied. *Dixon v. Page*, 291 F.3d 485, 488 (7th Cir. 2002); *Perez v. Wisconsin Dept. of Corrections*, 182 F.3d 532, 535 (7th Cir. 1999).

“[I]f a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim.” *Massey v. Helman*, 196 F.3d 727, 733 (7th Cir. 1999). The Bureau of Prisons’ grievance procedures are set forth at 28 C.F.R. §§ 542.13-15. An inmate must present his concerns to staff first so that staff can try to resolve the issue informally. 28 C.F.R. § 542.13. If no informal resolution is reached, the inmate may file a BP-9 form with the warden. 28 C.F.R. § 542.14. If the inmate does not receive relief, the inmate must appeal first to the regional director and then to the central office. 28 C.F.R. § 542.15.

Defendants contend that “[i]n order for Ortiz to pursue a civil rights lawsuit arising from alleged retaliatory conduct after Brandt’s threat of July 20, 2008, he needed to file an offender complaint alleging retaliation no later than 14 days thereafter, by August 3, 2008.” (Defs.’ Opening Br. (dkt. #25) 7 (citing Wis. Admin. Code DOC § 310.09(6) (“An inmate shall file a 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.”)).) In the alternative, defendants contend that even if Ortiz was not put on notice of his possible claim until August 6, 2008 -- the date he received his conduct report --

Ortiz was required to file a complaint by August 20, 2008. (*Id.*) Instead, Ortiz's offender complaint was not received until September 4, 2008.

In response, Ortiz contends that he "first realized that he was being harassed and retaliated against on 8-22-08 . . . when he got the appeal to CR 1969208 telling him that it was filed untimely." (Pl.'s Opp'n (dkt. #27) 3.) As such, Ortiz contends that his offender complaint was timely as it was received by ICE 13 days later on September 4, 2008.

Unfortunately for Ortiz, the *only* administrative complaints arguably relevant to Ortiz's current retaliation claim are the appeal of his conduct report and the related offender complaint. Neither document, however, placed the defendants on notice of a possible claim for retaliation based on Ortiz's refusal to inform on drug and gang activity. This means his challenge here does not turn on whether the original appeal was timely, even if this court could review the prison's internal determination of the timeliness of the appeal in determining exhaustion. *See Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002) ("If the state stands on its time limits and rejects a filing as too late, then state remedies have not been properly invoked.").

This is so because "[A] grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. As in a notice-pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming." *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002). In both the appeal of his conduct report and the offender complaint, Ortiz only raises concerns about procedural defects with respect to his hearing on the conduct report. In the offender complaint, Ortiz raises a concern about the delay in delivery of his appeal, but he does not alert the prison to the nature of the wrong he now seeks to litigate in this court,

namely his allegation that the GCBI defendants retaliated against him in fabricating a conduct report and in sentencing him to one-year administrative segregation because of his refusal to inform on his fellow inmates.

Accordingly, the court will grant defendants' motion for partial summary judgment and will dismiss Ortiz's GCBI retaliation claims and defendants Erickson, Brandt, Leatz and Swiekatowski from this lawsuit.

ORDER

IT IS ORDERED that:

- 1) defendants' motion for partial summary judgment (dkt. #24) is GRANTED; and
- 2) defendants Erickson, Brandt, Leatz and Swiekatowski are dismissed from this lawsuit.

Entered this 27th day of December, 2012.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge