

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ADREMY DENNIS, et al.	:	
	:	
Plaintiff,	:	CASE NO. C2-04-532
	:	
v.	:	
	:	JUDGE FROST
BOB TAFT, et al.,	:	MAGISTRATE JUDGE ABEL
	:	
Defendants.	:	

DEFENDANTS' MOTION TO DISMISS

Now come Defendants Bob Taft, Governor of the State of Ohio; Reginald Wilkinson, Director of the Ohio Department of Rehabilitation and Correction; and James Haviland, Warden of Southern Ohio Correctional Facility (SOCF), by and through counsel, and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, move this Court for dismissal. The basis for Defendants' motion is fully set forth in the attached memorandum of law.

Respectfully submitted,

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MEMORANDUM

I. STATEMENT OF FACTS

Plaintiffs Adremy Dennis and Richard W. Coeey, II, are inmates of the State of Ohio, currently incarcerated at Mansfield Correctional Institution. Both Plaintiffs are housed on Death Row pursuant to their respective death sentences.

On June 18, 2004, Plaintiffs filed a Complaint pursuant to 42 U.S.C. § 1983, for injunctive and declaratory relief, attorneys' fees and costs. Plaintiffs allege that, in the future, Defendants will violate their rights under the Eighth Amendment to the United States Constitution to be free from cruel and unusual punishment. Plaintiffs also allege future violations of their rights to substantive and procedural due process under the Fourteenth Amendment to the United States Constitution. (Complaint, p. 2, ¶ 1).

More specifically, according to Plaintiffs, Defendants' lethal injection protocol includes an unreliable and short-acting anesthetic that will "leave Plaintiffs conscious but trapped in a paralyzed body wracked with the pain of suffocation and a heart attack." (Complaint, p. 2, ¶ 3). Plaintiffs allege that the current method of lethal injection will cause Plaintiffs to be tortured to death. (Complaint, p. 2, ¶ 2-3). Plaintiffs also allege that the personnel attending to the executions are inadequately trained, and as such, Defendants' execution methods violate Plaintiffs' Constitutional rights. (Complaint, p. 15, ¶ 35-36). Additionally, Plaintiffs also complain that if they desire to have their respective attorneys view their executions, the attorneys must count as one of their three (3) witnesses permitted by O.R.C. § 2949.25(A)(5). (Complaint, p. 18-19, ¶ 42-46).

Defendants herein move the Court for dismissal of the instant Complaint for failure to exhaust administrative remedies prior to filing suit.

II. LAW AND ARGUMENT

A. STANDARD OF REVIEW

A motion to dismiss for failure state a claim under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of the complaint. For purposes of the motion, the court must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the nonmoving party. *Roth Steel Products v. Sharon Steel Co.* (6th Cir. 1983), 705 F.2d 134, 155. In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. *Conley v. Gibson* (1957), 355 U.S. 41, 45-46.

B. PLAINTIFFS FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES PRIOR TO FILING THIS ACTION, AS REQUIRED BY THE PRISON LITIGATION REFORM ACT.

The Prison Litigation Reform Act of 1995¹ (“PLRA”), applies to persons incarcerated in prison who bring civil actions or appeals against a government entity or employee. Certain requirements must be satisfied prior to and contemporaneously with the filing of a lawsuit. Plaintiffs failed to comply with the PLRA prior to commencing this suit which mandates dismissal of the Complaint.

Under 42 U.S.C. §1997e(a), a prisoner confined in any jail, prison or other correctional facility may not bring an action challenging “prison conditions” under 42 U.S.C. § 1983 or any other federal law “until such administrative remedies as are available are exhausted.” *White v. McGinnis* (6th Cir. 1997), 131 F.3d 593, 595. To define “prison conditions,” courts have utilized the definition of “a civil action with

¹ Pub. L. No. 104-134, 110 Stat. 1321.

respect to prison conditions” set forth in 18 U.S.C. § 3626(g). This statute defines a conditions suit as (emphasis added):

Any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison...

Plaintiffs’ Complaint concerning alleged cruel and unusual punishment qualifies as a “conditions” suit as Plaintiffs complain of the “effects of actions by government officials.” 18 U.S.C. § 3626(g). In *Brown v. Toombs* (6th Cir. 1998), 139 F.3d 1102, 1104, the court set forth what an inmate’s complaint must contain to satisfy the exhaustion requirement of § 1997e(a) and survive dismissal. Inmates who file lawsuits challenging the conditions of their confinement pursuant to 42 U.S.C. §1983 “must allege and show that they have exhausted all available state administrative remedies...a prisoner should attach to his §1983 complaint the administrative decision, if it is available, showing the administrative disposition of his complaint.” *Brown v. Toombs, supra*. Where the record fails to disclose that the inmate has complied with the exhaustion requirement, the case should be dismissed. *Id.*

The administrative remedy is provided to Ohio prisoners in the extensive grievance procedure set forth in O.A.C. 5120-9-31. Any prisoner may use this system no matter what his or her security or disciplinary status is. O.A.C. 5120-9-31(B). The system provides for the prompt resolution of informal complaints and a more structured procedure for dealing with formal grievances. O.A.C. 5120-9-31(E) and (H). The procedure for dealing with formal grievances includes neutral, third-party investigation and set time schedules for evaluation of grievances. O.A.C. 5120-9-31(H). It also provides for input by the grieving prisoner into the scope and manner of that

investigation, O.A.C. 5120-9-31(H)(3), and provides a right of appeal to the Chief Inspector of the ODRC and protection against reprisals. O.A.C. 5120-9-31(H)(8), (L), (M), and (N).

Furthermore, O.A.C. 5120-9-31 includes provisions for the expedited determination of grievances involving danger to prison inmates' personal well-being and requires that inmates be provided with written and verbal instructions on how to utilize the grievance process. O.A.C. 5120-9-31(E) and (G). The Ohio Supreme Court ruled that O.A.C. 5120-9-31 provides a sufficiently adequate remedy that must be exhausted before inmates seek to involve the judiciary in the day-to-day operations of Ohio's prisons. *State ex rel. Humphrey v. Jago*, 74 Ohio St.3d 675, 676 (1996). That holding is consistent with the Sixth Circuit's requirement that federal prisoners exhaust their administrative remedies before bringing their complaints about the conditions of their confinement to the courts. *Davis v. Keohane*, 835 F.2d 1147, 1148-1149 (6th Cir. 1987); *Little v. Hopkins*, 638 F.2d 953-954 (6th Cir. 1981).

Informal complaints must be sent to the department or supervisor most directly related to the matter at issue no later than fourteen calendar days after the date of the matter complained of. ODRC Policy 203-01 VI(D). Formal grievance forms must be filed no later than thirty calendar days after the date of the matter complained of. ODRC Policy 203-01 VI(D). Appeals to the Chief Inspector must be sent no later than twenty working days after the inmate's receipt of the written Disposition of Grievance. O.A.C. 5120-9-31(H)(8).

As applied to the instant case, Plaintiffs have not exhausted their administrative remedies as to each claim they bring. Furthermore, Plaintiffs name multiple Defendants

in their Complaint. Plaintiffs are required to exhaust their administrative remedies as to the claim they bring against each Defendant they named. There are a number of Sixth Circuit cases that support this proposition.

Curry v. Scott, 249 F.3d 493 (6th Cir. 2001) requires that "a prisoner file a grievance against the person he ultimately seeks to sue," *Id.* at 505. Similarly, in *Hartsfield v. Vidor*, 199 F.3d 305 (6th Cir. 1999), the appellate court ruled that an inmate who named three officers in his grievance, and who could have but did not name two additional officers, did not exhaust his administrative remedies with respect to the two unnamed officers. *Hartsfield*, 199 F.3d at 308-09. He thus did not "administratively exhaust his . . . claim as to each defendant associated with the claim." *Also see Burton v. Jones*, 321 F.3d 569, 574 (6th Cir. 2003); *Thomas v. Woolum*, 337 F.3d 720 (6th Cir. 2003). Thus, Plaintiffs must exhaust their administrative remedies as to each Defendant--each person they intend to sue. *Curry v. Scott, supra*.

Plaintiffs did not fully comply with the grievance process by filing an informal complaint, formal grievance and appeal to the Chief Inspector on each claim that they bring against each Defendant that they name. ODRC Policy 203-01 VI(D); O.A.C. 5120-9-31. The PLRA, 42 U.S.C. §1997e(a), and *White v. McGinnis, supra*, mandate complete exhaustion as a precondition to bringing a suit on federal claims and require dismissal if exhaustion has not occurred before filing. Per *Brown v. Toombs, supra*, Plaintiffs must also show proof of exhaustion. They have not done so. Consequently, Plaintiffs' Complaint should be dismissed.

CONCLUSION

Based on the foregoing, Defendants respectfully move this honorable Court for dismissal of Plaintiffs' Complaint and any other relief deemed necessary and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Defendants' Motion to Dismiss was filed electronically this 5th day of August 2004. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

S/ Kelley A. Sweeney
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