IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JEFFREY COTTER,

Plaintiff,

v.

KETTLE MORAINE CORRECTIONAL INSTITUTION HEALTH SERVICES UNIT, UNNAMED MEDICAL, CORRECTIONAL AND ADMINISTRATIVE STAFF AT KETTLE MORAINE CORRECTIONAL INSTITUTION,

Defendants.

OPINION AND ORDER

06-C-192-C

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This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Oakhill Correctional Institution in Oregon, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has had three or more lawsuits or appeals dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's

complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. Except in extraordinary circumstances (as are present in this case), this court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion. Typically, if respondents believe that petitioner has not exhausted the administrative remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioner contends that respondents violated his rights (presumably under the Eighth Amendment) by failing to provide him with medical care to alleviate his pain. Petitioner will be denied leave to proceed in forma pauperis on his claim because he admits that he did not exhaust administrative remedies available to him.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Jeffrey Cotter is a Wisconsin state inmate housed at the Oakhill Correctional Institution in Oregon, Wisconsin. Respondents are the health services unit and unnamed staff at Kettle Moraine Correctional Institution located in Plymouth, Wisconsin.

In October 2003, while petitioner was confined at Kettle Moraine Correctional Institution, he was placed in segregation after committing a smoking infraction. While in segregation, petitioner began to experience acute abdominal pain one afternoon at approximately 2 p.m. When petitioner asked for medical assistance, prison guards and medical personnel refused to help and laughed at him. Petitioner was left to scream in pain, beg for help in tears and roll around in his own vomit. Prison guards called him a cry baby and made faces at him. When guards finally contacted the institution's medical staff, no one visited petitioner in his cell. Instead, the guards were told by phone to have the petitioner drink water and take Tylenol or Ibuprofen, even though petitioner was in extreme pain. The next day, someone from the health services unit checked on petitioner and determined that he needed to be taken to the hospital immediately.

Dr. Charles Black, a physician at the Plymouth hospital, diagnosed petitioner with diverticulitis, resulting in a rupture in his intestine, infection and gangrene. Petitioner underwent abdominal surgery to repair the damage. He will need additional abdominal surgery this year to complete the repair. Dr. Black told petitioner that if he had stayed at the prison much longer without medical treatment, he would have died.

The present complaint is the first complaint petitioner has filed regarding this incident because he received threats from staff at the Kettle Moraine facility and was afraid to file anything about the incident. Petitioner's complaint explains "based solely on threats

made by Kettle Moraine Correctional staff and medical [staff,] this plaintiff never filed anything. It wasn't until I met Inmate Samuels that this civil action was filed." Therefore, petitioner did not file an administrative grievance concerning this incident.

DISCUSSION

Petitioner contends that unnamed staff at the Kettle Moraine Correctional Institution were deliberately indifferent to his serious medical need. I do not reach the question whether petitioner states a claim of a constitutional violation because I must deny petitioner leave to proceed for his failure to exhaust the administrative remedies available to him.

Typically, failure to exhaust administrative remedies is an affirmative defense. Dole v. Chandler, 438 F3d 804, 809 (7th Cir. 2006) (citing Dale v. Lappin, 376 F.3d 652, 656 (7th Cir. 2004)). However, "when the existence of a valid affirmative defense is so plain from the face of the complaint that the suit can be regarded as frivolous, the district judge need not wait for an answer before dismissing the suit." Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002).

The exhaustion provisions of the 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), state 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, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." 18 U.S.C. § 362(g)(2).

The United States Supreme Court has held that administrative exhaustion is necessary "even when the prisoner seeks relief not available in grievance proceedings, notably money damages." Porter v. Nussle, 534 U.S. 516, 524 (2002). Moreover, the Court has stated that as long as the administrative review board has the power to grant *some* relief in response to the prisoner's grievance, such as disciplinary action against prison guards, an administrative remedy is still "available" under the PLRA even if the remedy is not that requested by the inmate. Booth v. Churner, 532 U.S. 731, 741 (2001).

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, 182 F.3d at 535 (7th Cir. 1999); see also Massey, 196 F.3d at 733. Also, the court of appeals has held 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. The potential effectiveness of an administrative response bears no relationship to the statutory

requirement that prisoners first attempt to obtain relief through administrative procedures." Massey, 196 F.3d at 733.

Thus, before inmates may begin a civil action, Wis. Admin. Code § DOC 310.04 requires that they file a complaint under § DOC 310.09 or 310.10, receive a decision on the complaint under § DOC 310.12, have an adverse decision reviewed under § DOC 310.13, and be advised of the secretary's decision under § DOC 310.14.

Petitioner indicated in his complaint that he did not file an administrative grievance regarding the events of October 2003 because he "received threats" from staff at the Kettle Moraine facility and was afraid to file anything about the incident. According to petitioner, it was not until he met another inmate that he decided to take action by filing this lawsuit.

In Dole, 438 F.3d at 813, the court of appeals held that a prisoner had exhausted his administrative remedies even though prison officials claimed they did not have a record of Dole's complaint. In that case, Dole had suspected possible interference with his complaint from prison officials and had made an extra copy of the grievance before he placed the original in the proper deposit box. Later, after the time for filing his complaint had expired, Dole asked about the status of his grievance and was told that there was no record of it. Dole was not instructed what steps he might take to file a late grievance. In reversing the district court's dismissal of the case for Dole's failure to exhaust, the court of appeals reasoned that when a prisoner has done all he can to utilize the grievance system,

administrative remedies become unavailable if prison authorities refuse to respond to the grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting. It emphasized, however, that such a finding would not be possible where an inmate simply chose not to file a grievance at all. The misstep in the process must be entirely that of the prison system. Id. at 810.

In this case, petitioner admits that he made no effort to file a grievance. He does not describe in his complaint in this court the intimidation he believed he faced, but whatever fear he professes, it was clearly not so strong as to prevent him from filing this lawsuit with the encouragement of another inmate. Under these circumstances, I cannot find that administrative remedies were unavailable to petitioner. Therefore, petitioner's complaint must be dismissed without prejudice to petitioner's refiling his complaint after he exhausts his administrative remedies.

ORDER

IT IS ORDERED that

1. Petitioner Jeffrey Cotter's request for leave to proceed in forma pauperis on his claim of violation of his rights for respondent's failure to provide him with medical care in October of 2003 is DENIED because petitioner has failed to exhaust his administrative remedies, and this case is DISMISSED without prejudice.

2. The unpaid balance of petitioner's filing fee is $245.73; petitioner is obligated to pay this amount in monthly payments according to 28 U.S.C. § 1915(b)(2);

3. A strike will not be recorded against petitioner pursuant to 28 U.S.C. §1915(g), because failure to exhaust is not an enumerated ground for issuing a strike; and

4. The clerk of court is directed to close the file.

Entered this 30th day of May, 2006.

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