

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

MATTHEW DEROSCH,

Plaintiff,

v.

ROGER BURKE and DR. LILY LIU,

Defendants.

OPINION AND ORDER

20-cv-1103-wmc

Pro se plaintiff Matthew DeRosch is proceeding in this lawsuit against current or former Jackson Correctional Institution employees Roger Burke and Dr. Lily Liu under 42 U.S.C. § 1983. DeRosch claims that defendants violated his Eighth Amendment rights by improperly terminating his access to a single cell with a bathroom, which is necessary because he suffers from ulcerative colitis. Defendants are represented separately, and each filed a motion for summary judgment on the ground that DeRosch failed to exhaust his administrative remedies for his claims in this lawsuit. (Dkt. ##31, 34.) Based on the undisputed evidence of record, the court agrees. Accordingly, defendants are entitled to summary judgment, and DeRosch's claims in this lawsuit will be dismissed without prejudice.

OPINION

Prisoners may not bring a federal claim about events in prison “until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). As a result, a prisoner must follow all of the prison's rules for completing the grievance process as to a claim before proceeding to federal court. *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th

Cir. 2002). This includes: (1) compliance with instructions for filing an initial grievance, *Cannon v. Washington*, 418 F.3d 714, 718 (7th Cir. 2005); and (2) filing all available appeals “in the place, and at the time, the prison administrative rules require,” *Pozo*, 286 F.3d at 1025; *see also Burrell v. Powers*, 431 F.3d 282, 284-85 (7th Cir. 2005).

This exhaustion requirement is mandatory to ensure that prison administrators are afforded a fair opportunity to resolve a grievance without litigation. *Woodford v. Ngo*, 548 U.S. 81, 88-89 (2006). However, a prisoner’s failure to exhaust constitutes an affirmative defense, which means a *defendant* carries the burden of proof. *Davis v. Mason*, 881 F.3d 982, 985 (7th Cir. 2018). Defendants must show that there is no genuine dispute of material fact as to plaintiff’s failure to exhaust, entitling them to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In Wisconsin, inmates start the complaint process by filing a complaint with the institution complaint examiner (“ICE”) within 14 days after the occurrence giving rise to the complaint. Wis. Admin. Code § DOC 310.07(2) (2018). “Each complaint may contain only one clearly identified issue.” *Id.* § 310.07(5). If the ICE rejects a grievance for procedural reasons without addressing the merits, an inmate may appeal that rejection. *Id.* § 310.10(10). If the complaint is not rejected, the ICE must make a recommendation to the reviewing authority, who in turn renders a decision. *Id.* §§ 310.11(11), 310.12. If that decision is unfavorable to the inmate, the inmate still may appeal to the corrections complaint examiner (“CCE”). *Id.* § 310.13. Appeals to the CCE must be filed within ten days, unless good cause is shown for an untimely filing. *Id.* § 310.13. The CCE then makes a recommendation to the Secretary of the Department of

Corrections, who will take final action on the complaint. *Id.* §§ 310.13, 310.14.

DeRosch claims that his ulcerative colitis requires him to be housed in a cell with a bathroom, referred to as a “wet cell.” The court granted DeRosch leave to proceed against defendant Burke for improperly persuading Dr. Liu to cancel DeRosch’s medical restriction for a wet cell, and against Dr. Liu for cancelling the restriction without examining or consulting with DeRosch.

DeRosch submitted two inmate complaints related to those events, JCI-2020-10761 and JCI-2020-16429. In JCI-2020-10761, DeRosch identified the issue as: “[R]emoval of medical single wet-cell. I am requesting my medical single wet-cell reinstated.” (Ex. 1001 (dkt. #33-2) 7.) DeRosch alleged that Dr. Liu discontinued the single wet cell restriction despite his inability to hold his bowels. On June 30, 2020, the ICE recommended dismissal on the merits, reasoning that Dr. Liu’s recommendation was that DeRosch be assigned to a wet cell, as opposed to a single wet cell. The reviewing authority accepted that recommendation. DeRosch did not appeal the dismissal to the CCE.

Two months later, DeRosch submitted JCI-2020-16429, this time identifying the issue as “Unconstitutional condition of confinement./would like to be given my single cell status back.” (Ex. 1002 (dkt. #33-3) 7.) DeRosch wrote that “Sgt. Rober[t] Burke interfered with [DeRosch’s] appropriate treatment by calling Dr. Lily Liu and persuading her to cancel [his] treatment (single wet cell),” and that Dr. Liu failed to examine him or consult a gastroenterologist before terminating the single wet cell. (*Id.*) The ICE rejected that inmate complaint because DeRosch had already raised that issue in a previous inmate complaint. DeRosch appealed, and the reviewing authority affirmed the rejection.

Defendants seek summary judgment because DeRosch failed to timely appeal JCI-2020-10761, and JCI-2020-16429 was properly rejected and thus did not follow the exhaustion procedures. Defendants are correct. In failing to timely appeal, DeRosch failed to complete each step of the exhaustion process with respect to JCI-2020-10761. The rejection of JCI-2020-16429 was proper because DeRosch's allegations in that second inmate complaint repeated those he raised in JCI-2020-10761, and rejected claims "cannot satisfy the exhaustion requirement even if appealed." *Collins v. McCaughtry*, No. 04-C-147-C, 2005 WL 503818, at *3 (W.D. Wis. Feb. 28, 2005); *Torry v. Salter*, No. 11-cv-748-wmc, 2013 WL 6238608, at *3 (W.D. Wis. Dec. 3, 2013) ("Regardless of the exact reason for rejecting the complaint, a rejected complaint cannot be exhausted."); *see also Woodford*, 548 U.S. at 83 (the exhaustion requirement is not fulfilled "by the filing or an untimely or otherwise procedurally defective administrative grievance or appeal").

DeRosch's argument in opposition fail. He suggests that he properly exhausted by using all of the procedures available to him, which is untrue. DeRosch could have completed the exhaustion process by timely appealing the dismissal of JCI-2020-10761, but he did not take that necessary step. That inaction amounts to forfeiture. *See Kaba v. Stepp*, 458 F.3d 678, 684 (7th Cir. 2006) ("[W]hen the prisoner causes the unavailability of the grievance process by simply not filing a grievance in a timely manner, the process is not unavailable but rather forfeited."). Along the same lines, DeRosch claims that a law clerk at Jackson told him that filing this lawsuit was equivalent to appealing the dismissal to the CCE, but that is not a reasonable interpretation of the exhaustion regulations

detailed above, which provide explicit directions about how to appeal the reviewing authority's decision. *See* Wis. Admin. Code § 310.12.

In fairness, the exhaustion procedures may be rendered unavailable “when prison administrators thwart inmates from taking advantage of a grievance through machination, misrepresentation, or intimidation.” *Ross v. Blake*, 578 U.S. 632, 644 (2016). DeRosch has not shown that this conversation with a Jackson law clerk prevented him from timely appealing. The evidence of record shows that DeRosch was aware of the appeal procedure: between 2015 and 2020, he filed three appeals to the CCE. (*See* Ex. 1000 (dkt. #33-1) 1.) Additionally, DeRosch has not attested to the details of what the Jackson law clerk actually said, or, more importantly, when they told him to file a lawsuit rather than appeal the dismissal to the CCE. In short, DeRosch's undetailed statement about what a Jackson law clerk said to him does not amount to a genuine issue of material fact as to whether, the Jackson law clerk prevented him from timely appealing JCI-2020-10761.

DeRosch also challenges the rejection of JCI-2020-16429 because in this second inmate complaint he noted multiple incidents in which he defecated on himself since he filed the first inmate complaint. However, the one issue that DeRosch raised in that second inmate complaint repeated Dr. Liu's and Burke's actions from June of 2020; DeRosch did not bring up any continuing wrongful conduct by either defendant. Although not explicitly invoked by DeRosch, it appears that he also challenges the rejection of this second inmate complaint under the continuing violation doctrine of *Turley v. Rednour*, 729 F.3d 645, 650 (7th Cir. 2013), in which the Court of Appeals for the Seventh Circuit held that inmates do not need to file multiple successive complaints challenging ongoing wrongful conduct,

such as conditions of confinement or prison policies. *Id.* at 650. This principle does not apply here. DeRosch is not challenging ongoing wrongful conduct or a policy; his claims against Dr. Liu and Burke arise from discrete actions they took in June of 2020. Although their alleged deliberate indifference may have subsequently caused DeRosch to defecate on himself, his second inmate complaint did not allege that Dr. Liu took any additional action with respect to his cell restriction. In other words, DeRosch did not raise a concern that he was continually subjected to repeated wrongful conduct by either defendant. Therefore, DeRosch has not shown that the rejection of that inmate complaint was unreasonable. Accordingly, defendants have shown that DeRosch failed to exhaust his claims before filing this lawsuit, and those claims will be dismissed without prejudice. *See Ford v. Johnson*, 362 F.3d 395, 401 (7th Cir. 2004). If DeRosch makes a new request for a single wet cell that provides institution officials more information about his need for that placement, and he believes their responses violate his constitutional rights, he may be able to exhaust his claims related to those responses and bring them in a new federal lawsuit, provided he follows each of the steps outlined above.

ORDER

IT IS ORDERED that:

- 1) Defendants' motions for summary judgment (dkt. ##31, 34) are GRANTED, and plaintiff Matthew DeRosch's claims in this lawsuit are DISMISSED without prejudice for failure to exhaust his administrative remedies before filing this lawsuit.

2) The clerk of court is directed to enter judgment in defendants' favor and close this case.

Entered this 31st day of August, 2022.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge