IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JESSIE WILLIAMS,

Plaintiff,

v.

GARY H. HAMBLIN, WILLIAM POLLARD, DONALD STRAHOTA, JEFFREY GARBELMAN and GARY ANKARLO,

Defendants.

OPINION AND ORDER

12-cv-470-bbc

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Pro se plaintiff Jessie Williams is proceeding on the following claims: (1) defendants Gary Hamblin, William Pollard, Donald Strahota, Jeffrey Garbelman and Gary Ankarlo are failing to provide him adequate mental health care, in violation of the Eighth Amendment; (2) the same defendants are housing plaintiff in conditions that exacerbate his mental illness, in violation of the Eighth Amendment; and (3) defendant Pollard is refusing to assist plaintiff in writing grievances, in violation of the Americans with Disabilities Act. Now before the court is defendants' motion for summary judgment on the ground that plaintiff has not exhausted his administrative remedies with respect to any of these claims as he is required to do under 42 U.S.C. § 1997e(a). In addition, plaintiff has filed a motion for a preliminary injunction and a motion for assistance in recruiting counsel.

Because plaintiff did not file a grievance that complied with prison rules with respect

to any of his claims, I am granting defendants' motion for summary judgment. Although plaintiff says that his mental impairments limit his ability to read and write, he has not shown that he is unable to file a grievance or that prison officials are refusing to provide him assistance. Because I am dismissing the case for plaintiff's failure to exhaust his administrative remedies, I am denying plaintiff's motions as moot.

OPINION

Under 42 U.S.C. § 1997e(a), "[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 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).

Generally, to comply with § 1997e(a), a prisoner must "properly take each step within the administrative process," Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002), which includes following instructions for filing the initial grievance, Cannon v. Washington, 418 F.3d 714, 718 (7th Cir. 2005), as well as filing all necessary appeals, Burrell v. Powers, 431 F.3d 282, 284-85 (7th Cir. 2005), "in the place, and at the time, the prison's administrative rules require." Pozo, 286 F.3d at 1025. In Wisconsin, the administrative code sets out the process for a prisoner to file a grievance and appeal an adverse decision. Wis. Admin. Code. § DOC 310.07 (prisoner first files grievance with inmate complaint

examiner; prisoner may appeal adverse decision to corrections complaint examiner and then to department secretary). A failure to follow these rules may require dismissal of the prisoner's case. Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999). However, "[i]f administrative remedies are not 'available' to an inmate, then the inmate cannot be required to exhaust." Kaba v. Stepp, 458 F.3d 678, 684 (7th Cir. 2006).

A. "Available" Remedies

Plaintiff does not deny that he failed to file a grievance for his claim under the Americans with Disabilities Act. However, he says that should not be surprising in light of his claim that he is illiterate and that prison officials will not assist him in filing grievances. He argues that his inability to write combined with his mental illness rendered the grievance process unavailable to him. (Although plaintiff is proceeding pro se, many of the documents he filed related to the pending motions indicate that he was "assisted" by another prisoner in preparing those documents.)

I am not aware of any decisions from the Court of Appeals for the Seventh Circuit in which the court considered the extent to which a prisoner's mental impairment may excuse the exhaustion requirement. However, the court has stated that "a remedy is not 'available' within the meaning of the Prison Litigation Reform Act to a person physically unable to pursue it," Hurst v. Hantke, 634 F.3d 409, 412 (7th Cir. 2011), and I see no reason why the same rule would not apply to a mental barrier.

This does not mean that plaintiff may avoid the exhaustion requirement simply by

alleging that he was unable to file a grievance. When I screened plaintiff's complaint, I was required to accept all of his allegations as true, Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508, n.1 (2002), including his allegations that he had a mental impairment that substantially limited his ability to read and write and that prison officials refused to help him file grievances. However, a "party opposing summary judgment may not rest upon mere allegations or denials contained in [his] pleadings; instead, it is incumbent upon [him] to introduce affidavits or other evidence setting forth specific facts showing a genuine issue" of material fact. Anders v. Waste Management of Wisconsin, 463 F.3d 670, 675 (7th Cir. 2006). See also Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990) ("The object of [the rules on summary judgment is] not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.").

In his proposed findings of fact, plaintiff says that he is "illiterate and unable to read and write." Plt.'s PFOF ¶ 1, dkt. #27. However, he hedges in his declaration, in which he avers that he has "a very limited ability to read and write, which makes me virtually illiterate." Dkt. #31 at ¶ 3. He does not aver that he is unable to write a grievance, perhaps because his "inmate complaint history report" (filed with defendants' motion for summary judgment) shows that he has filed more than 50 grievances since 2005. Dkt. #23-1. Plaintiff does not explain how he was able to file all of those grievances, but unable to file a grievance for this claim. Although the clarity of plaintiff's grievances varies, at the least they show that plaintiff had the ability to make an attempt to use the grievance process. Baker v. Schriro, 2008 WL 622020, *5 (D. Ariz. 2008) (rejecting argument that mental and physical

impairments prevented prisoner from filing grievance when at same time "Plaintiff was acting pro se in three criminal appeals and initiating three civil rights actions. He does not explain how his condition prevented him from filing grievances but did not interfere with his extensive criminal and civil legal proceedings.") (citations omitted); Bester v. Dixion, 2007 WL 951558, *10 (N.D.N.Y. 2007) (rejecting argument that prisoner's mental status prevented him from filing grievance because record showed that prisoner had written letters to officials about his condition).

Even if I assume that plaintiff is unable to file a grievance without assistance, that would not be enough for plaintiff to prevail on the motion. Under Wis. Admin. Code § DOC 310.09(7), "[i]f an inmate is unable to write a complaint, the inmate may seek assistance in doing so." Plaintiff says in his brief that "Defendants have not provided any assistance" in filing grievances, but he does not explain what that means. Plt.'s Br., dkt. #26, at 2. In his proposed findings of fact and declaration, he does not say that prison officials have refused requests he made for assistance in preparing grievances. Instead, he says that prison officials have discontinued the "Legal Route System," which allowed prisoners to send legal documents to each other without the cost of postage. Dkt. #27 at ¶¶ 5-9. To the extent plaintiff believes that he is entitled to assistance *from other prisoners* that is subsidized by the Department of Corrections, he is mistaken. So long as prison officials are providing effective assistance in some form, that is sufficient to provide an "available" remedy to plaintiff.

Because plaintiff does not allege that he asked prison officials for help in filing a

grievance, I cannot find that he had no administrative remedies available to him. E.g., Ramos v. Smith, 187 Fed. Appx. 152, 154 (3d Cir. 2006) (rejecting argument that illiteracy excused failure to file grievance appeal when prisoner did "not claim that he asked for and was refused assistance in filing his administrative appeals"). To the extent plaintiff means to argue that he did not ask for help because he believed that no one would help him, that argument fails because § 1997e(a) requires prisoners to make the attempt even when they believe it will be unsuccessful. Booth v. Churner, 532 U.S. 731, 741 n.6 (2001) (no futility exception in § 1997e(a)).

B. Specificity Requirement

With respect to his claims under the Eighth Amendment, plaintiff says that he satisfied § 1997e(a) by filing two grievances. (Defendants discuss other grievances in their motion, but plaintiff does not rely on them, so I need not consider them.) In the first one, he wrote, "I am writing due to fact I talk with my [psychiatrist] and that he won't recommend that I be transferred to a place where it won't affect my mental health." Dkt. #23-7, exh. 107, at 1. The inmate complaint examiner rejected the grievance under Wis. Admin. Code § DOC 310.11(5)(c) for failing to "allege sufficient facts upon which redress may be made." In particular, the examiner wrote:

> Inmate Williams does not elaborate on his concern regarding his placement at WCI or why he thinks he should be moved to another institution. He does not cite what adverse condition he is subjected to here or how another location would not affect him. Lastly, inmate Williams states he contacted [the psychiatrist] but does not state what the result of that contact was.

Dkt. #23-7, exh. 107, at 3. In his appeal, plaintiff wrote, "I disagree because [I would] be in general population or P.S.U. unit." The reviewing authority affirmed the decision to reject the grievance under § DOC 310.11(5)(c). Id. at 7.

In the second grievance (filed a few days after the first), plaintiff included the same statement from his first grievance and added that he had contacted the psychiatrist about the "issue," but the psychiatrist did not respond. Dkt. #23-8, exh. 108, at 1. The inmate complaint examiner again rejected the grievance under § DOC 310.11(5)(c), writing that plaintiff "does not provide any information regarding the clinical contact and how or why he believes that PSU staff should recommend his transfer to another facility." Dkt. #23-8, exh. 108, at 3. In his appeal, plaintiff wrote, "I disagree with this decision." Id. at 4. The reviewing authority affirmed the rejection. Id. at 6.

In his brief, plaintiff argues that these two grievances show that he "did, maybe inartfully, raise the issue regarding receiving adequate mental health treatment and that his conditions of confinement were [exacerbating] it." Plt.'s Br., dkt. #26, at 3. He cites Riccardo v. Rausch, 375 F.3d 521, 524 (7th Cir. 2004), for the proposition that a grievance complies with § 1997e(a) if it "object[s] intelligibly to some asserted shortcoming."

It is debatable whether plaintiff objected intelligibly to the alleged problems that gave rise to his claims in this case. However, even if I assume that he did, plaintiff's argument misses an important point in Riccardo, which is that "[p]risoners must follow state rules about the . . . content of grievances." Id. at 523-24. See also Jones v. Bock, 549 U.S. 199, 218 (2007) ("[I]t is the prison's requirements, and not the PLRA, that define the boundaries

of proper exhaustion."). In Riccardo, the examiner for the Illinois Department of Corrections had denied the grievance on the merits, but the defendants argued that the court should find that the grievance was inadequate anyway. In response, the court stated, "[i]f Illinois wants grievances to be more detailed, it must adopt appropriate regulations and inform prisoners what is required of them." Id. at 524.

That is exactly what Wisconsin has done by enacting § DOC 310.11(5)(c). Although the rule does not identify precisely what information a grievance should include, the examiner provided specific instructions to plaintiff when rejecting his grievance about how to fix the problems. Compare Hurst, 634 F.3d at 411 (criticizing examiner for failing to tell prisoner what he had to do to demonstrate "good cause" for late grievance); with Cannon, 418 F.3d at 718 (affirming dismissal for failure to exhaust when prisoner failed to follow examiner's instructions), and Jones v. Frank, 2008 WL 4190322, *3-4 (W.D. Wis. 2008) (dismissing case for plaintiff's failure to comply with § DOC 310.11(5)(c) when examiner identified type of information that was missing from grievance). The examiner's request for more information was a reasonable one because plaintiff's grievance stated only that he wanted to be transferred to a different institution for a reason related to his mental health. Without knowing what aspects of his conditions of confinement plaintiff was challenging, the examiner had no way to address the alleged problem.

Plaintiff complied in part with the examiner's instructions when he stated in his second grievance that the psychiatrist had not responded to his request, but he still failed to provide details about the nature of his problem as the examiner requested. Although

plaintiff says that he has multiple mental impairments, he does not argue that he was unable to comply with the examiner's request for more information or that, if he could not comply, prison officials refused any request he made to provide assistance. Particularly because plaintiff *was* able to file a complaint in this court that more specifically identified his concerns, I cannot find that plaintiff was incapable of filing a grievance on the same issues. Under these circumstances, I conclude that plaintiff has not exhausted his available administrative remedies and I am granting defendants' motion for summary judgment and dismissing the case without prejudice. Ford v. Johnson, 362 F.3d 395, 401 (7th Cir. 2004) ("[A]ll dismissals under § 1997e(a) should be without prejudice.").

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Gary Hamblin, William Pollard, Donald Strahota, Jeffrey Garbelman and Gary Ankarlo, dkt. ##21 and 22, is GRANTED for plaintiff Jessie Williams's failure to exhaust his administrative remedies.

2. Plaintiff's motion for a preliminary injunction, dkt. ##29 and 30, and motion for assistance in recruiting counsel, dkt. #36, are DENIED as moot.

3. The case is DISMISSED WITHOUT PREJUDICE to plaintiff's refiling it after he has exhausted his administrative remedies.

4. The clerk of court is directed to enter judgment accordingly and close this case.

Entered this 31st day of May, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge