UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

HARVEY P. SHORT,

Plaintiff,

v. **Civil Action No. 2:07-00968**

VICKIE GREENE, Jail Administrator, and
LIEUTENANT HARVEY and
SERGEANT CARTER and
OFFICER FRYE and
OFFICER COOK and
CORPORAL KILLEN, II, and
OFFICER FERRELL and
CORPORAL BROWSER and
OFFICER HUGHES (the small Hughes), and
JOHN DOE I and
JOHN DOE II and
NURSE KATHY and
PRIMACARE MEDICAL OF W.V.,

Defendants.

MEMORANDUM OPINION AND ORDER

This action was previously referred to Mary E. Stanley, United States Magistrate Judge, who has submitted her Proposed Findings and Recommendation pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B).

The court has reviewed the Proposed Findings and Recommendation entered by the magistrate judge on July 23, 2008. The magistrate judge recommends that the court order the following:

1. That defendant Cathy Booth's motion to dismiss for insufficient service of process be granted and that process be re-issued by the Clerk and defendant Booth properly served;

2. That the motion to dismiss filed by the "Jail defendants[1]" be:

   a. denied insofar as defendants allege a failure to exhaust administrative remedies;

   b. granted insofar as defendants seek dismissal as to any claims made against them in their official capacities; and

   c. granted to the extent of any claims against defendants for inadequate medical care and treatment as it appears plaintiff is not alleging any such claims against the Jail defendants;

3. That the motion for summary judgment filed by the Jail defendants be denied as to both liability and the defense of qualified immunity; and

[1]The "Jail defendants" are Vickie Greene, Lieutenant Harvey, Sergeant Carter, Officer Frye, Officer Cook, Corporal Killen, II, Officer Ferrell, Corporal Browser, Officer Hughes, and an individual by the name of Farmer who does not appear in the style.

4. That defendant PrimeCare's motion to dismiss for failure to state a claim be granted and that the residue of the Primecare motions be denied without prejudice as moot.

On August 1, 2008, the Jail defendants objected to the magistrate judge's recommendation concerning the exhaustion of administrative remedies. The Jail defendants appear to suggest that the magistrate judge concluded exhaustion was unnecessary under the Prison Litigation Reform Act of 1995 ("PLRA") inasmuch as plaintiff was alleging he was subjected to physical abuse. On August 7, 2008, plaintiff responded to the objection.

The magistrate judge's analysis is more properly construed, in context, as concluding that while the PLRA requires exhaustion of administrative remedies, the state law that supplies the relevant administrative scheme does not require resort to its process when a plaintiff institutes "a civil . . . action alleging past . . . physical . . . abuse . . . ." W. Va. Code § 25-1A-2(c).[2]

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[2]The cited Code section provides materially as follows in its entirety:

> (c) Notwithstanding any other provision of this code, no inmate shall be prevented from filing an appeal of

(continued...)

The text of the exhaustion requirement is undeniably broad. Title 42 U.S.C. § 1997e(a) provides pertinently as follows:

> **No 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 . . . or other correctional facility until such administrative remedies as are available are exhausted.**

Id. See Moore v. Bennette, 517 F.3d 717, 725 (4th Cir. 2008)(stating that "to be entitled to bring suit in federal court, a prisoner must have utilized all available remedies "in accordance with the applicable procedural rules," so that prison officials have been given an opportunity to address the claims administratively.") (quoting Woodford v. Ngo, 548 U.S. 81 (2006)) (emphasis supplied); Jones v. Bock, 127 S. Ct. 910, 914 (2007) ("In an effort to address the large number of prisoner complaints filed in federal court, Congress enacted the . . . [PLRA]. Among other reforms, the PLRA mandates early judicial screening of prisoner complaints and requires prisoners to exhaust prison grievance procedures before filing suit.").

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[2](...continued)
his or her conviction or bringing a civil or criminal action alleging past, current or imminent physical or sexual abuse . . . .

W. Va. Code 25-1A-2(c).

The question, then, is whether a state statute exempting a certain class of inmate claims from exhaustion should be further extended to excuse compliance with section 1997e(a)? The answer to that question lies in the meaning of the word "available[,]" and the federal policy underlying the PLRA exhaustion requirement.

From a definitional standpoint, the answer seems clear enough. In Booth v. Churner, 532 U.S. 731, 737 (2001), the Supreme Court appeared to suggest that the dictionary meanings of "available" and "remedy[,]" as used in section 1997e(a), were imprecise. Nevertheless, the high Court appeared satisfied with a meaning of "available" that simply "require[d] the possibility of some relief for the action complained of . . ." Id. at 738. Despite the fact that a West Virginia inmate may apparently bypass state administrative processes when he or she alleges "past, current or imminent physical or sexual abuse[,]" it does not mean that the same processes would not possibly provide him some relief if he resorted to them.

From a policy standpoint, the proper outcome seems more apparent. The PLRA was spawned by an "'ever-growing number of prison-condition lawsuits that were threatening to overwhelm the capacity of the federal judiciary.'" Green v. Young, 454 F.3d

405, 406 (4th Cir. 2006) (quoting Anderson v. XYZ Correctional Health Servs., Inc., 407 F.3d 674, 676 (4th Cir. 2005)); see also id. at 405-06 ("To accomplish its goal of reducing the number of frivolous lawsuits, the PLRA placed three major hurdles in the path of prisoners seeking to challenge the conditions of their confinement[, including the] . . . require[ment] [that] prisoners . . . exhaust all administrative remedies before bringing suit."); id. at 408 ("Congress clearly viewed exhaustion as an important part of its efforts to curb the number of frivolous lawsuits brought by prisoners."); Anderson, 407 F.3d at 675 (noting that the PLRA "requires that inmates exhaust all administrative remedies before filing an action challenging prison conditions under federal law.").

The PLRA exhaustion requirement has been described as playing a central role in Congress' efforts to stem the tide of what it considered an abuse by some inmates of the civil justice system. See Jones, 127 S. Ct. at 923 ("The invigorated exhaustion requirement is a 'centerpiece' of the statute . . . .") (quoting Woodford v. Ngo, 548 U.S. 81, 84 (2006)("A centerpiece of the PLRA's effort 'to reduce the quantity . . . of prisoner suits' is an 'invigorated' exhaustion provision, § 1997e(a)."") (quoting Porter v. Nussle, 534 U.S. 516, 524 (2002)).

The Supreme Court has also observed repeatedly the many salutary purposes served by the PLRA exhaustion requirement. See, e.g., Jones, 127 S. Ct. at 923 ("We have identified the benefits of exhaustion to include allowing a prison to address complaints about the program it administers before being subjected to suit, reducing litigation to the extent complaints are satisfactorily resolved, and improving litigation that does occur by leading to the preparation of a useful record."); Woodford, 548 U.S. at 95 ("When a grievance is filed shortly after the event giving rise to the grievance, witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved.").[3]

[3]The court is also mindful of an additional benefit associated with encouraging resort to administrative processes in the correctional setting. For example, if a correctional officer inflicts an unwarranted assault on an inmate, it seems the better course to immediately, or within days, have that information in the hands of those managing the institution, as often occurs when an administrative grievance is filed. Institution officials might not otherwise learn of a potential problem respecting one of their employees until service of process occurs weeks later, perhaps after others have been victimized in the meantime. See also, e.g., Porter, 534 U.S. at 530 ("An unwarranted assault by a corrections officer may be reflective of a systemic problem traceable to poor hiring practices, inadequate training, or insufficient supervision."); id. at 531 ("Do prison authorities have an interest in receiving prompt notice of, and opportunity to take action against, guard brutality that is somehow less compelling than their interest in receiving notice and an opportunity to stop other types of staff wrongdoing?").

At bottom, Congress had significant policy objectives in mind when it enacted the PLRA. Stated in another way, Congress decided that

> [w]hat this country needs . . . is fewer and better prisoner suits. . . . Requiring exhaustion allows prison officials an opportunity to resolve disputes concerning the exercise of their responsibilities before being haled into court. This has the potential to reduce the number of inmate suits, and also to improve the quality of suits that are filed by producing a useful administrative record."

When Congress deemed exhaustion unimportant under the PLRA scheme, it spoke in explicit terms. For example, Congress enumerated four instances when a district judge might avoid examination of whether an inmate had exhausted his administrative remedies. See 42 U.S.C. § 1997e(c)(2) ("In the event that a claim is, on its face, [1] frivolous, [2] malicious, [3] fails to state a claim upon which relief can be granted, or [4] seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies."); Green, 454 F.3d at 408 (stating "we concluded in Anderson that Congress's leaving out references to exhaustion in some but not all of the subsections of § 1997e must be viewed as "intentional congressional omission[s] . . . .")(quoting Anderson, 407 F.3d at 680).

In sum, Congress could have provided for an exemption to the exhaustion requirement found in section 1997e(a) when the applicable state processes allow an inmate to immediately institute a civil action. In view of the use of the word "available[,]" along with the weighty, federal policy concerns that prompted the enactment of section 1997e(a), the court is reluctant to engraft onto the PLRA any such exception.[4]

Despite this ruling, the state has not demonstrated as a matter of fact and law that plaintiff has failed to exhaust his administrative remedies. Plaintiff has filed documents recently respecting that very question. The court, accordingly, concludes that the magistrate judge was correct regarding her ultimate recommendation concerning the Jail defendants' exhaustion defense found in their motion to dismiss.

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[4]The court is aware of Supreme Court precedent deferring to state law when examining how one exhausts a grievance:

> Compliance with prison grievance procedures, therefore, is all that is required by the PLRA to "properly exhaust." The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion.

Jones, 127 S. Ct. at 923 (2007). The court does not understand language such as that found in Jones to support the conclusion that state law governs the question of whether administrative remedies must be exhausted when an inmate brings suit in a federal court.

Based upon the foregoing analysis, the court ORDERS that, with the exception of the analysis respecting West Virginia Code § 25-1A-2(c), the Proposed Findings and Recommendation be, and it hereby is, adopted and incorporated herein. It is further ORDERED as follows:

1. **That defendant Cathy Booth's motion to dismiss for insufficient service of process be, and it hereby is, granted and that process be re-issued by the Clerk and defendant Booth be properly served;**

2. **That the motion to dismiss filed by the Jail defendants be, and it hereby is,**
   a. **denied without prejudice insofar as defendants allege a failure to exhaust administrative remedies;**
   b. **granted insofar as defendants seek dismissal as to any claims made against them in their official capacities; and**
   c. **granted to the extent of any claims against defendants for inadequate medical care and treatment as it appears plaintiff is not alleging any such claims against the Jail defendants;**

3. That the motion for summary judgment filed by the Jail defendants be, and it hereby is, denied as to both liability and the defense of qualified immunity; and

4. That defendant PrimeCare's motion to dismiss for failure to state a claim be, and it hereby is, granted and that the residue of the Primecare motions be, and they hereby are, denied without prejudice as moot.

The Clerk is directed to forward copies of this written opinion and order to the pro se plaintiff, all counsel of record, and the United States Magistrate Judge.

DATED: September 22, 2008

John T. Copenhaver, Jr.
United States District Judge