UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEPHEN JOHN KARES #261586,

Plaintiff,

Case No. 1:15-cv-972

v

HON. JANET T. NEFF

KENNETH MCKEE et al.,

Defendants.
_____/

OPINION AND ORDER

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff contends that his Eighth Amendment rights were violated by Defendants for their failure to protect him from an assault that took place at the Bellamy Creek Correctional Facility. Defendants filed a motion for summary judgment, arguing that Plaintiff failed to exhaust his administrative remedies pursuant to 42 U.S.C. § 1997e(a) (Dkt 15). The matter was referred to the Magistrate Judge, who issued a Report and Recommendation (R&R, Dkt 27), recommending that summary judgment be granted in favor of Defendants. The matter is presently before the Court on Plaintiff's objections to the Report and Recommendation. In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has considered de novo those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion and Order.

Plaintiff asserts that the Magistrate Judge erred because her "analysis . . . failed to give consideration to the fact that the Plaintiff made efforts to obtain assistance in filing the grievance" (Objs., Dkt 33 at PageID.161-162). Plaintiff further contends that the Magistrate Judge failed to

consider his mental impairment (*id.* at PageID.162), his enduring medical issues resulting from the assault (*id.*), his inability to access to legal materials while incarcerated (*id.*), and other factors that were "beyond his control" (*id.* at PageID.164) and are "sufficient to excuse the delay in filing of the grievance" (*id.* at PageID.163). Plaintiff argues that "the Magistrate erred when concluding that the Plaintiff failed to demonstrate that there exists a genuine factual issue on the question whether prison officials properly rejected his grievance as untimely" (*id.* at PageID.164).

Plaintiff's objections fail to demonstrate any factual or legal error in the Magistrate Judge's analysis or conclusion. The Magistrate Judge properly concluded that "whether the MDOC properly rejected Plaintiff's grievance as untimely is not a matter for this Court to resolve" (R&R, Dkt 27 at PageID.138, citing *Drain v. Burke*, 2015 WL 1323366, at *6 (W.D. Mich. Mar. 24, 2015) (citing *Jones v. Bonevelle*, No. 11-2242, slip op. at pp. 3–4 (6th Cir. Mar. 30, 2012)). Therefore, because Plaintiff has not properly brought a grievance through the Michigan Department of Correction's grievance process, he has not exhausted his administrative remedies. A prisoner asserting an action with respect to prison conditions under 42 U.S.C. § 1983 must first exhaust all available administrative remedies. *See Porter v. Nussle*, 534 U.S. 516, 524 (2002).

Despite this, the Magistrate Judge nonetheless considered whether Plaintiff's grievance was properly denied as untimely (R&R, Dkt 27 at PageID.138-139). In her analysis, the Magistrate Judge addressed Plaintiff's concerns. The Magistrate Judge properly concluded that Plaintiff "has failed to submit evidence supporting" his assertions "that his injuries caused him to delay for five months the act of submitting a grievance" (*id.* at PageID.138). Plaintiff presents no evidence showing that he has a mental impairment or an injury that affected his ability to file a timely grievance (*id.* at PageID.138-139). Furthermore, "Plaintiff fails to explain why it took five months

to explore this matter and determine whether to file a grievance" (*id.* at PageID.139). Because the question whether Plaintiff's grievance was correctly denied as untimely is not properly before the Court, and because the Magistrate Judge also concluded that Plaintiff to failed to present evidence to establish otherwise, Plaintiff's objections to the Report and Recommendation are without merit.

Accordingly, this Court adopts the Magistrate Judge's Report and Recommendation as the Opinion of this Court. A Judgment will be entered consistent with this Opinion and Order. *See* FED. R. CIV. P. 58. Because this action was filed *in forma pauperis*, this Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal of this decision would not be taken in good faith. *See McGore v. Wrigglesworth*, 114 F.3d 601, 610 (6th Cir. 1997), overruled on other grounds by *Jones v. Bock*, 549 U.S. 199, 206, 211-12 (2007).

Therefore:

IT IS HEREBY ORDERED that the Objections (Dkt 33) are DENIED and the Report and Recommendation of the Magistrate Judge (Dkt 27) is APPROVED and ADOPTED as the Opinion of the Court.

IT IS FURTHER ORDERED that the Motion for Summary Judgment (Dkt 15) is GRANTED.

IT IS FURTHER ORDERED that the Court certifies pursuant to 28 U.S.C. § 1915(a) that an appeal of the decision would not be taken in good faith.

Dated: September 28, 2016

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge