

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

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DANIEL J. HARPER,

Plaintiff,

v.

SERGEANT LAUFENBERG,

Defendant.

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ORDER

04-C-699-C

Plaintiff Daniel J. Harper has been allowed to proceed in forma pauperis in this case on his claim that defendant Sergeant Laufenberg violated his Eighth Amendment rights when Laufenberg failed to place plaintiff under observation status and instead encouraged plaintiff to stab himself and tie a sheet around his neck in an effort to commit suicide. Now before the court is defendant's motion to dismiss plaintiff's claim on the ground that plaintiff failed to exhaust his administrative remedies with respect to that claim as required by 42 U.S.C. § 1997e.

In deciding defendant's motion to dismiss, I have considered the exhibits submitted by the parties documenting the steps plaintiff took to exhaust his administrative remedies. I have not considered plaintiff's sworn statements in his brief or defendant's reply affidavit

because the factual statements made in these documents are not material to the determination whether plaintiff exhausted his administrative remedies.

## FACTS

On January 24, 2003, plaintiff filed a three-page inmate complaint complaining that on January 10, 2003, defendant Laufenberg encouraged him to make an attempt to commit suicide. At the top of his complaint, plaintiff wrote, "This is a medical complaint." Institution Complaint Examiner Glen Ripley received plaintiff's complaint on January 27, 2003. That same day, he returned the complaint to plaintiff with a form DOC-2058 that said, "Your complaint is being returned because of failure to meet the filing requirements as stated in § DOC 310, Wis. Adm. Code." Two boxes on the form are marked with an "x." The first box marked is positioned next to the statement, "[a]n inmate may include only one issue in each complaint (DOC 310.09(1))." The second box marked is positioned next to the word, "Comments." It is followed by a statement saying, "You indicate this is a medical complaint, but you complain about the actions of Sgt. Laufenberg. If you have feelings of killing yourself this is an issue you will have to address with Psychological Services."

On February 12, 2003, plaintiff revised and resubmitted his complaint. On February 13, 2003, Institution Complaint Examiner Glen Riply rejected the complaint as having been filed beyond the 14 calendar day limit. Plaintiff appealed the rejection to the

appropriate reviewing authority on February 14, 2003. On February 19, 2003, Kathleen Bierke issued a decision on plaintiff's appeal stating, "[t]his complaint was appropriately rejected by the ICE in accordance with DOC 310.11(5)."

### OPINION

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), mandates 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 term "prison conditions" is defined in 18 U.S.C. § 3626(g)(2), which provides that "the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." Section 1997(a)'s exhaustion requirement is mandatory and applies to all prisoners seeking redress for wrongs occurring in prison. Porter v. Nussle, 122 S. Ct. 983, 986 (2002).

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 (7th Cir. 1999). 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.

Wis. Admin. Code § DOC 310.04 has certain specific 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." Inmate complaints "are to be filed within 14 calendar days after the occurrence giving rise to the complaint, except that the institution complaint examiner may accept a late complaint for good cause." Wis. Admin. Code § 310.09(6). An inmate shall include only one issue in each complaint. Wis. Admin. Code § DOC 310.09(1). The institution complaint examiner is to return and not process a complaint that includes more than one issue. § DOC 310.09(3).

If an inmate complaint is rejected on the ground that it is untimely, the inmate may appeal the rejection within 10 calendar days to the appropriate reviewing authority "who shall only review the basis for the rejection of the complaint. The reviewing authority's decision is final." Wis. Admin. Code § DOC 310.11(6).

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) (“unless the prisoner completes the administrative process by following the rules the state has established for that process, exhaustion has not occurred”). In Pozo, the court of appeals reasoned that any other approach would defeat the statutory objective of allowing the prison administration the opportunity to fix the problem, id. at 1024, and would remove the incentive that § 1997e provides for inmates to follow state procedure, id. at 1025.

In this case, plaintiff failed to follow state procedure with respect to his claim against defendant Laufenberg. First, he filed a complaint that the institution complaint examiner found to contain more than one issue. When his complaint was returned because it contained more than one issue, plaintiff waited until February 12, 2003 to revise and resubmit it. By this time, the 14 calendar day limit set out in § DOC 310.09(6) had expired and the institution complaint examiner rejected the complaint on this ground. Plaintiff timely appealed the rejection to the appropriate reviewing authority, Kathleen Bierke. In his appeal, plaintiff did not explain why he had waited until the last possible day to file his original inmate complaint, thereby making it impossible for him to resubmit a timely revision after the complaint was returned for failure to comply with the one issue requirement. Moreover, plaintiff did not explain in his appeal why he had waited until February 12, 2003, to revise and refile the complaint. Under these circumstances, it is not surprising that neither the institution complaint examiner nor the appropriate reviewing

authority was inclined to find good cause to excuse plaintiff's late filing.

The Wisconsin Administrative Code makes it clear that inmates may not include more than one issue in each complaint, Wis. Admin. Code § DOC 310.09(1). Plaintiff concedes that his original inmate complaint could be construed to raise more than one issue: a claim relating to his failure to receive mental health treatment for his suicidal thoughts and a claim relating to defendant Laufenberg's alleged insensitive and unprofessional remarks. He argues, however, that because the original complaint was filed within the 14-day period prescribed by the administrative code, his revised complaint filed on February 2, 2003, should have been accepted as dating back to January 24. As interesting as this argument might be, I can find no provision in the Wisconsin Administrative Code that requires an institution complaint examiner to accept a revised complaint filed after the 14-day period prescribed in § DOC 310.09(6) as having been filed on the date the original complaint was submitted or returned.

Because plaintiff has not shown that he followed state procedure and obtained a decision on the merits of his inmate complaint, he has failed to exhaust his administrative remedies as to his claim against defendant Laufenberg. Although the institution complaint examiner had the discretion to accept plaintiff's revised complaint upon a finding of good cause for the late filing, she chose not to exercise that discretion. Nevertheless, plaintiff's case will be dismissed without prejudice. Ford v. Johnson, 362 F.3d 395, 401 (7th Cir.

2004) (all dismissals under § 1997e(a) should be without prejudice, because "[s]tates may allow cure of failure to exhaust or litigation in state court without exhaustion rule").

ORDER

IT IS ORDERED that defendant's motion to dismiss plaintiff's complaint for his failure to exhaust his administrative remedies is GRANTED. The clerk of court is directed to enter judgment dismissing this case without prejudice.

Entered this 6th day of January, 2005.

BY THE COURT:

BARBARA B. CRABB  
District Judge