

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

CLAYTON HARDY MELLENDER,

Plaintiff,

v.

DANE COUNTY and DR. JOHN DOE,

Defendants.

OPINION and ORDER

06-C-298-C

In this proposed civil action for monetary relief, plaintiff Clayton Hardy Mellender, a prisoner at the New Lisbon Correctional Institution in New Lisbon, Wisconsin, contends that defendants violated his rights under the Eighth Amendment by refusing to dispense his prescription pain medication while he was being held at the Dane County jail awaiting a hearing. Now before the court are plaintiff's "Motion for Default Judgment and Demand for Sanctions" and defendant Dane County's motion for summary judgment. (Defendant Dr. John Doe has not yet been identified or served with plaintiff's complaint. Therefore all references to defendant in this opinion will be to defendant Dane County.)

In his "Motion for Default Judgment and Demand for Sanctions," plaintiff contends that defendant should be sanctioned with a judgment against it because it failed to provide

a timely response to his requests for admission after it was ordered to do so by the magistrate judge on September 8, 2006. Because plaintiff was not prejudiced by defendant's delayed response to his requests, his motion will be denied.

Defendant has moved for summary judgment on a single ground: it contends that plaintiff's case should be dismissed because he failed to exhaust his administrative remedies as required under 42 U.S.C. § 1997e(a). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999). Although plaintiff does not dispute that he failed to file a grievance with the jail, he contends that his failure to file a grievance is excusable because defendant impeded his ability to access the jail's grievance process. Because defendant has not met its burden of showing that plaintiff failed to exhaust administrative remedies that were legitimately available to him, the motion will be denied.

Although the parties complied with this court's summary judgment procedures by proposing facts and responding to each other's proposed facts, each side failed to propose facts found in the record that are essential to the resolution of defendant's pending motion. Therefore, in the interest of justice and efficiency, I draw the following factual allegations from the parties' proposed findings of fact and from the record.

FACTS

A. Undisputed Facts

1. Parties

Plaintiff Clayton Mellender is a prisoner confined presently at the New Lisbon Correctional Institution in New Lisbon, Wisconsin. From March 28, 2006 until March 31, 2006, plaintiff was confined at the Dane County jail.

Defendant Dane County is responsible for the operation of the Dane County jail.

Defendant Dr. John Doe is a doctor who allegedly discontinued plaintiff's methadone prescription during the time plaintiff was confined at the Dane County jail.

2. Exhaustion

_____ Plaintiff was brought to the Dane County jail on March 28, 2006, to await a court hearing. Because plaintiff was taking prescription pain medication at the time he arrived at the jail, he was placed in the jail's segregation unit. His eyeglasses were confiscated.

In plaintiff's complaint in this court, he alleges that defendant Dr. Doe discontinued one of his prescription pain medications during the time he was confined at the jail. Afterward, plaintiff made numerous requests for his glasses and for a pencil so he could draft a grievance regarding the alleged discontinuation of his prescription medication. These

requests were denied. Plaintiff asked to be moved to the general population unit, where he would be able to use a pencil and have his glasses, but this request was denied also.

When he arrived at the jail, plaintiff was given a copy of the jail rules, which included the following section:

GRIEVANCES

Grievance procedures are posted in each housing area. Prisoners must make every effort to informally resolve issues prior to filing a grievance. Grievances will be rejected if the grievance instructions are not followed.

To ensure timely processing of your grievance, it must be sent to the Security Services Secretary through the U.S. Mail. If you are indigent you will be allowed to submit your grievance through the internal mail system. Your indigent status must be verified by the deputy in your housing area.

You will not be disciplined for using the grievance procedure. However, you may be disciplined if you lie or make false statements in the grievance.

Plaintiff was not given a copy of the grievance procedures themselves, which included the timeline for submitting complaints.

Plaintiff returned to the New Lisbon Correctional Institution on March 31, 2006. Nearly six months later, on August 15, 2006, plaintiff completed a prison Interview/Information Request Form, stating:

While on an outside court obligation (OCO) I had difficulties with the medical staff at the county jail. Is the institution complaint examiner empowered to investigate incidents in a county jail that happened while the inmate was on a writ?

Later that day, inmate complaint examiner Angela Kroll responded in writing to plaintiff's request form: "This is not in the ICE's scope."

B. Additional Factual Allegations¹

On April 2, 2006, plaintiff placed a grievance letter addressed to the jail in New Lisbon Correctional Institution's outgoing mail. Because plaintiff is indigent, he submitted a disbursement request slip with his letter, asking that the letter be mailed using the prison's legal loan program for indigent prisoners. The letter and disbursement form were returned to plaintiff because prison policy prohibits inmates from using the legal loan program to send letters to a sheriff's department for any purpose other than seeking service of process.

OPINION

A. Motion for Default Judgment and Demand for Sanctions

On September 8, 2006, Magistrate Judge Stephen Crocker entered an order requiring defendant Dane County to respond by September 15, 2006, to plaintiff's requests for admission. Defendant did not respond until September 27, 2006; however, it explained the

¹Because plaintiff averred facts in his affidavit that he did not include in his Proposed Findings of Fact, defendants have had no opportunity to indicate whether the additional facts plaintiff has alleged are in dispute. Because it is not clear whether defendants contest plaintiff's averments, I will treat these facts as though they are disputed.

delay to the court and to plaintiff in a letter mailed that same day, dkt. #34. In an order dated October 4, 2006, the magistrate “accept[ed] defendants’ responses as timely.” Id. Meanwhile, plaintiff requested and was granted additional time in which to oppose defendant’s motion for summary judgment. Dkt. #29. Because plaintiff was not prejudiced by defendant’s delayed response, his motion for a sanction of judgment against defendant will be denied.

B. Motion for Summary Judgment

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) (“To exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require.”). 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 the question whether failure to file a timely grievance could be excused under § 1997(e). The 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.

There is one catch, however. Prison officials may not take unfair advantage of the exhaustion requirement, and a remedy becomes “unavailable” if 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). In Dale, 376 F.3d at 654-55, an inmate alleged that the prison officials had failed to protect him from an attack by other inmates. When the inmate attempted to file a grievance, he was told that the employees did not have grievance forms and instead was given blank sheets of paper. Id. at 655. During the grievance period, Dale was transferred and the guard at the new prison told him that grievance forms could be obtained only from the unit team or if the warden permitted it. Id. Given the timing of his transfer, he was unable to file a grievance within the appropriate period. Id. The Court of Appeals for the Seventh Circuit held that administrative remedies were unavailable to Dale, explaining:

If prison employees refuse to provide inmates with those forms when requested, it is difficult to understand how the inmate has any available remedies. Just as prison employees cannot exploit the exhaustion requirement by not responding to grievances, they should not be rewarded for preventing an inmate access to an administrative remedy.

Dale, 376 F.3d at 656; see also Kaba v. Stepp, 458 F.3d 678, 685 (7th Cir. 2006); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) (“[A] remedy that prison officials prevent a prisoner from ‘utiliz[ing]’ is not an ‘available’ remedy under § 1997e(a).”).

It is undisputed that during plaintiff's four-day stay at the Dane County jail, he asked jail personnel repeatedly to provide him with a pencil and with his glasses so he could write and submit a written grievance in accordance with jail policy. His requests were denied. This alone might be sufficient reason to deny defendant's motion.

Like Dale, plaintiff was transferred soon after the event that sparked his grievance. And, like Dale, plaintiff avers that he continued to make efforts to file a grievance after his transfer, first by trying to mail the grievance to the jail using the prison's legal loan program for indigent prisoners. Some time after that attempt was unsuccessful, plaintiff asked whether he could file a grievance against the jail using the prison's inmate complaint system. He was informed that the prison lacked the authority to address complaints relating to the jail. Drawing all inferences in plaintiff's favor, it is difficult to see how he could have done more than he did to comply with the jail's grievance procedures, except perhaps for having inquired sooner whether he could utilize the prison grievance system to exhaust his complaint. Because defendants have not met their burden of proving that plaintiff had available remedies that he did not utilize, their motion for summary judgment will be denied.

ORDER

IT IS ORDERED that

1. Plaintiff's "Motion for Default Judgment and Demand for Sanctions" is DENIED;

and

2. Defendant Dane County's motion for summary judgment is DENIED.

3. The clerk of court is required to scheduled a status conference before United States Magistrate Judge Stephen Crocker promptly so that a trial date may be set and other deadlines established for bringing this case to resolution.

Entered this 27th day of October, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge