

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

ROBERT ESTHER,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 15-CV-1010-SMY-RJD
)	
REX FITCH, et al.,)	
)	
Defendants.)	

MEMORANDUM AND ORDER

This matter comes before the Court on Magistrate Judge Daly’s Report and Recommendation (“Report,” Doc. 55) recommending that Defendants’ Motion for Summary Judgment (Doc. 31) be granted. Plaintiff filed an objection to the Report (Doc. 60). For the following reasons, the Report is **ADOPTED** in its entirety.

Plaintiff Robert Esther filed this civil rights action while he was incarcerated at Lawrence Correctional Center (“Lawrence”). He is now out on parole. The defendants are Illinois Department of Corrections (“IDOC”) employees. Plaintiff’s lawsuit alleges that Defendant Fitch subjected him to excessive force while the other four defendants failed to intervene. Defendants moved for summary judgment for Plaintiff’s failure to exhaust his administrative remedies. Plaintiff responded that the grievance process was not available to him because IDOC officials were purposely ignoring his grievances. On February 16, 2017, the Court held a *Pavey* hearing to resolve the question of whether the grievance process was available to Plaintiff. On March 2, 2017, Magistrate Judge Daly issued a Report recommending that Defendants’ motion be granted. Specifically, Judge Daly found that Plaintiff did not exhaust his administrative remedies before filing his lawsuit because he did not properly complete the IDOC grievance process.

At the hearing, Plaintiff testified that he filed multiple grievances but his counselor, Collin Ray, was not pleased with this fact and was simply throwing them away. A review of the record indicates that Plaintiff sent a grievance directly to the Administrative Review Board (ARB) instead of first submitting it to his counselor. (Doc. 1, p. 17). The ARB rejected the grievance on July 27, 2015 and returned it to Plaintiff, who then gave it to Counselor Ray. Counselor Ray denied the grievance as untimely because Plaintiff submitted it to him approximately two weeks after the 60 day time limit. Plaintiff also submitted an emergency grievance concerning medical care on July 13, 2015, which was denied on July 21, 2015.

Also at the *Pavey* hearing, Plaintiff presented Earnest Merritte, a former cellmate, as a witness. Merritte testified that he witnessed Plaintiff submit multiple grievances to Counselor Ray while they were cellmates in June and July of 2015. Defendants produced evidence that the two did not become cellmates until July 23, 2015. Counselor Ray also testified that of his six memorialized interactions with Plaintiff, only one mentioned grievances. His note stated that the grievance was submitted outside of the allowable timeframe.

Plaintiff objects to Judge Daly's finding that he did not properly complete the grievance process. Plaintiff testified he hand delivered the grievance to Counselor Ray on June 5, 2015. However, Counselor Ray testified that he was not given that particular grievance and his Cumulative Counseling Summary report substantiates that assertion. Based upon its review of the record and all relevant filings, the Court agrees with Judge Daly's conclusion that Plaintiff did not properly complete the grievance process.

Plaintiff also objects to Judge Daly's conclusion that administrative remedies were not unavailable to Plaintiff. Plaintiff and his cellmate Earnest Merritte testified that Counselor Ray had thrown away Plaintiff's grievance. Again, Ray's testimony and the Cumulative Counseling Summary report substantiate Ray's assertion that he never received that grievance. Further,

Defendants produced cell assignment logs which indicate that Plaintiff and Merritte were not cellmates during this alleged incident. The Court again agrees with Judge Daly's conclusion that administrative remedies were not unavailable to Plaintiff.

Finally, Plaintiff objects to Judge Daly's determination that the good cause exception does not apply in this case. Plaintiff argues that Counselor Ray should have considered the grievance "as it was in transit from the ARB to Plaintiff[.]" (Doc. 60, p. 7). He cites case law holding that good cause is shown where untimely filing is due to circumstances outside of filer's control. However, there are no analogous facts here. Plaintiff simply submitted his grievance to the ARB first instead of his counselor. This is not a circumstance outside of Plaintiff's control – the fault is directly attributable to Plaintiff.

For these reasons, the Court adopts Magistrate Judge Daly's Report and Recommendation (Doc. 55). This case is **DISMISSED** without prejudice for failure to exhaust administrative remedies as to all remaining defendants.

IT IS SO ORDERED.

DATED: July 25, 2017

s/ Staci M. Yandle
STACI M. YANDLE
United States District Judge