

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

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STEVEN E. GERRARD,

Plaintiff,

v.

GEORGE M. DALEY, M.D.,

Defendant.

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ORDER

00-C-355-C

In this proposed civil action for monetary relief, plaintiff Steven E. Gerrard contends that defendant George M. Daley, M.D., violated his rights under the Eighth Amendment and state law by failing to authorize the necessary medical testing to diagnose plaintiff with cancer before it was no longer treatable. Plaintiff is an inmate at Fox Lake Correctional Institution in Fox Lake, Wisconsin. In an order entered July 24, 2000, I stayed a decision whether to allow plaintiff to proceed in order to allow him additional time to submit proof of administrative exhaustion, following the Seventh Circuit's directive that "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed." Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v. Helman, 196 F.3d 727 (7th Cir. 1999). In plaintiff's response to the July 24 order, he argued that he was not required

to file a grievance with the inmate complaint review system because he had satisfied the requirement in § DOC 310.08(4) that “[h]ealth care and psychiatric complaints shall be directed to the director of the bureau of health services or designee.” In an order entered August 9, 2000, I again stayed the decision whether to allow plaintiff to proceed in order to allow defendant Daley to submit a response to plaintiff's proof of exhaustion. Defendant has now submitted a response to the August 9 order.

Defendant contends that plaintiff has failed to exhaust his available administrative remedies for three reasons. First, defendant contends that plaintiff was required to file a complaint under the inmate complaint review system in which he alleged inadequate medical care. (The parties do not dispute that plaintiff did not file a complaint under the inmate complaint system.) In support of his argument, defendant points to the requirement in Wis. Admin. Code § DOC 310.04 that “[b]efore an inmate may commence a civil action . . . the inmate shall file a complaint under §§ DOC 310.09 or 310.10, receive a decision on the complaint under § DOC 310.12, have an adverse decision reviewed under § DOC 310.13, and be advised of the secretary's decision under § DOC 310.14.” Second, defendant contends that Dr. Lloren's two requests for defendant Daley's authorization of certain tests do not constitute inmate complaints under §§ DOC 310.09 or 310.10 because they were not filed on inmate complaint forms and they were not signed by the complaining inmate. See § DOC 310.09(1)

(“An inmate or group of inmates who file a complaint shall file the complaint in writing on forms supplied for that purpose and the inmate or all members of the group shall sign the complaint.”) Third, defendant contends that he is not the appropriate person to review health care complaints because such complaints are reviewed by “the director of the bureau of health services” see § DOC 310.08(4), who is currently Sharon Zunker.

After reviewing defendant's response and the applicable regulations, I am convinced that § DOC 310.08(4) does not set forth an exception to § DOC 310.04's exhaustion requirement. Rather, § DOC 310.08(4) specifies who reviews complaints relating to health and psychiatric care and “complaints” in § DOC 310.08(4)'s provision for “[h]ealth care and psychiatric complaints” refers to complaints filed under the inmate complaint review system under §§ DOC 310.09 or 310.10. I conclude that plaintiff was required to file an inmate complaint under § DOC 310.09 in which he complained of inadequate medical care and that he failed to do so. Therefore, his complaint must be dismissed for his failure to exhaust his available administrative remedies.

#### ORDER

IT IS ORDERED that this case is DISMISSED for plaintiff Steven Gerrard's failure

to exhaust his administrative remedies on the claims raised in this complaint.

Entered this 21st day of August, 2000.

BY THE COURT:

BARBARA B. CRABB  
District Judge