

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

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DWAYNE ALMOND,

Plaintiff,

OPINION and ORDER

v.

06-C-446-C

LT. MARK LESATZ,

Defendant.  
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In this civil action for monetary relief, plaintiff Dwayne Almond, an inmate at the Wisconsin Resource Center in Winnebago, Wisconsin, contends that defendant Mark LeSatz violated plaintiff's constitutional rights under the Eighth Amendment of the United States Constitution when Lesatz refused to provide plaintiff with emergency medical treatment for a back injury he sustained on April 1, 2006.

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 did not fully exhaust any of the three grievances he filed regarding defendant's alleged actions, I will grant defendant's motion and will dismiss this case.

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 Dwayne Almond is a prisoner at the Wisconsin Resource Center in Winnebago, Wisconsin. At all times relevant to the complaint, he was incarcerated at the Green Bay Correctional Institution in Green Bay, Wisconsin.

Defendant Mark LeSatz is a correctional officer at the Green Bay Correctional Institution.

### B. Exhaustion

#### 1. Rejected complaint

On April 5, 2006, plaintiff completed a three-page offender complaint form, which he submitted to prison officials. On April 7, 2007, the form was returned to him, with a letter from institution complaint examiner Donna Liebergen, stating:

Your complaint materials received on April 07, 2006 are being returned because of failure to meet the filing requirements as stated in DOC 310, Wis. Adm. Code:

- Complaints shall contain only one issue and that issue shall be clearly identified [DOC 310.09(1)(e)].
- Other, see comments below.

Complaint is being returned as it is unclear what your one issue is. You mentioned you've been refused medical treatment, then state you've been seen by Nurse Jean; you mention you have no clothing, you've been put on "Nutra-Loaf" and a bag meal and you can't shower. You also mention you want paperwork to file charges against G[reen] B[ay] C[orrectional] I[nstitution]/D[eartment of] C[orrections] with the F[ederal] B[ureau of] I[nvestigation].

Please clearly define ONE issue per complaint that you would like ICE to respond to. These must be filed in a timely manner as well.

Plaintiff did not challenge the decision to reject the complaint.

## 2. Inmate Complaint #GBCI-2006-10334

On April 12, 2006, plaintiff completed offender complaint number GBCI-2006-10334. Although plaintiff received no immediate response to his complaint, he did not file an appeal. On September 5, 2006, institution complaint examiner Michael Mohr responded

to plaintiff's complaint, recommending that it be "dismissed with modification," for the following reasons:

Inmate Almond claims he was refused medical treatment over the weekend of 3-31-06. Inmate Almond complains that G[reen] B[ay] C[orrectional] I[nstitution] and D[eartment of] C[orrections] H[ealth] S[ervices] U[nits] do not operate on weekends.

Lt. Swietatowski, Seg Unit Supervisor, stated that Inmate Almond complained to him about back pain when he arrived from C[oulmbia] C[orrectional] I[nstitution]. Lt. Swietatowski stated that he had Inmate Almond brought to HSU. Nurse Lutsey saw Inmate Almond and he was then returned to the Segregation Unit. Lt. Swietatowski stated that Inmate Almond complained about his back again the next day on Saturday April 1.

Inmate Almond was seen by Nurse Jean Lutsey on 4/4/06 for back pain. She requested an [sic] full examination with X-rays. Nurse instructs that Ibuprofen be put on the Medical Cart for Inmate Almond for pain.

Jeananne Greenwood, H[ealth] S[ervices] M[anager] at GBCI keeps a nurse on-call 24 hours a day, 7 days a week. The Department of Corrections keeps a doctor on call 24 hours a day, 7 days a week. If an inmate's physical condition would require emergency care, the Institution [ha]s contracted with a local hospital to provide such services.

Inmate Almond was not denied medical treatment but was seen by Nurse Lutsey who determined the medical needs of Inmate Almond. The ICE is not in the position to question or judge the merits, opinions or treatments offered by the trained professional HSU staff. The inmate's concerns are documented and will be submitted to the Director of the Bureau of Health Services for review and decision. At this juncture, the ICE can take no further action.

On September 8, 2006, after reviewing Mohr's recommendation, Cynthia Thorpe "affirmed with modification" plaintiff's complaint. In doing so, she wrote:

The summary states that patient was seen upon transfer to [sic] CCI and complained about back pain to officers on 3-31-06 and 4-1-06. The Lt. states that the Nurse s[aw] the inmate on 3-31-06. There is not documentation of the assessment of the patient in the medical record of that encounter. Patient not provided with medical care until seen on 4-3-06. Modification is that manager will remind staff to document all encounters.

3. Inmate Complaint #GBCI-2006-11681

On April 21, 2006, plaintiff filed an inmate complaint numbered GBCI-2006-11681. In his complaint, plaintiff alleged that he had been refused pain medication for his back and again complained that he had been refused treatment on the weekend of March 31, 2006. On May 18, 2006, Mohr recommended that the complaint be dismissed; Thorpe did so the following day. (The decision was not printed until May 22, 2006.)

On June 12, 2006, plaintiff appealed the dismissal to the corrections complaint examiner, who dismissed the appeal as untimely.

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 three complaints that mentioned his alleged denial of medical treatment on the weekend of March 31, 2006. Defendant contends that plaintiff

failed to exhaust his administrative remedies with respect to each of these complaints.

1. April 5, 2006

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). Complaints may also be rejected if they contain more than one issue per complaint, or if an inmate has filed more than two complaints in the previous week. Wis. Admin. Code §§ DOC 310.09(1)(e), (2).

Plaintiff's April 5, 2006 complaint contained three pages of complaints regarding a variety of matters ranging from his desire to file a complaint against the prison with the FBI to denial of medical treatment to an objection to the food he was receiving. Because his complaint raised more than one issue in violation of Wis. Admin. Code § DOC 310.09(1)(e), it was properly rejected by the inmate complaint examiner. Plaintiff did not appeal the rejection of his complaint. Because plaintiff failed to comply with the procedural requirement for limiting his complaint to one issue, he cannot rely on this complaint to show he exhausted his administrative remedies on the claim raised in this lawsuit.

## 2. Inmate Complaint #GBCI-2006-10334

On April 12, 2006, plaintiff filed inmate complaint #GBCI-2006-10334, raising only one issue: that defendant had failed to provide him with medical treatment on the weekend of March 31, 2006. The problem, defendants contend, is that when prison officials did not respond within the time designated in the procedures, plaintiff failed to appeal the grievance.

The administrative code provides, “If the complainant does not receive [a] decision within 30 working days after the I[nstitution] C[omplaint] E[xaminer] acknowledges receipt of the complaint under s. DOC 310.11(2), the complainant *may* appeal to the C[orrections] C[omplaint] E[xaminer].” Wis. Admin. Code § DOC 310.12(3) (emphasis added). Although defendant contends that plaintiff was *required* to appeal his grievance after 30 days had elapsed without a response from prison officials, the permissive phrasing of the code left him with two options: (1) he could appeal the decision without a response or (2) he could wait for an answer before appealing any adverse decision.

It is undisputed that plaintiff did not appeal the grievance to the corrections complaint examiner. Instead, he waited. When he did not receive a response, he filed suit in this court on August 21, 2006. On September 5, 2006 (less than one week after plaintiff’s complaint was served on defendant), prison officials affirmed plaintiff’s original grievance “with modification.” Because a prisoner is not required to appeal a favorable



grievance decision, Thornton v. Snyder, 428 F.3d 690, 697 (7th Cir. 2005), plaintiff contends that he has exhausted his administrative remedies with respect to his Eighth Amendment claim against defendant. Unfortunately for plaintiff, however, his exhaustion came too late.

In Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999), the Court of Appeals for the Seventh Circuit held that a suit brought in federal court by a prisoner before administrative remedies have been exhausted must be dismissed. A district court lacks “discretion to resolve the claim on the merits, even if the prisoner exhausts intra-prison remedies before judgment.” Id. In Ford v. Johnson, 362 F.3d 395, 398-99 (7th Cir. 2004), the court held that a lawsuit is “brought” within the meaning of the exhaustion statute “when the complaint is tendered to the district clerk.”

The only instance in which the court of appeals has allowed a prisoner to exhaust his administrative remedies after beginning his lawsuit is in Barnes v. Briley, 420 F.3d 673 (7th Cir. 2005), a case in which the facts pertaining to exhaustion were unique and entirely distinguishable from cases such as this one. In Barnes, the pro se plaintiff originally filed his complaint under the Federal Tort Claims Act. Although Barnes had exhausted his administrative remedies under the act, he had not taken his claim through the prison’s inmate complaint system. Subsequently, Barnes was assigned appointed counsel, who determined that plaintiff’s claim was properly brought under 42 U.S.C. § 1983 rather than

the Tort Claims Act. Counsel initiated the prison grievance process and, once plaintiff had exhausted his administrative remedies, Barnes dismissed his Tort Claims Act claim against the defendant United States and, with leave of the district court, amended his complaint to allege § 1983 claims against entirely new defendants. In that rare instance, the court of appeals held that Barnes had properly exhausted his administrative remedies under the Prison Litigation Reform Act because his amended complaint was “the functional equivalent of filing a new complaint.” Barnes, 420 F.3d at 678. The court noted expressly that this was *not* a situation in which Barnes was attempting to replead improperly exhausted claims in an amended complaint, which would be forbidden under Perez and Ford. Id.

Had plaintiff received the decision affirming his grievance from prison officials before he filed his federal lawsuit, he would have exhausted his administrative remedies as required under § 1997e(a). Similarly, he would have exhausted his administrative remedies if he had assumed his complaint to be denied when 30 days had elapsed and appealed the assumed denial, as he was authorized to do under Wis. Admin. Code § DOC 310.12(3). However, because he filed his lawsuit before receiving an answer to either his initial grievance or to an appeal of that grievance, he failed to exhaust his administrative remedies with respect to inmate complaint number GBCI-2006-10334.

### 3. Inmate Complaint #GBCI-2006-11681

On April 21, 2006, plaintiff filed an inmate complaint numbered GBCI-2006-11681, alleging that he had been refused pain medication and medical treatment for his back on the weekend of March 31, 2006. On May 19, 2006, the institution complaint examiner dismissed the grievance. A copy of the decision was provided to plaintiff on May 22, 2006.

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 received notification on May 22, 2006 that his complaint had been dismissed, he did not appeal the decision until June 12, 2006, more than ten days after the decision had been rendered. Therefore, the corrections complaint examiner did not consider the appeal because it was untimely.

“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. An inmate who fails to “us[e] all steps that the agency holds out, and do[] so properly” is foreclosed by 42 U.S.C. § 1997(e) from bringing a suit. Woodford v. Ngo, 126 S. Ct. 2378, 2380-2381 (2006) (citing Pozo, 286 F.3d at 1024). Because plaintiff did not exhaust any of his three prison grievances regarding the treatment he was allegedly denied on the

weekend of March 31, 2006 before he filed suit in this court, defendant's motion to dismiss must be granted.

ORDER

IT IS ORDERED that defendant's motion to dismiss plaintiff's complaint is GRANTED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 29th day of October, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge