

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

DALLAS COBBS, #164276,

Plaintiff,

v.

Case No.: 07-CV-14644

Hon. Anna Diggs Taylor

Magistrate Judge Charles E. Binder

GEORGE J. PRAMSTALLER, CRAIG
HUTCHINSON, WILLIAM BORGERDING,
MARCELLA CLARK, JAMES DILLON,
ROLDERT FISCHRÈ, KEITH IVENS,
GREGORY NAYLOR, BENCY MATHAI,
BONITA DAVIS NEIGHBORS, WALTER
ORMES, HARESH PANDYA, CHRIS SAMY,
individually and in their official capacities, and
CORRECTIONAL MEDICAL SERVICES,
INC.,

Defendants.

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**DEFENDANTS, CRAIG HUTCHINSON, M.D. AND
BENCY MATHAI, M.D.'S MOTION TO DISMISS PURSUANT TO
42 U.S.C. § 1997e(a) AND FED. R. CIV. P. 12(b)(6)**

NOW COME the Defendants, CRAIG HUTCHINSON, M.D., and BENCY MATHAI, M.D., by and through their attorneys, CHAPMAN AND ASSOCIATES, P.C., and for their Motion To Dismiss Pursuant To 42 U.S.C. § 1997e(a) And Fed. R. Civ. P. 12(b)(6), state as follows:

1. On or about October 30, 2007, Plaintiff filed his *pro se* civil rights Complaint.
2. At the time of the alleged events giving rise to the present action, Plaintiff was incarcerated by the Michigan Department of Corrections at the Ryan Correctional Facility, located in Detroit, Michigan, where Plaintiff is currently incarcerated.
3. On March 27, 2008, Magistrate Judge Charles E. Binder entered an Order of Assignment of Counsel, ordering that Paul D. Reingold and the Michigan Clinical Law Program were assigned to represent Plaintiff in this action.
4. On June 10, 2008, Plaintiff, through counsel, filed his First Amended Complaint. Plaintiff's First Amended Complaint alleges claims of deliberate indifference to Plaintiff's alleged cataracts in violation of the Eighth Amendment pursuant to 42 U.S.C. § 1983, and names 14 Defendants, including Craig Hutchinson, M.D. and Bency Mathai, M.D.
5. Prior to filing the instant action, however, Plaintiff failed to exhaust his administrative remedies as to Dr. Hutchinson and Dr. Mathai.
6. Therefore, Plaintiff's claims should be dismissed because they are barred by 42 U.S.C. § 1997e(a). Porter v. Nussle, 534 U.S. 516, 524, 122 S. Ct. 983 (2002).
7. The moving Defendants rely upon the facts and arguments set forth in their attached supporting brief as if more fully restated herein.

8. On Thursday, May 14, 2009, counsel for the moving Defendants spoke with Plaintiff's counsel in an attempt to obtain concurrence in the relief sought in this motion, and same was denied.

WHEREFORE, the Defendants, CRAIG HUTCHINSON, M.D. and BENCY MATHAI, M.D., respectfully request this Honorable Court to grant their motion, dismiss Plaintiff's claims against them with prejudice, and tax all reasonable costs and attorney's fees against Plaintiff where permissible.

Respectfully submitted,

CHAPMAN AND ASSOCIATES, P.C.

Dated: May 19, 2009

s/Brian J. Richtarcik

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P49390

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**BRIEF IN SUPPORT OF DEFENDANTS, CRAIG HUTCHINSON, M.D.
AND BENCY MATHAI, M.D.'S MOTION TO DISMISS PURSUANT TO
42 U.S.C. § 1997e(a) AND FED. R. CIV. P. 12(b)(6)**

PROOF OF SERVICE

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Exhibit A	Affidavit of James Armstrong
Attachment 1	MDOC Policy Directive 03.02.130 (December 19, 2003 version)
Attachment 2	MDOC Grievance Inquiry Screen for Dallas Cobbs, #164276
Attachment 3	Grievance RRF-2004-12-1151-12z
Attachment 4	Grievance RRF-2006-11-757-12g
Exhibit B	<u>Sullivan v. Kasajaru</u> . 2009 U.S. App. LEXIS 5362 (6th Cir. March 13, 2009)

ISSUE PRESENTED

WHETHER PLAINTIFF'S CLAIMS OF DELIBERATE INDIFFERENCE AGAINST CRAIG HUTCHINSON, M.D. AND BENCY MATHAI, M.D. BROUGHT PURSUANT TO 42 U.S.C. § 1983 SHOULD BE DISMISSED WHEN PLAINTIFF'S CLAIMS ARE BARRED BY 42 U.S.C. § 1997e(a) DUE TO PLAINTIFF'S FAILURE TO EXHAUST HIS ADMINISTRATIVE REMEDIES PRIOR TO FILING THE PRESENT ACTION AS TO THE AFOREMENTIONED DEFENDANTS.

Defendants Answer:	Yes.
Plaintiff Answers:	No.

CONTROLLING/APPROPRIATE AUTHORITY FOR RELIEF SOUGHT

According to 42 U.S.C. § 1997e(a), a prisoner may not bring a claim under 42 U.S.C. § 1983 until the prisoner has exhausted all administrative remedies that are available. Porter v. Nussle, 534 U.S. 516, 524, 122 S. Ct. 983 (2002). The Court has made clear that exhaustion of administrative remedies is a mandatory precursor to a prisoner's filing a lawsuit in federal court. Booth v. Churner, 532 U.S. 731, 741, 121 S. Ct. 1819 (2001).

The exhaustion requirement requires inmates to give prison officials fair notice of their alleged misconduct by alleging in their grievance the misconduct or mistreatment of the Defendant. Spencer v. Bouchard, 449 F.3d 721, 725-26 (6th Cir. 2006). The exhaustion requirement of 42 U.S.C. § 1997e(a) also requires an inmate to "properly exhaust" his administrative remedies prior to filing suit, which means that the inmate must comply with the specific requirements of the individual prison's grievance policy. Woodford v. Ngo, 126 S. Ct. 2378, 2386, 165 L. Ed. 2d 368 (2006). "The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the Prison Litigation Reform Act ("PLRA"), that define the boundaries of proper exhaustion." Jones v. Bock, 127 S. Ct. 910, 923, 166 L. Ed. 2d 798 (2007). Where a prison's grievance policy specifically requires a grievant to name each person against whom the grievance is filed, a prisoner-Plaintiff's failure to specifically name each Defendant amounts to a failure to properly exhaust that grievance as to each non-named Defendant. Sullivan v. Kasajaru, 2009 U.S. App. LEXIS 5362, *3 (6th Cir. March 13, 2009) (**Exhibit B**).

STATEMENT OF FACTS

On or about October 30, 2007, Plaintiff filed his *pro se* civil rights Complaint. (Dkt #1). At the time of the alleged events giving rise to the present action, Plaintiff was incarcerated by the Michigan Department of Corrections at the Ryan Correctional Facility, located in Detroit, Michigan, where Plaintiff is currently incarcerated.

On March 27, 2008, Magistrate Judge Charles E. Binder entered an Order of Assignment of Counsel, ordering that Paul D. Reingold and the Michigan Clinical Law Program were assigned to represent Plaintiff in this action. (Dkt #24). On March 31, 2008, Paul D. Reingold entered an Appearance on behalf of Plaintiff. (Dkt. #27). On June 10, 2008, Plaintiff, through counsel, filed his First Amended Complaint. (Dkt #38). Plaintiff's First Amended Complaint alleges claims of deliberate indifference to Plaintiff's alleged cataracts in violation of the Eighth Amendment pursuant to 42 U.S.C. § 1983. (Dkt #38). Plaintiff's First Amended Complaint names 14 Defendants, including Craig Hutchinson, M.D. and Bency Mathai, M.D. (Dkt #38).

STANDARD OF REVIEW

A complaint may be dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In considering a Rule 12(b)(6) motion to dismiss, the court must accept all well-pleaded allegations as true and construe them in the light most favorable to the Plaintiff. See Zinermon v. Burch, 494 U.S. 113, 117, 110 S. Ct. 975 (1990); Grindstaff v. Green, 133 F.3d 416, 421 (6th Cir. 1998). A complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Jenkins v. McKeithen, 395 U.S. 411, 422, 89 S. Ct. 1843 (1969). While decidedly liberal, the standard under Rule 12(b)(6) requires more than the

bare assertion of legal conclusions. In re Delorean Motor Co., 991 F.2d 1236, 1240 (6th Cir. 1993). Rather, a Complaint must contain allegations respecting all of the material elements of a claim to sustain a recovery under some viable legal theory. Id.

“When a court is presented with a Rule 12(b)(6) motion, it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant’s motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein.” Bassett v. National Collegiate Athletic Ass’n, 528 F.3d 426, 430 (6th Cir. 2008).

ARGUMENT

Plaintiff’s Claims Of Deliberate Indifference Against Craig Hutchinson, M.D. And Bency Mathai, M.D. Brought Pursuant To 42 U.S.C. § 1983 Should Be Dismissed Because Plaintiff’s Claims Are Barred By 42 U.S.C. § 1997e(a) Due To Plaintiff’s Failure To Exhaust His Administrative Remedies Prior To Filing The Present Action As To The Aforementioned Defendants.

According to 42 U.S.C. § 1997e(a), a prisoner may not bring a claim under 42 U.S.C. § 1983 until the prisoner has exhausted all administrative remedies that are available. Porter v. Nussle, 534 U.S. 516, 524, 122 S. Ct. 983 (2002). The Court has made clear that exhaustion of administrative remedies is a mandatory precursor to a prisoner’s filing a lawsuit in federal court. Booth v. Churner, 532 U.S. 731, 741, 121 S. Ct. 1819 (2001).

The exhaustion requirement requires inmates to give prison officials fair notice of their alleged misconduct by alleging in their grievance the misconduct or mistreatment of the Defendant. Spencer v. Bouchard, 449 F.3d 721, 725-26 (6th Cir. 2006). The exhaustion requirement of 42 U.S.C. § 1997e(a) also requires an inmate to “properly exhaust” his administrative remedies prior to filing suit, which means that the inmate must comply with the

specific requirements of the individual prison's grievance policy. Woodford v. Ngo, 126 S. Ct. 2378, 2386, 165 L. Ed. 2d 368 (2006). "The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the Prison Litigation Reform Act ("PLRA"), that define the boundaries of proper exhaustion."¹ Jones v. Bock, 127 S. Ct. 910, 923, 166 L. Ed. 2d 798 (2007). The United States Court of Appeals for the Sixth Circuit recently addressed this very point in the case of Sullivan v. Kasajaru. 2009 U.S. App. LEXIS 5362 (6th Cir. March 13, 2009) (**Exhibit B**). In that case the Court held that **where the grievance policy in place at the time in which the Plaintiff filed his grievance required a grievant to specifically name each person against whom the grievance was filed, the Plaintiff's failure to specifically name each Defendant in his grievance amounted to a failure to properly exhaust that grievance as to each non-named Defendant.** Id. at *3 (**Exhibit B**). Under Jones v. Bock, the burden now rests on the Defendants to show whether the Plaintiff exhausted his administrative remedies. 127 S. Ct. at 921. Nevertheless, it is still incumbent upon the Plaintiff to comply with the specific requirements of the relevant administrative grievance procedure. Id. at 923.

Prior to filing the instant action, Plaintiff pursued two grievances through Step III of the grievance process. (**Exhibit A, ¶18 and Attachment 2**). Those grievances are as follows: 1) RRF-2004-12-1151-12z (**Exhibit A, Attachment 3**); and 2) RRF-2006-11-757-12g (**Exhibit A, Attachment 4**). (**Exhibit A, ¶18 and Attachment 2**). During the period of time in which Plaintiff filed these two grievances, the December 19, 2003 version of MDOC Policy Directive 03.02.130 was the relevant grievance policy. (**Exhibit A, ¶7 and Attachment 1**).

¹ The policy in effect during the time relevant to Plaintiff's claims is different from the one at issue in Jones v. Bock, 127 S. Ct. 910, 916; 166 L. Ed. 2d 798 (2007). MDOC has since revised its policy several times. The version of the grievance policy that is relevant to this action is the December 19, 2003 version (**Exhibit A, Attachment 1**).

Pursuant to MDOC Policy Directive 03.02.130, there are four stages that an inmate must satisfy, each within specific time limits, prior to seeking judicial review. (**Exhibit A, Attachment 1**). First, within two days of discovering a grievable issue, the inmate must attempt to verbally resolve the issue with those involved. (**Exhibit A, Attachment 1, ¶R**). If the attempted resolution is unsuccessful, only then may an inmate file a Step I grievance form, and must do so within five business days of the attempted resolution. (**Exhibit A, Attachment 1, ¶X**). If the inmate is not satisfied with the response at Step I, he may request a Step II appeal form within five days of the response, and has an additional five days within which to file the Step II appeal. (**Exhibit A, Attachment 1, ¶DD**). If the inmate is dissatisfied with the result at Step II, he has ten business days to appeal to Step III of the grievance process. (**Exhibit A, Attachment 1, ¶HH**). The Step III response concludes the administrative grievance process set forth in MDOC Policy Directive 03.02.130. In filing a grievance and/or grievance appeals, an inmate must state the facts involved with the issue being grieved and must also include the specific dates, times, places, and names of all those involved in the issue being grieved. (**Exhibit A, Attachment 1, ¶T**).

In the present case, as demonstrated more fully below, Plaintiff failed to exhaust either grievance as to Dr. Hutchinson and Dr. Mathai. Therefore, Plaintiff's claims against the moving Defendants must be dismissed as they are barred by 42 U.S.C. § 1997e(a). Porter, 534 U.S. at 524.

A. Grievance RRF-2004-12-1151-12z (Exhibit A, Attachment 3).

The first grievance that Plaintiff pursued through Step III of the grievance procedure, and which is therefore relevant to the discussion of exhaustion, is Grievance RRF-2004-12-1151-12z

(**Exhibit A, Attachment 3**). Plaintiff failed to exhaust this grievance against either of the moving Defendants.

First, and most importantly, this grievance was not filed against Dr. Hutchinson or Dr. Mathai. **Nowhere in this grievance does Plaintiff name Dr. Hutchinson or Dr. Mathai.** (*See Exhibit A, Attachment 3*). By failing to name either of the moving Defendants in the body of this grievance, Plaintiff failed to give either Dr. Hutchinson or Dr. Mathai fair notice of the misconduct alleged against them in the Complaint, as required by the exhaustion requirement. *See Spencer*, 449 F.3d at 725-26. Furthermore, to the extent that Plaintiff may allege that this grievance was filed against the moving Defendants, his failure to name them in the body of this grievance is a failure to comply with the specific requirements of MDOC Policy Directive 03.02.130. According to Paragraph T of the grievance policy, a grievant must specifically name each person against whom the grievance is filed. *See Exhibit A, ¶T*. By failing to name each of the moving Defendants in this grievance, Plaintiff failed to comply with the requirements of the grievance policy, thereby failing to properly exhaust this grievance. *Woodford*, 126 S.Ct. at 2386; *Sullivan*, 2009 U.S. App. LEXIS 5362, at *3 (**Exhibit B**). Furthermore, to the extent that Plaintiff argues that he filed this grievance against the moving Defendants, he also failed to attempt to resolve the issue being grieved with each of the moving Defendants as required by Paragraph R of the grievance policy. According to the provisions of Paragraph R, a grievant must attempt to verbally resolve the issue being grieved with each person involved. Prior to filing this grievance, Plaintiff merely sent alleged medical notes to Health Care. *See Exhibit A, Attachment 3*. Plaintiff did not attempt to verbally resolve the issue being grieved with anyone, much less the moving Defendants. Therefore, Plaintiff failed to comply with the requirements of

MDOC Policy Directive 03.02.130, thereby failing to properly exhaust this grievance. Woodford, 126 S.Ct. at 2386.

B. Grievance RRF-2006-11-747-12g (Exhibit A, Attachment 4).

The second grievance that is relevant to the discussion of exhaustion is Grievance RRF-2006-11-747-12g (**Exhibit A, Attachment 4**). Plaintiff also failed to exhaust this grievance against either of the moving Defendants.

Again, as was the case with the grievance discussed above, Plaintiff did not file Grievance RRF-2006-11-747-12g against either Dr. Hutchinson or Dr. Mathai. (*See* **Exhibit A, Attachment 4**). **Again, Plaintiff failed to name either Dr. Hutchinson or Dr. Mathai in this grievance.** To the extent that Plaintiff argues that this grievance was filed against either of the moving Defendants, Plaintiff failed to give either Dr. Hutchinson or Dr. Mathai fair notice of the wrongdoing alleged against them in the Complaint, as he did not specifically name them in this grievance or state any wrongdoing against them. Therefore, Plaintiff failed to exhaust this grievance as to either Dr. Hutchinson or Dr. Mathai. Spencer, 449 F.3d at 725-26. By failing to specifically name either Dr. Hutchinson or Dr. Mathai in the body of this grievance, Plaintiff also failed to comply with the specific requirements of the grievance policy. Paragraph T of the grievance policy requires the grievant to specifically name each person against whom it is filed in the body of the grievance. (*See* **Exhibit A, Attachment 1**). By failing to name either Dr. Hutchinson or Dr. Mathai in this grievance, Plaintiff failed to comply with the requirements of the grievance policy, thereby failing to properly exhaust this grievance. Woodford, 126 S.Ct. at 2386; Sullivan, 2009 U.S. App. LEXIS 5362, at *3 (**Exhibit B**). To the extent that Plaintiff alleges he filed this grievance against either of the moving Defendants, Plaintiff also failed to

properly exhaust this grievance by failing to comply with Paragraph R of the grievance policy, which requires the grievant to attempt to verbally resolve the issue being grieved with those involved. (See **Exhibit A, Attachment 1**). In filing this grievance, Plaintiff merely alleges that he attempted to resolve the issue being grieved by submitting kites to healthcare. (See **Exhibit A, Attachment 4**). Therefore, Plaintiff did not attempt to verbally resolve the issue being grieved with anyone, much less Dr. Hutchinson or Dr. Mathai. By failing to attempt to verbally resolve the issue being grieved with either of the moving Defendants, Plaintiff also failed to properly exhaust this grievance as to the moving Defendants. Woodford, 126 S.Ct. at 2386.

CONCLUSION

Plaintiff's claims against Dr. Hutchinson and Dr. Mathai should be dismissed because Plaintiff's claims against them are barred by 42 U.S.C. § 1997e(a). Although Plaintiff pursued two separate grievances through Step III of the grievance process available to him through the Michigan Department of Corrections, neither grievance was filed against Dr. Hutchinson or Dr. Mathai. Furthermore, to the extent that Plaintiff alleges that they were filed against the moving Defendants, Plaintiff failed to specifically name either of the moving Defendants in the body of the grievance and failed to attempt to verbally resolve the issue being grieved with either Defendant, thereby failing to "properly exhaust" each grievance. Because Plaintiff failed to exhaust his administrative remedies prior to bringing the instant action pursuant to 42 U.S.C. § 1983, as required by 42 U.S.C. § 1997e(a), Plaintiff's claims are barred, and, therefore, he failed to state a claim against the moving Defendants upon which relief can be granted. Therefore, Plaintiff's claims against the moving Defendants should be dismissed pursuant to 42 U.S.C. § 1997e(a) and Fed. R. Civ. P. 12(b)(6) with prejudice.

RELIEF REQUESTED

WHEREFORE, the Defendants, CRAIG HUTCHINSON, M.D. and BENCY MATHAI, M.D., respectfully request this Honorable Court to grant their motion, dismiss Plaintiff's claims against them with prejudice, and tax all reasonable costs and attorney's fees against Plaintiff where permissible.

Respectfully submitted,

CHAPMAN AND ASSOCIATES, P.C.

Dated: May 19, 2009

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PROOF OF SERVICE

I hereby certify that on May 19, 2009, I presented the foregoing paper to the Clerk of the Court for filing and uploading to the ECF system, which will send notification of such filing to the attorneys of record listed herein and I hereby certify that I have mailed by US Postal Service the document to the involved non participants.

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