

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

LARRY GEORGE,

Plaintiff,

v.

JUDY SMITH, RUTH TRITT, MARTY
SCHROEDER, OFFICER VILSKI, TIM
PIERCE, NURSE CARIVOU, REBECCA
BLODGETT, TOM EDWARDS, MARY
HOPFENSBERGER and DR. CHAN,

Defendants.

OPINION AND
ORDER

05-C-0403-C

In this civil action for injunctive and monetary relief, plaintiff Larry George, a prisoner at the Oshkosh Correctional Institution in Oshkosh, Wisconsin, contends that defendants Judy Smith, Ruth Tritt, Marty Schroeder, Officer Vilski, Tim Pierce, Wendy Carivou, Rebecca Blodgett, Tom Edwards, Mary Hopfensperger and Tai Chan violated his rights under the First and Eighth Amendments by limiting his access to various publications and providing him with allegedly inadequate medical care.

Defendants have moved for summary judgment on each of plaintiffs' claims against them. In this opinion, I will consider defendants' contention that five of plaintiff's claims

should be dismissed for plaintiff's alleged failure to exhaust administrative remedies under 42 U.S.C. § 1997e(a). With respect to those claims that cannot be dismissed for failure to exhaust, in a separate order I will consider defendants' alternative request for summary judgment on their favor on the merits of those claims. Because plaintiff did not attempt to justify his untimely-filed appeal of inmate complaint OSCI-2004-37103 as prison officials directed him to do, defendant's motion for summary judgment will be granted with respect to plaintiff's claim that defendant Tritt violated his First Amendment rights by denying him delivery of the December 2004 issue of Maxim magazine.

The question whether plaintiff's four remaining claims were exhausted turns on the manner in which the timeline for filing an appeal of a dismissed grievance is calculated. Under Wis. Admin. Code § 310.13(1), "a complainant dissatisfied with a [grievance] decision may, within 10 calendar days after the date of the decision, appeal that decision by filing a written request for review with the corrections complaint examiner on forms supplied for that purpose." It is undisputed that plaintiff placed his appeals of inmate complaints OSCI-2002-23951, OSCI-2003-20305 and OSCI-2005-13613 in the prison mail within the 10-day deadline for filing an appeal in each case.¹ Nevertheless, plaintiff's appeals were dismissed as untimely. Plaintiff contends that he exhausted his administrative remedies by

¹In inmate complaint OSCI-2002-23951 plaintiff challenges the delivery of four books that are the subject of two separate claims in this lawsuit.

placing his appeals in the mail within 10 days; defendants assert that his appeals were not timely because the corrections complaint examiners did not receive them before the 10-day deadline passed.

Having reviewed the federal and state case law relevant to the question of exhaustion, I conclude that plaintiff exhausted his administrative remedies by placing his grievance appeals in the prison mail within the 10 days provided by DOC § 310.13(1). Consequently, because plaintiff exhausted the claims raised in inmate complaints OSCI-2002-23951, OSCI-2003-20305 and OSCI-2005-13613, defendants' motion to dismiss those claims will be denied. Plaintiff's claims that defendants Schroeder and Hopfensperger denied him delivery of 3 art books on July 8, 2002, that defendants Schroeder and Hopfensperger denied him delivery of an atlas on July 8, 2002, that defendant Vilski denied him delivery of the July 2003 issue of FHM magazine and that defendants Blodgett and Vilski denied him delivery of the May 2005 edition of Spin magazine will be considered on their merits in a separate opinion.

From the parties' proposed findings of fact and the record of plaintiff's use of the inmate complaint process, I find the following facts to be material and undisputed.

FACTS

A. Parties

Plaintiff Larry George is a prisoner at the Oshkosh Correctional Institution in Oshkosh, Wisconsin, where he resided at all times relevant to this lawsuit.

Defendant Judy Smith is Warden of the Oshkosh Correctional Institution.

At all times relevant to this lawsuit, defendant Martin Schroeder was employed as a disruptive group gang coordinator for the Oshkosh Correctional Institution.

Defendant Rebecca Blodgett is a corrections unit supervisor at the Oshkosh Correctional Institution. Since February 2002, defendant Blodgett has been a disruptive group coordinator at the institution.

Defendants Ruth Tritt and Laura Vilski are correctional officers at the Oshkosh Correctional Institution.

Defendant Timothy Pierce is an inmate complaint examiner at the Oshkosh Correctional Institution.

B. Exhaustion

1. Inmate Complaint OSCI-2002-23951

On July 9, 2002, four books arrived at the prison addressed to plaintiff: an atlas, Enjoying Sex, The Pocket Guide to Good Sex and (Don't) Call Me Shirley. All four books were designated contraband and were not delivered to plaintiff. That same day, plaintiff

filed an inmate complaint numbered OSCI-2002-23951, in which he challenged the denial of his books. On July 12, 2002, the complaint was dismissed with the following explanation:

The above staff and ICE reviewed the books in question. Pursuant to the above listed policy, "Publication that feature photographs, pictures, and/or drawings of nudity, or publications that include photographs, pictures and/or drawings of sexual intercourse, fellatio or cunnilingus, sodomy, bestiality, masturbation, necrophilia, sadomasochistic abuse, unnatural preoccupation with human excretion, or nudity if any person has not attained the age of 18, as described in DOC 309.02." It was found that the three books—Enjoying Sex, The Pocket Good Sex Guide, and (Don't) Call Me Shirley, fall under the above described publication and are not allowed.

As for the Atlas, maps/atlas, etc. are not allowable property items

Using a standard form dated and submitted for mailing on July 22, 2002, plaintiff appealed the dismissal. On August 12, 2002, corrections complaint examiner John Ray recommended the appeal be dismissed, stating, "DOC 310(13)(1) Wis. Adm. Code requires appeals to be filed within 10 days of a complaint decision. This appeal does not conform to that requirement and it is thus recommended it be dismissed." (It is not clear from the record when Ray received plaintiff's appeal.) On August 31, 2002, Cindy O'Donnell accepted Ray's recommendation and dismissed the appeal.

2. Inmate Complaint OSCI-2003-20305

On June 9, 2003, plaintiff was issued a Notice of Non-Delivery of Mail, which stated that page 92 of the July 2003 issue of FHM magazine showed gang signing and was therefore

considered contraband. Plaintiff chose to have the issue sent out of the prison.

On June 12, 2003, plaintiff filed an inmate complaint numbered OSCI-2003-20305, in which he challenged the denial of his magazine. On June 16, 2003, the complaint was dismissed. Plaintiff received a copy of the dismissal decision the following day. Using a standard form dated and submitted for mailing on June 27, 2003, plaintiff appealed the dismissal. The appeal was received by the corrections complaint examiner's office on July 1, 2003. On July 3, 2003, corrections complaint examiner Sandy Hautamaki recommended the appeal be dismissed for the following reasons:

. . . [Plaintiff] was told to file an appeal if he was dissatisfied with the complaint decision, As such, he filed his appeal which was received in this office on 7/1/03, which is beyond the 10-day limit for filing appeals, pursuant to DOC 310.13(1). To date, complainant has 112 complaints that have been appealed. He is well aware of the provisions of DOC 310. For this reason, the CCE does not find good cause to accept his late appeal and it is thus recommended this complaint be dismissed as untimely.

On July 7, 2003, Cindy O'Donnell accepted Hautamaki's recommendation and dismissed the appeal.

3. Inmate Complaint OSCI-2004-37103

On November 22, 2004, defendant Tritt issued plaintiff a Notice of Non-Delivery of Mail, which stated that page 117 of the December 2004 issue of Maxim magazine showed gang signing and was therefore considered contraband. The magazine was destroyed.

On November 24, 2004, plaintiff filed an inmate complaint numbered OSCI-2004-37103, in which he challenged the denial of his magazine. On December 1, 2004, the complaint was dismissed. Using a standard form dated December 23, 2004, plaintiff appealed the dismissal, noting that his appeal was being filed late because “the reviewer’s decision was misdelivered and given to me past the 10 day filing period.” Plaintiff did not indicate when he received the inmate complaint examiner’s decision.

Plaintiff’s appeal was received by the corrections complaint examiner’s office on December 28, 2004. The next day, corrections complaint examiner Sandy Hautamaki recommended the appeal be dismissed, stating:

DOC 310.13(1) requires appeals to be filed within ten days of the complaint decision. Noting the complaint was decided on 12/1/04, was printed on 12/2/04, yet this appeal was not received until 12/28/04, further noting complainant offers no good cause for the late appeal, it is recommended it be dismissed as untimely. Though complainant claims his decision was “misdelivered” and given to him past the 10-day time limit for filing an appeal, the ICE advises that decisions are printed and distributed on a daily basis. If complainant received his decision untimely, he should have had staff verify and document the same.

On January 3, 2004, Rick Raemisch accepted Hautamaki’s recommendation and dismissed the appeal.

4. Inmate Complaint OSCI-2005-13613

On April 27, 2005, plaintiff’s May 2005 copy of Spin magazine arrived at the prison.

Plaintiff was issued an unsigned, undated Notice of Non-Delivery of Mail, which stated that page 85 of the magazine “t[aught] or advocate[d] illegal activity, disruption, or behavior consistent with a gang or violent ritualistic group.

On April 27, 2005, plaintiff filed an inmate complaint numbered OSCI-2005-13613, in which he challenged the denial of his magazine. On May 2, 2005, the complaint was dismissed. Using a standard form, plaintiff appealed the dismissal, submitting the envelope containing his appeal for mailing on May 11, 2005.

Plaintiff’s appeal was received by the corrections complaint examiner’s office on May 17, 2005. On the same day, corrections complaint examiner Sandy Hautamaki recommended the appeal be dismissed, stating:

DOC 310.13(1) requires appeals to be filed within ten days of the complaint decision. Noting the complaint was decided on 5/2/05, was printed on 5/3/05, yet this appeal was not received until 5/17/05, further noting complainant offers no good cause for the late appeal, it is recommended it be dismissed as untimely.

On May 17, 2005, Rick Raemisch accepted Hautamaki’s recommendation and dismissed the appeal.

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). Failure to exhaust is an affirmative defense that the defendants have the burden of pleading and proving. Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002).

“[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, 196 F.3d at 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). An inmate must “properly take each step within the administrative process” or else he is foreclosed by 42 U.S.C. § 1997(e) from bringing a suit. Pozo, 286 F.3d at 1024.

Recently, in Woodford v. Ngo, 126 S. Ct. 2378 (2006), the United States Supreme Court considered whether failure to file a timely grievance could be excused under § 1997(e). The general answer was no, for this reason:

The benefits of exhaustion can be realized only if the prison grievance system

is given a fair opportunity to consider the grievance. The prison grievance system will not have such an opportunity unless the grievant complies with the system's critical procedural rules . . . For example, a prisoner wishing to bypass available administrative remedies could simply file a late grievance without providing any reason for failing to file on time. If the prison then rejects the grievance as untimely, the prisoner could proceed directly to federal court. And acceptance of the late grievance would not thwart the prisoner's wish to bypass the administrative process; the prisoner could easily achieve this by violating other procedural rules until the prison administration has no alternative but to dismiss the grievance on procedural grounds. We are confident that the PLRA did not create such a toothless scheme.

Id. at 2388.

However, there are several exceptions to this general rule. Prison officials may not take unfair advantage of the exhaustion requirement, and a remedy becomes "unavailable" when prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting. Dole v. Chandler, 438 F.3d 804, 809 (7th Cir. 2006); Lewis v. Washington, 300 F.3d 829, 833 (7th Cir. 2002); Dale v. Lappin, 376 F.3d 652, 656 (7th Cir. 2004). With those governing principles in mind, the court must examine whether plaintiff filed timely appeals with respect to inmate complaints OSCI-2002-23951, OSCI-2003-20305, OSCI-2004-37103 and OSCI-2005-13613.

A. Inmate Complaints OSCI-2002-23951, OSCI-2003-20305, and OSCI-2005-13613

Under the Wisconsin Administrative Code, when a prisoner's original grievance is dismissed, he "may, within 10 calendar days after the date of the decision, appeal that

decision by filing a written request for review with the corrections complaint examiner on forms supplied for that purpose.” Wis. Admin. Code § DOC 310.13(1). “Upon good cause shown . . . [a corrections complaint examiner] may accept for review an appeal filed later than 10 calendar days after receipt of the decision,” although the examiner is not required to do so. Wis. Admin. Code § DOC 310.13(2).

Although defendants do not dispute that plaintiff placed his appeals of inmate complaints OSCI-2002-23951, OSCI-2003-20305 and OSCI-2005-13613 in the prison mailbox before the 10-day deadline passed, they assert that his appeals were untimely because they were not received by the corrections complaint examiner’s Madison, Wisconsin office until after the deadline.

Not surprisingly, plaintiff disagrees. He concedes that he did not mail his appeal from the Oshkosh Correctional Institution until the 10th day of his 10-day deadline. Therefore, he had no reasonable expectation that his appeal would be received at the corrections complaint examiners’ office before the deadline expired. Nevertheless, plaintiff asserts, the court should consider his appeal timely under a long line of cases dating back to Houston v. Lack, 487 U.S. 266 (1988).

In Houston, 487 U.S. at 268, the Supreme Court was asked to determine whether a state prisoner “filed” an appeal of the denial of his petition for a writ of habeas corpus at the time he deposited his notice of appeal in the prison mail system (before his filing

deadline) or when the clerk of court received his notice (after the deadline). The court concluded that the appeal was “filed” at moment the plaintiff “delivered the notice to prison authorities for forwarding to the District Court.” Id. The Court explained its reasons for adopting the so-called “mailbox rule” in this way:

[T]he moment at which pro se prisoners necessarily lose control over and contact with their notices of appeal is at delivery to prison authorities, not receipt by the clerk. Thus, whereas the general rule has been justified on the ground that a civil litigant who chooses to mail a notice of appeal assumes the risk of untimely delivery and filing, a pro se prisoner has no choice but to hand his notice over to prison authorities for forwarding to the court clerk. . . . [Since] the prison’s failure to act promptly cannot bind a pro se prisoner, relying on receipt in this context would raise yet more difficult to resolve questions whether the prison authorities were dilatory. The prison will be the only party with at least some of the evidence needed to resolve such questions—one of the vices the general rule is meant to avoid—and evidence on any of these issues will be hard to come by for the prisoner confined to his cell, who can usually only guess whether the prison authorities, the Postal Service, or the court clerk is to blame for any delay.

Id. at 275-76. As the Court noted, generally, prisons “have well-developed procedures for recording the date and time at which they receive papers for mailing” and therefore prison officials are well-positioned to “dispute a prisoner’s assertions that he delivered the paper on a different date” than he did. Id.

Because the Court’s reasoning applies with equal force to nearly all documents mailed by prisoners, over time appellate and district courts have extended the mailbox rule (or versions of it) to petitions for writs of habeas corpus, Jones v. Bertrand, 171 F.3d 499, 501

(7th Cir. 1999), motions filed under Fed. R. Civ. P. 59(e), Edwards v. United States, 266 F.3d 756, 758 (7th Cir. 2001), and complaints under 42 U.S.C. § 1983, Bekefeld v. Jansma, 369 F. Supp. 2d 1008, 1010 (N.D. Ind. 2005) (citing Cooper v. Brookshire, 70 F.3d 377 (5th Cir. 1995)). Tellingly, in Edwards, 266 F.3d at 758, the court of appeals noted:

We need not decide here whether there is any kind of paper, or any circumstance, under which a district court would be entitled to hold a pro se prisoner litigant to an actual receipt standard, but we are confident that this would be an exceptional situation.

There is good reason to think that this case does not present the sort of exceptional situation envisioned by the court in Edwards. First, it is not only federal courts that have recognized the need to treat pro se prisoner filings differently from documents filed by persons who are not incarcerated. In State ex rel. Shimkus v. Sondalle, 2000 WI App 238, 239 Wis. 2d 327, 620 N.W.2d 409, Wisconsin courts adopted its own variation of the mailbox rule. Although the court did not believe that a petition could be “filed” before it was received by a clerk of court, the court held that when a prisoner placed a petition for court review of a prison grievance in the prison mail system, the time for filing was tolled. In reaching this decision, the state court of appeals relied heavily on the rationale in the Supreme Court’s decision in Houston v. Lack, 487 U.S. 266 (1988). Shimkus, 2000 WI App 238, ¶ 13. One year later, in State ex rel. Nichols v. Litscher, 2001 WI 119, ¶ 15, 247 Wis. 2d 1013, 635 N.W.2d 292, the Wisconsin Supreme Court extended the Shimkus

tolling rule to criminal appeals filed by pro se prisoners. These decisions indicate strongly that Wisconsin courts considering the question at issue here would calculate the timeliness of a prisoner's appeal from the time it is placed in the mail, as plaintiff urges, and not from the time it is received by prison officials.

Furthermore, although the Court of Appeals for the Seventh Circuit has never been presented directly with the question whether a Wisconsin inmate's grievance or grievance appeal is timely under DOC § 310.13 if it is placed in the prison mail within 10 days, the court confronted a similar question in Dole v. Chandler, 438 F.3d 804 (7th Cir. 2006). In Dole, the court held that an Illinois prisoner had filed a timely grievance appeal by placing his appeal in the prison mail system even though the grievance was never received by the prison officials to whom the appeal was addressed. Id. at 810. The court distinguished Dole's case from others in which prisoners have been found not to exhaust because no grievance was filed at all:

[T]he misstep in Dole's case was entirely that of the prison system. Dole could not maintain control of his complaint once the guard picked it up. He had no choice in the method used to transmit the complaint from the prison to the [appeals] board. He also had no means of being alerted that the ARB had not received his appeal in time to file a new, timely complaint; Illinois has no receipt system for prisoner mail.

Id.

The rationale used to justify imposition of the mailbox rule under federal law and the

tolling rule used under Wisconsin law applies with equal force to the facts of this case. Prisoners such as plaintiff have no control over the speed with which prison officials collect, process and post their mail. They have no means of tracking the mail's progress or insuring that it arrives at its intended designation. Moreover, the 10-day deadline provided under Wisconsin's administrative code is hardly generous. Were the court to hold that mail must arrive at its intended destination within 10 days from the day a prisoner receives his initial grievance decision, it is not clear that even the most rapidly posted appeal would arrive at the Madison office within the timeframe provided. There is nothing unjust about tolling the filing period beginning at the moment an inmate places his complaint in the prison mail.

Because it is undisputed that plaintiff deposited his appeals of inmate complaints OSCI-2002-23951, OSCI-2003-20305 and OSCI-2005-13613 in the prison mail within the 10-day timeframe required under DOC § 310.13, he exhausted his administrative remedies. Consequently, to the extent that defendants' motion seeks summary judgment on the ground that plaintiff failed to exhaust his administrative remedies, the motion will be denied with respect to plaintiff's claims that defendant Hopfensperger denied him delivery of three art books on July 8, 2002; defendant Hopfensperger denied him an atlas on July 8, 2002; defendant Vilski denied him delivery of the July 2003 issue of FHM magazine; and defendants Blodgett and Vilski denied him delivery of the May 2005 edition of Spin magazine.

B. Inmate Complaint OSCI-2004-37103

Inmate complaint OSCI-2004-37103 presents a different question because it is undisputed that plaintiff did not place his appeal of that complaint in the prison mail system until after the 10 day deadline for filing an appeal had passed. Prison officials dismissed his complaint on December 1, 2004; plaintiff did not complete his appeal form until December 23, 2004. Although plaintiff alleged that the decision dismissing his complaint had been “misdelivered,” he did not indicate when he received the decision and did not provide any documentation to corroborate his allegations. There is no indication that plaintiff tried to provide these details to the corrections complaint examiner after the examiner dismissed his complaint for failure to show “good cause” why it should be accepted.

“To exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require.” Pozo, 286 F.3d at 1025. Under the Wisconsin Administrative Code, corrections complaint examiners may accept untimely filed appeals only “upon good cause shown.” Under the circumstances, it was not unreasonable for prison officials to require plaintiff to provide more information to them than simply a general allegation that his original dismissal had been “misdelivered” before they would find cause for considering his appeal. At the very least, plaintiff might have told the examiner when he received word that his complaint had been dismissed. Without that information, it was impossible to determine whether plaintiff filed his appeal at the earliest opportunity

available to him or whether he had simply been remiss in meeting his deadlines. Because plaintiff did not file a timely appeal or show cause why his untimely appeal should have been accepted, he did not exhaust his administrative remedies with respect to the claim raised in inmate complaint OSCI-2004-37103. Consequently, defendant's motion for summary judgment on the ground that plaintiff failed to exhaust his administrative remedies will be granted with respect to plaintiff's claim that defendant Tritt violated plaintiff's First Amendment rights by denying him delivery of the December 2004 issue of Maxim magazine.

ORDER

IT IS ORDERED that defendants' motion for summary judgment on the ground that plaintiff failed to exhaust his administrative remedies is

1. GRANTED with respect to plaintiff's claim that defendant Tritt violated plaintiff's First Amendment rights by denying him delivery of the December 2004 issue of Maxim magazine; and

2. DENIED with respect to plaintiff's claims that his First Amendment rights were violated when

a) defendants Schroeder and Hopfensperger denied him delivery of three art books on July 8, 2002;

b) defendant Schroeder and Hopfensperger denied him an atlas on July 8,

2002;

c) defendant Vilski denied him delivery of the July 2003 issue of FHM magazine; and

d) defendants Blodgett and Vilski denied him delivery of the May 2005 edition of Spin magazine.

Entered this 12th day of December, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge