

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

ANTHONY CORDOVA,

Plaintiff,

OPINION and ORDER

v.

07-C-172-C

MATTHEW FRANK, Secretary,
GREGORY GRAMS, Warden, JANEL
NICKEL, Security Director, JANET
WALSH, Psychologist DS 1, DS I first
shift sergeant, RICKY PLATH, Bldgs
and Grounds Supervisor, CAPTAIN
DYLON RADTKE, Administrative Cpt.,
DOCTOR SULIENE, physician, DR.
JENS, Psychiatrist, DR. DANA
DIEDRICH, Psychiatrist and JUSTIN
McLIMANS, Corrections Officer,

Defendants.

Plaintiff Anthony Cordova is a prisoner confined at the Wisconsin Resource Center in Winnebago, Wisconsin. He is a former inmate of the Columbia Correctional Correctional Institution in Waupun, Wisconsin. In orders dated April 19, 2007, and April 30, 2007, I granted plaintiff leave to proceed on claims that his Eighth Amendment rights were violated when (1) defendant Dr. Suliene refused to treat his back pain; (2) defendants

Janet Walsh, Dr. Jens and Dr. Dana Diedrich refused to provide him with mental health treatment; (3) defendants Gregory Grams and Ricky Plath refused to repair poorly-sealed windows in his cell, causing the cell to become excessively cold; (4) defendants Dylan Radtke, Janel Nickel, Grams and Matthew Frank enforced prison policies that required food to be delivered through filthy traps in the bottom of cell doors; and (5) defendant McLimans “bashed” him into a wall without provocation.

Now before the court is defendants’ motion to dismiss plaintiff’s claims that defendant Suliene refused to treat his back pain and that defendants Walsh, Jens and Diedrich refused to provide him with mental health treatment. Defendants contend that plaintiff failed to exhaust these claims through the prison administrative grievance process, as required by 42 U.S.C. § 1997e(a).

Defendant’s motion will be granted with respect to plaintiff’s claim that defendant Suliene exhibited deliberate indifference to his back pain because plaintiff did not provide prison officials with enough information to permit them to consider his untimely-filed appeal of his inmate grievance. However, because defendants have not met their burden of showing that plaintiff failed to exhaust the administrative remedies available to him with respect to his complaints about mental health treatment, defendant’s motion will be denied with respect to plaintiff’s claim that defendants Walsh, Jens and Diedrich failed to provide him with mental health treatment.

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 the record defendants have submitted accurately reflects his use of the inmate grievance system. Therefore, the only question whether he exhausted his administrative remedies is legal, rather than factual. Because converting defendants' motion would accomplish nothing but a delay in the resolution of the case, the court is not obliged to do so. 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").

The following facts are drawn from the allegations of plaintiff's complaint and the relevant exhaustion documents defendants have submitted in connection with their pending motion.

UNDISPUTED FACTS

A. Relevant Parties

Plaintiff is an inmate of Wisconsin Resource Center in Winnebago, Wisconsin. Previously, he was incarcerated at the Waupun Correctional Institution in Waupun, Wisconsin and the Columbia Correctional Institution in Portage, Wisconsin.

Defendant Janet Walsh is a psychologist at the Columbia Correctional Institution.

Defendants Dr. Jens and Dr. Dana Diedrich are psychiatrists at the Columbia Correctional Institution.

Defendant Suliene is a physician at the Columbia Correctional Institution.

B. Inmate Grievances

I. Complaint about back pain

On December 4, 2006, plaintiff filed Offender Complaint CCI-2006-35643, complaining that defendant Suliene had not provided him with adequate treatment for his back pain.

On December 11, 2006, after investigating plaintiff's claim, inmate complaint examiner Burt Tamminga made the following recommendation:

Mr. Cordova complains that the treatment for his back pain ordered by Dr. Suliene is not working. He requests to have the treatment previously prescribed by Dr. Cox.

RN Ward provided the following information: On 2/24/06 Dr. Cox prescribed Cyclobenzaprine 10 mg for Mr. Cordova's back pain. This is a medication that is often prescribed for acute, painful musculoskeletal conditions. Use of this medication is not recommended longer than 2 or 3 weeks. Therefore, Dr. Suliene changed the treatment to Gabapentin and Ibuprofen. Mr. Cordova is also on Amitriptyline which is often used to treat intractable pain. Mr. Cordova mentions that he is suicidal due to the back pain. He has been seen and treated by Dr. Diedrich, however is currently refusing all the medication and treatment offered. I do think Dr. Diedrich'[s] treatment might be of help

in terms of increasing Mr. Cordova's ability to deal with pain and to work out a regimen that strengthens his pain tolerance.

The inmate's concerns are documented and will be submitted to the Bureau of Health Services' Regional Nursing Coordinator for review and decision. At this juncture, the I[nmate] C[omplaint] E[xaminer] can take no further action.

Later that day, Cynthia Thorpe dismissed the complaint "with modifications," stating that the complaint would be referred to the prison's psychological services director.

On December 14, 2006, plaintiff submitted a disbursement request, asking for legal loan funds with which to post his appeal of the dismissed complaint. On December 15, 2006, defendant Grams denied the request. In the margin of the disbursement request form, defendant Grams wrote: "Can only exceed \$200 legal loan to send a 39¢ letter/correspondence to the Dept. of Justice attny representing the DOC or to the presiding Judge."¹

After receiving notice of the denial, plaintiff waited to receive a free weekly stamp to use in posting his appeal on January 4, 2007. In his appeal, plaintiff did not provide any explanation why he had not mailed the appeal sooner.

¹In his brief in opposition to defendants' motion to dismiss, plaintiff relies heavily on his disbursement request form, the original of which was appended to plaintiff's proposed amended complaint as dkt. #14, Exh. 8G. Because plaintiff's motion to file the amended complaint was denied, a copy of the complaint and its exhibits was never served on defendants. However, because including the text of the request does not prejudice defendants (because it will not alter the outcome of defendants' motion), I have included it above.

On January 5, 2007, the corrections complaint examiner recommended that the appeal be dismissed as untimely because (1) plaintiff had not filed it within 10 days of the dismissal and (2) plaintiff had offered no good cause for the late appeal. On January 8, 2007, deputy secretary Richard Raemisch dismissed the complaint as untimely.

2. Complaint about lack of mental health treatment

On December 26, 2006, plaintiff filed Offender Complaint CCI-2006-37721, complaining about his need for clinical psychiatric care. In his complaint, plaintiff wrote:

Need clinical/psychiatric care

I have spoken and written to clinical staff concerning the treatment of the blackouts and other serious Mental Disorders such as active suicidal and others. However, i have been told by both the clinical staff that are assigned to DS 1 & DS 2 and the warden that because i'm in segregation i can't receive treatment.

On December 26, 2006, inmate complaint examiner Tamminga rejected the grievance, noting:

Inmate submits allegations about not being eligible for treatment in segregation but fails to provide any specifics.

Rejected pursuant to DOC 310.11(5)(c), Wis. Adm. Code, because the "inmate does not allege sufficient facts upon which redress may be made."

Plaintiff filed a timely appeal of the rejection; the appeal was denied on January 10, 2007.

DISCUSSION

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.” Failure to exhaust is an affirmative defense that the defendants have the burden of pleading and proving. Jones v. Bock, 127 S. Ct. 910, 918-919 (2007); Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002). Once defendants raise failure to exhaust as a defense, district courts lack discretion to decide claims on the merits unless the exhaustion requirement has been satisfied. Woodford v. Ngo, 126 S. Ct. 2378, 2382-83 (2006); Dixon v. Page, 291 F.3d 485, 488 (7th Cir. 2002).

In analyzing plaintiff’s exhaustion efforts, the first question is whether plaintiff filed complaints that adequately called to prison officials’ attention his complaints about defendant Suliene’s alleged failure to treat his back pain and the alleged failure of defendants Walsh, Jens and Diedrich to provide him with mental health care. To exhaust his grievances, plaintiff was required to frame his complaints with sufficient clarity to allow prison officials a fair opportunity to resolve them. Woodford, 126 S. Ct. at 2385 (“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, 182 F.3d at 537-38

(purpose of exhaustion to narrow dispute and avoid litigation).

In considering what facts or pleadings an inmate's administrative complaint should contain, the court must look to the relevant grievance procedures. Strong v. David, 297 F.3d 646, 649 (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). An inmate must "properly take each step within the administrative process" or else he is foreclosed by 42 U.S.C. § 1997e from bringing suit with respect to each unexhausted claim. Pozo, 286 F.3d at 1024.

Wisconsin inmates have access to an administrative grievance system governed by the procedures set out in Wis. Admin. Code §§ DOC 310.01-310.18. Under these provisions, prisoners start the complaint process by filing an inmate complaint with the institution complaint examiner. An institution complaint examiner may investigate inmate complaints, reject them for failure to meet filing requirements or recommend to the appropriate reviewing authority that they be granted or dismissed. Wis. Admin. Code § DOC 310.07(2). However, if the institution complaint examiner makes a recommendation that the complaint be granted or dismissed on its merits, the appropriate reviewing authority may dismiss,

affirm or return the complaint for further investigation. Wis. Admin. Code § DOC 310.12. If an inmate disagrees with the decision of the reviewing authority, he may appeal to a corrections complaint examiner, who is required to conduct additional investigation where appropriate and make a recommendation to the secretary of the Wisconsin Department of Corrections. Wis. Admin. Code § DOC 310.13. Within ten working days following receipt of the corrections complaint examiner's recommendation, the secretary must accept the recommendation in whole or with modifications, reject it and make a new decision or return it for further investigation. Wis. Admin. Code § DOC 310.14.

Under some circumstances, an inmate complaint may be rejected before it is passed along to a reviewing authority. These include instances in which:

- (a) The inmate submitted the complaint solely for the purpose of harassing or causing malicious injury to one or more of the department's employees, agents, independent contractors, or any other person;
- (b) The inmate does not raise a significant issue regarding rules, living conditions, or staff actions affecting institution environment;
- (c) The inmate does not allege sufficient facts upon which redress may be made;
- (d) The inmate submitted the complaint beyond 14 calendar days from the date of the occurrence giving rise to the complaint and provides no good cause for the I[nmate] C[omplaint] E[xaminer] to extend the time limits;
- (e) The issue raised in the complaint does not personally affect the inmate;
- (f) The issue is moot;

(g) The issue has already been addressed through the inmate's prior use of the [inmate complaint system]; and

(h) The issue raised is not within the scope of the [inmate complaint system].

Wis. Admin. Code § DOC 310.11(5). When an inmate's complaint is rejected, the prisoner may appeal the rejection to the appropriate reviewing authority (usually the warden), who may review only "the basis for the rejection of the complaint." Wis. Admin. Code § DOC 310.11(6).

Defendants do not deny that plaintiff filed administrative grievances regarding both his back pain (Inmate Complaint CCI-2006-35643) and his alleged lack of mental health treatment (Inmate Complaint CCI-2006-37721). However, defendants contend that plaintiff failed to exhaust these grievances by failing to provide sufficient factual detail in CCI-2006-37721 and by failing to file a timely appeal of CCI-2006-35643.

Plaintiff offers several arguments why dismissal is inappropriate. First, he contends that the prison's exhaustion rules are invalid because they have not been properly certified by the United States Attorney General or that, if they have, the certification has not been made public. In support of this argument, plaintiff cites to repealed sections of 42 U.S.C. § 1997e, specifically 1997e(a)(1)-(2), which were replaced by the Prison Litigation Reform Act of 1997. Because those provisions are no longer in effect, plaintiff may not rely on them.

Plaintiff's second argument is more substantive. He contends that he did exhaust all available administrative remedies with respect to both complaint CCI-2006-37721 and complaint CCI-2006-35643. I will address each in turn.

A. Complaint CCI-2006-37721

Plaintiff's inmate complaint regarding defendant Suliene's alleged failure to treat his back pain was dismissed. Following the dismissal, plaintiff did not post his appeal until almost one month later. Because prison rules require appeals to be filed within 10 days and plaintiff failed to do so, defendants contend that plaintiff's claim against defendant Suliene must be dismissed from this lawsuit because it is unexhausted.

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 § 1997e. 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 to this rule, 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).

For example, 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).”).

In this case, it is undisputed that plaintiff submitted a timely request for a legal loan with which to mail his appeal of inmate complaint CCI-2006-37721. Prison officials denied his request, stating that he had exhausted the legal loan funds available to him and could not obtain additional funding except for the purpose of writing to the Wisconsin Department of Justice or to the court.

Defendants contend that prison officials were justified in withholding postage from plaintiff because prisoners are not entitled to government subsidization of their civil litigation. Lindell v. McCallum, 352 F.3d 1107, 1111 (7th Cir. 2003); Lewis v. Sullivan, 279 F.3d 526, 528 (7th Cir. 2002); see also Johnson v. Daley, 339 F.3d 582, 586 (7th Cir. 2003). Defendants’ argument misses the point. The question is not one of subsidy; it is a question of the availability of administrative remedies. Insofar as defendants have devised a grievance system that prevents indigent prisoners from filing appeals of their inmate grievances, they have made the grievance process unavailable to those inmates and may not use failure to file timely appeals as a ground for dismissing subsequent lawsuits.

Had plaintiff’s only error been his brief delay in filing a timely appeal because of his temporary lack of stamps, defendants’ motion would be denied. However, there is more to

plaintiff's story. After receiving notice that his disbursement request had been denied and having received his next free weekly postage stamp, plaintiff filed an appeal of his grievance. By that time, his grievance was two weeks overdue. Although Wis. Admin. Code § DOC 310.13(1) requires prisoners to file appeals within 10 calendar days after an adverse decision is made, § DOC 310.13(1) states that “[u]pon good cause, the C[orrections] C[omplaint] E[xaminer] may accept for review an appeal filed later than 10 calendar days after receipt of the decision.” In other words, had plaintiff provided an explanation for his untimely filing, prison officials would have had discretion to consider his appeal.

Plaintiff did not make any attempt to explain why he filed his appeal several weeks after the deadline for doing so. By failing to do so, plaintiff deprived prison officials of the opportunity to consider his appeal despite its untimeliness for the (good) reason that he had been financially unable to mail it any sooner than he did. Because plaintiff did not explain his delay, prison officials could not determine whether his appeal was untimely because he had flouted the prison grievance procedures or because he had a valid excuse. Without some indication of the latter, prison officials were well within their rights to assume the former. Because plaintiff failed to provide prison officials with grounds for considering his untimely appeal, he failed to exhaust his administrative remedies. Therefore, defendants' motion to dismiss will be granted with respect to plaintiff's claim that defendant Suliene exhibited deliberate indifference to his back pain.

B. Complaint CCI-2006-35643

Plaintiff's inmate complaint CCI-2006-35643 was rejected by the inmate complaint examiner on the ground that it "d[id] not allege sufficient facts upon which redress [could] be made," a ground that the reviewing authority reiterated on appeal. Normally, determining whether an inmate complaint has been properly rejected is the responsibility of the reviewing authority designated by Wis. Admin. Code § DOC 310.11(6), and is not a question the federal court is free to revisit. Pozo, 286 F.3d at 1025 ("If the state stands on its time limits and rejects a filing as too late, then state remedies have not been properly invoked."); Freeman v. Page, 208 F.3d 572, 576 (7th Cir. 2000) (if state court dismisses petition for procedural flaws such as untimeliness, then petition was not properly filed); Lindell v. O'Donnell, Case No. 05-C-004-C, Order dated Oct. 21, 2005, dkt #75, at40-41 ("[W]hen the record of an inmate's use of the prison complaint system arrives in federal court, it is what it is."). This is because, typically, inmate complaints are "rejected," rather than "dismissed," only when they fail to comport with the prison's procedural rules.

In this case, however, it is difficult to see what more plaintiff could have said to put defendants clearly on notice of the grounds for his complaint. Plaintiff captioned his grievance "Need clinical/psychiatric care" and complained that although he was experiencing blackouts and attempting suicide, the warden and correctional officers to whom he spoke told him that he could not receive treatment because he was in segregation. Nevertheless,

the complaint was rejected on the ground that plaintiff's allegations were not insufficiently "specific." In rejecting plaintiff's grievance and appeal, the inmate complaint examiner did not provide any hint of what "specific" information he wanted plaintiff to include in his grievance. The answer is not obvious. (I note that even in the context of briefing the motion to dismiss, defendants have not suggested what sort of information they believe plaintiff should have included in his inmate complaint.)

After the complaint was rejected, plaintiff filed a timely appeal to the reviewing authority, as he was permitted to do under Wis. Admin. Code § DOC 310.11(6). The warden upheld the rejection but provided no explanation for his decision and did not indicate what prison officials wanted plaintiff to say. Under these circumstances, it is difficult to imagine what more plaintiff could have done to exhaust the administrative remedies available to him. Because plaintiff put prison officials on notice of his claim and exhausted all administrative remedies legitimately available to him, defendants' motion to dismiss will be denied with respect to plaintiff's claim that defendants Walsh, Jens and Diedrich failed to provide him with mental health treatment.

ORDER

IT IS ORDERED that defendants' motion to dismiss for failure to exhaust administrative remedies is

1. DENIED with respect to plaintiff's claim that defendants Walsh, Jens and Diedrich failed to provide him with mental health treatment; and

2. GRANTED with respect to plaintiff's claim that defendant Suliene exhibited deliberate indifference to his back pain.

FURTHER, IT IS ORDERED that defendant Suliene is DISMISSED from this lawsuit.

Entered this 26th day of July, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge