IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROBERT D. WHEELER,

Plaintiff,

v.

RON KOLLMAN,

Defendant.

OPINION AND ORDER

03-C-576-C

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This is a civil action brought pursuant to 42 U.S.C. § 1983. Plaintiff Robert Wheeler, an inmate at Fox Lake Correctional Institution in Fox Lake, Wisconsin, contends that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment. Specifically, plaintiff contends that defendant used excessive force against him when defendant struck him in the mid-section while the two were working in the maintenance department tool crib at Stanley Correctional Institution. In an order dated November 14, 2003, I granted plaintiff leave to proceed in forma pauperis on this claim.

Presently before the court is defendant's motion to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6). Defendant contends that plaintiff failed to properly

exhaust his administrative remedies prior to filing suit as required by 42 U.S.C. § 1997e(a). In support of his motion, defendant has submitted an affidavit and several documents relating to plaintiff's efforts to exhaust his remedies within the Department of Corrections inmate complaint review system. Plaintiff has submitted additional documents in opposition to the motion. I can consider the parties' documentation without converting the motion to dismiss into a motion for summary judgment because the documentation of a prisoner's use of the inmate complaint review system is a matter of public record. See Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 455 (7th Cir.1998); General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir.1997). For the reasons stated below, I conclude that plaintiff has failed to properly exhaust his administrative remedies as to his Eighth Amendment claim. Accordingly, I will grant defendant's motion to dismiss this case.

A motion to dismiss will be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. Cook v. Winfrey, 141 F.3d 322, 327 (7th Cir.1998) (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). For the purpose of deciding defendant's motion, I accept as true the factual allegations in plaintiff's complaint.

FACTS

On the morning of August 1, 2003, defendant struck plaintiff in the mid-section while the two were sorting through orange work jerseys in the maintenance tool crib at Stanley Correctional Institution.

Approximately one week later, plaintiff was placed in temporary lockup status pending an investigation for possible threats to another inmate. While he was in temporary lockup, plaintiff wrote a note to Sgt. Berseth, describing the incident involving defendant. Shortly thereafter, Deputy Warden Randy Hepp ordered building and grounds superintendent Jim Gilbertson and Lt. Jensen to investigate the note because, under Wis. Admin. Code § DOC 303.271, statements made outside the Inmate Complaint Review System that are found to be false constitute the offense of "Lying about Staff." On August 21, 2003, Jensen issued conduct report #1524657, charging plaintiff with "Lying about Staff."

On August 25, 2003, plaintiff filed an inmate complaint with the Inmate Complaint Examiner, who rejected the complaint immediately as untimely. Wis. Admin. Code § DOC 310.11(5)(d) allows the Institution Complaint Examiner to reject complaints that have not been submitted within 14 calendar days of the alleged incident unless the inmate can show good cause for extending the time limit. On August 26, 2003, plaintiff appealed the rejection of his complaint to Warden Daniel Benik of Stanley Correctional Institution. On

August 29, Warden Benik sent plaintiff a report with his final decision that the Institution Complaint Examiner had acted appropriately in rejecting the complaint as untimely. Wis. Admin Code § 310.11(6).

OPINION

The 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), provides that "[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 Court of Appeals for the Seventh Circuit has held that "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits." 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). In addition, "if a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim." Massey, 196 F.3d at 733. Before filing a civil action, Wisconsin inmates must file a complaint with the inmate complaint examiner under §§ DOC 310.09 or 310.10, receive a decision on the complaint from the appropriate reviewing authority under § DOC 310.12, have an adverse decision reviewed by the

corrections complaint examiner under § DOC 310.13 and be advised of the secretary's decision under § DOC 310.14. Wis. Admin. Code § DOC 310.07.

The facts reveal that plaintiff's complaint was dismissed because it was not filed with the Institution Complaint Examiner within 14 calendar days of the date that the alleged incident took place. "[U]nless [a] prisoner completes the administrative process by following the rules the state established for that process, exhaustion has not occurred." Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir.2002). Defendant argues that this case must be dismissed for plaintiff's failure to exhaust.

I understand plaintiff to be advancing four arguments in opposition to defendant's motion. First, plaintiff contends that he should be allowed to proceed on his claim despite his failure to exhaust because prison officials led him to believe that he had taken the appropriate first step in the administrative process when he passed a note to Sgt. Berseth. Essentially, plaintiff contends that defendant should be estopped from raising the exhaustion defense because prison officials misrepresented the institution's actual complaint procedure. Although other courts have held that equitable estoppel can apply to the Prison Litigation Reform Act's exhaustion requirement, see Wright v. Hollingsworth, 260 F.3d 357, 358 n. 2 (5th Cir. 2001); Rivera v. Goord, 253 F.Supp.2d 735, 746-47 (S.D.N.Y. 2003), the Seventh Circuit has yet to conclude that the exhaustion defense is subject to equitable estoppel. See Lewis v. Washington, 300 F.3d 829, 834 (7th Cir. 2002). Even so, plaintiff

would be unable to satisfy the requirements of this doctrine.

To establish equitable estoppel, the party claiming estoppel must show: (1) a misrepresentation by the opposing party; (2) reasonable reliance on that misrepresentation; and (3) detriment. LaBonte v. United States, 233 F.3d 1049, 1053 (7th Cir. 2000). In addition, when asserting equitable estoppel against the government, one must prove affirmative misconduct. Gibson v. West, 201 F.3d 990, 994 (7th Cir. 2000). Affirmative misconduct "requires an affirmative act to misrepresent or mislead." Id. at 994 (quoting Edgewater Hosp., Inc. v. Bowen, 857 F.2d 1123, 1138 n. 8 (7th Cir. 1988), as amended, 866 F.2d 228 (7th Cir. 1989)).

Plaintiff would not succeed on his equitable estoppel theory because, even if plaintiff's allegations that prison officials misrepresented the institution's complaint procedures are true, plaintiff's reliance on those misrepresentations was not reasonable. A written version of the institution's complaint procedures is made available to all inmates. Wis. Admin. Code § DOC 310.06. The Department of Corrections provides each inmate with written notification and an oral explanation of the complaint procedures. Id. Plaintiff included a copy of the procedures in his response to defendant's motion. Plaintiff is hard pressed to show that his ignorance of these procedures is the result of anything other than his own negligence.

For his second argument, plaintiff contends that the Prison Litigation Reform Act

excludes claims of excessive force from the general rule that a prisoner must exhaust his administrative remedies before commencing suit. For support, plaintiff cites Warren v. Westchester County Jail, 106 F.Supp.2d 559 (S.D.N.Y. 2000)(exhaustion requirement does not apply to excessive force claims). Warren is not controlling in this case and the holding in Warren is no longer good law. In Porter v. Nussle, 534 U.S. 516 (2002), the Supreme Court held that exhaustion is required for all prisoner suits seeking redress for prison circumstances or occurrences regardless whether they allege an Eighth Amendment excessive force claim. Therefore, plaintiff was required to properly exhaust his administrative remedies before seeking relief on his Eighth Amendment claim in federal court.

For his third argument, plaintiff contends that he should be entitled to the good cause exception to the 14-day rule. He argues, "[T]he complaint system has a policy that states it will take a late complaint foe [sic] good cause but it would not accept the Plaintiffs [sic] under the cause ruling as it claims . . . one would think that being struck by [defendant] would certainly warrant the good cause ruling . . . ." It is not this court's place to review the Institution Complaint Examiner's good cause determinations. The only question is whether plaintiff properly exhausted all of his administrative remedies. As I have noted, to do so, a prisoner must file complaints in the place and at the time that the prison's administrative rules require. Pozo, 286 F.3d at 1025. Plaintiff did not file a timely complaint with the Institution Complaint Examiner; therefore, he did not properly exhaust his administrative

remedies. The fact that the Institution Complaint Examiner had the discretion to accept plaintiff's untimely complaint for good cause and chose not to exercise that discretion does not excuse plaintiff from following the rules. If it did, then the incentive that § 1997e(a) provides for prisoners to use the state process would disappear. Id.

Finally, plaintiff contends that he should be excused from exhausting his administrative remedies because the Department of Corrections "is known for not honoring what is brought to their attention." However, "the [Prison Litigation Reform Act] does not condition the applicability of the exhaustion requirement on the effectiveness of the administrative remedy available in a given case." Massey, 196 F.3d at 733. The Court of Appeals for the Seventh Circuit has made it clear that "[t]here is no futility exception to § 1997e(a)," Perez, 182 F.3d at 537; see also Massey, 196 F. 3d at 733. "The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures." Massey, 196 F.3d at 733. Even if plaintiff suspected that his inmate complaint would not be "honored," he was still required to file his complaint in a timely manner.

In his brief, plaintiff requests that I set aside this ruling for ninety days and order the Department of Corrections to accept his untimely complaint so that he may complete the administrative process. I do not have the authority to do this. Again, prisoners must file complaints in the place and at the time that the prison's administrative rules require. Pozo

286 F.3d at 1025. In this case, the Inmate Complaint Examiner rejected plaintiff's complaint because it was filed after the 14-day deadline and plaintiff failed to show good cause for accepting it. The Inmate Complaint Examiner gave no other ground for rejecting plaintiff's complaint. "[T]here is no doubt about the right treatment when the one and only ground for rejecting a claim or appeal is untimeliness." Id., at 1025. "An unseasonable claim is a defaulted claim." Id. (citing Coleman v. Thompson, 501 U.S. 722, 740-44). Plaintiff cannot ask to start over.

Because I conclude that plaintiff failed to properly exhaust his administrative remedies on his Eighth Amendment claim against defendant, I will grant defendant's motion to dismiss this case. The dismissal will be with prejudice because Warden Benik's decision on the matter was final and, therefore, plaintiff has no opportunity to complete the administrative process.

ORDER

IT IS ORDERED that:

1) Defendant's motion to dismiss this action is GRANTED with prejudice because plaintiff failed to properly exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a).

2) The clerk of court is directed to enter judgment in favor of defendant and close this

case.

Entered this 3rd day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge