IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RALPHFIELD HUDSON,

OPINION and ORDER

Plaintiff,

10-cv-478-bbc

v.

J. PENAFLOR,

Defendant.

- -

In this civil action for monetary relief, brought pursuant to Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), plaintiff Ralphfield Hudson is proceeding on a claim that defendant Jamie Penaflor violated his rights under the Eighth Amendment by refusing to treat a rash on his arms and legs while he was incarcerated at the Federal Correction Institution in Oxford, Wisconsin. Now before the court is defendant's motion to dismiss the complaint for plaintiff's failure to exhaust his administrative remedies, dkt. #11. Initially plaintiff opposed the motion, contending that he had exhausted his administrative remedies, dkt. #14. However, plaintiff later filed a motion to stay the case so that he may satisfy outstanding exhaustion requirements, dkt. #18.

Also before the court is plaintiff's motion to amend the complaint, dkt. #15, in which

he seeks permission to add claims against defendants who work at the Federal Correctional Institution in Pekin, Illinois, where plaintiff is now incarcerated. In addition, plaintiff has filed a motion for appointment of counsel, dkt. #16.

Although defendant styles his motion as one to dismiss under Fed. R. Civ. P. 12(b)(6), both plaintiff and defendant have submitted documents outside the pleadings. When this happens, Rule 12 requires the court to convert the motion to dismiss into a motion for summary judgment. Fleischfresser v. Directors of School District 200, 15 F.3d 680, 684 (7th Cir. 1994). There is an exception to the rule for public documents, at least in cases in which those documents are subject to judicial notice. General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-83 (7th Cir. 1997). In past cases, I have concluded that I may take judicial notice of the filing of prisoner grievances and the responses to those grievances by prison administrators.

In this case, defendant has submitted not only grievances and their responses, but also a purported summary of all the grievances and appeals that plaintiff has filed. Dkt. #13. The summary is not subject to judicial notice. Therefore, I am converting defendant's motion to dismiss into a motion for summary judgment. This will not prejudice either party because it is clear that the facts related to exhaustion are undisputed. Both sides agree that plaintiff submitted one set of grievances related to the claim in this case. The dispute is a legal one, that is, whether the grievances plaintiff submitted satisfy the requirement under

§ 1997e(a) to exhaust all available administrative remedies before filing his lawsuit.

I conclude that defendant has met his burden to prove that plaintiff failed to exhaust his administrative remedies. Jones v. Bock, 549 U.S. 199, 216 (2007). The undisputed facts show that plaintiff failed to raise his claim regarding defendant's treatment of his rash at all levels of his administrative appeals, as required by the Bureau of Prison's exhaustion regulations. Therefore, I will grant defendant's motion for summary judgment. In addition, I will deny plaintiff's motion to stay the case because the law requires plaintiff to exhaust *before* he files suit. I will also deny plaintiff's motion for leave to amend his complaint because he has provided insufficient information about the defendants or claims he wishes to add. Finally, because this case will be closed, I will deny plaintiff's motion for appointment of counsel.

From the materials submitted by the parties in connection with defendant's motion, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

Plaintiff was housed at the Federal Correctional Institution in Oxford, Wisconsin from January 23, 2006 to March 11, 2008. On January 17, 2008, plaintiff filed an administrative remedy request (BP-9) with the warden, stating that he was receiving inadequate medical care for his bowel problems, swelling on his leg and a rash between his

legs. Dkt. #13-4 at 1. He stated specifically that defendant Penaflor, a physician's assistant, was failing to provide proper medical treatment for his problems. Plaintiff attached a copy of an informal grievance, labeled BP-8, to his BP-9. The BP-8 is dated in 2007 and complains of defendant's failure to provide proper treatment for a rash on his finger and arm and swelling in his legs.

On February 26, 2008, the warden responded to plaintiff's request. Id. at 2. She addressed plaintiff's concerns about his knee pain and diarrhea, but did not mention the rash in particular. She stated that the Assistant Health Services Administrator had seen plaintiff on February 26, 2008, and asked plaintiff about each of the issues raised in his request for administrative remedy and that plaintiff had answered that each issue had been resolved and that he was satisfied with the current medical plan.

On April 16, 2008, plaintiff appealed the warden's response to his BP-9 to the Bureau of Prison's North Central Regional Office. In his appeal he stated that "[t]he issues have not been addressed properly because [defendant] refused to give me the proper treatment. And, the [Assistant Health Services Administrator] looked at the injury and did not take any steps to help with the problem." Id. at 5. Plaintiff goes on to state that defendant and the Administrator knew that plaintiff's leg was swollen, that his medication had not been filled for the swelling in his legs and that he never said the issues in his complaint were resolved.

On May 13, 2008, the North Central Regional Office denied the administrative

remedy appeal, framing the issue as whether the warden "address[ed] the issues [plaintiff] raised" in his BP-9. Id. at 6. The Regional Office upheld the warden's response, stating that a review of plaintiff's medical care indicated that his condition was being treated properly by health services staff and that his medication had not been filled because he had a similar medication for the same condition.

On June 4, 2008, plaintiff filed an appeal of the Regional Office's decision to the Bureau of Prison's Central Office, stating that defendant did not examine or treat him for the swelling in his leg, that he could not walk, stand or sleep without pain from the swelling and that the pharmacists would not give him a prescription. Id. at 7.

On July 23, 2008, the Central Office denied plaintiff's appeal, stating that a review of his medical record revealed that he had been receiving medical care for his knee and that the warden and staff at FCI-Oxford had properly addressed all of his concerns in its response to his BP-9.

On March 11, 2009, plaintiff was transferred to the Federal Correctional Institution in Pekin, Illinois. Once there, he filed an administrative remedy request, in which he alleged improper medical treatment by the medical staff at FCI-Pekin for the rash on his "forehead, face, body and arms" in 2009. Dkt. #13-5.

OPINION

A. Motion to Amend Complaint

Plaintiff seeks leave to amend his complaint to add claims against staff at the Federal Correctional Institution in Pekin, Illinois. Under Fed. R. Civ. P. 15(a)(2), a court "should freely give leave [to amend the complaint] when justice so requires." In determining whether a plaintiff satisfies this standard, courts consider a number of factors, including whether the amendment would be futile or cause unfair prejudice or whether the party waited too long to ask for amendment. Foman v. Davis, 371 U. S. 178, 182 (1962); Sound of Music v. Minnesota Mining & Manufacturing Co., 477 F.3d 910, 922-23 (7th Cir. 2007).

Granting leave to amend would not be appropriate in this case. As plaintiff has presented his proposed amendment, it would be futile because his new claims would be dismissed immediately for failure to satisfy Fed. R. Civ. P. 8, which requires a plaintiff to provide proper notice of his claims to the defendant. Plaintiff has provided no specific allegations against any particular staff members at FCI-Pekin and does not state whom he wishes to sue or what his cause of action would be. Accordingly, I will deny plaintiff's motion to amend his complaint.

B. Exhaustion

Under 42 U.S.C. § 1997e(a), a prison may not bring a Bivens challenge such as this

one "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 failure to exhaust is an affirmative defense, defendant bears the burden to prove that plaintiff failed to exhaust all available administrative remedies. Jones, 549 U.S. at 211-12 . To meet this burden, defendant must show that plaintiff failed to comply with whatever administrative review process was in place at FCI-Oxford. As a federal prisoner, plaintiff is subject to the exhaustion requirements set forth in the Bureau of Prisons' three-step administrative remedy procedure. 28 C.F.R. §§ 542.14; 542.15. An inmate must first submit an Administrative Remedy Request (BP-9), and then file appeals to the appropriate regional director (BP-10) and then to the Central Office (BP-11) if he is not satisfied with the decision. Under the Bureau of Prison regulations, all "[a]ppeals shall state specifically the reason for the appeal." 28 C.F.R. § 542.15(b)(1). According to defendant, plaintiff failed to comply with these rules because his BP-10 and BP-11 did not specify that he was still seeking an administrative remedy for the rash on his arms and legs. Instead, defendant argues, plaintiff's appeals focused only on his need for medical treatment for the swelling in his legs.

When the warden responded to plaintiff's BP-9, she did not acknowledge plaintiff's complaints about a rash, but stated that plaintiff had admitted to a health administrator that all of his complaints had been resolved. Although plaintiff did not discuss the rash in his appeal (his BP-10), he stated that the issues he grieved in his BP-9 had not been addressed properly and he attached copies of his BP-8 and BP-9, both of which describe his need for treatment of his rash. He objected to the warden's decision, stating that he never said the issues had been resolved and that they had not in fact been resolved properly. These statements "state specifically the reason for the appeal," namely, that the warden had not addressed plaintiff's complaints properly and that they were ongoing.

However, in plaintiff's appeal fo the Regional Office's decision (his BP-11), he focuses solely on the swelling in his legs and makes no mention of the other issues he raised initially. The Central Office had no reason to think plaintiff was still seeking an administrative remedy for defendant's alleged failure to provide treatment for plaintiff's rash. Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002) (grievance must be sufficiently specific to put responsible persons on notice about conditions about which prisoner is complaining). In sum, plaintiff failed to "state specifically" that he was appealing the prison's decision regarding treatment of his rash, as required by Bureau of Prison regulations. Thus, plaintiff failed to exhaust his administrative remedies with respect to this claim.

C. Motion to Stay Proceedings

Although plaintiff has asked for a stay so that he may exhaust his administrative remedies, granting the stay would be futile. The court of appeals has stated without qualification that exhaustion must be complete *before* the lawsuit is filed. Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999) ("[A] suit filed by a prisoner before administrative remedies have been exhausted must be dismissed."); see also Cannon v. Washington, 418 F.3d 714, 719 (7th Cir. 2005); Johnson v. Jones, 340 F.3d 624, 627-28 (8th Cir. 2003). The district court is required to "dismis[s] a suit that begins too soon, even if the plaintiff exhausts his administrative remedies while the litigation is pending." Ford v. Johnson, 362 F.3d 395, 398 (7th Cir. 2004).

Thus, in Ford, the court held that it was proper to dismiss a case for failure to exhaust when the prisoner filed his lawsuit *two days* before he received the decision on his final administrative appeal. Therefore, I will grant summary judgment for defendant and this case will be dismissed without prejudice. Ford, 362 F.3d at 401 (dismissal for failure to exhaust is always without prejudice). Because I am dismissing this case, I will deny plaintiff's motion for appointment of counsel.

ORDER

IT IS ORDERED that

1. Plaintiff Ralphfield Hudson's motion for leave to file an amended complaint, dkt. #15, motion for appointment of counsel, dkt. #16, and motion for a continuance, dkt. #18, are DENIED.

2. Defendant Jamie Penaflor's motion to dismiss, dkt. #11, is CONVERTED to a motion for summary judgment and is GRANTED.

3. This case is DISMISSED without prejudice for plaintiff's failure to exhaust available administrative remedies before filing his lawsuit.

Entered this 18th day of March, 2011.

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