

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

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ROBERT B. CIARPAGLINI,

Plaintiff,

v.

MEMORANDUM AND ORDER  
07-C-430-S

COREY MUELLER  
and JOE HALL,

Defendants.

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Plaintiff Robert B. Ciarpaglini was allowed to proceed on his Eighth Amendment claim against defendants Corey Mueller and Joe Hall. In his complaint he alleged that the defendants provided him food to which he was allergic causing him imminent danger of serious physical injury.

On August 23, 2007 defendants moved to dismiss plaintiff's complaint for failure to exhaust his administrative remedies. This motion has been fully briefed and is ready for decision.

Plaintiff has also moved to strike the motion to dismiss and the affidavit of Tom Gozinske. Plaintiff asserts that Tom Gozinske incorrectly stated that he had filed no inmate grievances concerning this claim. Plaintiff has submitted copies of inmate complaints which were stamped received but these complaints were not accepted for filing and were not given complaint numbers. Accordingly, Tom Gozinske's affidavit does not falsely represent the facts. Plaintiff's motion to strike the defendants' motion and affidavit will be denied.

## FACTS

Plaintiff is currently incarcerated at the Waupun Correctional Institution, Waupun, Wisconsin (WCI). Defendants Corey Mueller and Joe Hall are employed at WCI.

Plaintiff attempted to file an inmate complaint on his claim that he was provided food to which he was allergic. Although the inmate complaint was stamped received it was not filed and was returned to plaintiff.

Plaintiff's inmate complaint was rejected pursuant to a 1993 Settlement agreement to which he entered into with the State of Wisconsin. That agreement limits the number of inmate complaints he may file at one time. Plaintiff agreed to have no more than two active inmate complaints at any given time.

## MEMORANDUM

Defendants seek to dismiss plaintiff's complaint for failure to exhaust his administrative remedies pursuant to 42 U.S.C. § 1997e(a). No action shall be brought with respect to prison conditions by a prisoner confined in any jail, prison or other correctional facility until available administrative remedies are exhausted. Prisoners must file their complaints and appeals in the place and at the time the prison's administrative rules require. Pozo v. McCaughtry, 286 F. 3d 1022, 1025 (7<sup>th</sup> Cir. 2002).

In Perez v. Wisconsin Department of Corrections, 182 F.3d 532, 535 (7<sup>th</sup> Cir. 1999), the Court held as follows:

...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, even if the prisoner exhausts intra-prison remedies before judgment.

Plaintiff argues that he is exempt from the exhaustion requirement because administrative remedies are not available to him. Administrative remedies are available to him. He may have two active inmate complaints at a time. Had plaintiff wished to file an inmate complaint concerning his food allergy he could have dismissed another inmate complaint to do so. Plaintiff voluntarily entered into the Settlement agreement and is bound by it.

Plaintiff has failed to exhaust administrative remedies that were available to him. Accordingly, plaintiff's complaint will be dismissed for his failure to exhaust his administrative remedies. Defendants' motion to stay discovery will be denied as moot.

Plaintiff is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his complaint must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7<sup>th</sup> Cir. 1997).

ORDER

IT IS ORDERED that plaintiff's motion to strike defendants' motion to dismiss and the affidavit of Tom Gozinske is DENIED.

Ciarpaglini v. Mueller, et al., 07-C-430-S

IT IS FURTHER ORDERED that defendants' motion to dismiss is GRANTED.

IT IS FURTHER ORDERED that defendants' motion to stay discovery is DENIED as moot.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants against plaintiff DISMISSING his complaint without prejudice for his failure to exhaust his administrative remedies.

Entered this 11<sup>th</sup> day of September, 2007.

BY THE COURT:

/s/

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JOHN C. SHABAZ  
District Judge