

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

DAVID J. CLARK, #215034,

Plaintiff,

v.

SERGEANT SPITTLE,
JOHN DOE SECURITY SUPERVISOR/WARDEN,

Defendants.

ORDER

04-C-119-C

Plaintiff David J. Clark, a prisoner at the Racine Correctional Institution in Sturtevant, Wisconsin, has filed a complaint and paid the filing fee. However, because he is a prisoner, I must screen his complaint pursuant to 28 U.S.C. § 1915A, construing the allegations liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, I must dismiss the action if, even under a liberal construction, the complaint is legally frivolous or malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief. 42 U.S.C. § 1915(e).

From my review of plaintiff's complaint, I conclude that this case may be subject to prompt dismissal. The subject matter of plaintiff's complaint concerns an incident in which

plaintiff's cell mate battered him. Plaintiff contends that defendants were deliberately indifferent to his safety when they placed him in the cell with the inmate, because the inmate was known to be physically violent. On the second page of plaintiff's complaint, he describes the administrative procedure he used to grieve his claim. Plaintiff states that he realized too late that he had sent his appeal to the Corrections Complaint Examiner to the wrong address. He promptly corrected the mistake, but his appeal was dismissed as untimely, despite his explanation for the delay and request that he be allowed to file a late appeal. Thus, plaintiff appears to be conceding in his complaint that his grievance was rejected by prison officials as untimely. If so, plaintiff cannot proceed on his claims.

The Prison Litigation Reform Act requires prisoners to exhaust their administrative remedies before filing an action in federal court. 42 U.S.C. § 1997e(a). To exhaust administrative remedies, a prisoner must observe the procedural requirements of the system. Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002). “[A] prisoner who does not properly take each step within the administrative process has failed to exhaust state remedies, and thus is foreclosed by § 1997e(a) from litigating. Failure to do what the state requires bars, and does not just postpone, suit under § 1983.” Id. at 1024.

Because plaintiff's grievance was dismissed as untimely, he has not properly taken each step within the administrative process and has not exhausted his administrative remedies. Although failure to exhaust administrative remedies is an affirmative defense, the

Court of Appeals for the Seventh Circuit has held that courts have discretion to raise affirmative defenses on their own. Gleash v. Yuswak, 308 F.3d 758, 760-61 (7th Cir. 2002). In Walker v. Thompson, 288 F.3d 1005, 1009-10 (7th Cir. 2002), the court held that a court may dismiss a claim if it is plain from the face of the complaint that the plaintiff failed to exhaust his administrative remedies. In this case, plaintiff has admitted in his complaint that his grievance was dismissed as untimely. However, he may have until April 29, 2004, in which to inform the court whether it has misconstrued his statements about his efforts to exhaust his administrative remedies. If plaintiff does not respond by that date with a showing that his claim in this lawsuit was considered administratively on its merits through the entire administrative procedure, this case will be dismissed.

ORDER

IT IS ORDERED that plaintiff David J. Clark may have until April 29, 2004, in which to inform the court that it has misconstrued his statements that his appeal to the Corrections Complaint Examiner was dismissed as untimely. If plaintiff does not respond

by that date, the clerk of court is directed to enter judgment dismissing this case for plaintiff's failure to exhaust his administrative remedies.

Entered this 6th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge