

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

JOEL FLAKES,

Plaintiff,

v.

MATTHEW FRANK, CORRECTIONS
CORPORATION OF AMERICA, JANE
SONDALLE, LAWRENCE DAKEN,
CYNTHIA NEUHAUSER and PEGGY
MEYER,

Defendants.

OPINION AND
ORDER

04-C-189-C

This is a civil action brought under 42 U.S.C. § 1983 in which plaintiff Joel Flakes alleges that (1) defendant Corrections Corporation of America's policies deprived him of a cane, double mattresses, a chair and hip replacement surgery in violation of his Eighth Amendment rights; (2) defendant Jane Sondalle retaliated against him for exercising his First Amendment right to file a grievance by (a) directing staff to harass him; (b) refusing him assistance in moving about the prison; and (c) arranging for him to go to the Health Services unit to shower; (3) defendant Sondalle discriminated against plaintiff because of his race by not assigning him an aide; (4) defendant Lawrence Daken retaliated against him for

exercising his First Amendment right to file a grievance by refusing to retrieve a shower chair for him; (5) defendant Peggy Meyers retaliated against him for exercising his First Amendment right to file a grievance by denying him job opportunities; (6) defendant Cynthia Neuhauser deliberately refused to arrange for plaintiff to have hip surgery despite his treating physician's approval of the surgery; and (7) defendant Frank violated plaintiff's rights under the Americans with Disabilities Act of 1990 by (a) allowing him to be confined to a handicap cell at the Stanley Correctional Institution that lacked the amenities of a regular cell; (b) failing to arrange for recreational activities and programming for handicapped individuals; and (c) failing to arrange for plaintiff to receive the services of an aide while he was confined at the Oshkosh Correctional Institution.

Now before the court is defendants' motion to dismiss one of plaintiff's retaliation claims against defendant Sondalle, two of his Americans with Disabilities Act claims and all of claims three, four, five and six for plaintiff's failure to exhaust his administrative remedies. For the reasons explained below, I will grant defendants' motion to dismiss. In addition, I will lift the stay on discovery that was imposed pending the resolution of this motion. (In their brief in support of their motion, defendants question whether plaintiff has adequately stated some of the claims on which I allowed him to proceed. However, defendants have not formally moved for reconsideration. Therefore, I will disregard these suggestions. In any event, these arguments relate to claims that will be dismissed for failure to exhaust.)

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 “[e]xhaustion of administrative remedies, as required by § 1997e, is a condition precedent to suit” and that district courts lack discretion to decide claims on the merits unless the exhaustion requirement has been satisfied. Dixon v. Page, 291 F.3d 485, 488 (7th Cir. 2002); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999).

“[I]f 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 v. Helman, 196 F.3d 727, 733 (7th Cir. 1999). Exhaustion has not occurred unless an inmate follows the rules that the state has established governing the administrative process. Dixon, 291 F.3d at 491; Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). Wisconsin inmates have access to an administrative grievance system governed by the procedures set out in Wis. Admin. Code §§ DOC 310.01-310.18. Under these provisions, prisoners start the complaint process by filing an inmate complaint with the institution complaint examiner. 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 corrections complaint examiner considers a complaint on its merits but denies the inmate relief, the inmate may appeal to the Secretary of the 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). Administrative remedies will be deemed exhausted if the Secretary decides to uphold the complaint examiner's recommendation.

In support of their motion to dismiss, defendants submitted documents relating to plaintiff's exhaustion efforts within Wisconsin's inmate complaint review system. Because documentation of a prisoner's use of the inmate complaint review system is a matter of public record, these documents may be considered without converting the motion to dismiss into a motion for summary judgment. 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). I have reviewed the inmate complaints plaintiff filed during the relevant time period and agree with defendants that plaintiff did not raise the following claims in any of the complaints that he appealed: defendant Sondalle retaliated against him by forcing him to shower on the Health Services Unit and discriminated against him by denying him an aide; defendant Daken retaliated against him by refusing to retrieve a shower chair for him; defendant Meyers retaliated against him by denying him job opportunities; defendant Neuhauser deliberately refused to arrange for plaintiff to have hip surgery; and defendant Frank failed to arrange for recreational activities and programming for handicapped individuals. (Although plaintiff filed a complaint related to his claim against defendant Daken, SCI-2003-3309, he did not appeal its denial and thus, did not exhaust administrative remedies.)

It is a closer question whether plaintiff exhausted administrative remedies with respect to his claim that defendant Frank allowed him to be housed in a cell for the handicapped at the Stanley Institution that lacked the amenities of a regular cell presents a closer case. I granted plaintiff leave to proceed on this claim based on his allegations that handicapped cells do not have a television stand, cable television or a writing desk, which are standard in regular cells. Plaintiff filed an inmate complaint regarding these particular disparities, SCI-2003-3064, but did not appeal it. In one of the complaints he did exhaust, SCI-2003-35145, plaintiff complained that unlike standard cells, the cells for the

handicapped had leaks that allowed in cold air and rain. Although plaintiff complained generally about unequal cell conditions in SCI-2003-35145, the purpose of the exhaustion requirement is to allow prison officials an opportunity to resolve the complaint without judicial intervention. Perez, 182 F.3d at 537-38 (7th Cir. 1999) (exhaustion serves purposes of “narrow[ing] a dispute [and] avoid[ing] the need for litigation”). Because plaintiff did not mention the absence of a television stand, cable access or a writing desk in SCI-2003-35145, he did not provide prison officials with fair notice of that claim and did not satisfy the PLRA’s administrative exhaustion requirements. Accordingly, defendants’ motion will be granted with respect to this claim as well.

Plaintiff does not contend that he exhausted his administrative remedies related to any of these claims. Instead, he argues that 42 U.S.C. § 1997e(a) does not apply to this case because he filed it in state court. (Defendants removed the case to this court.) The Prison Litigation Reform Act’s exhaustion requirement applies to all claims relating to prison conditions brought under 42 U.S.C. § 1983 or any other federal law by an inmate, regardless whether the inmate files his claim in state or federal court. Plaintiff’s claims arise under 42 U.S.C. § 1983 and the Americans with Disabilities Act, a federal law; the forum in which plaintiff chose to bring these claims is largely immaterial. Felder v. Casey, 487 U.S. 131, 148 (1988) (“The dominant characteristic of a § 1983 action, of course, does not vary depending upon whether it is litigated in state or federal court.”); Western Securities Co. v.

Derwinski, 937 F.2d 1276, 1279 (7th Cir.1991) (“If a case is removed to a court that has original jurisdiction over the type of case, and no objection to removal is lodged, it is as if the plaintiff had sued in the federal district court in the first place.”). Had defendants not removed this case to federal court, the Wisconsin state court would have been bound to enforce the exhaustion requirement as well. E.g., State ex rel. Ledford v. Circuit Court for Dane County, 228 Wis.2d 768, 769, 599 N.W.2d 45, 46 (Ct. App. 1999).

Alternatively, plaintiff contends that even if the exhaustion requirement does apply, he provided defendants with notice of his claims by making a complaint to defendant Frank, the Secretary of the Wisconsin Department of Corrections. As I have already explained, when an internal administrative grievance system exists, as it does in Wisconsin’s prisons, an inmate must accomplish exhaustion through that system and comply with all of its governing procedures. Pozo, 286 F.3d at 1025. Under Wisconsin’s inmate grievance system, prisoners are to file their complaints with the institution complaint examiner in the first instance, a corrections complaint examiner as a second step and appeal to the Secretary only if and when the corrections complaint examiner recommends an outcome adverse to the inmate. Plaintiff did not utilize the appropriate procedure. He filed his complaint with defendant Frank directly, skipping over the institution complaint examiners. “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.” Pozo, 286 F.3d at

1024. Accordingly, whatever claims plaintiff may have raised in his complaint to defendant Frank have not been exhausted under § 1997e(a).

ORDER

IT IS ORDERED that defendants' motion to dismiss for plaintiff Joel Flakes's failure to exhaust his administrative remedies is GRANTED and the following claims are DISMISSED:

(1) Defendant Jane Sondalle retaliated against plaintiff by forcing him to shower on the Health Services Unit in violation of his First Amendment rights;

(2) Defendant Sondalle discriminated against plaintiff on the basis of his race by denying him an aide;

(3) Defendant Lawrence Daken retaliated against plaintiff by refusing to retrieve a shower chair for him;

(4) Defendant Peggy Meyers retaliated against plaintiff by denying him job opportunities;

(5) Defendant Cynthia Neuhauser deliberately refused to arrange for plaintiff to have hip surgery; and

(6) Defendant Matthew Frank violated the Americans with Disabilities Act by allowing plaintiff to be confined to a cell for the handicapped at the Stanley Correctional

Institution that lacked the amenities of a regular cell and failed to arrange for recreational activities and programming for handicapped individuals.

FURTHER, IT IS ORDERED that the stay on discovery previously imposed in this case is LIFTED.

Entered this 26th day of May, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge