

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

ROBERT STANLEY DuROSS,

Plaintiff,

v.

LINDA KENNEDY, DR. DASGUPTA
and RICK KALSON

Defendants.

OPINION AND ORDER

05-C-0079-C

This is a civil action for monetary relief, brought under 42 U.S.C. §1983. Plaintiff Robert Stanley DuRoss was an inmate at Oakhill Correctional Institution in Oregon, Wisconsin, from December 29, 2004 through May 10, 2005. Defendants Linda Kennedy, Dr. Dasgupta and Rick Kalson are employees of Oakhill Correctional Institution. Plaintiff is proceeding in forma pauperis and pro se in this action, which is before the court on defendants' motion to dismiss for plaintiff's failure to exhaust his administrative remedies as required by 42 U.S.C. §1997e.

In deciding defendants' motion to dismiss, I have considered documentation of the steps that plaintiff took to exhaust his administrative remedies. I can consider this evidence

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).

Although plaintiff filed a complaint about his medical treatment and the denial of a second mattress, he failed to appeal the dismissal of that complaint. His failure to complete the steps established by the Wisconsin Department of Corrections for the filing and appeal of inmate complaints means that this court lacks discretion to decide his claim on its merits.

For the purpose of deciding defendants' motion to dismiss, I accept as true the allegations in plaintiff's complaint and the information in plaintiff's inmate complaint and the administrative response.

FACTUAL ALLEGATIONS

On December 29, 2004, plaintiff was transferred from Dodge Correctional Institution in Waupun, Wisconsin to Oakhill Correctional Institution. At Oakhill, plaintiff was given the pain medication Percoset in place of Oxycontin, which had been prescribed and given to him at Dodge Correctional Institution. Plaintiff filed an inmate complaint about the substitution of pain medicines matter on January 2, 2005, which was dismissed on February 21, 2005. Plaintiff did not appeal the dismissal. Before commencing this action, plaintiff

did not file an inmate complaint about being denied a second mattress that he had requested.

OPINION

42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act, provides that

No 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 “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).

Wis. Admin. Code § DOC 310.04 sets out the procedure for exhaustion of claims involving prison conditions: “[B]efore an inmate may commence a civil action . . . the inmate shall file a complaint under s. DOC 310.09 or 310.10, receive a decision on the complaint under s. DOC 310.12, have an adverse decision reviewed under s. DOC 310.13, and be advised of the secretary's decision under s. DOC 310.14.”

Prison records show that plaintiff filed a complaint about the change in his prescribed medication but did not appeal the dismissal of that complaint and that he did not pursue

any administrative remedies to remedy the denial of his request for a second mattress. Therefore, this court cannot entertain his claims on the merits, but must dismiss the suit without prejudice. Ford v. Johnson, 362 F.3d 395, 401 (7th Cir. 2004) (dismissal for plaintiff's failure to exhaust administrative remedies always without prejudice).

ORDER

IT IS ORDERED that the motion of defendants Linda Kennedy, Dr. Dasgupta and Rick Kalson to dismiss for plaintiff's failure to exhaust his administrative remedies is GRANTED. The clerk of court is directed to enter judgment dismissing this case without prejudice.

Entered this 24th day of June, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge