UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES LYONS,

Plaintiff,

v.

DR. TIMOTHY HEYD, M.D.,

Defendant.

CASE NO.: 1:12-cv-324

Judge Michael R. Barrett

OPINION AND ORDER

This matter is before the Court on Defendant's First Motion for Summary Judgment on the Sole Issue of Plaintiff's Failure to Exhaust His Administrative Remedies. (Doc. 14). Plaintiff has filed his opposition (Doc. 17), and Defendant has filed a reply (Doc. 18). This matter is now ripe for review.

I. BACKGROUND

Plaintiff James Lyons ("Plaintiff") is an inmate at the Lebanon Correction Institution ("LeCI"). (Doc. 2, Ex. 1, ¶ 1). Plaintiff suffers from sick cell anemia, which is an inherited blood disorder. (Doc. 2, Ex. 1, ¶ 2; Doc. 17, Ex. 1, ¶ 2). He suffers from chronic daily pain and severe pain episodes known as sickle cell crises. (Doc. 2, Ex. 1, ¶¶ 2, 4; Doc. 2, Ex. 1-A). The pain episodes can last anywhere from a few hours to a few days. (Doc. 2, Ex. 1, ¶¶ 3-4; Doc. 2, Ex. 1-A). Plaintiff describes his daily pain as being a four on a scale of one to ten, and he describes his pain during a sickle cell crisis as being a ten on a scale of one to ten. (Doc. 2, Ex. 1, ¶ 4). Plaintiff states that he suffers sickle cell crisis pain at least one to three times per month. (Doc. 2, Ex. 1, ¶ 4).

At LeCI, Plaintiff was prescribed by the Medical Director a non-steroidal anti-inflammatory drug, Incodin, and was told to purchase Ibuprofen from the commissary. (Doc. 2, Ex. 1, ¶ 8). Plaintiff states that the Ibuprofen and Indocin failed to control his pain, especially during a sickle cell crisis. (Doc. 2, Ex. 1, ¶ 8). During a sickle cell crisis, healthcare staff provided fluid hydration and Ultram to treat his pain. (Doc. 2, Ex. 1, ¶ 9). Plaintiff claims that this did not control his acute pain during sickle cell crises. (Doc. 2, Ex. 1, ¶ 9).

For complaints by an inmate regarding "any aspect of institutional life that directly and personally affects the grievant," the Ohio Department of Rehabilitation and Correction ("ODRC") maintains a three-step grievance system. Ohio Admin. Code § 5120-9-31; (Doc. 14, Ex. A, ¶¶ 4-6; Doc. 14, Ex. B, ¶¶ 4-6; Doc. 14, Ex. C, ¶¶ 4-6). Under step one, the inmate submits an informal complaint to the direct supervisor of the staff member or the department most directly responsible over the subject matter concerning the inmate within fourteen calendar days of the event giving rise to the complaint. (Doc. 14, p. 3 and Ex. A, ¶ 4) (citing Ohio Admin. Code § 5120-9-31(K)(1)); *see also* (Doc. 14, Ex. B, ¶ 4; Doc. 14, Ex. C, ¶ 4). If the inmate is not satisfied with the results under step one, he can proceed to step two. (Doc. 14, Ex. A, ¶ 5) (citing Ohio Admin. Code § 5120-9-31(K)(2)); *see also* (Doc. 14, Ex. B, ¶ 5; Doc. 14, Ex. C, ¶ 5).

Under step two, the inmate files a formal grievance with the inspector of institutional services at the prison where he is confined within fourteen calendar days from the date of the informal complaint response. (Doc. 14, p. 3 and Ex. A, ¶ 5) (citing Ohio Admin. Code § 5120-9-31(K)(2)); *see also* (Doc. 14, Ex. B, ¶ 5; Doc. 14, Ex. C, ¶ 5). That inspector will investigate the matter and issue a written response to the

inmate's grievance. (Doc. 14, Ex. A, ¶ 5) (citing Ohio Admin. Code § 5120-9-31(K)(2)); *see also* (Doc. 14, Ex. B, ¶ 5; Doc. 14, Ex. C, ¶ 5). If the inmate still is dissatisfied, then he may proceed to step three. (Doc. 14, p. 4 and Ex. A, ¶ 6) (citing Ohio Admin. Code § 5120-9-31(K)(3)).

Under step three, the inmate may appeal to the office of the Chief Inspector of ODRC. (Doc. 14, p. 4 and Ex. A, ¶ 6 (citing Ohio Admin. Code § 5120-9-31(K)(3)).

On December 21, 2011, Plaintiff submitted a complaint on a form titled "Informal Complaint Resolution" requesting medication to manage his pain. (Doc. 2, Ex. 1-A; Doc. 18, Ex. 1, ¶ 3). Plaintiff submitted the complaint by placing it in the "kite box" in his cell block, as he was advised to do by the second shift correctional officer on duty that day. (Doc. 17, Ex. 1, ¶ 6). On December 23, 2011, Ms. A. Weiss, the Healthcare Administrator at LeCI, issued a written response to Plaintiff's complaint. (Doc. 2, Ex. 1-A; Doc. 17, Ex. 1, ¶ 7; Doc. 18, Ex. 1, ¶ 3). The response stated that "it is currently not necessary to administer Chronic Narcotics" to treat Plaintiff's pain. (Doc. 2, Ex. 1-A; Doc. 17, Ex. 1, ¶ 7).

In early January 2012, Defendant Dr. Heyd prescribed Ultram, a non-opiate medication, to treat Plaintiff's daily chronic pain. (Doc. 2, Ex. 1, ¶ 10). Plaintiff states that Ultram was slightly effective in relieving his pain, but it did not control his pain during sickle cell crises. (Doc. 2, Ex. 1, ¶ 10).

In late January 2012, Defendant Heyd discontinued the Ultram prescription for "cheeking." (Doc. 2, Ex. 1, ¶¶ 11-12; Doc. 17, Ex. 1, ¶ 9). Defendant Heyd did not prescribe any other pain medication to treat Plaintiff's sickle cell pain. (Doc. 2, Ex. 1, ¶¶ 12-13; Doc. 17, Ex. 1, ¶ 9).

Plaintiff met with Dr. Heyd regarding the discontinuation of his pain medication. (Doc. 17, Ex. 1, ¶ 13). Then, in February 2012, he had a sickle cell crisis for which he submitted a Health Service Request seeking medical attention, and Plaintiff states that in responding to that request, the medical staff did not admit him to the infirmary, provide fluids, or provide what he believed to be adequate pain management. (Doc. 17, Ex. 1, ¶ 11).

On February 10, 2012, LeCI received a kite from Plaintiff inquiring about a grievance he filed weeks prior, and LeCI responded by informing him that a notice of grievance was never received. (Doc. 18, Ex. 1, ¶ 4). On or about February 16, 2012, Plaintiff filled out an Informal Complaint Resolution form requesting medication to adequately manage his sickle cell pain. (Doc. 17, Ex. 1, ¶ 12 and Ex. 1-A). He states that he submitted the complaint by placing it in the "kite box" in his unit, as directed by prison staff. (Doc. 17, Ex. 1, ¶ 12). He did not receive a response from the prison to that complaint. (Doc. 17, Ex. 1, ¶ 12). LeCI claims that it does not have a record of Plaintiff filing that complaint. (Doc. 18, Ex. 1, ¶ 4).

On or about March 27, 2012, Plaintiff spoke to his case manager, Mr. Tyus, about his complaint. (Doc. 17, Ex. 1, ¶ 13). Plaintiff requested a Notice of Grievance form. (Doc. 17, Ex. 1, ¶ 13). Mr. Tyus advised Plaintiff to complete another Informal Complaint and to write "Notification of Grievance" at the top of the form. (Doc. 17, Ex. 1, ¶ 13). Plaintiff states that he did so, that he addressed the form to Ms. Weiss as well as the Deputy Warden,[1] and that he placed the form in the kite box located in his cell block. (Doc. 17, Ex. 1, ¶ 13 and Ex. 1-B). He also states that he attached a kite to the

[1] The form as written is submitted to "DW Swisher" and "Ms. A. Weiss." (Doc. 17, Ex. 1-B). Defendant states that the form was addressed to "Deputy Warden Schweitzer" and “Ms. Weiss." (Doc. 18, Ex. 1, ¶ 5).

form stating that he had not received a response to his informal complaint. (Doc. 17, Ex. 1, ¶ 13). Plaintiff did not receive a response to that submission. (Doc. 17, Ex. 1, ¶ 13). Defendant does not expressly state that LeCI has no record of Plaintiff filing that complaint, but Daniel Hudson, the Institutional Inspector at LeCI, denies that he received a kite about an unanswered informal complaint resolution. (Doc. 18, Ex. 1, ¶¶ 1, 4).

In April 2012, Plaintiff spoke with Mr. Tyus again regarding his unanswered grievance. (Doc. 17, Ex. 1, ¶ 14). He asked Mr. Tyus for a form to send to the Institutional Inspector, Mr. Hudson. (Doc. 17, Ex. 1, ¶ 14). Mr. Tyus advised him to send a kite to Mr. Hudson regarding his Notification of Grievance, which he states that he did that evening and put it in his kite box. (Doc. 17, Ex. 1, ¶ 14). Plaintiff states he never received a response to that kite from Mr. Hudson or anyone else at LeCI. (Doc. 17, Ex. 1, ¶ 14). This lawsuit was filed on April 24, 2012. (Doc. 1). Mr. Hudson states that he received a kite from Plaintiff on April 26, 2012 requesting a grievance form, and that a grievance form was sent back to Plaintiff on the date received. (Doc. 18, Ex. 1, ¶ 6). Mr. Hudson states Plaintiff did not file the grievance with his office. (Doc. 18, Ex. 1, ¶ 6).

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is "genuine" when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is "material" only if its resolution affects the outcome of the suit. *Id.*

On summary judgment, a court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The moving party has the burden of showing an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Once the moving party has met its burden of production, the non-moving party cannot rest on his pleadings, but must present significant probative evidence in support of his complaint to defeat the motion for summary judgment. *Anderson*, 477 U.S. at 248-49. "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Id.* at 252. Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

III. ANALYSIS

A. Legal Standard

Defendant moves for summary judgment pursuant to the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997(e)(a). Section 1997(e)(a) provides, in pertinent part:

> No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

"To exhaust his administrative remedies, a prisoner must adhere to the institutional grievance policy, including any time limitations." *Rischer v. Lappin*, 639 F.3d 236, 240 (6th Cir. 2011) (citing *Woodford v. Ngo*, 548 U.S. 81, 90-91, 126 S.Ct. 2378 (2006)). The Sixth Circuit requires an inmate to make "'affirmative efforts to comply with the administrative procedures,' and analyzes whether those 'efforts to exhaust were sufficient under the circumstances.'" *Id*. at 240 (quoting *Napier v. Laurel Cnty.*, 636 F.3d 218, 224 (6th Cir. 2011)).

The Sixth Circuit has held that the failure to exhaust administrative remedies is "an affirmative defense under the PLRA, with the burden of proof falling on [the defendant]." *Risher*, 639 F.3d at 240 (citing *Jones v. Bock*, 549 U.S 199, 216, 127 S. Ct. 910 (2007); *Napier*, 636 F.3d at 225). Summary judgment is appropriate only if defendants establish the absence of a genuine dispute as to any material fact regarding non-exhaustion. *Id*.

B. <u>Defendant's Arguments for Summary Judgment</u>

Defendant contends that Plaintiff has failed to exhaust his administrative remedies before filing his lawsuit. (*See* Doc. 14; Doc. 18). Plaintiff counters that there are genuine issues of material fact as to (1) whether Plaintiff made affirmative efforts to properly exhaust his available administrative remedies and whether those efforts were frustrated by the facility's staff; and (2) whether an "imminent danger of serious harm" exception applies to the exhaustion requirement. (*See* Doc. 17). Given that Defendant filed its summary judgment motion prior to discovery, the evidence available to support the motions includes only the four declarations submitted by Defendants, several declarations submitted on behalf of Plaintiff, the declarations of Plaintiff, three grievance

forms submitted by Plaintiff, and several medical records. (*See generally* Doc. 2; Doc. 14; Doc. 17; Doc. 18).

1. **Affirmative efforts and frustration of efforts to exhaust**

Addressing first whether Plaintiff made sufficient affirmative efforts to exhaust or whether his efforts to exhaust were frustrated, the Court finds that there are two separate issues to consider. The first issue relates to Plaintiff's December 2011 informal complaint. The second issue relates to Plaintiff's purported submissions in February 16, 2012, March 18, 2012, and April 2012. The Court will address each issue below.

As to the first issue, Defendant claims that Plaintiff did not exhaust his administrative remedies because he did not appeal his December 2011 informal complaint within the time proscribed by the three-step grievance procedure. It is undisputed that Plaintiff filed an informal dispute on or about December 21, 2011, and that he received a response to that informal dispute from the prison staff on or about December 23, 2011, which informed Plaintiff that "it is currently not necessary to administer Chronic Narcotics." (Doc. 14, p. 4); *see also* (Doc. 17, p. 3) (citing Doc. 2, Ex. 1, ¶ 10 and Ex. 1-A). It also is undisputed that pursuant to the grievance procedure, he had fourteen calendar days from the response date to file a formal grievance. (Doc. 14, p. 3) (citing Ohio Admin. Code § 5120-9-31-(K)(2)); *see also* (Doc. 17). It further is undisputed that Plaintiff did not file a formal grievance at that time within the required timeframe. (*See generally* Doc. 14; Doc. 17, Doc. 18). As such, Defendant has demonstrated that there are no genuine issues of material fact as to whether Plaintiff failed to exhaust his administrative remedies with respect to the December 21, 2011 informal complaint. Partial summary judgment is granted to Defendant on this issue.

Now the Court moves to the second issue. As to the February 16, 2012, the Court finds that there are genuine issues of material fact as to whether the February 16, 2012 dispute constituted an affirmative effort to comply with the first step of the grievance procedure that was sufficient under the circumstances. Mr. Hudson admits that he received a kite on February 10, 2012 from Plaintiff inquiring about a grievance Plaintiff claimed to have filed weeks prior, and that he responded by telling Plaintiff that such a grievance was never received. (Doc. 18, pp. 2-3) (citing Doc. 18, Ex. A, at 4). Dr. Hudson, however, states that he does not have a record of Plaintiff filing an informal complaint resolution on February 16, 2012. (Doc. 18, Ex. 1, ¶ 4). Plaintiff, on the other hand, has submitted a declaration as well as documentary evidence of an informal dispute that he purportedly submitted on February 16, 2012. (Doc. 17, Ex. 1, ¶ 12 and Ex. 1-A). Plaintiff's declaration further indicates that he submitted that informal dispute in the same manner that he submitted the informal dispute in December 2011, by placing it in the "kite box" in his unit. (Doc. 17, Ex. 1, ¶ 12). Plaintiff states that he did not receive a response to that informal dispute. (Doc. 17, Ex. 1, ¶ 12). Defendant has set forth no evidence as to the proper internal procedures for getting a complaint processed. (*See generally* Doc. 14; Doc. 18). When the evidence is construed in favor of Plaintiff, there are genuine issues of material fact as to whether the February 16, 2012 complaint constituted a sufficient affirmative effort to comply with step one of the grievance procedure.

Defendant's second argument as to why the February 16, 2012 notice was insufficient fares no better on summary judgment. Defendant argues that even if Plaintiff submitted an informal dispute on February 16, 2012, that dispute is of no

relevance because it "alleged the same issues that were discussed but not exhaustively grieved in December [2011]" and that Plaintiff "cannot file the same ICR multiple times in an effort to extend deadlines set forth in the grievance policy." (Doc. 18, p. 3). Although Defendant's argument is conclusory and lacking any legal or factual support, even assuming it could be supported, there is evidence that when construed in favor of Plaintiff could demonstrate that the issues were not the same and that Plaintiff made a sufficient affirmative effort to comply. Specifically, under the three-step grievance procedures, an informal dispute may be submitted within a specified timeframe after an "event giving rise to the complaint." (Doc. 14, p. 3) (citing Ohio Admin. Code § 5120-9-31(K)(1)). Plaintiff has produced evidence that after the December 23, 2012 response to his first informal dispute but before Plaintiff purportedly submitted his February 16, 2012 dispute, the following events occurred: (1) his Ultram was discontinued by Dr. Heyd in late January 2012, (2) Plaintiff met with Dr. Heyd and found it was discontinued as a result of "cheeking," and (3) Plaintiff had a sickle cell crisis for which he was not provided what he believed to be adequate medical care to manage his pain. (Doc. 17, Ex. 1, ¶¶ 9-12). Moreover, Plaintiff references in the February 16, 2012 complaint that he only is being told to buy Ibuprofun to manage his pain, whereas in his December 2011 informal complaint he refers to receiving an anti-inflammatory and being told to buy Ibuprofun, suggesting a change in circumstances. (*See* Doc. 2, Ex. 2; Doc. 17, Ex. 1-A). Defendant has set forth no evidence that demonstrates that under such circumstances it still was improper to submit a second informal complaint or that Plaintiff's complaint was insufficient in terms of content. As such, when the evidence is construed in favor of Plaintiff, as required on a motion for summary judgment filed by

Defendant, there are genuine issues of material fact as to whether the informal dispute constituted a sufficient affirmative effort to comply.

Turning to the March 28, 2012 complaint, the Court finds, as it did with the February 16, 2012 complaint, that there are genuine issues of material fact as to whether the complaint constituted a sufficient affirmative effort to comply with step-two of the grievance procedures. Plaintiff has submitted a declaration stating that he submitted a grievance on March 28, 2012 along with kite stating he had not received a response to his informal complaint, and he submits supporting documentary evidence. (Doc. 17, Ex. 1, ¶ 13 and Ex 1-B). In his declaration, he states that he put the grievance and the kite into his kite box. (Doc. 17, Ex. 1, ¶ 13). Plaintiff further states that he submitted the grievance in the form suggested by Mr. Tyus, who would not provide the notice of grievance form to Plaintiff. (Doc. 17, Ex. 1, ¶ 13 and Ex.1-B). He instead wrote "Notification of Grievance" at the top of the grievance form as Mr. Tyus had instructed him to do. (Doc. 17, Ex. 1, ¶ 13 and Ex. 1-B). Notably, Defendant has set forth no argument as to whether the form or timing of the kite inquiring about the informal grievance was proper. (*See generally* Doc. 14; Doc. 18). Nor has Defendant argued or set forth any evidence that Plaintiff used the improper internal avenues to submit to notification of grievance or to obtain the notice of grievance form.[2] (*See generally* Doc. 14; Doc. 18). Defendant instead challenges Plaintiff's March 28, 2012 complaint on three other grounds.

[2] Although Ohio Admin. Code § 5120-9-31(K)(2) states that a notice of grievance form should be requested from the inspector, the Court cannot without argument or evidence from Defendant as to the requirement at LeCI, impose such a procedural requirement on Plaintiff when considering whether his efforts to comply were insufficient under the circumstances. *See Risher*, 639 F.3d at 240-41 (declining to impose requirements on the prisoner for exhaustion purposes beyond those that have been shown to be required by the grievance procedures).

First, Defendant challenges the form of the notice as not being on the "proper form." (Doc. 18, Ex. 1, ¶ 5). Although Mr. Hudson states that it is the incorrect form, Defendant has set forth no evidence that demonstrates what constitutes the correct form. (*See* Doc. 18). Further, under Ohio Admin. Code § 5120-9-31(J), the notification of grievance form to be used is to be designated by the chief inspector, and there is no evidence presented by Defendant here that demonstrates any such form was designated by the chief inspector for use by the inmates. (*See generally* Doc. 14; Doc. 18). Without such evidence, the Court cannot conclusively determine that the form used by Plaintiff was per se improper. *See Risher*, 639 F.3d at 240-41 (declining to impose requirements on the prisoner for exhaustion purposes beyond those that have been shown to be required by the grievance procedures). Second, Defendant argues that the purported notice of grievance was different from the prior informal complaints only in that it references being told to buy Ibuprofen. (Doc. 18, p. 3). However, the Court finds that argument does not render Plaintiff's efforts insufficient, as it would be expected that a notification of grievance would refer to the same information as the informal complaint that the inmate is attempting to appeal. Third, Defendant challenges the notification of grievance as addressed to the wrong person because Mr. Hudson, as the inspector, is the only staff member who could respond to the dispute. (Doc. 18, p. 3). In support, Defendant has set forth evidence demonstrating that the grievance procedure provided for a notification of grievance to be filed with the inspector. (Doc. 18, p. 3) (citing Ohio Admin. Code § 5120-9-31(K)(2))); *see also* (Doc. 14, Ex. 1, ¶ 5; Doc. 14, Ex. 2, ¶ 5; Doc. 14, Ex. 3, ¶ 5; Doc. 18, Ex. 1, ¶ 5). Given that only the third dispute currently carries weight, and since the facts are to be construed in the light most

favorable to Plaintiff, the Court finds that Defendant has not met its burden of proving that there are no genuine issues of material fact as to whether the March 28, 2012 kite and notice of grievance were insufficient affirmative efforts to comply.

As for the April 2012 request, there also are genuine issues of material fact. Plaintiff states that he requested the grievance form, but received no response, whereas Defendant sets forth the declaration of Mr. Hudson who states that he received the request on April 26, 2012 and responded immediately but that Plaintiff is the one who failed to take further action. (Doc. 17, Ex. 1, ¶ 14; Doc. 18, Ex. 1, ¶ 6). As to whether the circumstances surrounding that request, there is a plain factual dispute that cannot be resolved by the Court on a motion for summary judgment.

Having concluded that there are genuine issues of material fact as to whether Plaintiff's efforts to comply were sufficient under the circumstances, the Court concludes that there also are genuine issues of material fact as to whether the facility rendered Plaintiff's remedies unavailable. If Plaintiff's complaints constitute sufficient efforts to comply and the facility has no record of them, there are genuine issues of material fact as to whether the facility's staff frustrated his efforts to follow the grievance procedure since Defendant received prior complaints sent by Plaintiff using the "kite box" but failed to receive, or record, the particular complaints at issue. *Surles v. Andison*, 678 F.3d 452, 457-58 (6th Cir. 2012) (genuine issues of material fact existed as to whether the defendant interfered with the plaintiff's ability to exhaust his administrative remedies by refusing to file or process the grievances).

There also is a genuine issues of material fact as to whether Plaintiff's efforts to exhaust his administrative remedies were frustrated by erroneous advice from LeCI staff

on how to file his complaints properly or by the LeCI staff's failure to provide Plaintiff with the proper forms for doing so when requested by Plaintiff. Plaintiff has set forth evidence that he was advised by a correctional officer to submit his informal complaint through the "kite box," and his December 2011 informal complaint submitted in that same manner was processed. As to the March 28, 2012 complaint, Plaintiff set forth evidence that he wrote "Notification of Grievance" at the top of the form as he was advised to do by Mr. Tyus, after Mr. Tyus failed to provide him a notification of grievance form. In April 2012, he submitted a kite regarding his Notification of Grievance to which he alleges he received no response. Defendant has set forth no evidence as to the proper internal procedures for submitting those kites, complaints and grievances. If Plaintiff was improperly advised as to how to grieve, or if Plaintiff was improperly deprived of the proper forms on which to grieve, then his efforts to follow the three-step grievance procedure may be an excuse to complete exhaustion. *See Surles,* 678 F.3d at 457-58; *see also Peterson v. Unknown Cooper*, 463 Fed. App'x 528, 530 (6th Cir. 2012) (summary judgment not appropriate against prisoner where evidence indicated that the prisoner requested the required grievance forms but was not provided them by prison staff); *Dale v. Lappin*, 376 F.3d 652 (7th Cir. 2004) (per curiam) (failure to give prisoner grievance forms when requested can render administrative grievance system unavailable); *Lee v. Willey*, No. 10-12625, 2012 U.S. Dist. LEXIS 25958, at *11-14 (E.D. Mich. Feb. 1, 2012) (Randon, M.J.), *adopted at*, 2012 U.S. Dist. LEXIS 25955 (Feb. 29, 2012) (Edmunds, J.).

Given that there are material issues of fact that must be resolved before the Court can determine whether exhaustion occurred with respect to Plaintiff's purported

submissions around February 16, 2012, March 28, 2012 and April 2012, summary judgment is denied to Defendant.

2. **Imminent danger of serious harm**

Turning to the issue of imminent danger of serious harm, Plaintiff contends that he had no duty to exhaust his remedies in a situation of imminent danger if there are no administrative remedies for warding off such a danger, but that even if had such a duty, he exhausted those remedies. (Doc. 17, p. 7). In response, Defendant contends that Plaintiff's argument runs counter to well-established precedent that a prisoner must pursue administrative remedies even if the specific relief he seeks is not available in grievance procedures. (Doc. 18, pp. 1-2).

The Court agrees with Defendant that even if Plaintiff claims imminent harm, he must exhaust the available administrative remedies. The Sixth Circuit has held that "[t]o further the purposes behind the PLRA, exhaustion is required even if the prisoner subjectively believes the remedy is not available, even when the state cannot grant the particular relief requested and even where [the prisoners] believe the procedure to be ineffectual or futile." *Napier v. Laurel Cnty.*, 636 F.3d 218, 222 (6th Cir. 2011) (internal citations and quotations omitted). Thus, "when a reasonable policy is in place, but is silent or vague in a particular circumstance, courts must look to see whether the prisoner has attempted to satisfy the requirements of the policy." *Napier*, 636 F.3d at 223. This is true even when a prisoner believes he is in imminent danger of serious physical injury. *Arbuckle v. Bouchard*, 92 Fed. App'x 289 (6th Cir. 2004) ("The PLRA does not excuse exhaustion for prisoners under imminent danger of serious physical injury.").

Here, Plaintiff was not excused from attempting to exhaust his available administrative remedies under the three-step grievance procedure even though he believed he was in imminent danger. The three-step grievance procedure expressly provides for a manner for handling situations that may pose imminent harm to the prisoner. *See* Ohio Rev. Code § 5120-9-3(K)(1)-(2). While the policy may be vague as to how a prisoner should seek a waiver of an informal grievance or other steps in the grievance process for what he perceives to be a threat of imminent harm, he still was required to make reasonable efforts to comply with the procedures.

Nevertheless, for the reasons explained above, the Court finds that there are genuine issues of material fact as to whether Plaintiff sufficiently attempted to exhaust his available administrative remedies under the three-step grievance procedure and whether prison staff interfered with his efforts. Further, and more specific to the issue of imminent danger, the Court finds that there are genuine issues of material fact as to whether Plaintiff sufficiently attempted to exhaust his available remedies where there may be a threat of imminent harm, given that Defendant has not set forth any evidence as to the applicability, or lack thereof, of the imminent harm procedures to Plaintiff, or as to Plaintiff's failure to make sufficient efforts to exhaust those remedies specifically available where imminent harm is possible. Accordingly, summary judgment is denied to Defendant.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**. It is ORDERED that summary judgment is:

1. GRANTED to Defendant with respect to the December 21, 2011 informal complaint resolution, and

2. DENIED to Defendant on all remaining issues.

IT IS SO ORDERED.

s/Michael R. Barrett
Michael R. Barrett, Judge
United States District Court