IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CHI CA UNG,

ORDER

Plaintiff,

v.

06-C-494-C

HARLEY LAPPIN, Director,
Federal Bureau of Prisons;
PETER NALLY, Regional Director,
North Central Region, Federal Bureau of Prisons,
RICARDO MARTINEZ, Warden, FCI-Oxford, WI,

Defendants.

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In an order dated October 2, 2006, I allowed plaintiff to proceed on a claim that defendants denied his right to equal protection of the laws by refusing to admit him in to a drug treatment program because of his race. Defendants have moved to dismiss the case on the ground that plaintiff failed to comply with 42 U.S.C. § 1997e(a), which prohibits prisoners from bringing suits about prison conditions "until such administrative remedies as are available are exhausted."

The Bureau of Prisons has an internal 3-level grievance mechanism, which is set out in 28 C.F.R. § 542.10. The procedure consists of the prisoner's completing forms and

submitting them to the warden (BP-9), the regional director of the Bureau of Prisons (BP-10) and the Bureau of Prison's General Counsel (BP-11) according to the timetable set out in 28 C.F.R. § 542.14 and § 542.15. In their motion, defendants allege that plaintiff failed to use this procedure.

A failure to exhaust administrative remedies under 42 U.S.C. §1997e(a) is an affirmative defense that must be proven by the defendants. Jones v. Bock, No. 05-7142, 2007 WL 135890, *11 (U.S. Jan. 22, 2007). (It is not, as defendants suggest, a question of subject matter jurisdiction. The court of appeals explained long ago that a prisoner's failure to exhaust does not deprive the court of jurisdiction to hear the case; like other affirmative defenses and unlike jurisdictional defects, the exhaustion defense can be waived. Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999).) In support of their motion to dismiss, defendants rely on the affidavit of Vickie Bortz, who is a legal administrative assistant for the Federal Bureau of Prisons and responsible for receiving all prisoner grievances and entering them into a database. In her affidavit, Bortz avers that a review of her records "indicates that [plaintiff] has filed no administrative remedy requests or appeals to date." Aff. of Vickie L. Bortz, dkt. #7, ¶8.

Normally, a court may not consider matters outside the pleadings in the context of a motion to dismiss. Fed. R. Civ. P. 12(b); Fleischfresser v. Directors of School District 200, 15 F.3d 680, 684 (7th Cir. 1994). However, it is unnecessary to convert defendants'

motion to dismiss into one for summary judgment because plaintiff does not deny that he failed to file a grievance under the Administrative Remedy Program. Thus, the only question remaining is legal rather than factual, that is, whether plaintiff's failure to file a grievance requires dismissal. Converting defendants' motion would accomplish nothing but a delay in the resolution of the case. Cf. Loeb Industries, Inc. v. Sumitomo Corp., 306 F.3d 469, 480 (7th Cir. 2002) (failing to convert motion not reversible error when "there are no potential disputed material issues of fact").

Plaintiff advances a number of arguments why this case should not be dismissed, but unfortunately for him, none is availing. First, plaintiff argues that he did not need to exhaust his administrative remedies because of the type of relief he is seeking. Plaintiff says that he hopes to gain an early release upon completion of the program, meaning that he is actually challenging his custody and not his conditions of confinement.

Plaintiff is correct that the exhaustion requirement of §1997e(a) applies only to cases involving "prison conditions." It is also true that courts have held that a prisoner's challenge to his custody, that is, a petition for a writ of habeas corpus, is not a case about "prison conditions" within the meaning of §1997e(a). Skinner v. Wiley, 355 F.3d 1293 (11th Cir. 2004); Carmona v. United States Bureau of Prisons, 243 F.3d 629 (2d Cir. 2001); McIntosh v. United States Parole Commission, 115 F.3d 809 (10th Cir. 1997); see also Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000) (holding that requirements of Prisoner Litigation

Reform Act do not apply to habeas corpus petitions). But plaintiff has mischaracterized his claim. He cannot proceed under the habeas corpus statutes because he is not challenging the validity of his custody.

The requirements for bringing a petition for a writ of habeas corpus are explained in Richmond v. Scibana, 387 F.3d 602 (7th Cir. 2004), a case that plaintiff cites in his brief. Richmond involved a Bureau of Prisons rule that prisoners could not be placed in a halfway house before the last 10% of their sentence. A prisoner brought a petition for a writ of habeas corpus, arguing that the governing statute entitled him to be *considered* for earlier placement. The court held that the prisoner could not proceed under the habeas statute because, even if he was correct in his interpretation of the statute, "victory in this litigation would not entitle [him] to any change in the duration or even the location of his confinement." Id. at 605. In other words, a complaint seeking the right to be considered for early release is not enough to qualify the action as a petition for a writ of habeas corpus. Rather, the prisoner must show that, if he were to succeed, he would be entitled to an order releasing him from confinement.

Plaintiff cannot meet this standard. His claim is even further removed from an action challenging his confinement than the one in Richmond. Under 18 U.S.C. § 3621(e), the Bureau of Prisons "may" reduce a prisoner's sentence by as much as one year if that prisoner "successfully complet[es] a treatment program." Plaintiff's claim is not that he successfully

completed a treatment program and was subsequently denied early release because of his race. Rather, he says only that he was denied *entry* into a program. Thus, if plaintiff were successful in this suit, he could not obtain an order directing his early release; at most, he would be entitled to admittance into the drug treatment program. Although plaintiff's ultimate goal may be to obtain early release, he cannot achieve that through this suit. Further, by seeking entry into the drug program, plaintiff is seeking to change his prison conditions. Porter v. Nussle, 534 U.S. 516, 532 (2002) (§1997e(a) applies to "all inmate suits about prison life"). Section 1997e(a) is applicable to this case.

Second, plaintiff writes that "until the Seventh Circuit's decision in Pacheco v. Lappin, 167 Fed. Appx. 562 (7th Cir. 2006), there did not appear to be an avenue for prisoners to challenge a Bureau decision regarding its programs." Plt.'s Br., dkt. #8, at 2. To the extent plaintiff means to argue that he had no "available" remedies within the meaning of § 1997e(a), he misunderstands the exhaustion requirement. In Pacheco, the plaintiff was a federal prisoner who, like plaintiff, alleged that he was denied entry into a drug treatment program because of his race. The court of appeals concluded that the district court erred in dismissing the case for failure to state a claim.

Plaintiff's reliance on Pacheco is understandable because the facts of that case are so similar to his own. But Pacheco had nothing to do with exhaustion of administrative remedies. It is true that the court in Pacheco recognized that prisoners had a right to be

considered for a treatment program without regard to their race, but it was not the first court to hold that prisoners had a right to equal protection. More important, even if Pacheco was groundbreaking, this would not affect plaintiff's requirement to exhaust his administrative remedies. Plaintiff appears to believe that the exhaustion requirement applies only to claims that have been considered previously by courts, but this is not true. An administrative remedy is "available" under § 1997e(a) if the prisoner may use it to obtain some form of relief for his grievance. Booth v. Churner, 532 U.S. 731, 736 (2001).

In this case, defendants point to 28 C.F.R. § 542 as a source of potential relief. On its face, that regulation allows prisoners to grieve "any aspect of . . . confinement." Plaintiff provides no reason why § 542 would not apply to his case.

Third, plaintiff argues that "administrative appeal would be futile" and suggests that this means he did not actually have an "available" remedy. Plaintiff does not explain why he believes it would have been futile to file a grievance. Even if I agreed with him that seeking an administrative remedy would have been unsuccessful, I could not accept his argument. Both the Supreme Court and the Court of Appeals for the Seventh Circuit have held that there is no futility exception to § 1997e(a). Booth; 532 U.S. at 741 n.6; Massey v. Wheeler, 221 F.3d 1030, 1034 (7th Cir, 2000). Thus, a remedy is "available" under § 1997e(a) so long as "the administrative process has authority to take some action in response to a complaint." Booth, 532 U.S. at 726. Although it does not appear that § 542

sets out the type of relief prisoners may obtain in the administrative remedy program, the regulations do not prohibit prison officials from providing *any* type of relief, which means that plaintiff had an available remedy within the meaning of § 1997e(a).

Fourth, plaintiff suggests that he did exhaust his administrative remedies, or at least that his failure to do so should be excused, because he "did ask the Drug Program technician, Program Coordinator, and his FCI Unit Team for admittance to the program." Plt.'s Br., dkt #8, at 3. Plaintiff is correct to note that asking for admission into the treatment program was an important step. If he had not done this, it is likely that his case would not be ripe for review: plaintiff could not complain that he was illegally denied entry into a program for which he never asked to be admitted. But taking these steps did not excuse plaintiff from following the grievance procedure established by the Bureau of Prisons. Prisoners do not have discretion to seek an informal resolution in the way they think best. For good or ill, they are stuck with the procedure required by prison administrators. 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."). See also Woodford v. Ngo, 126 S. Ct. 2378, 2385 (2006) (adopting rationale of Pozo).

Fifth, plaintiff says that "irreparable injury may occur without immediate relief." Plt.'s Br., dkt. #8, at 4. Although plaintiff cites no authority for this argument, some courts have declined to dismiss a prisoner's case despite a failure to exhaust in cases in which

serious harm is imminent. E.g., Evans v. Saar, 412 F. Supp. 2d 519, 527 (D. Md. 2006); Howard v. Ashcroft, 248 F. Supp. 2d 518, 533-34 (M.D. La. 2003); Borgetti v. Bureau of Prisons, No. 03 C 50034, 2003 WL 743936, *2 n.2 (N.D. Ill. Feb. 14, 2003). See also Marvin v. Goord, 255 F.3d 40, 43 (2d Cir. 2001) (instructing district court to consider on remand whether "exhaustion under the PLRA is required when the remedy sought, i.e., urgent medical relief, is available in the prison administrative proceedings but, because of exigencies of the situation, the remedy may be ineffective"). However, in each of these cases, the plaintiff demonstrated that the nature of the relief sought was such that the claim would be moot before the plaintiff was finished with the exhaustion process, suggesting that no administrative remedy was actually available. Evans, 412 F. Supp. 2d at 527 (plaintiff on verge of execution); Howard, 248 F. Supp. 2d at 533-34 (plaintiff about to be transferred from halfway house); Borgetti, 2003 WL 743936, at *2 n.2 (plaintiff's sentence would expire before he was finished with exhaustion).

According to plaintiff's complaint, he received a five-year sentence in March 2005. Plaintiff says nothing in his brief to suggest that he does not have enough time to complete the grievance process and still finish the drug program before his release. Further, to the extent plaintiff is running out of time, plaintiff does not suggest that he was prevented from filing a grievance earlier. The court of appeals has stated that, even in cases in which exhaustion is not mandatory, "a prisoner cannot manufacture exigency by tarrying."

Richmond, 387 F.3d at 604. In other words, plaintiff cannot wait to file a lawsuit until the last minute and then argue that he does have enough time to complete the exhaustion process.

Plaintiff concludes his brief with a discussion of the merits of his claim, but this is beside the point. Regardless how strong plaintiff's case is, he is still required to complete the grievance process before he files a federal lawsuit. In fact, the court of appeals has held that once a defendant shows that the plaintiff has failed to exhaust, the court "lacks discretion to resolve the claim on the merits, even if the prisoner exhausts intra-prison remedies before judgment." Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999).

Because plaintiff failed to exhaust his available administrative remedies before filing this case, defendants' motion to dismiss must be granted. Plaintiff may file another lawsuit once he completes the administrative remedy process.

ORDER

IT IS ORDERED that the motion to dismiss filed by defendants Harley Lappin, Peter Nally and Ricardo Martinez is GRANTED. This case is DISMISSED WITHOUT PREJUDICE to plaintiff's filing a new law suit it after he has exhausted his administrative

remedies.

Entered this 29th day of January, 2007.

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