

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

PARISH GOLDEN,

Plaintiff,

OPINION and ORDER

v.

11-cv-616-bbc

MARK S. STUTLEEN, CO II RAUSCH,
JESS FRISCH, CHAD BIEMERET
and CHAD DEBROUX,

Defendants.

Pro se plaintiff Parish Golden is proceeding on two claims in this prisoner civil rights case: (1) defendants CO II Rausch, Jess Frisch, Chad Biemeret and Chad DeBroux used excessive force against him, in violation of the Eighth Amendment; and (2) defendants Rausch and Frisch interfered with his mail, in violation of the First Amendment. All defendants but Rausch have filed a motion for summary judgment with respect to both claims on the ground that plaintiff failed to exhaust his administrative remedies, as required by 42 U.S.C. § 1997e(a). Because defendants have shown that plaintiff did not complete the grievance process before he filed this lawsuit, I am granting their motion.

Two other issues are before the court. The first is that defendant Rausch has not yet

been served with plaintiff's complaint. Generally, the Wisconsin Department of Justice accepts service on behalf of state employees, but it did not accept service for Rausch on the ground that no one by that name is employed at the prison. Dkt. #12. As a result, the magistrate judge instructed plaintiff to "provid[e] the correct name of this defendant," but he did not set a deadline or provide instructions to plaintiff for accomplishing that task. Dkt. #21. Since that order, plaintiff has not informed the court of any efforts he has made to determine the identity of this defendant. Ordinarily, I would give plaintiff one last chance to amend his complaint to identify this defendant, but it would be pointless to do so now because I am dismissing the case for plaintiff's failure to exhaust his administrative remedies.

The second issue is plaintiff's motion to "strike" defendants' summary judgment submissions on the ground that they are not signed as required by Fed. R. Civ. P. 11. However, a review of the submissions defendants filed with the court in support of their motion shows that all these materials were signed electronically with an "s/" followed by the author's name. That is sufficient under the court's Administrative Procedures for Electronic Filing and Service, which I have attached to this order.

It may be that defendants did not include electronic signatures on the copies they sent to plaintiff. If that is the case, it is requested that defendants provide signed copies to plaintiff. However, that oversight would not require the court to strike defendants' motion so long as the copies submitted to the court are signed.

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 the 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).

In their motion, defendants identify three grievances related to this case that plaintiff filed with the inmate complaint review system, two on August 30, 2011 and one on November 3, 2011. However, at the time plaintiff filed this lawsuit on September 6, 2011, he had not yet received a decision on any of these grievances. Dkt. #43, exhs. B, C and D.

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. In Wisconsin, prisoners are required to file a timely grievance and then appeal an adverse decision to the appropriate authority. Wis. Admin. Code § DOC Chapter 310.

I must dismiss this case for plaintiff's failure to exhaust because he started the grievance process without finishing it before he filed his lawsuit. Perez v. Wisconsin Department of Corrections, 182 F.3d 532 (7th Cir. 1999). If a prisoner files a lawsuit before completing the grievance process, the court must dismiss the case, even if the prisoner receives a final administrative decision while the lawsuit is pending. Ford v. Johnson, 362 F.3d 395, 398 (7th Cir. 2004) (dismissal required even though prisoner completed grievance process two days after he filed his lawsuit).

In his response brief, plaintiff does not dispute defendants' contention that he had not completed the grievance process when he filed this lawsuit. Instead, he relies on grievances he says he *tried* to file "between January 27, 2011 and August 29, 2011," but which never made it to the examiner because prison officials were interfering with his mail. He cites cases such as Kaba v. Stepp, 458 F.3d 678, 684 (7th Cir. 2006), and Dale v. Lappin, 376 F.3d 652, 645-56 (7th Cir. 2004), in which the court held that a prisoner does not have any "available" remedies under § 1997e(a) if prison officials prevent him from filing a grievance.

Defendants deny that anyone interfered with plaintiff's grievances, but even if I accept plaintiff's version of the facts, cases such as Kaba and Dale cannot help him. Unlike the prisoners in those cases, plaintiff *was* able to file a grievance successfully. He fails to explain why he did not seek judicial relief during the time of the alleged interference but then decided to file this lawsuit immediately after the examiner accepted his grievances. At that point, he had an available administrative remedy and he decided not to see it through before filing this case. Thus, plaintiff failed to comply with the plain language of § 1997e(a), which means I must dismiss his case for his failure to exhaust his administrative remedies before filing this lawsuit.

Under Ford, 362 F.3d at 401, all dismissals for lack of exhaustion are without prejudice, so plaintiff is free to refile this lawsuit once he has completed the grievance process. From the grievances materials filed by defendants, it appears that plaintiff has now received a final decision on his August 30 and November 3 grievances.

However, before plaintiff decides to file a new lawsuit with the same allegations, he should consider whether any of his claims would be subject to dismissal a second time. Although plaintiff received a decision on the merits regarding his mail interference claim, his excessive force claim was rejected as untimely. Woodford, 548 U.S. 81 (generally, if grievance is rejected as untimely, federal lawsuit is subject to dismissal under § 1997e(a)). Plaintiff says that he tried to file a grievance on February 23, 2011, but the grievance never

made it because of interference by correctional officers. However, even that is true, his grievance would still be untimely. Plaintiff alleges that the incident occurred on January 27, 2011, but the deadline for filing a grievance is 14 days after the incident, Wis. Admin. Code § DOC 310.09(6), so February 23 is still too late.

ORDER

IT IS ORDERED that

1. Plaintiff Parish Golden's motion to strike, dkt. #51, is DENIED.
2. Defendant CO Rausch II is DISMISSED from the case for lack of service of process.
3. The motion for summary judgment filed by defendants Chad DeBroux, Chad Biemeret, Jess Frisch and Mark Stutleen, dkt. #39, is GRANTED. This case is DISMISSED WITHOUT PREJUDICE to plaintiff's refiling the lawsuit after he has exhausted his administrative remedies.
4. The clerk of court is directed to enter judgment in favor of defendants DeBroux,

Biemeret, Frisch and Stutleen and close this case.

Entered this 5th day of April, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge