

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

Tyrone R. Williams,

Plaintiff,

vs.

Sheriff Dart, *et al.*,

Defendants.

20 CV 05639

Judge Martha M. Pacold

Magistrate Beth W. Jantz

**DEFENDANT SHERIFF THOMAS DART’S (IN HIS OFFICIAL CAPACITY) REPLY
IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT ON THE LIMITED
ISSUE OF EXHAUSTION**

Defendant, Sheriff Thomas Dart in his official capacity (“Defendant Dart”), by his attorney KIMBERLY M. FOXX, Cook County State’s Attorney, through her Assistant State’s Attorney, Jorie R. Johnson, in support of his Motion for Summary Judgment replies as follows:

INTRODUCTION

Plaintiff’s Third Amended Complaint seeks to hold Defendant Dart liable for the fact that Plaintiff contracted COVID-19 in December, 2020, while Plaintiff was housed in the Cook County Department of Corrections (“CCDOC”). (Dkt. 76 at ¶ 10-13.) Defendant’s Motion for Summary Judgment on the Limited Issue of Exhaustion (the “Motion”) argued that Plaintiff’s complaint must be dismissed for failure to exhaust administrative remedies because Plaintiff never appealed the response to the grievance he filed on December 9, 2020 (the “December Grievance”), about contracting COVID. (Dkt. 87 at p. 10-12.) In Response, Plaintiff makes no argument that the December Grievance exhausted Plaintiff’s administrative remedies, as required by the Prison Litigation Reform Act (“PLRA”), thus waiving any argument about the December Grievance and conceding that it did not exhaust Plaintiff’s administrative remedies. (Dkt. 92.) Instead, Plaintiff

argues that a grievance he filed on September 4, 2020 (the “September Grievance”), months before getting COVID, about being “high risk” for COVID, properly exhausted the claim he now puts forth in this litigation about contracting COVID, and the resulting injuries, suffered in December, 2020. Plaintiff’s argument is not supported by the record, basic principles of time, and is contrary to well-established Supreme Court and Seventh Circuit authority. Accordingly, this Court should find in favor of the Defendant and grant Defendant’s Motion for Summary Judgment.

ARGUMENT

I. Plaintiff’s Complaint states allegations only addressed in the December Grievance. Plaintiff failed to appeal the December Grievance, and Plaintiff makes no argument in Response about the December Grievance. Therefore his argument is waived.

As an initial matter, Plaintiff fails to address Defendant Dart’s arguments that this action should be dismissed because Plaintiff never appealed the December 9, 2020 Grievance with control number 2020x17496.

The Third Amended Complaint alleges that Plaintiff became infected with COVID-19 in December of 2020, and relatedly, makes further complaints about guidelines surrounding preventative measures, such as hand sanitizer and masks. (Dkt. 76.) The only grievance Plaintiff filed that addresses the issues stated in Plaintiff’s Third Amended Complaint—getting COVID in December—was the December Grievance filed on December 9, 2020, with control number 2020x17496. (Dkt. 88. at ¶27.) As previously articulated in Defendant’s Motion, Plaintiff did not appeal that December Grievance. (Dkt. 87 at pg. 4; Dkt. 88. at ¶27-29.) Because Plaintiff did not appeal the December Grievance, Plaintiff did not exhaust his administrative remedies as to getting COVID in December. Plaintiff makes no argument in Response that the December Grievance exhausted his administrative remedies. See *Rufus v. City of Chi.*, No. 17-cv-4192, 2019 U.S. Dist. LEXIS 62436, at *18 (N.D. Ill. Apr. 11, 2019) (“Plaintiff’s response memorandum failed to address

causation at all, thus waiving this argument entirely”); See *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) (“Failure to respond to an argument . . . results in waiver.”) (internal citations omitted); see also *United States v. 5443 Suffield Terrace*, 607 F.3d 504, 510-11 (7th Cir. 2010) (“summary judgment may only be defeated by pointing to admissible evidence in the summary judgment record that creates a genuine issue of material fact, and it was not the district court’s job to sift through the record and make [plaintiff’s] case for him.”).

On December 14, 2020, Plaintiff submitted a second grievance about getting COVID in December, which was deemed non-compliant and given the control number NC 202005392. (Dkt. 88. at ¶30.) Plaintiff’s non-complaint grievance NC-202005392 complained that he contracted COVID-19 on December 2, 2020, and that the CCDOC failed to provide access to enough quality or enough quantity of personal protective equipment and cleaning supplies to protect Plaintiff from contracting COVID-19. (*Id.*) On December 17, 2020, Plaintiff received a response to the non-complaint grievance, explaining that it was non-compliant because it was a repeat submission of the December Grievance (Dkt. 88 at SOF at ¶31.) Plaintiff makes no argument in Response that the non-complaint grievance should have been deemed compliant, or that the non-complaint grievance in any way should be found to exhaust administrative remedies. *Roxanne R. v. Berryhill*, No. 18 C 5484, 2019 U.S. Dist. LEXIS 100753, 2019 WL 2502033, at *6 n.6 (N.D. Ill. June 17, 2019) (“Notably, [the Commissioner] does not respond to this argument, thus, waiving any response.”)

As stated in Defendant’s Motion, it is well-settled that The PLRA requires proper exhaustion; that is, before filing a civil rights lawsuit, the inmate must file a grievance utilizing the applicable procedural rules. *Woodford v. Ngo*, 548 U.S. 81, 90, 93 (2006). The applicable procedural rules are defined not by the PLRA, but by the prison’s grievance process itself. *Jones*

v. Bock, 549 U.S. 199, 218 (2007). The Seventh Circuit has taken a “strict compliance” approach to exhaustion. “A prisoner must properly use the prison's grievance process. If he or she fails to do so, the prison administrative authority can refuse to hear the case, and the prisoner's claim can be indefinitely unexhausted.” *Dole v. Chandler*, 438 F. 3d 804, 808 (7th Cir. 2006). “To exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require.” *Lewis v. Washington*, 300 F. 3d 829, 833 (7th Cir. 2002).

In his Response to Defendant’s Statement of Facts, Plaintiff concedes that he did not file an appeal to the December Grievance with control number 2020x17496, and that the grievance he submitted on December 14, 2020 with the control number NC-202005392 was non-complaint. (Dkt. 90 at ¶¶28-33.) Additionally, Plaintiff’s Response to Defendant’s Motion makes no argument about his failure to appeal the December Grievance or the status of the non-compliant grievance. (Dkt. 92.) Thus, this Court should consider any argument related to the December Grievance or the non-compliant grievance as waived. See *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) (“Failure to respond to an argument. . .results in waiver.”).

Accordingly, this Court should grant summary judgment in favor of Defendant Dart because Plaintiff never appealed the grievance he filed about the issue that is the subject of his Third Amended Complaint—getting COVID in December 2020.

II. The September Grievance failed to exhaust administrative remedies as to claims in Plaintiff’s Third Amended Complaint.

Instead of making any argument responsive to Defendant’s position that the December Grievance and December non-complaint grievance failed to exhaust Plaintiff’s administrative remedies as to a claim that Plaintiff contracted COVID in December, Plaintiff instead jumps back in time, and argues that the September Grievance, submitted on September 3, 2020 with the control

number 2020x1143, somehow exhausts remedies as to an event that had not even happened yet. (Dkt. 92 at pg. 2.)

Plaintiff's Third Amended Complaint is about contracting COVID in December, 2020, and the related shortness of breath, fatigue, fever, chills, etc. that he suffered at that time "[w]ile infected by the coronavirus." (Dkt. 76 at ¶ 10-13.) But the September Grievance, submitted on September 3, 2020, makes no reference to a COVID infection, or the related symptoms, for the very sound reason that it had not happened yet. It was not possible for the September Grievance to be about Plaintiff contracting COVID because Plaintiff was not diagnosed with COVID until December of 2020. A grievance cannot exhaust administrative remedies about an event that has not yet happened. *Mayo v. Snyder*, 166 Fed. Appx 845, 848 (7th Cir. 2006) (plaintiff "failed to exhaust his remedies against Dr. Doughty and Nurses Arnett and Henneke because he filed his grievance before he was ever seen by these medical personnel."); *Stites v. Mahoney*, 594 F. App'x 303, 305 (7th Cir. 2015) (explaining that the one grievance that the plaintiff properly exhausted had nothing to do with the issues raised by the federal lawsuit and thus plaintiff failed to exhaust his administrative remedies on the issues before the court).

The purpose of the PLRA is to allow "correctional officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. 516, 525 (2002). The PLRA prohibits actions relating to "prison conditions under §1983 until such administrative remedies as are available are exhausted." 42 U.S.C §1997e(a); see also *Jones v. Block*, 549 U.S. 199, 211 (2007) ("There is no question that . . . unexhausted claims cannot be brought in court."). An inmate must seek to correct a problem through a correctional facility's administrative procedure before filing a Section 1983 claim. *Massey v. Helman*, 196 F.3d 727, 733 (7th Cir.1999); *Jones*, 549 U.S. at 218. "The benefits of exhaustion can be realized only if the

prison grievance system is given a fair opportunity to consider the grievance.” *Pavey v. Conley*, 663 F.3d 899, 905 (7th Cir. 2011).

Because “the primary purpose of a grievance is to alert prison officials to a problem,” *Maddox v. Love*, 655 F.3d 709, 722 (7th Cir. 2011) (internal citations and quotation marks omitted), and give the institution an opportunity to fix the problem, the prisoner’s grievance must include enough information to alert the prison of the wrong which the prisoner seeks redress. *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002). The detainee’s grievance and the federal Complaint must raise the same issues. See *Bowers v. Dart*, 1 F.4th 513, 517-18 (7th Cir. 2021). Plaintiff’s September Grievance did not give prison officials a fair opportunity to respond to Plaintiff’s COVID diagnosis because he did not have COVID at that time.

The Seventh Circuit’s recent opinion in *Bowers*, 1 F.4th 513 (7th Cir. 2021) is demonstrative of Plaintiff’s problem, and controlling. In *Bowers*, the plaintiff filed a grievance complaining that officers at CCDOC failed to respond properly to an ongoing inmate fight and protect him from harm. *Bowers*, 1 F.4th at 516-17. The complaint, however, alleged that the plaintiff informed the defendants of a brewing fight before it happened, and they failed to take appropriate measures to protect the plaintiff before the fight erupted. *Id.* The Seventh Circuit held that the plaintiff’s complaint, about notice of risk and actions before a fight, were fundamentally different from plaintiff’s grievance, about the fight itself, meaning that the plaintiff did not exhaust his administrative remedies. *Id.* at 518. That, in a nutshell, is Plaintiff’s problem here. Plaintiff’s September Grievance was about being “high risk for COVID-19”, which, as noted, Plaintiff had not caught in September. The Third Amended Complaint, however, is about the fact that Plaintiff actually caught COVID in December, and seeks damages for Plaintiff’s shortness of breath, fatigue, fever, chills, coughing, muscle and body aches, headaches, lost senses of smell and taste,

sore throat, runny nose, nausea, diarrhea, and persistent vomiting—none of which Plaintiff had or grieved in the September Grievance. Much like in *Bowers*, a grievance about actions before an incident is different from a complaint about the incident itself, and vice versa. Plaintiff's September Grievance did not complain about getting COVID and suffering through related COVID symptoms, meaning that the September Grievance did not exhaust administrative remedies for a federal lawsuit about getting COVID and suffering through related COVID symptoms.

Plaintiff's September Grievance, in addition to being different subject matter from the Third Amended Complaint and failing to address Plaintiff's COVID infection because that wouldn't have happened for three more months, fails to exhaust administrative remedies for an additional reason: Plaintiff commenced this litigation too soon. The PLRA requires that, before filing a civil rights lawsuit, the inmate must file a grievance utilizing the applicable procedural rules. *Woodford v. Ngo*, 548 U.S. 81, 90, 93 (2006). As noted, that means that Plaintiff must not only file and appeal a grievance about the same subject matter as the federal lawsuit, but that Plaintiff must file his appeal before he files his federal complaint. *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532, 535 (7th Cir. 1999) ("a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits, even if the prisoner exhausts intra-prison remedies before judgment."); *Ford v. Johnson*, 362 F.3d 395; 401 (7th Cir. 2004), ("[I]f the prisoner does exhaust, but files suit early, then dismissal of the premature action may be followed by a new suit that unquestionably post-dates the administrative decision."); *Boykin v. Dart*, No. 12 C 04447, 2014 U.S. Dist. LEXIS 156010, at *10-12 (N.D. Ill. Nov. 4, 2014) The Seventh Circuit has also noted that mailing of a 42 U.S.C. § 1983 civil rights Complaint to the court was enough to bring suit for purposes of 42

U.S.C. § 1997e(a), but since an inmate's Complaint was mailed and received prior to prison administrative review board's final grievance decision, court action was premature and the court should have dismissed the action without prejudice. *Ford*, 362 F.3d at 395.

In the case at bar, on September 15, 2020, Plaintiff completed his *pro se* Section 1983 Complaint form. (Dkt. 1 at pg. 6.) Plaintiff sent the Complaint out for filing through the mail on the same day. (*Id.*) On September 22, 2020, Plaintiff's Complaint was received by the district court and filed on the docket. (*Id.*) But pursuant to "the mailbox rule," a prisoner's action is deemed filed on the day he mails it to the court, meaning the Complaint was filed on September 15, 2020. In *Ford v. Johnson*, 362 F.3d 395 (7th Cir. 2004), the Seventh Circuit Court of Appeals held that, for purposes of 42 U.S.C. § 1997e(a), mailing a complaint to the Court was sufficient [*18] to bring suit. *Id.* at 399. As such, whether the complaint was screened at a later date pursuant to 28 U.S.C. § 1915A, whether Plaintiff paid his filing fee or was granted in forma pauperis status pursuant to 28 U.S.C. § 1915 after submitting his complaint, or whether the action is severed pursuant to the PLRA, the date that Plaintiff submitted his Complaint to the Court for filing is the operative date in determining whether Plaintiff exhausted his administrative remedies prior to filing suit. Holding differently would frustrate the purpose of the PLRA, which is to require exhaustion prior to the Court's involvement. *Ford*, 362 F.3d at 398-99; *Washington v. Goldsborough*, No. 3:13-cv-613-NJR-DGW, 2015 U.S. Dist. LEXIS 101160, at *17-18 (S.D. Ill. July 13, 2015).

Plaintiff's September Grievance was filed with CCDOC on September 3, 2020, and Plaintiff received a response from CCDOC on September 14, 2020. (Dkt. 88 at pgs. 12,13.) Plaintiff did not file an appeal to the September Grievance until September 17, 2020, two days after he had already filed his federal lawsuit. (Dkt. 90 at ¶3.)

Plaintiff prematurely filed his Complaint two days before he appealed the September Grievance, meaning that Plaintiff did not exhaust his administrative remedies prior to filing suit. While those two days might seem like small infraction, the entire purpose of the PLRA is to provide correctional institutions the opportunity to address prisoner concerns before the prisoner files suit, and to decrease the burden on the federal courts. By filing this action before appealing the September Grievance (which, as noted above, fails to exhaust for other reasons), Plaintiff sought to circumvent the PLRA, and this action must be dismissed because Plaintiff failed to exhaust his administrative remedies before filing suit.

Plaintiff concedes that the December Grievance and the non-compliant December grievance do not exhaust his administrative remedies. Instead, Plaintiff pins all his hopes on the September Grievance, but that grievance does not exhaust his administrative remedies either. First, Plaintiff filed his federal complaint before appealing the September Grievance, meaning that he failed to exhaust administrative remedies before filing suit. Second, the September Grievance is not about the same subject matter as Plaintiff's Third Amended Complaint, because the September Grievance is about Plaintiff's risk of catching COVID, while the Third Amended Complaint is actually about Plaintiff catching, and suffering from, COVID. Third, as a simple matter of time the September Grievance cannot be about the same subject matter as the Third Amended Complaint, because Plaintiff did not catch COVID until December 2020, months after he had already filed the September Grievance. The September Grievance did not exhaust Plaintiff's administrative remedies, so this case must be dismissed.

CONCLUSION

Plaintiff failed to exhaust his administrative remedies because he did not appeal the December Grievance submitted regarding the claims at issue in this matter. Plaintiff also failed to exhaust because the September Grievance was filed before Plaintiff ever had COVID,

addresses different issues because it is about the risk of getting COVID rather than injuries as a result of COVID, and was also appealed after Plaintiff had already filed this suit. Therefore, Plaintiff's suit must be dismissed due to a failure to exhaust his administrative remedies.

WHEREFORE, for the foregoing reasons, Defendant respectfully requests that this Honorable Court: (i) enter an order granting Defendant's Motion for Summary Judgment as to Exhaustion of Administrative Remedies and dismiss Defendant Dart from this suit because Plaintiff failed to exhaust his administrative remedies; (ii) dismiss Plaintiff's Third Amended Complaint for failure to exhaust his administrative remedies as required by *Pavey*; (iii) or in the alternative grant Defendant Dart's request for a Pavey Hearing consistent with the Seventh Circuit's holding in *Pavey v. Conley*, 544 F.3d. 739, 742 (7th Cir. 2009); and (iv) for any other relief that this Honorable Court deems necessary and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jorie R. Johnson hereby certify that on January 19, 2024 I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of Illinois Eastern Division by using the CM/ECF system. I certify that in accordance with Fed. R. Civ. P. and LR 5.5 and the General Order on Electronic Case Filing (ECF), the foregoing was served upon all ECF users.

/s/ Jorie R. Johnson
Jorie R. Johnson

