

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

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ORLANDO LEWAYNE PILCHER,

Plaintiff,

v.

ORDER

09-cv-490-slc<sup>1</sup>

MS. HOLINKA, MS. FEATHERS,  
MR. TRATE, MR. MARTIN,  
and MR. RUSSELL,

Defendants.  
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Plaintiff Orlando Pilcher has filed a complaint and has made an initial partial payment in accordance with 28 U.S.C. § 1915(b)(1). Because plaintiff is a prisoner, I am required under the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money

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<sup>1</sup> While this court has a judicial vacancy, it is assigning 50% of its caseload automatically to Magistrate Judge Stephen Crocker. At this early date, consents to the magistrate judge's jurisdiction have not yet been filed by all the parties to this action. Therefore, for the purpose of issuing this order only, I am assuming jurisdiction over the case.

damages. 28 U.S.C. § 1915A.

This is the third lawsuit that plaintiff has filed in this court in recent months. Like his other complaints, plaintiff's complaint in this case is long and rambling but contains few specific facts about defendants' alleged wrongdoing. One thing that seems clear from the face of the complaint is that plaintiff did not complete the grievance process. Rather, he says that he "voluntar[il]y dismiss[ed]" his grievance "until a later time." Although a prisoner's failure to exhaust his administrative remedies is an affirmative defense that normally must be proven by the defendants, a district court may raise an affirmative defense on its own if it is clear from the face of the complaint that the defense applies. Gleash v. Yuswak, 308 F.3d 758, 760-61 (7th Cir. 2002).

Under 42 U.S.C. § 1997e(a), "[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." This means that a prisoner must "properly take *each step* within the administrative process." Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002) (emphasis added). Thus, it is not enough to file a grievance and then dismiss it. To comply with § 1997e(a), a prisoner must file all necessary appeals as well. Burrell v. Powers, 431 F.3d 282, 284-85 (7th Cir. 2005).

Because plaintiff is a federal prisoner, he was required to comply with the Bureau of

Prisons' three-step administrative remedy procedure. 28 C.F.R. §§ 542.14 and 542.15. An inmate must first submit an Administrative Remedy Request (BP-9), and then file appeals with the appropriate regional director (BP-10) and then to the Central Office (BP-11) if he is not satisfied with the decision.

By filing a federal lawsuit before completing the grievance process, plaintiff failed to give officials at his prison a fair opportunity to resolve his problems. In accordance with circuit precedent, I must dismiss this case without prejudice to petitioner's refiling it after he completes the grievance process. Ford v. Johnson, 362 F.3d 395 (7th Cir. 2004) (when prisoner brings lawsuit before completing exhaustion process, case must be dismissed without prejudice, even if prisoner has finished process since filing lawsuit).

If plaintiff later succeeds in complying with § 1997e(a), he should not simply refile the same complaint naming the same defendants because it violates Rule 8 of the Federal Rules of Civil Procedure, which requires a plaintiff to provide each defendant notice of his claims against him or her. Plaintiff includes *no* allegations identifying particular conduct of defendants Holinka, Feathers or Trate, making it impossible for them to determine what plaintiff believes they did to violate his rights. He includes some allegations directed at defendants Martin and Russell, but those allegations are too vague to provide Martin and Russell appropriate notice. For example, he alleges that Martin gave him a conduct report for "exposing [Martin's] misconduct," but he fails to identify what the alleged misconduct

is. (He also alleges more generally that Martin gave him “fraudulent” conduct reports on other occasions, but a conduct report is not necessarily a violation of a constitutional right simply because the prisoner believes it was not justified.) He alleges that defendant Russell failed to schedule an “outside examination” or prescribe pain medication, but he fails to describe the condition he suffers from or otherwise explain why he needs particular treatment.

Another potential problem with plaintiff’s complaint involves Federal Rule of Civil Procedure 20. As I have explained to plaintiff in other cases, Rule 20 prohibits a plaintiff from asserting unrelated claims against different defendants or sets of defendants in the same lawsuit. Multiple defendants may not be joined in a single action unless the plaintiff asserts at least one claim to relief against each respondent that arises out of the same transaction or occurrence or series of transactions or occurrences and presents questions of law or fact common to all. George v. Smith, 507 F.3d 605, 607 (7th Cir.2007); 3A Moore's Federal Practice § 20.06, at 2036-2045 (2d ed.1978). Although the vague nature of plaintiff’s allegations make it difficult to tell whether plaintiff’s complaint violates Rule 20, he does not identify any connection between his allegations against Russell (which seem to involve medical care) and his allegations against Martin (which seem to involved conduct reports).

In addition to dismissing the case, I must record a strike under 28 U.S.C. § 1915(g), which prohibits a prisoner from proceeding in forma pauperis when a federal court has

dismissed three or more actions on the ground that the prisoner has failed to state a claim upon which relief may be granted, among other things. In Jones v. Bock, 549 U.S. 199, 214-16(2007), the Supreme Court made it clear that a dismissal for failure to state a claim is not limited to a dismissal on the merits. Rather, a complaint fails to state a claim upon which relief may be granted any time “the allegations, taken as true, show the plaintiff is not entitled to relief,” including times when the complaint shows that a prisoner failed to comply with exhaustion requirements. Id. at 215-16. See also Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 670 n.14 (7th Cir. 1998) (plaintiff may plead himself out of court by pleading facts showing that action is barred by affirmative defense). Because plaintiff's complaint shows that his case must be dismissed for failure to exhaust his administrative remedies, he has failed to state a claim upon which relief may be granted.

This means that plaintiff now has three strikes against him: one in this case, one in 08-cv-336-slc and one in 09-cv-46-slc. In the future, plaintiff will be unable to proceed in forma pauperis in federal court unless he can show that he is in imminent danger of serious physical injury. In any other case, plaintiff will have to pay the \$350 filing fee in full when he files his complaint or the complaint will be dismissed.

ORDER

IT IS ORDERED that

1. This case is DISMISSED without prejudice to plaintiff Orlando Pilcher's refiling it after he exhausts his administrative remedies as required by 42 U.S.C. § 1997e(a).

2. A strike will be recorded in accordance with 28 U.S.C. § 1915(g).

3. Plaintiff is obligated to pay the unpaid balance of his filing fees in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fees have been paid in full.

4. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 18<sup>th</sup> day of August, 2009.

BY THE COURT:

/s/

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BARBARA B. CRABB  
District Judge