

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

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LUIS A. RAMIREZ,

Plaintiff,

v.

ANTHONY MELI, MARC CLEMENTS,
TOD RUSSEL, STEVEN SCHUELER,
CURT JANSSEN, BRET MIERZEJEWSKI,
MICHAEL GLAMANN and BRIAN PASSIG,

Defendants.

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OPINION AND ORDER

04-C-786-C

This is a civil action for monetary relief, brought under 42 U.S.C. § 1983. Plaintiff Luis A. Ramirez, a prisoner at Waupun Correctional Institution in Waupun, Wisconsin, is proceeding on four claims: (1) defendants Tod Russel, Bret Mierzejewski, Michael Glamann and Brian Passig used excessive force against him during a January 15, 2002 cell extraction in violation of the Eighth Amendment; (2) defendant Anthony Meli violated plaintiff's Eighth Amendment Rights by failing to prevent the members of the extraction team from using excessive force; (3) defendants Meli and Steven Schueler subjected him to cruel and unusual punishment in violation of the Eighth Amendment by holding him in an extremely

cold cell without clothes; and (4) defendants Schueler, Meli, Russel, Mierzejewski, Glamann and Passig were deliberately indifferent to his serious medical needs after the cell extraction.

The case is now before the court on the motion of defendants Meli, Russel, Schueler, Mierzejewski, Glamann and Passig to partially dismiss the claims against them on the ground that plaintiff failed to exhaust his administrative remedies. Because plaintiff did not file an appeal of his disciplinary sanction, I conclude that he did not exhaust his administrative remedies with respect to his claim that defendants Russel, Mierzejewski, Glamann and Passig used excessive force during a January 15, 2002 cell extraction. For the same reason, I conclude that he did not exhaust his administrative remedies with respect to his claim that defendant Meli failed to intervene after observing prisons officers using excessive force.

Also, because plaintiff never filed a complaint with the Wisconsin Department of Corrections suggesting he had been required to stay in an extremely cold cell without clothes, I conclude that plaintiff did not exhaust administrative remedies on this claim.

In support of their motion to dismiss, defendants submitted documents relating to plaintiff's exhaustion efforts within the inmate complaint review system. Plaintiff submitted additional documentation in opposition to the motion. I can consider this documentation without converting the motion to dismiss into a motion for summary judgment because documentation of a prisoner's use of the inmate complaint review system is a matter of

public record. General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997).

For the sole purpose of deciding defendants' motion to dismiss, I accept as true the allegations in plaintiff's complaint.

ALLEGATIONS OF FACT

Plaintiff Luis A. Ramirez is an inmate at Waupun Correctional Institution in Waupun, Wisconsin. Defendant Anthony Meli is a lieutenant at the Waupun Correctional Institution. Defendants Tod Russel, Bret Mierzejewski, Michael Glamann and Brian Passig are officers at the facility. Defendant Schueler is the head of security for segregation.

On January 15, 2002, officials at Waupun Correctional Institution conducted a cell extraction after plaintiff refused to comply with a request that he "put [his] hands out the trap." Defendant Meli was the supervisor on duty and defendants Russel, Mierzejewski, Glamann and Passig were on the extraction team. Defendant Meli, Russel, Mierzejewski, Glamann and Passig entered plaintiff's cell; all except defendant Meli beat plaintiff, punching him in the nose and ribs and kneeing him in the groin. Meli did not intercede on plaintiff's behalf during the extraction. After plaintiff was removed from his cell, defendant Meli ordered the members of the extraction team to place plaintiff in another cell without any clothes, sheets, blankets, pillows or a mattress. Plaintiff could see his own breath in his cell and had to sleep on the cold floor. He experienced pain in his ribs, face and arm,

numbness in his nose and bleeding in unspecified areas. The morning after the extraction, plaintiff was examined by a doctor and his injuries were photographed. After having seen plaintiff's injuries and a video recording of the extraction, defendant Schueler allowed prison officials to place plaintiff in another cold room wearing only underwear and a tee shirt. Plaintiff was unable to sleep because of the cold temperatures and he did not eat the "seg loaf" he was given.

On January 18, 2002, plaintiff filed inmate complaint WCI-2002-3216. In it he expressed two concerns: (1) some officers had used excessive force while extracting him from his room; and (2) other officers had observed the violent treatment and failed to intervene. Neither in this complaint nor in any other did plaintiff allege that officers had placed him in an unreasonably cold cell after the incident on January 15, 2002.

On February 22, 2002, inmate complaint examiner Amy Fischer "rejected" plaintiff's complaint, stating, "The complainant's behavior on the date listed resulted in him being issued a Conduct Report. The conduct report was heard on 2/5/02 and no appeal has been filed as of yet. The scope of the ICE is limited to a record investigation only and only after the appeal has been filed an answered. This complaint is premature." She indicated on the form that, pursuant to DOC 310.11(6), plaintiff had ten days to appeal the rejection. She added that if plaintiff wished to appeal, he should "complete form DOC 2182 Request for Review of Rejected Complaint and send to [the warden]."

Plaintiff did not appeal this rejection or file a new complaint for two and a half years. On August 17, 2004, the officer reviewing plaintiff's appeal of his rejected complaint dismissed the appeal as untimely.

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 phrase "'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" 18 U.S.C. § 362(g)(2).

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). The court of appeals has held also that "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.

Exhaustion occurs only if “the prisoner completes the administrative process by following the rules the state has established for that process.” Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002),

In November, 2002, the state of Wisconsin revised its administrative code governing inmate complaints in November, 2002. Before this date, the procedure for challenging prison conditions, rules or staff action was as follows:

First, an inmate could file a complaint within fourteen calendar days of the occurrence giving rise to complaint. § DOC 310.09(3). However, he or she was required to postpone the filing of the complaint if the issue related to the “subject matter of a conduct report that ha[d] not been resolved through the disciplinary process in accordance with ch. DOC 303.” § DOC 310.08(a).

Once an inmate filed a complaint, an institution complaint examiner would conduct the first review. § DOC 310.06. He or she could choose to investigate the claim, reject the claim, dismiss the claim, attempt to resolve the complaint, or recommend a decision to the appropriate reviewing authority. § DOC 310.06(2).

A rejection would fall into two categories: frivolous or non-frivolous. A claim could be rejected as frivolous for three reasons only: (1) the inmate submitted the complaint solely for the purpose of harassing or causing malicious injury to Department of Corrections employees; (2) the complaint did not raise a significant issue regarding rules, living

conditions or staff actions affecting institution environment; or (3) the complaint did not allege sufficient facts upon which redress may be made. § DOC 310.11(4). In the event that the inmate complaint examiner rejected the claim on grounds of frivolousness, § DOC 310.11(4) permitted the inmate to appeal to the appropriate reviewing authority. The appropriate reviewing authority could dismiss the complaint, in part or in whole, affirm the complaint, in part or in whole, or return the recommendation to the inmate complaint examiner for further investigation. § DOC 310.12(2). The inmate could appeal an adverse decision to the Corrections Complaint Examiner, who would be required to issue a recommendation to the Secretary within ten working days. § DOC 310.13(7). The Secretary would then have ten working days to accept the recommendation of the Corrections Complaint Examiner, in part or in whole, or reject it, in part or in whole. § DOC 310.14(1).

If the Inmate Complaint Examiner rejected a claim for a reason other than frivolousness, § DOC 310.13(1) allowed the inmate to appeal to the Corrections Complaint Examiner within ten days. The Corrections Complaint Examiner would be required to issue a recommendation to the Secretary within ten working days. § DOC 310.13(7). The Secretary would then have ten working days to accept the recommendation of the Corrections Complaint Examiner, in part or in whole, or reject it, in part or in whole. § DOC 310.14(1).

If rather than rejecting a claim, an Inmate Complaint Examiner made a recommendation to the appropriate reviewing authority, then the process would work as follows. The appropriate reviewing authority could dismiss the complaint, in part or in whole, affirm the complaint, in part or in whole, or return the recommendation to the Inmate Complaint Examiner for further investigation. § DOC 310.12(2). The inmate could appeal an adverse decision to the Corrections Complaint Examiner, who would be required to issue a recommendation to the Secretary within ten working days. § DOC 310.13(7). The Secretary would then have ten working days to accept the recommendation of the Corrections Complaint Examiner in part or in whole or reject it in part or in whole. § DOC 310.14(1).

In sum, an inmate could not exhaust his administrative remedies until he “file[d] a complaint under s. DOC 310.09 or 310.10, receive[d] a decision on the complaint under s. DOC 310.12, ha[d] an adverse decision reviewed under s. DOC 310.13, and [received notice] of the secretary's decision under s. DOC 310.14 .” DOC 310.04.

With respect to plaintiff’s claims that four defendants used excessive force in the January 15, 2002 cell extraction and defendant Meli failed to intervene, plaintiff did not exhaust the administrative procedures available to him. § DOC 310.08(2) suggests that an inmate must complete the disciplinary process before engaging the complaint review system. In the present case, plaintiff filed his complaint in this court before initiating an appeal of

his disciplinary sanction, the last step of the disciplinary process. §§ DOC 303. 75, 303. 76. Therefore, he did not satisfy “the administrative process by following the rules the state has established for that process.” Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002).

With respect to plaintiff’s claim that defendants Meli and Schueler subjected him to cruel and unusual punishment by placing him in an extremely cold cell without clothes, plaintiff did not exhaust the administrative process. Neither his complaint labeled WCI-2002-3216 nor any of the other complaints included in his prisoner file made any mention of this issue. Because plaintiff did not raise the cold cell claim within the department’s administrative process, he is precluded from bringing the present claim.

ORDER

IT IS ORDERED that defendants’ motion to dismiss plaintiff’s claim against defendants Russel, Mierzejewski, Glamann and Passig for using excessive force in a January 15, 2002 cell extraction, plaintiff’s claim against defendant Meli for failing to prevent other guards from using excessive force and plaintiff’s claim against defendants Meli and Schueler for placing him in an extremely cold cell without clothes are GRANTED on the ground that

plaintiff failed to exhaust his administrative remedies with respect to any of these claims.

Entered this 2nd day of May, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge