

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

CANYON A. THIXTON,

Plaintiff,

v.

GERALD BERGE (in his individual capacity),
JON LITSCHER (in his individual capacity),
BRAD HOMPE, (in his individual capacity)
& BRIAN KOOL in his individual capacity),

Defendants.

OPINION AND
ORDER

05-C-620-C

In this civil action for monetary relief filed under 42 U.S.C. § 1983, plaintiff Canyon Thixton contends that defendants Gerald Berge, Jon Litscher, Brad Hompe and Brian Kool violated his Eighth Amendment protection against cruel and unusual punishment when they placed him in a “Behavior Management Program” at the Wisconsin Secure Program Facility for 58 days. Plaintiff contends that while he was in the Behavior Management Program defendants denied him clothing, a mattress, a pillow, sheets and a blanket, hygiene items and a working toilet and sink.

Presently before the court is defendants’ motion for partial summary judgment.

(Following the decision of the Court of Appeals for the Seventh Circuit in Gillis v. Litscher, 468 F.3d 488 (7th Cir. 2006), defendants withdrew their motion with respect to the merits of plaintiff's claim. What remains is defendants' motion for summary judgment regarding plaintiff's alleged failure to exhaust his administrative remedies on his claim that he did not have a working toilet and sink while he was in the Behavior Management Program at the Wisconsin Secure Program Facility.)

Failure to exhaust administrative remedies is an affirmative defense that defendants bear the burden of pleading and proving. Massey v. Helman, 196 F.3d 727, 735 (1999). Because defendants have not met their burden of showing that plaintiff failed to properly exhaust his administrative remedies with respect to his claim that he did not have a working toilet and sink while in the Behavior Management Program, defendants' motion for summary judgment will be denied.

In deciding a motion requesting dismissal for failure to exhaust, the court looks to the complaint to determine the issues raised and then examines the record of an inmate's use of the inmate complaint system to determine whether the plaintiff has presented the issues raised in his complaint first to prison officials so that they have an opportunity to resolve the matter without federal court intervention. In his fourth amended complaint, which is the operative pleading in this case, plaintiff alleged, among other things, that defendants Litscher or Berge turned off his toilet and sink while he was in the Behavior Management

Program at the Wisconsin Secure Program Facility for a period of 58 days.

Defendants proposed only one fact regarding plaintiff's effort to exhaust this claim: that plaintiff has not filed an ICRS appeal with the Wisconsin DOC Corrections Complaint Examiner regarding his allegations he was denied access to a working toilet and or sink or both while incarcerated at WSPF. In support of this proposed fact, defendant cites the affidavit of John Ray at ¶ 9 in which Ray avers, "[m]y search [of ICRS records pertaining to plaintiff] disclosed that [plaintiff] has not filed an ICRS appeal with my office concerning the allegations that he was denied a toilet and/or sink while incarcerated at WSPF." Dkt. #48 at 3. Plaintiff has attempted to put defendants' proposed fact into dispute by asserting, "Plaintiff objects. After August 30, 2001, Thixton appealed again. In that appeal, Thixton made specific reference to the continuum (behavior management program) and to the fact that Thixton had been deprived of 'essential hygiene.'" Dkt. #52 at 1.

As discussed below, these facts are wholly insufficient to allow a finding as a matter of law that plaintiff failed to exhaust his administrative remedies with respect to his claim that he was deprived of a working toilet and sink while he was in the Behavior Management Program.

OPINION

As an initial matter, I note that defendants argue that if plaintiff failed to exhaust with respect to any of his claims, his case should be dismissed in full. This court has rejected the so-called “total exhaustion” argument in the past. See, e.g., Henderson v. Sebastian, No. 04-C-0039-C, 2004 WL 1946398 (W.D. Wis. Aug. 25, 2004) (rejecting application of “total exhaustion” rule, “because the Court of Appeals for the Seventh Circuit has at least tacitly approved partial dismissals and because . . . the dismissal of 'mixed' actions is neither mandated by § 1997e(a) nor consistent with its objective”); Hill v. Thalacker, 399 F. Supp. 2d 925 (W.D. Wis. 2005) (same). Defendants have not shown a good reason to depart from this position.

Under the exhaustion requirement of the 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), prisoners who are dissatisfied with prison conditions must exhaust administrative remedies that are available to them before they file an action under federal law. In order to exhaust administrative remedies, a prisoner must follow the rules that the state has established governing the administrative process. Dixon v. Page, 291 F.3d 485, 491 (7th Cir. 2002); Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). In Wisconsin, prisoners must comply with the exhaustion procedures set out in Wis. Admin. Code §§ DOC 310.01-310.18. Under these provisions, an inmate complaint must "contain only one issue per complaint and shall clearly identify the issue" and must, in most cases, be

filed within 14 days “after the occurrence giving rise to the complaint.” Wis. Admin. Code § DOC 310.09(1)(e). Upon receipt of a complaint, an inmate complaint examiner may investigate it, return the complaint forms for failure to meet filing requirements or recommend a decision to the appropriate reviewing authority. Wis. Admin. Code § DOC 310.07(2). If the examiner makes a recommendation, the reviewing authority is to dismiss, affirm or return the complaint for further investigation. Wis. Admin. Code § DOC 310.12. An inmate who is dissatisfied with the decision of the reviewing authority may appeal that decision to the corrections complaint examiner, who is to conduct additional investigation where appropriate and make a recommendation to the secretary of the Wisconsin Department of Corrections. Wis. Admin. Code § DOC 310.13. Within forty-five days after a recommendation has been made, the secretary must accept it in whole or with modifications, reject it and make a new decision or return it for further investigation.

The rule regarding exhaustion is strict. District courts lack discretion to decide claims on their merits if a prisoner has not satisfied the PLRA’s exhaustion requirement. Dixon, 291 F.3d at 488. However, failure to exhaust administrative remedies is an affirmative defense that defendants bear the burden of pleading and proving. Massey v. Helman, 196 F.3d 727, 735 (1999).

Defendants contend that, because a search of their records did not disclose that plaintiff filed an appeal regarding his claim that he did not have a working toilet and sink

while in the Behavior Management Program at the Wisconsin Secure Program Facility, plaintiff has failed to exhaust his administrative remedies and is barred from now raising this claim. Defendants devote several pages of their brief in support of their motion for summary judgment to this argument. However, defendants' proposed solitary fact falls far short of carrying their burden. They proposed no facts about any complaints that plaintiff might have filed or what happened to those complaints. It is true that under Wisconsin prison regulations, a prisoner must appeal if he is dissatisfied with the initial disposition of an inmate complaint. Wis. Admin. Code § DOC 310.13. However, a prisoner who prevails at the first stage is not required to appeal a favorable decision. Nonetheless, the prisoner may have a civil claim regarding the conditions he experienced before the situation was rectified through the inmate complaint process. I do not suggest that this is what happened in this case, except to illustrate the point that the absence of an *appeal* in defendants' records is not dispositive of the question of exhaustion. Because the burden falls on defendants, I will deny their motion for summary judgment.

It is perplexing that defendants believed they could meet their burden on such limited factual grounds. Plaintiff was allegedly placed in a Behavior Modification Program at the Wisconsin Secure Program Facility for 58 days. Under Wisconsin regulations, a prisoner must file an inmate complaint within 14 days of an "occurrence," unless he can show good cause for delay. Wis. Admin. Code § DOC 310.09(1)(e)(6). Thus, any complaint that

plaintiff filed for the purpose of exhaustion would have been filed within a limited period of time, making it fairly easy to investigate. In the future, prison officials advancing exhaustion arguments in similar circumstances would do well to review *all* of the complaints filed by a prisoner within the relevant time period and provide the court with copies of any complaints and appeals that pertain to the subject matter at issue. This would allow prison officials to present a much more persuasive case for exhaustion than they have done here.

Finally, I note that the parties do not address all of the elements of the Behavior Management Program in which plaintiff was placed. If plaintiff lodged a general complaint about the conditions of his confinement in the Behavior Management Program in offender complaint number SMCI-2001-23494, and a common condition of the program includes a toilet and sink whose operation are not controlled by the prisoner, defendants might be compelled to concede that plaintiff exhausted his administrative remedies.

ORDER

IT IS ORDERED that the motion for summary judgment of defendants Gerald Berge, Jon Litscher, Brad Hompe and Brian Kool is DENIED because defendants have failed to demonstrate that plaintiff did not properly exhaust available administrative remedies with respect to his claim that he did not have a working toilet and sink while in the Behavior

Management Program at the Wisconsin Secure Program Facility.

Entered this 19th day of December, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge