IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GERARD M. MOCNIK,

OPINION and ORDER

Plaintiff,

06-C-191-C

v.

DR. WILLIAMS,

Defendant.

- -

In this civil action for monetary relief under 42 U.S.C. § 1983, plaintiff Gerard M. Mocnik, a prisoner at the Stanley Correctional Institution in Stanley, Wisconsin, contends that defendant Dr. Williams, a former prison doctor, sexually assaulted him in violation of his rights under the Eighth Amendment. Now before the court is defendant's motion to dismiss plaintiff's complaint for failure to properly exhaust administrative remedies as required by 42 U.S.C. § 1997e(a). Because plaintiff exhausted all the administrative remedies available to him under Wisconsin law, defendant's motion will be denied.

In support of his motion, defendant has submitted an affidavit and several documents relating to plaintiff's efforts to exhaust his remedies within the administrative complaint review system. I can consider this documentation of plaintiff's use of the grievance system

without converting the motion to dismiss into a motion for summary judgment because such documentation is a matter of public record. Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 455 (7th Cir. 1998); General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997). Therefore, I draw the following facts from plaintiff's complaint and the documents the parties have submitting in connection with defendant's pending motion.

ALLEGATIONS OF FACT

A. Parties

Plaintiff Gerard Mocnik is a prisoner at the Stanley Correctional Institution in Stanley, Wisconsin.

Defendant Dr. Williams was formerly employed by the Wisconsin Department of Corrections as a prison doctor.

B. Sexual Assault

On September 10, 2004, plaintiff was sexually assaulted by defendant Williams in the prison's health service unit. Defendant Williams placed his finger or fingers into plaintiff's anus without plaintiff's consent, causing plaintiff pain, emotional distress and embarrassment.

Plaintiff tried to report the incident immediately, but was ordered to return to his housing unit. He arrived at the unit approximately twenty minutes after the assault, and reported the incident to defendant Webster.

Later that day, plaintiff was asked to return to the health services unit. Plaintiff expected he would be interviewed regarding the assault; instead, defendant Unknown Nurse gave him a packet containing medication he had not requested.

When plaintiff refused to accept the medication, defendant Peck called defendant Lundmark, who placed plaintiff in handcuffs and escorted him to a temporary lock-up cell in the prison segregation unit. As defendant Lundmark placed plaintiff in the segregation cell, plaintiff explained to Lundmark "why [he] had apprehension." Defendant Lundmark told plaintiff he would discuss "the matter" with defendant Webster.

C. Exhaustion

1. Inmate Complaint SCI 2004-36473

On November17, 2004, plaintiff filed a grievance through the inmate complaint process, in which he alleged the following:

> On Sept. 10th there was an incident that happened at H[ealth] S[ervices] U[nit]. I reported it to my unit manager Ms. Webster and Lt. Lundmark. Lt. Lundmark told me he was going to talk to the Security Director about the situation. I can't tell on this paper that [sic] happened, but the people I mentioned know whats [sic] going on. I feel messed up about the incident,

and I feel that the Lt. and Security Director are not taking it seriously.

On November 19, 2004, the grievance was rejected by defendant Woodford, with the notation, "The inmate does not allege sufficient facts upon which redress may be made."

2. Inmate Complaint SCI 2004-36946

Plaintiff filed a second grievance on November 23, 2004. This complaint stated:

> I wrote I[nmate] C[omplaint] E[xaminer] on 11/17/04 about an incident that happened to me on 9/10/04. I stated in the ICE that something happened to me between the Doctor and myself, I didn't state facts, because the people I mentioned in the ICE, knows whats [sic] going on. I guess you feel you didn't need to ask Lt. Lundma[rk] the security director or Ms. Webster what happened. Anyway I feel I was sexually assaulted by Dr. Williams when I went to see him about some pills for acne.

On November 24, 2004, defendant Woodford dismissed plaintiff's second complaint "with modification," stating:

> The inmate was called to the ICE office and Administrative Directive 11.6 was explained to him. In addition to that, the provisions of DOC 303.271, Wis. Admin, Code, were also reviewed. He was also informed that, because the investigative process is regulated by state law and collective bargaining agreements (which protect the privacy and due process rights of staff) no further information would be given to him. The inmate chose to pursue the complaint and provided a detailed written description of the events he claimed happened.
>
> Based on that statement and the sensitive nature of the incident, I recommend that this complaint be dismissed with the modification that it was forwarded to the Deputy Warden for further review and action. Consequently, no further action will be taken by this office.

Later that day, defendant Wallace affirmed the dismissal of plaintiff's complaint.

On January 28, 2005, plaintiff wrote to defendant Wallace, asking what was being done to address the incident he had reported. Plaintiff received no response. Again, on March 10, 2005, plaintiff wrote to defendant Wallace and asked "what was going on." Plaintiff's March 10 letter to defendant Wallace was forwarded to defendant Dressler, manager of the health services unit. Defendant Dressler responded, "[B]ased on the fact that you refuse to be seen by [defendant Williams], you have been reassigned to [a new] primary care provider."

On March 23, 2005, plaintiff received a letter from defendant Wallace stating that plaintiff would be assigned to a new doctor and that defendant Williams was no longer working at the prison.

On March 28, 2005, plaintiff wrote again to defendant Wallace, indicating that he "did not feel that the situation of sexual assault by Williams was resolved simply by dismissing Williams and assigning [plaintiff] a different doctor." The following day, defendant Wallace wrote to plaintiff, stating:

> [T]his appears to be a loaded question and any answer I give would be taken the wrong way, so I ask you: Do you feel that concerns you had surrounding interactions with Dr. Williams are resolved given the fact that [he] no longer works at S[tanley] C[orrectional] I[nstitution] as a doctor? If not, what specifically are your continuing concerns? I will do my best to have them addressed by the appropriate party.

On April 1, 2005, plaintiff responded, stating, "I do not feel the situation was resolved, because the doctor no longer works here. I was still assaulted and want some kind of action taken." On April 7, 2005, defendant Wallace wrote, "Your correspondences, past and present, will be forwarded to the Health Services Manager, for follow up and address."

On May 11, 2005, plaintiff wrote to defendant Dressler, asking for an update. He received no response.

On June 29, 2005, plaintiff wrote to the inmate complaint examiner at the Department of Corrections Central Office in Madison, Wisconsin. The complaint was denied on July 18, 2005. A notation indicated that the complaint should have been filed "within 10 days of complaint decision."

On October 9, 2005, plaintiff again wrote the department's central office, asking that his complaint be reopened. Inmate Complaint Examiner Karen Gourie denied the request, stating that she "found no provisions under [Wis. Admin Code §] DOC Chapter 310 to Re-open the Complaint."

On October 26, 2005, plaintiff wrote to Sharon Zunker, Health Services Coordinator for the Department of Corrections. She responded by stating that the matter had been referred for investigation and that "under D.A.I. Administrative Directives concerning misconduct by employees," plaintiff would not receive any information regarding the outcome of the investigation.

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).

Exhaustion requires compliance with the procedural requirements of the system in which the grievance is filed. Woodford v. Ngo, 126 S. Ct. 2378 (2006); 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"), even if the prisoner cannot achieve an effective response through the system. Massey v. Helman, 196 F.3d 727, 733 (7th Cir. 1999).

As an inmate of the Wisconsin prison system, plaintiff was required to comply with the grievance procedure set forth in Wis. Admin. Code DOC Ch. 310. Under Ch. 310, a

prisoner initiates the complaint process by filing an inmate complaint with an institution complaint examiner. The prisoner may appeal an adverse decision to either the appropriate reviewing authority (for "rejected" complaints), Wis. Admin. Code § DOC 310.11(6), or to a corrections complaint examiner (for other complaints), Wis. Admin. Code § DOC 310.13.

In this case, plaintiff filed two complaints that mentioned defendant's alleged sexual assault. Defendant contends that plaintiff failed to exhaust his administrative remedies with respect to each of these complaints.

1. Inmate Complaint SCI 2004-36473

Under the Wisconsin Administrative Code, a complaint may be rejected for various reasons: the inmate does not raise a significant issue; the inmate does not allege sufficient facts; the complaint is untimely; the issue raised in the complaint does not affect the inmate personally; the issue is moot; the complaint was filed solely for harassment purposes; the issue has been addressed previously; or the issue is not within the scope of the Inmate Complaint Review System. Wis. Admin. Code § DOC 310.11(5). Plaintiff's complaint number SCI 2004-36473 was rejected because it did not contain facts specific enough to permit prison officials to respond to it adequately.

When a complaint is rejected under § DOC 310.11(5), an inmate may appeal the decision to the warden. Plaintiff did not appeal the rejection of complaint number SCI

2004-36473, and because he did not do so, he failed to exhaust his administrative remedies with respect to that complaint.

2. Inmate Complaint SCI 2004-36946

That leaves inmate complaint SCI 2004-36946, which was dismissed "with modification" by the inmate complaint examiner. When an institution complaint examiner renders an unfavorable decision on an inmate's grievance,

> [a] complainant dissatisfied with [the] . . . 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.

Wis. Admin. Code § DOC 310.13(1). Although plaintiff's complaint was dismissed on November 24, 2004, he did not appeal the dismissal until July 18, 2005, more than seven months later. The corrections complaint examiner did not consider the appeal because it was untimely. Plaintiff concedes that his complaint was untimely; therefore, if he was required to appeal the dismissal, he has failed to exhaust his administrative remedies and his complaint must be dismissed. Woodford, 126 S. Ct. at 2380-2381 (2006); Pozo, 286 F.3d at 1025.

Here, the question is whether the "dismissal" was, in fact, an adverse decision that needed to be appealed. Normally, when a complaint is dismissed, the practical consequence

is that the inmate is denied the relief he has requested, often because his complaint has been determined to be unfounded. That is not what happened here. Although plaintiff's complaint was "dismissed," prison officials "modified" that dismissal to indicate that his complaint against defendant Williams would be investigated by the warden and appropriate action would be taken. The only reason his complaint was not affirmed appears to be that Wisconsin law provides for a formal, confidential investigative process that must occur each time an inmate alleges that he has been sexually assaulted by a prison staff member. Under the circumstances, it is difficult to imagine what other relief could have been afforded plaintiff or what grounds he would have for appealing the decision to forward his complaints on to the prison warden.

The purpose of the exhaustion requirement is to allow prison officials the opportunity to correct their mistakes and resolve prisoners' complaints without judicial intervention. Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 537-38 (7th Cir. 1999) (purpose of exhaustion to narrow dispute and avoid litigation). It is true that in some instances (such as when money damages are requested), an inmate must appeal decisions denying him relief when the relief he is seeking is unavailable through the administrative grievance process. Booth v. Churner, 532 U.S. 731, 741 (2001). However, he must do so only when administrative officials have the ability to offer relief in other forms. Id. at 736 n. 4 ("Without the possibility of some relief, the administrative officers would presumably have

no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust."). For example:

> It is possible to imagine cases in which the harm is done and no further administrative action could supply any remedy. . . . Suppose the prisoner breaks his leg and claims delay in setting the bone is cruel and unusual punishment. If the injury has healed by the time the suit begins, nothing other than damages could be a 'remedy' and if the administrative process cannot provide compensation then there is no administrative remedy to exhaust.

Perez, 182 F.3d at 537; see also Ross v. County of Bernalillo, 365 F.3d 1181, 1187 (10th Cir. 2004) (stating that prisoners "need not engage in entirely fruitless exercises when no form of relief is available at all"); Gabby v. Meyer, 390 F. Supp. 2d 801, 803 (E.D. Wis. 2005) (where inmate brought grievance alleging inadequate medical care and received proper treatment, he did not have to appeal denial of grievance because his complaint had been addressed); Gomez v. Winslow, 177 F. Supp. 2d 977, 983-85 (N.D. Cal. 2001) (same).

In this case, plaintiff pursued his complaint until he was assured that prison officials would investigate his allegations, as he had asked them to do. At that point, by defendant's own admission, there was no further relief prison officials could provide him. Plaintiff utilized all the administrative remedies available to him under the Wisconsin Administrative Code. Therefore, he exhausted his remedies with respect to his Eighth Amendment claim. Defendant's motion will be denied.

ORDER

IT IS ORDERED that defendant Dr. Williams's motion to dismiss plaintiff's complaint for his alleged failure to exhaust administrative remedies is DENIED.

Entered this 6th day of December, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge