IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DONALD CHARLES WILSON,

OPINION AND ORDER

Plaintiff,

11-cv-725-bbc

v.

DR. ASHLEY THOMPSON,
DR. THOMAS J. MICHLOWSKI,
DR. JASON KOCINA,
DR. ALEXANDER STOLARSKI and
DR. KEVIN MCSORLEY,

Defendants.

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DONALD CHARLES WILSON,

OPINION AND ORDER

Plaintiff,

12-cv-114-bbc

v.

DR. CARLO GAANAN,

Defendant.

- -

Plaintiff Donald Wilson is proceeding in case 11-cv-725-bbc on a claim that defendants Ashley Thompson, Thomas Michlowski, Jason Kocina, Alexander Stolarski and Kevin McSorley violated his rights under the Eighth Amendment by failing to provide medical care for his Alzheimer's disease. He is proceeding in case 12-cv-114-bbc on a claim

that defendant Carlo Gaanan violated his rights under the Eighth Amendment by failing to treat his thyroid condition. Plaintiff is represented by counsel. In both cases, defendants filed motions for summary judgment on the ground that plaintiff failed to exhaust his administrative remedies before filing suit. Their arguments are the same in both cases. Thus, I am considering both motions in this opinion.

I am granting defendants' motions for summary judgment. Although plaintiff contends that he exhausted every administrative remedy available to him, the undisputed evidence establishes that he failed to appeal to the appropriate reviewing authority or to the corrections complaint examiner before filing suit. Therefore, plaintiff did not exhaust his administrative remedies in either case.

The following facts are drawn from the parties' affidavits and evidence submitted in conjunction with defendants' motions. I find the following facts to be material and undisputed.

UNDISPUTED FACTS

Plaintiff Donald Wilson was incarcerated at the Wisconsin Resource Center on September 24, 2011, when he filed an offender complaint through the inmate complaint review system. In the complaint, plaintiff stated that he was not receiving medication or treatment for his Alzheimer's and thyroid conditions. The offender complaint form plaintiff submitted was a single sheet of paper with text printed on both sides. On the first side, plaintiff entered his personal information and the details of his grievances. The other side

contained instructions.

The instructions read:

> You should talk to appropriate staff in an effort to informally resolve your issue before filling out this form. If you have not done so, the Institution Complaint Examiner (ICE) may direct you to, prior to accepting the complaint, in accordance with DOC 310.09(4), Wis. Adm. Code. . . .
>
> 1. Complaints filed by an inmate or group of inmates shall:
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> a. Be typed or written legibly on forms supplied for that purpose.
>
> b. Be signed by the inmate.
>
> c. Not contain language that is obscene, profane, abusive, or threatens others, unless such language is necessary to describe the factual basis of the substance of the complaint.
>
> d. Be filed only under the name by which the inmate was committed to the department or the legal name if an inmate has had a name change.
>
> e. Contain only one issue per complaint, and shall clearly identify the issue.
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> * * *
>
> 4. An inmate may appeal a rejected complaint within 10 calendar days only to the appropriate reviewing authority who shall only review the basis for the rejection of the complaint.
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> The ICE shall use discretion in deciding the method best suited to determine the facts, including personal interviews, telephone calls, and document review, except that the processing of complaints under s. DOC 310.08(3) shall be limited to review of the record. The ICE shall direct complaint recommendations to the appropriate Reviewing Authority (aRA); the ICE may reject a complaint pursuant to s. DOC 310.11(5). If you do not receive the aRA's decision within 30 working days after the ICE acknowledges receipt of the complaint, you may appeal to the Corrections Complaint Examiner (CCE). A complainant dissatisfied with a reviewing authority's decision may, within 10 calendar days after the date of the decision, appeal that decision by filing a written request for review with the CCE on forms supplied for that purpose. The institution shall make these forms accessible to inmates. The CCE will make a recommendation on your appeal to the Secretary of the Department of Corrections. The secretary will review the material submitted and render a decision.

Off. Compl., dkt. #53-1, at 2.

On September 30, 2011, plaintiff received a receipt from the institution complaint examiner, acknowledging his complaint and assigning it complaint number WRC-2011-19464. After the summary of plaintiff's complaint, the receipt contained the following language:

> This is to acknowledge the complaint you filed and which was received on the date indicated. Depending on the nature of the complaint, you may or may not be interviewed by the ICE. A recommendation on the complaint will be made and submitted to the appropriate reviewing authority within 20 working days of acknowledgement [sic]. A decision will be made by the appropriate reviewing authority within 10 working days following receipt of the recommendation unless extended for cause.

ICE Rec., dkt. #53-2, at 1.

On October 17, 2011, plaintiff mailed a complaint to this court. Plaintiff incorporated the allegations from his offender complaint and claimed that several doctors and administrators at the Wisconsin Department of Corrections had violated his constitutional rights. At the time, he had not received any decision from the institution complaint examiner. On December 8, 2011, the institution complaint examiner recommended rejecting plaintiff's complaint under Wis. Admin. Code § DOC 310.09(1)(e) because it "contain[ed] more than one issue or the issue [was] not clearly identified." ICE Rej., dkt. #53-4, at 1. According to plaintiff, he did not receive a copy of this rejection until February 8, 2013, when defendants filed their motions for summary judgment.

OPINION

The Prison Litigation Reform Act (PLRA) requires plaintiff to exhaust all available administrative remedies before bringing suit. 42 U.S.C. § 1997e(a); Dole v. Chandler, 438 F.3d 804, 809 (7th Cir. 2006). Exhaustion is "an affirmative defense that the defendants have the burden of pleading and proving." Dale v. Lappin, 376 F.3d 652, 655 (7th Cir. 2004). To exhaust administrative remedies, a prisoner must "file complaints and appeals in the place, and at the time, the prison's administrative rules require." Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). The purpose of the exhaustion requirement is to "afford corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." Woodford v. Ngo, 548 U.S. 81, 93 (2006) (citations and internal quotations omitted).

In Wisconsin, the first step in the inmate complaint review system is for the prisoner to properly file a complaint under sections DOC 310.09, 310.10 or 310.16(4). Wis. Admin. Code DOC § 310.07(1). Then the institution complaint examiner investigates the complaint or rejects it and returns it to the prisoner. Wis. Admin. Code DOC §§ 310.07(2), 310.11(1)-(5). Within twenty working days of sending the prisoner an acknowledgment of receipt, the institution complaint examiner either rejects the complaint or sends a recommendation to the appropriate reviewing authority. Wis. Admin. Code DOC § 310.11(11). If the institution complaint examiner rejects the complaint, the prisoner has ten calendar days to appeal to the appropriate reviewing authority. Wis. Admin. Code DOC § 310.11(6). If the prisoner does not receive an appropriate reviewing authority decision within 30 working days of the institution complaint examiner acknowledgment, the prisoner may appeal to the corrections

complaint examiner. Wis. Admin. Code DOC § 310.12(3).

As an inmate of the Wisconsin prison system, plaintiff was required to comply with the grievance procedure set forth in Wis. Admin. Code DOC Ch. 310. Defendants contend that plaintiff failed to exhaust his administrative remedies because he had two options for filing an appeal and failed to take either. In particular, plaintiff could have appealed from the examiner's rejection of his complaint or after thirty days had passed from the time he received acknowledgment of his complaint. Plaintiff does not deny that he failed to file any appeal. Nonetheless, plaintiff argues that he exhausted his remedies before filing suit because neither appeal option identified by defendants was truly "available" to him.

With respect to his failure to appeal the rejection of his complaint, plaintiff contends that he did not receive notice of his complaint rejection until defendants filed these motions for summary judgment. Thus, plaintiff argues it would have been impossible for him to appeal a rejection he never received. However, plaintiff filed his complaint in this court before the institution complaint examiner had had an opportunity to make a recommendation to the appropriate reviewing authority. Under § 310.11(11), the institution complaint examiner had twenty working days from the acknowledgment to send a recommendation to the appropriate reviewing authority. Twenty working days from September 30, 2011 is October 28, 2011. Plaintiff filed his complaint in this court on October 17, 2011. Because plaintiff did not wait to receive the institution complaint examiner's rejection and did not appeal the rejection, he failed to exhaust that avenue of administrative remedies.

Even if plaintiff could be excused for not waiting to receive the institution complaint examiner's response, plaintiff had another option that he failed to take. He could have appealed to the corrections complaint examiner after thirty days had passed without a response from the institution complaint examiner. The instructions on the back of the offender complaint notified plaintiff of this option. Plaintiff contends that this option was not available to him because

> (1) the instructions on the complaint form were confusing and failed to describe the procedure for appealing should he not receive a decision;
>
> (2) the instructions were on the back of the complaint that plaintiff submitted along with the rest of the complaint, so he could not refer back to them; and
>
> (3) the institution complaint examiner receipt did not mention the possibility that plaintiff would not hear back and the receipt did not indicate what he could do if he did not receive a decision.

Each of plaintiff's arguments fails. To start, plaintiff's comparison between the instructions for appealing a received decision with those for appealing no decision is unavailing. Both appeals go to the corrections complaint examiner and plaintiff has not shown that the processes differ materially. Moreover, there is no evidence that plaintiff tried unsuccessfully to follow the steps for appealing a received decision. On their face, the instructions notified plaintiff of his right to appeal and were not so unclear as to make the remedy unavailable.

Next, plaintiff could have asked for a copy of the instructions on the back of the complaint form or he could have asked for another blank form. The court of appeals has held that administrative remedies are unavailable to prisoners when "prison employees do

not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting," Dole, 438 F.3d at 809 (citations omitted), but plaintiff has not alleged any affirmative misconduct by prison employees to deny him access to the rules or, that he inquired of any anyone about his options. Thus, the fact that plaintiff did not have another copy of the instructions from the complaint is not enough to make an appeal unavailable.

Plaintiff's last argument fails for two reasons. First, plaintiff knew from the acknowledgment receipt that the institution complaint examiner was supposed to make a recommendation within twenty working days. In spite of this notice, plaintiff chose to initiate these lawsuits before the twenty days had run.

Second, simply being unaware of the available procedures is not enough to render an administrative remedy unavailable. Where there is no allegation of affirmative misconduct, as here, other circuits have held that subjective lack of awareness of a procedure does not excuse noncompliance. E.g., Chelette v. Harris, 229 F.3d 684, 688 (8th Cir. 2000) ("[The PLRA] says nothing about a prisoner's subjective beliefs, logical or otherwise, about administrative remedies that might be available to him. The statute's requirements are clear: if administrative remedies are available, the prisoner must exhaust them."). Indeed, because plaintiff did not allow the institution complaint examiner time to review his complaint before filing in federal court, it appears that plaintiff wished to remain unaware of further administrative remedies within the prison system.

In sum, plaintiff had two available appellate options and he declined to exhaust either

administrative remedy. I am not persuaded that either appeal was unavailable to plaintiff. Plaintiff's premature filing in this court contradicts the policy behind the PLRA to provide the prison system "a fair opportunity to consider the grievance." Woodford, 548 U.S. at 95 (2006). Therefore, because he admits he did not appeal the rejection of his complaint, and instead filed these suits before a recommendation was made on the complaint, plaintiff failed to exhaust his administrative remedies.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Dr. Ashley Thompson, Dr. Thomas J. Michlowski, Dr. Jason Kocina, Dr. Alexander Stolarski and Dr. Kevin McSoley, dkt. #49 in case number 3:11-cv-725-bbc, and the motion for summary judgment filed by defendant Dr. Carlo Gaanan, dkt. #33 in case number 3:12-cv-114-bbc are GRANTED. Plaintiff Donald Charles Wilson's complaints are dismissed without prejudice for his failure to exhaust his administrative remedies. The clerk of court is directed to enter judgment in favor of defendants and close these cases.

Entered this 29th day of April, 2013.

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