

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

JERRY MEANS,

Plaintiff,

ORDER

v.

02-C-0695-C

DR. C. CULLEN, Psychologist,
DR. TWILA HAGAN, Head Psychologist,

Defendants.

This is an action brought pursuant to 42 U.S.C. § 1983 in which plaintiff alleges that defendants were deliberately indifferent to his serious mental health care needs between April 11 and May 19, 2002. The action was started in January 2003, when plaintiff paid the filing fee. Later, plaintiff asked for leave to proceed in forma pauperis for the purpose of having the Marshal serve his complaint on the defendants and I found that he qualified for pauper status. Defendants filed an answer to the complaint on April 2, 2003. On April 30, Magistrate Judge Stephen Crocker held a preliminary pretrial conference to set the trial date and schedule deadlines for discovery, naming witnesses and filing dispositive motions. That same day, defendants filed a motion for summary judgment, together with

supporting documents.

Defendants' motion raises two separate issues: 1) whether plaintiff exhausted his administrative remedies on his claim as it relates to the alleged conduct of defendant Twila Hagan; and 2) whether defendants are entitled to a judgment in their favor on the merits of plaintiff's claims against both defendants.

When Magistrate Judge Crocker set October 2, 2003 as the deadline for filing dispositive motions, he was expecting that the parties would need to collect evidence to support or defend against a motion for summary judgment, if such a motion were to be filed. In particular, the magistrate judge noted that the parties might need to obtain the report or testimony of an expert witness who would address the issue of the seriousness of plaintiff's mental health needs at the time plaintiff alleges defendants were deliberately indifferent to them. Because plaintiff has not had an opportunity to conduct discovery or search for an expert witness who might be willing to testify on his behalf, it would not be proper to set a schedule for briefing defendants' motion for summary judgment at this early stage in the lawsuit. Instead, I will stay briefing on the merits of plaintiff's claims for 60 days to allow plaintiff to gather the evidence he believes is necessary to defend against the motion.

However, the question whether plaintiff used the inmate complaint procedure as prison rules require it to be used to exhaust his administrative remedies must be resolved before I can consider defendants' motion for summary judgment on its merits. See Perez v.

Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999). Therefore, with respect to the portion of defendants' motion that requests dismissal of plaintiff's claim against defendant Twila Hagan for plaintiff's failure to exhaust his administrative remedies, I will set a schedule for briefing that issue in this order.

To assist both parties in addressing the motion, I note the following.

Defendants do not propose any facts relating to the question of exhaustion in their "Proposed Findings of Fact." Instead, they have submitted the affidavit of John Ray in which Ray avers that he is custodian of the records for appeals of inmate complaints and that his records do not show that plaintiff appealed any inmate complaint concerning defendant Twila Hagan.

Failure to exhaust administrative remedies is an affirmative defense, and defendants have the burden of pleading and proving the defense. Massey v. Helman, 196 F.3d 727, 735 (7th Cir. 1999). In this case, plaintiff alleges that over a five week period his pleas to mental health officials for treatment for his anxiety, hearing voices, and bipolar disorder were ignored, despite the fact that he was eating feces and setting himself on fire in front of defendant Hagan. In order for defendants to prove that plaintiff has not exhausted his administrative remedies on his claim, it is not sufficient for them to say only that Ray does not have a record of an appeal of an inmate complaint from plaintiff with Twila Hagan's name on it. This is because I am unaware of any provision relating to inmate complaint

procedures in the Wisconsin Administrative Code that would require inmates to name persons individually when they complain about their conditions or the lack of mental health or medical treatment. If internal procedures establish such a requirement, then defendants will have to submit evidence of the procedure in support of their motion. Without such evidence, I am unable to conclude from Ray's affidavit alone that plaintiff failed to exhaust his administrative remedies on his claim that he was deprived of mental health treatment during the period at issue in this case.

ORDER

IT IS ORDERED that briefing on defendants' motion for summary judgment is STAYED for 60 days on the question whether defendants denied treatment to plaintiff in violation of the Eighth Amendment. A schedule for briefing the motion on the merits of plaintiff's claim against the defendants will be established in early July.

Further, IT IS ORDERED that the parties are to observe the following schedule for briefing the question whether plaintiff failed to follow proper inmate complaint procedures to exhaust his administrative remedies on his claim against defendant Twila Hagan:

1. Defendants may have until May 20, 2003, in which to submit supplemental support for the motion.

2. Plaintiff may have until June 3, 2003, in which to serve on defendants' counsel and file with the court copies of any inmate complaints, appeals, and decisions from inmate complaint examiners, corrections complaint examiners and the secretary of the Department of Corrections he may have to prove that he exhausted his administrative remedies with respect to his claim against Twila Hagan.

3. Defendants may have until June 10, 2003, in which to serve and file a reply.

Entered this 7th day of May, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge