IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TONIE CURTIS COTTON,

Plaintiff,

v.

PHIL KINGSTON, TIMOTHY DOUMA and PAT SIEDSCHLAG,

Defendants.

OPINION AND ORDER

03-C-468-C

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This is a civil action for monetary relief, brought under 42 U.S.C. § 1983. Plaintiff Tonie Curtis Cotton is confined at the Columbia Correctional Institution in Portage, Wisconsin. He contends that his Eighth Amendment rights were violated by defendants Phil Kingston and Timothy Douma when they imposed bag lunch restrictions on him and provided him lunches with inedible and rotten food and when they imposed a "sharps" restriction on him that included the withholding of personal hygiene items while he was in segregation. He contends that defendants Kingston and Pat Siedschlag violated the Eighth Amendment when they denied him his niacin prescription on two occasions, once in July 2003 and again in September 2003. Jurisdiction is present. 28 U.S.C. § 1331.

Presently before the court are the parties' cross motions for summary judgment. Because I conclude that plaintiff has failed to exhaust his administrative remedies as to his "sharps" restriction claim, I will grant defendants' motion for summary judgment and deny plaintiff's motion as to that claim. I conclude that although plaintiff exhausted his administrative remedies regarding the bag lunch issue, he has failed to show that the quality and quantity of the bag lunches he received were so poor that his health was threatened. In addition, I conclude that plaintiff has failed to put in any evidence to show any deliberate indifference on the part of defendants Kingston and Siedschlag concerning the denial of his niacin prescription. Therefore, I will grant defendants' motion for summary judgment with respect to the bag lunch and niacin prescription claims and deny plaintiff's motion as to those claims.

From the parties' proposed findings of fact and the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. The Parties

Plaintiff Tonie Curtis Cotton is an inmate of the Columbia Correctional Institution in Portage, Wisconsin. Defendant Phil Kingston is the warden of the institution, responsible for implementing all Department of Corrections policies and directives and legislative and

judicial mandates. Defendant Timothy Douma is the security director; he is responsible for developing, implementing and monitoring institution goals, policies and procedures as part of the institution management team. Defendant Pat Siedschlag is the nursing supervisor of the health services unit.

On July 15, 2003, plaintiff was issued Adult Conduct Report #1220213 for violating Wis. Admin. Code § DOC 303.45 (possession, manufacture and alteration of weapons) and conduct report #1513910 for violating § DOC 303.24 (disobeying orders), § DOC 303.25 (disrespect) and § DOC 303.28 (disruptive conduct). On July 16, 2003, after reviewing these charges against plaintiff, defendant Douma issued a bag lunch and sharps restriction for plaintiff. Defendant Kingston did not order these restrictions and he was not aware that plaintiff was placed on them.

A step review team reviewed the bag lunch restriction on a weekly basis; clinical and security staff reviewed the sharps restriction on a weekly basis. During the due process hearing on August 3, 2003, plaintiff was found guilty of all charges in conduct report ## 1220213 and 1513910.

On August 3, 2003, plaintiff filed a complaint, CCI-2003-26471, regarding the issue of bag meals, stating that on numerous occasions the bag lunches contained spoiled meats, old and mildewed breads and rotten fruits. The institution complaint examiner dismissed plaintiff's complaint because plaintiff never mentioned any problems with his meals to unit

staff. Plaintiff appealed the dismissal on August 10, 2003. The corrections complaint examiner and the Office of the Secretary of the Department of Corrections upheld the dismissal. As security director, defendant Douma was not aware of any complaints from plaintiff with respect to the quality or quantity of the bag lunches.

Plaintiff filed offender complaint CCI-2003-25853 on July 30, 2003, complaining that on July 18, 2003 and July 22, 2003, he had submitted requests to the health services unit to obtain refills of the niacin medication that had been prescribed to him for high cholesterol, but had not received the medication. On August 5, 2003, the institution complaint examiner rejected plaintiff's complaint as moot. According to the health services unit, plaintiff's prescription had been refilled on July 16, July 22 and July 28, 2003. Plaintiff appealed the rejection of his complaint. On August 21, 2003, defendant Kingston decided that the institution complaint examiner had rejected plaintiff's inappropriately because plaintiff's niacin prescription had not been supplied to him but had been stored with the controlled medications by mistake. He noted that the niacin had been delivered to plaintiff immediately upon discovery of this error. Kingston directed that plaintiff's complaint was to be reopened and dismissed. On August 27, 2003, the institution complaint examiner filed an amended report in which he recommended dismissal of plaintiff's complaint after explaining that the niacin had been stored with plaintiff's controlled medication in error and that it had since been delivered to plaintiff. On September 2, 2003, the appropriate

reviewing authority, Susan Koon, filed an amended decision dismissing plaintiff's complaint "with modification." The modification was intended to document the delay in plaintiff's receipt of his medication. The form on which Koon amended her dismissal is a standard prison form containing language advising the complainant to appeal the decision to a corrections complaint examiner if he is dissatisfied with it by filing a written request for review with the corrections complaint examiner on form DOC-405 within 10 calendar days of Koon's decision. Plaintiff did not appeal the amended decision of CCI-2003-25853 to the corrections complaint examiner.

After plaintiff filed his law suit in this court on September 18, 2003, he filed another complaint, CCI-2003-33110, on October 6, 2003, saying that he had not been receiving his niacin medication because it had been "discontinued" on September 10, 2003. Plaintiff appealed the dismissal of that complaint to the corrections complaint examiner. The Office of the Secretary dismissed this complaint on October 30, 2003.

Also, after he filed his law suit in this court, plaintiff filed inmate complaint CCI-2203-35093 on October 23, 2003, complaining that on July 16, 2003, he was on a "sharps" restriction and that prison staff were not responding to his request for personal hygiene items such as deodorant, lotion, toothpaste and toothbrush while he was in segregation. This complaint was ultimately dismissed as having been filed beyond the 14-day time period for filing a complaint.

OPINION

A. Exhaustion of Administrative Remedies

The initial question is whether plaintiff has exhausted his administrative remedies as he is required to do under the 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) ("No 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 court has no authority to resolve a prisoner's suit on its merits if the suit is filed before the prisoner exhausted his administrative remedies. Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v. Helman, 196 F.3d 727, 733 (7th Cir. 1999). Exhaustion requires compliance with the procedural requirements of the system, Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002) ("unless the prisoner completes the administrative process by following the rules the state has established for that process, exhaustion has not occurred"), even if the prisoner cannot achieve an effective response through the system. Massey, 196 F.3d at 733.

Under Wis. Admin. Code DOC ch. 310, prisoners start the complaint process by filing an inmate complaint with the *institution* complaint examiner. They may appeal adverse decisions to either the appropriate reviewing authority for "rejected" complaints, Wis. Admin. Code § DOC 310.11(6), or to a *corrections* complaint examiner for other complaints.

Wis. Admin. Code § DOC 310.13. According to the code, a complaint may be rejected for various reasons: the inmate does not raise a significant issue, the inmate does not allege sufficient facts; the complaint is untimely; the issue raised in the complaint does not affect the inmate personally; the issue is moot; the complaint was filed solely for harassment purposes; the issue has been addressed previously; or the issue is not within the scope of the Inmate Complaint Review System. Wis. Admin. Code § 310.11(5). Rejected complaints cannot be appealed to a corrections complaint examiner.

If the inmate appeals a complaint decided on its merits to a corrections complaint examiner and receives an adverse decision, the inmate may appeal to the Secretary, Department of Corrections. Wis. Admin. Code § DOC 310.14. The secretary must decide the appeal with 45 working days of the acknowledgment of receipt. If he does not and if he does not extend the time for doing so, the inmate can consider his administrative remedies exhausted. Wis. Admin. Code § DOC 310.14(3).

In contending that defendant has not exhausted his administrative remedies. defendants raise a novel issue. Unfortunately, they limit their discussion of the issue to one sentence, saying only that plaintiff did not appeal his first complaint of not receiving niacin to the Corrections Complaint Examiner. This provides so little help in deciphering the contours of their argument, let alone providing support for the argument, that it would be reasonable to consider the issue waived. Given the importance of exhaustion in prisoner

cases, however, I will address what I think is their argument.

Defendants may be arguing that for exhaustion purposes it was not enough that plaintiff received a positive response to his complaint in the form of immediate delivery of his niacin once Warden Kingston had reviewed plaintiff's complaint and had decided it had been rejected erroneously by the institution complaint examiner; in addition, plaintiff should have appealed this decision to the secretary of the department, if he wanted to bring a court action for money damages for the withholding of the niacin. Alternatively, defendants may be arguing that plaintiff should have appealed Susan Koon's decision to dismiss his complaint with modification after the institution complaint examiner had filed an amended reporting recommending dismissal on the ground that the complaint had been resolved by the delivery of the niacin to plaintiff. It is undisputed that the form that Koon used contains language advising complainants that they should appeal to a corrections complaint examiner if they are dissatisfied with a decision.

Defendants do not explain why a prisoner would think he had to continue to appeal a complaint after he prevailed and was granted relief, why prison officials would want to deal with appeals of complaints that have been resolved or what provision in the Wisconsin Administrative Code or in any other rule or regulation relating to the exhaustion of administrative remedies would require further appeal of a positive outcome or a ministerial order complying with the warden's directive. If they think that this court has sufficient

imagination to posit its own explanations, they are mistaken.

As plaintiff points out, DOC ch. 310 provides no avenue for appealing a positive outcome and it does not allow an inmate to appeal a complaint to a corrections complaint examiner if the complaint has been held to be moot. If the Department of Corrections considers that exhaustion is not complete for litigation purposes unless and until a satisfied prisoner has "appealed" the positive resolution of his complaint, it must make its view explicit and advise prisoner complainants that they will not be held to have exhausted their remedies until they have appealed positive as well as negative outcomes and it must advise inmates of the further levels to which such appeals are to be taken. In the absence of any showing that the department has made its view clear on this point, I conclude that plaintiff has exhausted his administrative remedies as to his first complaint that he was denied his niacin.

As to plaintiff's personal hygiene claim regarding the withholding of personal hygiene items while he was on a sharps restriction and his second complaint about failing to receive his prescribed niacin, I conclude that plaintiff may not proceed because he brought this lawsuit before he had exhausted his administrative remedies on those claims. It is undisputed that plaintiff filed this lawsuit on September 18, 2003, and that he did not file a complaint related to the second instance of non-delivery of his niacin until October 6, 2003 and he did not file any complaint related to his personal hygiene claim until October

23, 2003. Therefore, under Perez, 182 F.3d at 535, this court lacks discretion to resolve these claims on their merits.

Plaintiff argues that he had attempted to file complaints about the personal hygiene issue earlier, but that the institution complaint examiner did not acknowledge or answer those complaints. He admits, however, that other than his complaint addressing bag meals, his complaint addressing the September non-delivery of his niacin prescription and the complaint addressing the withholding of his personal hygiene items, he did not file any other inmate complaints relating to any of the issues he has raised in this lawsuit. Accordingly, I will grant defendants' motion for summary judgment and deny plaintiff's motion as to these claims. I note that a dismissal for failure to exhaust is always without prejudice, which means that plaintiff is free to file a new suit raising these claims after he has exhausted his administrative remedies.

B. Bag Lunches

Defendants admit that plaintiff exhausted his administrative remedies with respect to his bag lunch claim and that the court has the authority to resolve this issue on its merits. They argues the resolution should be in defendants' favor because defendants Kingston and Douma were not personally involved in deciding the quality or quantity of plaintiff's bag lunches. My reading of plaintiff's allegations and arguments is that he is not arguing that

the bag lunch restriction itself was unconstitutional, but that the inedible food that made up the bag lunches violated his Eighth Amendment rights.

In order to state a claim under the Eighth Amendment, plaintiff's allegations about prison conditions must satisfy a test that involves both an objective and subjective component. Farmer v. Brennan, 511 U.S. 825, 834 (1994). He must show that the conditions to which he was subjected were "sufficiently serious" (objective component) and that defendants were deliberately indifferent to his health or safety (subjective component). Id. At this stage of the proceedings, plaintiff must show that he can come forward at trial with enough evidence to allow a jury to find in his favor. For his bag lunch claim, plaintiff would have to have evidence of the dates on which his bag lunches contained inedible or rotten food, the specific foods that were inedible, what ill effects to his health he suffered as a result of the spoiled food, if any, who prepared his food for him and whether the preparer and any other persons knew that the lunches contained spoiled food but were indifferent to the effect the rotten food would have on plaintiff. Despite this evidentiary burden that he must meet, the only "evidence" plaintiff has submitted is his inmate complaint in which he claims that he received "spoiled meats and old and mildewed breads and rotten fruits" on "numerous occasions."

Plaintiff's proposed facts do not establish even that he was on a bag lunch restriction, much less that the contents of his bag lunches subjected him to sufficiently serious

conditions as to violate the Eighth Amendment. Plaintiff did not propose any facts about whether he became ill from the bag lunches, whether he advised any of the defendants about the problem or whether the defendants refused to replace his bag lunch with food that was not spoiled. Plaintiff made some statements of a factual nature in his brief about how the bag lunches affected his health and well-being, but as plaintiff was advised before he filed his motion for summary judgment, this court will not consider proposed facts that are contained only in a brief. Procedure to be Followed on Motions for Summary Judgment I(B)(4). Without any admissible evidence on these points, a reasonable jury could not find that defendants subjected plaintiff to conditions that violate the Eighth Amendment by keeping him on a bag lunch restriction. Therefore, I will grant defendants' motion for summary judgment and deny plaintiff's motion as to the bag lunch claim.

C. Niacin Prescription

Plaintiff exhausted his administrative remedies with respect to the non-delivery of his niacin prescription in July 2003 incident. Therefore, this claim is properly before the court and may be resolved on its merits. Perez, 182 F.3d at 535. The deliberate refusal to provide an inmate with prescribed medication can violate the Eighth Amendment. Walker v. Benjamin, 293 F.3d 1030, 1040 (7th Cir. 2002). The significant adjective is "deliberate." Mere negligence does not violate the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97,

104 (1976). An official is deliberately indifferent when he knows of and disregards an excessive risk to an inmate's health or safety. Farmer v. Brennan, 511 U.S. 834, 837 (1994). An official must have actual knowledge of a substantial risk before he can be found deliberately indifferent. Id. at 839-42. Such knowledge may be inferred from the fact that the risk was obvious. Id.

It is undisputed that in his August 21, 2003 response to plaintiff's complaint concerning the July non-delivery of his niacin, defendant Kingston admitted that plaintiff's niacin prescription had been misplaced with the controlled medications and that plaintiff had since received his medication. Plaintiff submitted no evidence that would tend to show that either defendant Kingston or Siedschlag refused deliberately to provide the medication to plaintiff. At most, the undisputed facts suggest that the delay in providing plaintiff his medication was a mistake. Inadvertent error, negligence or even ordinary malpractice do not violate the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996).

I conclude that plaintiff has failed to meet his burden of showing deliberate indifference on the part of defendants Kingston and Siedschlag and will grant defendants' motion for summary judgment at to this claim and deny plaintiff's motion.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Phil Kingston, Timothy Douma and Pat Siedschlag motion for summary judgment is GRANTED as to plaintiff Tonie Curtis Cotton's personal hygiene claim and his claim that he was denied his prescribed niacin in September 2003 for plaintiff's failure to exhaust his administrative remedies. Plaintiff's motion for summary judgment as to those claims are DENIED;

2. Defendants' motion for summary judgment regarding plaintiff's bag lunch claim is GRANTED and plaintiff's motion is DENIED;

3. Defendants' motion for summary judgment regarding plaintiff's July 2003 niacin prescription claim is GRANTED and plaintiff's motion is DENIED;

4. The clerk of court is directed to enter judgment for defendants without prejudice as to plaintiff's claims regarding the non-delivery of his niacin in September 2003 and his claim that he was denied personal hygiene items in July 2003 and with prejudice as to plaintiff's claims that he was denied niacin in July 2003 and was provided bag lunches with inedible and rotten food prior to August 2003 and the clerk is to close this case.

Entered this 4th day of September, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge