

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

SHAWN MCGARVEY,

Plaintiff,

v.

THOMAS BORGAN
ANDREW BATH
BRIAN DOMMISSE,

Defendants.

OPINION AND
ORDER

04-C-0269-C

In this civil action for monetary relief, plaintiff Shawn McGarvey, an inmate confined at the Fox Lake Correctional Institution, contends that in the summer of 2003, certain prison officials violated his constitutional rights. He alleges that 1) defendant Brian Dommisse retaliated against him for refusing to sign a waiver of work restrictions by issuing him a conduct report; 2) defendants Dommisse, Thomas Borgan and Andrew Bath retaliated against him for writing a letter to a congressman; and 3) defendants Dommisse, Borgan and Bath violated his Eighth Amendment rights by cancelling his scheduled appointments with a physician and discontinuing his prescribed treatment for a work injury. The case is now

before the court on defendants' motion to dismiss for plaintiff's failure to exhaust his administrative remedies within the prison system, as required under 42 U.S.C. § 1997e(a).

In deciding a motion to dismiss for failure to exhaust, a court may take judicial notice of public records, such as inmate grievance records, without converting the motion to dismiss into a motion for summary judgment. Henson v. CSC Credit Services, 29 F.3d 280, 284 (7th Cir. 1994). In addition, the court may look to the well-pleaded allegations of the complaint.

DISCUSSION

Under 42 U.S.C. §1997e(a), a plaintiff must exhaust those administrative remedies that are available to him before bringing an action under 42 U.S.C. § 1983 with respect to prison conditions. To exhaust administrative remedies, "a person must follow the rules governing filing and prosecution of a claim." Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). Wis. Admin. Code § DOC 310.04 sets forth the requirements that inmates must follow when filing a complaint: "Before 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." The Court of Appeals for the Seventh Circuit has held that exhaustion is an affirmative defense that the defendants

have the burden of pleading and proving. Massey v. Helman, 96 F.3d 727, 735 (7th Cir. 1999).

In support of their motion to dismiss, defendants have submitted the affidavit of John Ray, who is the custodian of records for appeals filed by inmates in the Inmate Complaint Review System. In his affidavit, Ray avers that a true and correct copy of all the inmate complaints that plaintiff has filed since being placed at the Fox Lake Correctional Institution on February 20, 2003, is attached to his affidavit. According to plaintiff's complaint, all of his claims stem from incidents that took place after he was placed at Fox Lake. Defendants argue that plaintiff did not raise either of his retaliation claims in any of the offender complaints attached to Ray's affidavit. With respect to plaintiff's Eighth Amendment claim, defendants concede that plaintiff did file offender complaint FLCI-2003-29060, in which he complained that he was being denied workmen's compensation and that defendant Bath cancelled medical appointments and physical therapy for a "work-related injury." However, defendants argue that in offender complaint FLCI-2003-29060, plaintiff did not allege that defendant Bath cancelled any medical appointments or treatments for his broken thumb. Although I agree that plaintiff failed to exhaust his retaliation claims, I do not agree that he failed to exhaust his claim regarding the denial of medical care.

A. Exhaustion of Eighth Amendment Claim

In offender complaint FLCI-2003-29060, plaintiff does not describe the specific nature of his injury. The entirety of FLCI-2003-29060 reads as follows:

On Mon. 8-25-03 Sgt. Andy Bath called me into his office, before I left for work at 6:45am, At this time he stated to me that workmans compensation had denied my claims for my work related injury, and that he was cancelling all my medical appointments and my physical therapy that my doctor set up for me on 8-22-03. I wasn't given any paperwork to my claim being denied by Sgt. Bath, my employer or from workmans comp. When I ask them about this at work, Tim Lont (safety coordinator) stated to me that Sgt. Bath was contacting my workmans comp claims Adjuster as well as the company's corporate office, and my doctors office about my claim, I would like to know how a D.O.C. officer can legally interfere with a workmans comp. claim? in the mean time I am being denied to get the medical attention my doctor prescribed for my work related injury!

Although plaintiff did not specifically identify a body part, plaintiff does allege cancellation of subsequent medical appointments for his "work-related injury." According to his complaint, plaintiff's work-related injury includes his broken thumb. Wis. Stat. § DOC 310.09(e) requires inmates to "clearly identify the issue" when submitting inmate complaints. In both his complaint in this case and offender complaint FLCI-2003-29060, plaintiff complained about the cancellation of his prescribed treatment plan; identifying the specific body part that was injured is not necessary in order to "clearly identify the issue" of inadequate medical treatment. Through the offender complaint, plaintiff gave fair notice to the defendants regarding his desire to proceed with his claim regarding cancelled medical

appointments related to his work-related injury. This court will not parse words over whether the appointments related to a broken thumb or some other aspect of plaintiff's "work-related injury."

Plaintiff has put forth additional evidence showing that he exhausted administrative remedies completely with respect to this inmate complaint. This evidence includes the inmate complaint examiner recommendation, the reviewer's decision, the request for review, the corrections complaint examiner recommendation and the secretary's decision. Because plaintiff pursued his claim regarding cancellation of medical appointments through the state's grievance system, I conclude that he has exhausted his administrative remedies on his Eighth Amendment claim in the manner required under 42 U.S.C. § 1997e. Accordingly, defendants' motion will be denied with respect to this claim.

B. Exhaustion of Retaliation Claims

Although plaintiff has submitted many documents, none show that he has exhausted his retaliation claims. Nonetheless, defendants bear the burden of proving failure to exhaust. In this case, they have met that burden. Defendants have submitted all of plaintiff's inmate complaints during the relevant time period and none addresses plaintiff's retaliation claims. Because plaintiff failed to file an offender complaint alleging retaliation for the exercise of his constitutional rights, I conclude that he has failed to exhaust his administrative remedies

in the manner required under 42 U.S.C. § 1997e concerning his two claims of retaliation. Accordingly, defendants' motion will be granted with respect to the two retaliation claims.

ORDER

IT IS ORDERED that the motion of defendants Thomas Borgan, Andrew Bath and Brian Dommissie to dismiss for failure to exhaust administrative remedies is GRANTED with respect to plaintiff Shawn McGarvey's claim regarding the denial of medical care and DENIED with respect to plaintiff Shawn McGarvey's retaliation claims.

Entered this 22nd day of October, 2004.

BY THE COURT:

BARBARA B. CRABB

District Judge