NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 26, 2024*
Decided February 27, 2024

Before

DIANE S. SYKES, *Chief Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 23-1573

ANTONIO L. ALMODOVAR,
Plaintiff-Appellant,

v.

LISA AVILA, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 21-CV-1455

Stephen C. Dries,
Magistrate Judge.

O R D E R

Antonio Almodovar, formerly a prisoner in Wisconsin, sued guards, a doctor, and the prison's superintendent (in her individual capacity) under 42 U.S.C. § 1983, alleging that they violated his constitutional rights by using excessive force, ignoring his need for medical treatment, and retaliating against him for submitting grievances. The

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

magistrate judge, presiding with the parties' consent under 28 U.S.C. § 636(c), granted the defendants' motion for summary judgment based on failure to exhaust administrative remedies. We affirm.

Almodovar's complaint recounts conditions at the Sturtevant Transitional Facility, a unit of Racine Correctional Institution, from which he has since been released. He alleged that, after he broke a tooth on December 19, 2019, his mouth became infected because his requests for medical treatment were ignored, including by the superintendent. And according to Almodovar, one guard, Warren Herwig, responded to Almodovar's requests for treatment by smacking him. After Almodovar filed a grievance about this, he alleges, Herwig retaliated against him by filing a false conduct report.

The defendants moved for summary judgment on the ground that Almodovar failed to exhaust his administrative remedies. They supplied evidence from the grievance tracking system of the Department of Corrections showing that Almodovar had submitted only one grievance while at Sturtevant. Specifically, on May 19, 2021, Almodovar complained about Herwig singling him out for discipline when he gathered with others to receive toilet paper instead of waiting for its distribution to their cells. The grievance made no mention of the tooth injury or a need for medical treatment, nor did it mention that Herwig, or anyone, had struck him or retaliated against him. The grievance was dismissed and returned to Almodovar with instructions that he could appeal the decision within 14 days, but he did not file an administrative appeal.

Almodovar did not respond to the motion for summary judgment and later reported that he never received notice of it because he had been arrested and was in jail. Indeed, one week after the defendants' filing (and two weeks after the arrest), Almodovar sent a letter notifying the court of his new address at the Milwaukee County Jail. The magistrate judge later warned Almodovar of the consequences of not responding to the motion, but that order was returned as undeliverable.

Three months later, the magistrate judge granted the motion for summary judgment. First, the judge explained that because Almodovar had not filed a response, the judge would construe the motion for summary judgment "as unopposed." But the judge, properly, did not grant the motion for that reason alone. *See Marcure v. Lynn*, 992 F.3d 625, 631 (7th Cir. 2021) (explaining that burden remains on movant despite lack of response). The judge adopted the defendants' proposed findings of fact and concluded that the supporting evidence established that Almodovar had failed to

exhaust his administrative remedies. This decision reached Almodovar, who timely filed a notice of appeal. We review the summary-judgment decision de novo. *See Schillinger v. Kiley*, 954 F.3d 990, 995 (7th Cir. 2020).

Based on the evidence in the record, summary judgment for the defendants was appropriate. The Prison Litigation Reform Act provides that "[n]o action shall be brought with respect to prison conditions … until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). This provision requires "proper" exhaustion, *Woodford v. Ngo*, 548 U.S. 81, 93 (2006), the boundaries of which are defined by state law. *Jones v. Bock*, 549 U.S. 199, 218 (2007). Therefore, a state inmate must file timely complaints and appeals in accordance with the state's administrative rules about prisoner grievances. *See Schillinger*, 954 F.3d at 995.

Almodovar did not do so. Under Wisconsin regulations, inmate complaints must contain "one clearly identified issue" and "sufficient information" to permit an investigation and decision. WIS. ADMIN. CODE DOC § 310.07(5)–(6). This requires a grievance to give notice to the prison of "the nature of the wrong for which redress is sought." *Schillinger*, 954 F.3d at 995 (interpreting similarly worded previous version of code). Further, for proper exhaustion, Wisconsin law requires a prisoner to complete all stages of review, which includes an intermediate appeal and then an appeal to the Secretary of the Department of Corrections. *See id*. §§ 310.5, 310.12, 310.13. Here, the defendants submitted evidence that Almodovar's only grievance did not mention the issues in his federal complaint and therefore did not provide notice of his current claims. And even if the grievance could encompass the events in the complaint, Almodovar did not submit an administrative appeal after the initial reviewing authority dismissed the grievance. He did not properly exhaust, and so judgment for the defendants was proper.

Almodovar protests that he never received notice of the defendants' motion for summary judgment and therefore was unable to oppose it. Even if this is true, however, he does not suggest on appeal that he could have submitted any evidence to refute the defendants' documentation or even warrant a *Pavey* hearing. *See Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008). And given the Department's authenticated records, we cannot hypothesize any such evidence. A remand to allow him to respond would therefore be futile. *See Outlaw v. Newkirk*, 259 F.3d 833, 841–42 (7th Cir. 2001) (affirming

summary judgment where plaintiff failed to identify how he could have overcome motion with notice).

AFFIRMED