

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

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BOBBIE TORRY,

Plaintiff,

v.

SEAN SALTER,

Defendant.

OPINION AND ORDER

11-cv-748-wmc

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The court previously dismissed this action on the basis that plaintiff Bobbie Torry failed to exhaust his administrative remedies as required pursuant to the PLRA, 42 U.S.C. § 1997e(a). (Dkt. #21.) Before the court is Torry's motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). (Dkt. #23.)<sup>1</sup> Torry raises two bases for reconsideration in his motion, both of which the court rejects.

*First*, Torry takes issue with the court's statement that "a rejected complaint cannot be exhausted" (dkt. #21 at p.6), arguing that it conflicts with this court's holding in *Shaw v. Jahnke*, 607 F. Supp. 1005 (W.D. Wis. 2009). In *Shaw*, the court reviewed three rejected grievances filed by the plaintiff, concluded that defendants' treatment of the rejected grievances placed the plaintiff in a catch-22 situation, and found that the plaintiff had exhausted his claim under those circumstances. *Id.* at 1008-1011. The first and second grievances were rejected because the plaintiff was required to pursue the complaint through the disciplinary proceeding, even though the nature of the plaintiff's complaint did not involve a procedural defect; the third complaint was rejected because it

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<sup>1</sup> Plaintiff's motion was filed 9 days after entry of judgment.

was untimely, insinuating that he should have brought his complaint as part of the prisoner grievance process. 607 F. Supp. 2d at 1008.

Here, however, there is no internal discrepancy in defendants' treatment of plaintiff's complaints. His initial grievances were rejected because he was complaining of procedural defects that needed to be raised as part of the disciplinary procedure. Ultimately, Torry's grievances were rejected because they were untimely. While the court in *Shaw* apparently recognized a specific circumstance where a rejected complaint satisfies the exhaustion requirement, that circumstance is simply not present here.

*Second*, Torry complains of this court's citation to *Pozo v. McCaughtry*, 286 F.2d 1022, 1024 (7th Cir. 2002), for the proposition that a "[f]ailure to do what the state requires, bars, and does not postpone, suit under § 1983." (Dkt. #21 at p.6.) Torry contends that this language conflicts with the Seventh Circuit's instruction that a dismissal for failure to exhaust is without prejudice. (Dkt. #23 at p.2.) While these positions at first glance may appear at odds, a closer look reveals that they, too, are easily reconciled.

The court dismisses all challenges based on a failure to exhaust without prejudice because the court does not reach the merits of plaintiff's claims in dismissing the action. In certain situations, the prisoner will be able to exhaust and refile his complaint. For example, a prisoner who jumped the gun and filed his complaint before he had exhausted his administrative remedies, could simply refile his complaint after doing so. *See Ford v. Johnson*, 362 F.3d 395, 398 (7th Cir. 2004) ("[I]f the prisoner does exhaust, but files suit early" dismissal without prejudice is correct response so "the premature action may be

followed by a new suit that unquestionably post-dates the administrative decision”). Similarly, the state may opt to accept an otherwise untimely grievance, allowing for exhaustion and, in turn, allowing the plaintiff to challenge the outcome of the administrative process in federal court. *See Conyers v. Abitz*, 416 F.3d 580, 584 (7th Cir. 2005) (explaining that, if prison administrators accept untimely grievance and resolve it on the merits, then grievance “has served its function of inviting prison administrators to take corrective action, and thus the administrative exhaustion requirement has been satisfied”).

Here, however, Torry’s failure to follow the state’s rules in the first go-around, coupled with the state’s unwillingness to accept a now untimely grievance in the second go-around, bar his claims in this court.

ORDER

IT IS ORDERED that plaintiff Bobbie Torry’s motion to alter or amend the judgment (dkt. #23) is DENIED.

Entered this 7th day of April, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge