

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

TERRY EARL HARVEY THOMPSON, )

Plaintiff, )

vs. )

OREGON DEPARTMENT OF )  
CORRECTIONS, et al., )

Defendants. )  
\_\_\_\_\_ )

Civil Case No. 08-430-KI

OPINION AND ORDER

Terry Earl Harvey Thompson  
Snake River Correctional Institution  
777 Stanton Boulevard  
Ontario, Oregon 97914-8335

Pro Se Plaintiff

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Attorneys for Defendants

KING, Judge:

Plaintiff Terry Earl Harvey Thompson became a partial paraplegic after injuring his spinal cord in 1986. He has used a wheelchair since 1993. Thompson was committed to the custody of the Oregon Department of Corrections (“ODOC”) in August 1996 and has been incarcerated at Snake River Correctional Institution (“SRCI”) for most of the time since January 21, 1999. Thompson alleges claims against many ODOC employees, with most of the defendants providing health care at SRCI. Thompson’s claims allege that he is not getting appropriate health care for his serious medical conditions, that he is discriminated against because of his disabilities, and that he is retaliated against because of his complaints. The claims are alleged under the United States and Oregon Constitutions, the Americans with Disabilities Act, and the Rehabilitation Act. Before the court is Defendants’ Unenumerated 12B Motion to Dismiss for Failure to Exhaust (#18). For the reasons below, I grant the motion.

### **LEGAL STANDARDS**

The Prison Litigation Reform Act’s (“PLRA”) exhaustion requirement creates an affirmative defense that must be raised and proven by defendants. Wyatt v. Terhune, 315 F.3d

1108, 1119 (9th Cir.), cert. denied, 540 U.S. 810 (2003). Because the failure to exhaust nonjudicial remedies is not jurisdictional under the PLRA, the defense is treated as a matter in abatement and is subject to an unenumerated motion to dismiss rather than a motion for summary judgment. The court may look beyond the pleadings and decide disputed issues of fact. If the prisoner has not exhausted nonjudicial remedies, the court should dismiss the claim without prejudice. Id. at 1119-20.

The PLRA's exhaustion requirement applies to claims under the Americans with Disabilities Act and the Rehabilitation Act, in addition to constitutional claims. O'Guinn v. Lovelock Corral. Ctr., 502 F.3d 1056, 1062 (9th Cir. 2007).

## **DISCUSSION**

Defendants ask me to dismiss Thompson's claims because he failed to exhaust his administrative remedies with respect to the issues in his complaint. Although Thompson has filed several grievances over his medical concerns, he has not appealed any of the responses. Thompson also has not filed a discrimination complaint and thus did not utilize the available administrative remedies available to address that issue.

Grievances are processed in accordance with the ODOC Administrative Rules for Inmate Communication and Grievance Review System. Inmates are encouraged to talk to first line staff as their primary way to resolve disputes and, if not satisfied, to use a written inmate communication form. OAR 291-109-0100(3)(a). If this does not resolve the issue, the inmate may file a grievance if it complies with the rules. OAR 291-109-0140(1)(a).

Inmates may grieve: (1) the misapplication of or lack of any administrative directive or operational procedure; (2) unprofessional behavior or action directed toward an inmate by an

employee or volunteer; (3) any oversight or error affecting an inmate; (4) a program failure; or (5) the loss or destruction of personal property. OAR 291-109-0140(2)(a)-(f). A grievance must be filed within 30 days of the incident. OAR 291-109-0150(2) Once the inmate grievance has been logged, the grievance coordinator sends a receipt to the inmate. OAR 291-109-0160(1)(a).

An inmate may appeal a grievance response to the functional unit manager by completing a grievance appeal form and filing it with the grievance coordinator within fourteen days of receipt of the response. OAR 291-109-0170(1)(a) and (b). The inmate will receive a return receipt. OAR 291-109-0170(1)(a). If still not satisfied, the inmate may appeal the functional unit manager's decision by completing another grievance appeal form and filing it with the grievance coordinator within fourteen days of receipt of the response. Again, the inmate will receive a return receipt. OAR 291-109-0170(2)(a). This final appeal is decided by an assistant director having authority over the issue. OAR 291-109-0170(2)(a)-(c).

An inmate may file a discrimination complaint based on the inmate's own protected status of race, color, national origin, sex, religion, age, marital status, or handicap; the protected status of a person with whom the inmate associates; or because the inmate has opposed unlawful discrimination. OAR 291-006-005(1). The inmate must file a written complaint with the functional unit manager within 180 days of the alleged act of discrimination. OAR 291-006-005(2). The inmate is entitled to a review of the functional unit manager's decision. OAR 291-006-005(2)(c).

Thompson filed the following grievances:

Grievance Number	Date Received	Issue	Response Sent
2006.02.045	2-24-06	lack of attention to special medical needs	3-23-06
2006.09.052	9-7-06	inability to get optical exam	10-16-06
2006.09.053	9-27-06	lack of parts for wheelchair	10-18-06
2006.09.054	9-27-06	loss of teeth due to use of prescription methadone	11-6-06
2006.09.055	9-27-06	prescription pain medication not given for several days when doctor increased the dosage	11-21-06

Thompson did not appeal any of the grievance responses. Thompson also did not file any discrimination complaints.

Thompson filed a lengthy response which centered around his denial of corporate existence and the Uniform Commercial Code. Thompson does not deny that he failed to appeal the grievances but instead contends, without citing supporting authority, that the exhaustion requirement does not apply to him. He is wrong. Thompson's failure to exhaust his administrative remedies requires me to dismiss his claims.

### CONCLUSION

Defendants' Unenumerated 12B Motion to Dismiss for Failure to Exhaust (#18) is granted. This action is dismissed without prejudice.

IT IS SO ORDERED.

Dated this 6th day of May, 2009.

/s/ Garr M. King  
Garr M. King  
United States District Judge