

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

DWAYNE ALMOND,

Plaintiff,

v.

JEAN LUTSEY, JEANANNA ZWIERS,
DR. RICHARD HEIDORN
and MICHAEL BAENEN,

Defendants.

OPINION and ORDER

11-cv-333-bbc

Plaintiff Dwayne Almond is proceeding on claims that defendants are violating his Eighth Amendment rights by being deliberately indifferent to his back and abdominal problems. Plaintiff has filed also a motion for preliminary injunctive relief, a motion to be moved out of the Green Bay Correctional Institution and a motion to bring criminal charges against defendants. Defendants have filed a motion for summary judgment, arguing that plaintiff has failed to exhaust his administrative remedies. Because I conclude that plaintiff has failed to exhaust his administrative remedies, I will deny plaintiff's motions as moot and dismiss this case without prejudice.

OPINION

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 defendants have the burden of pleading and proving. Jones v. Bock, 549 U.S. 199, 212 (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 requirements have been satisfied. Woodford v. Ngo, 548 U.S. 81, 83-85 (2006); Dixon v. Page, 291 F.3d 485, 488 (7th Cir. 2002).

Generally, to comply with § 1997e(a), a prisoner must “properly take each step within the administrative process.” Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). This includes following instructions for filing the initial grievance, Cannon v. Washington, 418 F.3d 714, 718 (7th Cir. 2005), as well as filing all necessary appeals, Burrell v. Powers, 431 F.3d 282, 284-85 (7th Cir. 2005), “in the place, and at the time, the prison administrative rules require.” Pozo, 286 F.3d at 1025. The purpose of these requirements is to give the prison administrators a fair opportunity to resolve grievances without litigation. Woodruff, 548 U.S. at 88-89.

Under the Wisconsin administrative code, prisoners start the grievance process by filing an offender complaint with the institution complaint examiner. Wis. Admin. Code

§§ DOC 310.09, 310.10 and 310.16(4). As a general rule, an offender complaint must be filed within 14 calendar days of the occurrence giving rise to the complaint. Id. § DOC 310.09(6). An institution complaint examiner must then acknowledge receipt of the offender complaint within five working days of its receipt. Id. § DOC 310.11(2). After reviewing the complaint, an institution complaint examiner may reject it for failure to meet filing requirements, investigate it, recommend to the appropriate reviewing authority that the complaint be granted or dismissed or direct the prisoner to attempt to resolve the complaint informally before proceeding with a formal offender complaint. Id. §§ DOC 310.07(2), 310.09(4). Once the institution complaint examiner makes a recommendation that the grievance be granted or dismissed on its merits, the appropriate reviewing authority may dismiss or affirm the grievance or return it for further investigation. Id. § DOC 310.12. A prisoner may also appeal to a corrections complaint examiner if the prisoner disagrees with the decision of the reviewing authority. Id. § DOC 310.13.

The corrections complaint examiner is then required to conduct an additional investigation when appropriate and make a recommendation to the Secretary of the Wisconsin Department of Corrections. Id. § 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. Id. § DOC 310.14.

As an initial matter, I must discuss the scope of plaintiff's claims. Both sides point

out that plaintiff has litigated similar cases previously in this court. In the August 29, 2011

order in this case, I stated as follows:

. . . I granted summary judgment in favor of defendants Heidorn and Zwiers in case no. 09-cv-335-bbc, in which plaintiff brought very similar claims regarding treatment for his back. (Plaintiff's claims in that case regarding a groin or abdominal ailment were dismissed without prejudice for his failure to exhaust administrative remedies.)

Thus, I have already concluded that prison staff were not deliberately indifferent to plaintiff's back problems during the timeframe of the claims in case no. 09-cv-335-bbc. Because plaintiff is alleging that defendants Heidorn, Zwiers, Lutsey and Baenen have acted with deliberate indifference in the time period *following* the timeframe of his claims in the previous case, I will allow him to proceed. However, I warn plaintiff that he will not be able to relitigate claims or issues that were litigated in case no. 09-cv-335-bbc.

Dkt. #8, at 8-9. As stated in his complaint, plaintiff's claims in this case are limited to his medical treatment following his February 19 and 25, 2010 examinations finding "questionable" lower back pain and a "minimal amount of air in [plaintiff's] small bowel."

The problem for plaintiff is that he has not exhausted his administrative remedies with respect to these claims. Both sides provide a report documenting plaintiff's inmate grievance history, which shows that he has not pursued any inmate grievances about the medical treatment or lack of medical treatment for his back or abdomen from February 2010 onward. Plaintiff seems to recognize this because he highlights various grievances from pre-February 2010, but those grievances pertain to treatment that predates the claims in this case and thus cannot serve to exhaust his current claims. Also, he highlights a grievance from April 2010 regarding the denial of the medication for treating his mental illness, but this

grievance is not related to his back and abdominal problems.

Thus, defendants have shown that plaintiff has failed to exhaust his administrative remedies with respect to any of the claims raised in this lawsuit. The case will be dismissed without prejudice to plaintiff's filing a new lawsuit at a later date, after he has exhausted his administrative remedies. Plaintiff's remaining motions will be denied as moot.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Jean Lutsey, Jeananna Zwiers, Richard Heidorn and Michael Baenen, dkt. #32, is GRANTED. This case is DISMISSED without prejudice for plaintiff's failure to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a).

2. Plaintiff's remaining motions are DENIED as moot.

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

Entered this 15th day of December, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge