UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN T. THOMPSON, BETTINA SCHRECK, GERALD L. HESSELL, DONALD WARD, KENNETH ALEXANDER, HENRY TORREZ, and SILAS T. McADOO, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

CASE NO. 03-70234
HON. LAWRENCE P. ZATKOFF

WILLIAM OVERTON, Director, Michigan Department of Corrections, in his official capacity; GEORGE PRAMSTALLER, M.D., Director of Bureau of Health Services, Michigan Department of Corrections, in his official capacity; CORRECTIONAL MEDICAL SERVICES, INC., And DR. CRAIG HUTCHINSON, M.D., Director of Correctional Medical Services Inc., in his official capacity,

Defendants.
_____/

OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on JUL 01 2003

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
CHIEF UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This matter is before the Court on Defendants CMS and Hutchinson's Motion to Dismiss. Plaintiffs responded and Defendants CMS and Hutchinson replied. The Court finds that the parties have adequately set forth the relevant law and facts, and that oral argument would not aid in the disposition of the instant motion. *See* E.D. MICH. LR 7.1(e)(2). Accordingly, the Court ORDERS

that the motion be decided on the briefs submitted. For the reasons set forth herein, Defendants CMS and Hutchinson's Motion to Dismiss is GRANTED.

II. BACKGROUND

Plaintiffs are prisoners who are currently incarcerated by the Michigan Department of Corrections (hereinafter "MDOC"). The named Defendants include the Director of the MDOC, as well as individuals and entities that provide medical services to prisoners who are incarcerated at MDOC facilities. Each Plaintiff is incarcerated at a different MDOC facility, and collectively, Plaintiffs allege that they represent all similarly incarcerated individuals. In their Complaint, Plaintiffs allege a violation of 42 U.S.C. § 1983; in particular, they allege that their Eighth Amendment right to be free from cruel and unusual punishment was violated by Defendants, who are state actors acting under color of state law. In addition, Plaintiffs also allege a violation of Article 1, § 16 of the Michigan Constitution of 1963, which is substantially identical to the Eighth Amendment of the United States Constitution.

Plaintiffs state that they are all infected with the Hepatitis C Virus (hereinafter "HCV"), and that Defendants have been deliberately indifferent towards Plaintiffs' serious medical needs by failing to provide adequate testing and treatment for those prisoners infected with the virus. Specifically, Plaintiffs' Complaint alleges the following: first, Defendants' HCV testing and treatment protocol does not meet nationally recognized standards, and is constitutionally deficient; and second, Defendants have a policy of often failing to follow their own deficient protocol. Each individual Plaintiff alleges that he or she was diagnosed with HCV, and that Defendants failed to treat him or her pursuant to Defendants' deficient protocol; Plaintiffs allege that the care that they

would have received under Defendants' deficient protocol would have been better than the total lack of treatment that they in fact received. Plaintiffs state that they bring this action on behalf of themselves and all similarly situated individuals; in short, Plaintiffs allege that they are representatives of a class of incarcerated individuals who have also been subjected to Defendants' deliberate indifference.

Defendants Correctional Medical Services, Inc., (hereinafter "Defendant CMS") and Defendant Dr. Craig Hutchinson, (hereinafter "Defendant Hutchinson") who is a director of Defendant CMS, provide medical services to incarcerated inmates. Defendants CMS and Hutchinson bring this current Motion to Dismiss based on the following arguments:

1. Although Plaintiffs appear to have proceeded through Step III of the MDOC grievance procedure, Plaintiffs failed to attach to their Complaint any document other than the resolution page of their Step III review. Thus, Plaintiffs failed to describe the nature of the grievance filed, thus making it impossible to determine whether said Defendants had been given an opportunity to respond to the issues raised in Plaintiffs' Complaint.

2. Plaintiffs present no evidence that they ever filed a grievance against either Defendant CMS or Defendant Hutchinson, and in fact, Plaintiffs never filed a grievance against either of said Defendants.

3. Plaintiffs failed to file a grievance regarding all of the claims in their Complaint, thus Plaintiffs failed to exhaust their remedies.

4. Plaintiffs' claims against Defendants CMS and Hutchinson that arise under the Michigan Constitution are barred by Michigan law.

5. Plaintiffs fail to state a claim of deliberate indifference to their serious medical condition by Defendants CMS and Hutchinson.

6. Plaintiffs only allegation of deliberate indifference is based merely on a difference in medical opinion, and does not rise to a constitutional violation.

Many of Defendants CMS and Hutchinson's arguments are based on 42 U.S.C. § 1997e. Under federal law, a prisoner is required to exhaust all administrative remedies before he or she may

file an action pursuant to 42 U.S.C. § 1983. *See* 42 U.S.C. § 1997e(a). Prior to bringing this cause of action, each individual Plaintiff filed an administrative grievance with the MDOC. Under MDOC regulations, there are three steps to the grievance process, with the final review being entitled "Step III." Defendants argue, and Plaintiffs implicitly concede, that none of the individual Plaintiffs in this action filed a grievance alleging that Defendants' HCV testing and treatment protocol is constitutionally deficient.

The Court shall evaluate said Defendants' arguments in the most logical order.

III. LEGAL STANDARD

A motion brought pursuant to FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief may be granted tests the legal sufficiency of Plaintiffs' claims. The Court must accept as true all factual allegations in the pleadings, and any ambiguities must be resolved in Plaintiffs' favor. *See Jackson v. Richards Med. Co.*, 961 F.2d 575, 577-78 (6th Cir. 1992). The Court, however, need not accept as true legal conclusions or unwarranted factual inferences. *See Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). The Court may properly grant a motion to dismiss when no set of facts exists that would allow Plaintiffs to recover. *See Carter by Carter v. Cornwall*, 983 F.2d 52, 54 (6th Cir. 1993).

IV. ANALYSIS

In their motion to dismiss, Defendants CMS and Hutchinson give six reasons for why Plaintiffs' Complaint should be dismissed. Defendants CMS and Hutchinson's first three arguments, however, run together. Basically, Defendants CMS and Hutchinson argue that Plaintiffs are required

to exhaust the MDOC grievance procedure before they are permitted to bring an action in this Court. In addition, Plaintiffs are required to specifically plead facts that demonstrate that they have exhausted the MDOC grievance procedure for each of the claims in their Complaint. Defendants CMS and Hutchinson assert that Plaintiffs failed to specifically plead such facts. Based on this assertion, Defendants CMS and Hutchinson make the following three arguments:1) Plaintiffs only proof that they submitted their claims to the MDOC grievance procedure are the resolution pages for the final, Step III review of each Plaintiff's grievance, and that such resolution pages do not list each Plaintiff's individual grievances; 2) similarly, Defendants CMS and Hutchinson were never named in any of these grievances; and 3) there is no proof that each claim by each individual Plaintiff has been fully exhausted.

Said Defendants argument regarding failure to exhaust shall now be applied to Defendant's deficient protocol claim.

A. Deficient Protocol

42 U.S.C. § 1997e(a) states that a prisoner may not bring a cause of action regarding "prison conditions" until "such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a); *see also Porter v. Nussle*, 534 U.S. 516, 520 (2002). The Sixth Circuit stated that the reasons for this exhaustion requirement is to allow States an opportunity to exercise their authority over their own prison systems, and to give States a chance to utilize their expertise over grievances that arise on a routine basis. *See Brown v. Toombs*, 139 F.3d 1102, 1103 (6th Cir. 1998) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973)); *see also Porter*, 534 U.S. at 524-25 (". . . Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case."). Consequently, the Court finds that Plaintiffs were

required to exhaust their administrative remedies—specifically, the MDOC grievance procedure—before filing this action.

As mentioned above, no individual Plaintiff filed a grievance regarding the allegedly constitutionally deficient HCV testing and treatment protocol. Plaintiffs argue, however, that their failure to file a grievance on this issue is excused because § 1997e only requires them to exhaust "available" administrative remedies. Plaintiffs contend that they had no administrative remedies available to them for their deficient protocol claim because the MDOC's grievance policy only permits prisoners to file grievances regarding "the application of a policy or procedure if it affects him/her personally. . . ," and does not permit a prisoner to "grieve the content of policy or procedure." MDOC PD 03.02.130(E). Similarly, the MDOC's policy states that a prisoner may not grieve "the content of administrative rules, policy directives, operating procedures and Director's Office Memoranda;" or "Issues which affect the entire prisoner population or significant numbers of prisoners." MDOC PD 03.02.130(F)(1) & (4). In short, Plaintiffs argue that, pursuant to MDOC policy, they were not permitted to file a grievance challenging Defendants' policy regarding the testing and treatment of HCV, which is the crux of their deficient protocol claim, and that they cannot be required to exhaust an administrative remedy that is not available. *See, e.g., Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) (holding that a prisoner is not required to exhaust all remedies, but only ones that are available).

The Court is neither persuaded by Plaintiffs' argument, nor with the cases that Plaintiffs rely upon. The Supreme Court in *Porter* makes clear that prisoners must give prison officials an opportunity to remedy any complaint. This is true even if the grievance procedure is not "'plain, speedy, or effective,'" and even if "the prisoner seeks relief not available in grievance proceedings.

. . ." *See Porter* 534 U.S. at 524 (citing *Booth v. Churner*, 532 U.S. 731, 739-40 (2001)). Commenting on the scope of § 1997e, the Supreme Court remarked that "exhaustion is now required for all 'action[s] . . . brought with respect to prison conditions.'" *See id.* at 525 (quoting 42 U.S.C. § 1997e(a)). Therefore, given the breadth of § 1997e, the purposes behind it, as well as the Supreme Court's interpretation of it, the Court finds that Plaintiffs were required to present their deficient protocol claim in a form of a grievance to the proper MDOC officials, even if there is reason to presume that such a grievance will be denied.

There is no dispute that Plaintiffs did not grieve the MDOC's protocol for testing and treating HCV. Plaintiffs do not even attempt to argue that they have exhausted their state law remedies for their deficient protocol claims. Accordingly, the MDOC was never given an opportunity to respond to such a grievance, even if such a grievance would presumably be denied. Therefore, Plaintiffs failed to exhaust their administrative remedies for their deficient protocol claims.

B. Total Exhaustion

Defendants argue that because Plaintiffs failed to completely exhaust their deficient protocol claim that Plaintiffs' Complaint should be dismissed without prejudice in its entirety. Defendants argue that a number of courts, including the Eighth Circuit and the Western District of Michigan, have held that if a prisoner fails to completely exhaust each of his or her claims, then the prisoner's complaint should be dismissed. *See Graves v. Norris*, 218 F.3d 884 (8th Cir. 2000); *see also Smeltzer v. Hook*, 235 F. Supp. 2d 736 (W.D. Mich. 2002). This is known as the "total exhaustion" rule.

There is a debate between a number of U.S. district courts as to the total exhaustion rule, and whether it comports with Congress' intent in drafting § 1997e(a). *Compare Smeltzer v. Hook*, 235

F. Supp. 2d 736 (W.D. Mich. 2002) *with Hattley v. Goord*, 2003 WL 1700435 (S.D.N.Y. March 27, 2003). The Court finds *Smeltzer* to be more persuasive. In particular, upon examining the statutory language, the Court notes that § 1997e(a) states: "No *action* shall be brought with respect to prison conditions under section 1983 of this title, 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." 42 U.S.C. § 1997e(a) (emphasis added). An action is distinct from a claim for relief. According to the Federal Rules of Civil Procedure, and action is commenced when a party files a complaint. *See* FED. R. CIV. P. 3. There may be several claims for relief in a particular action, however. *See* FED. R. CIV. P. 8. Congress did not use the word "claim," but rather, it used the word "action," which indicates to the Court that a prisoner must exhaust all claims before he or she may file an action. *See Graves*, 218 F.3d at 885; *Smeltzer*, 235 F. Supp. 2d at 743-44. Therefore, Plaintiffs' action shall be dismissed without prejudice, thereby allowing Plaintiffs to exhaust their unexhausted remedies.

As for Plaintiffs' argument that *Smeltzer* is contrary to Sixth Circuit precedent, the Court is not persuaded. Plaintiffs' argument relies on *Hartsfield v. Vidor*, 199 F.3d 305 (6th Cir. 1999) and *Burton v. Jones*, 321 F.3d 569 (6th Cir. 2003). In *Burton*, the Sixth Circuit stated: "[T]he *Hartsfield* holding illustrates that a prisoner's lawsuit, which alleges multiple claims against multiple defendants, is not vulnerable to dismissal under § 1997e(a) simply because the prisoner has failed to exhaust a particular claim as to a specific defendant." *Burton*, 321 F.3d at 575 n.2. The Court notes, however, the issue of total exhaustion was not before the Sixth Circuit in either *Hartsfield*, or *Burton*, and that the Sixth Circuit's comments on the topic are merely dicta. Further, unpublished decisions by the Sixth Circuit indicates that the Sixth Circuit has not definitively held that it has

rejected the total exhaustion rule. *Compare McElhaney v. Elo*, No. 98-2173, 2000 WL 1477498, at *3 (6th Cir. Sept. 25, 2000) *with Kemp v. Jones*, 42 Fed. Appx. 744, 745 (6th Cir. 2002). In fact, the Sixth Circuit has explicitly stated that it has decided to "reserve to another day" the question of whether a prisoner's complaint that contains both exhausted and unexhausted claims should be dismissed in its entirety. *See Knuckles El v. Toombs*, 215 F.3d 640, 641-42 (6th Cir. 2000).

Therefore, the Court finds that because Plaintiffs' Complaint contains unexhausted claims, and because Complaints by prisoners with unexhausted claims should be dismissed without prejudice, this Court finds that this action should be dismissed, and that it is unnecessary for the Court to decide any other issues at this time.

V. CONCLUSION

For the reasons set forth above, Defendants CMS and Hutchinson's Motion to Dismiss is GRANTED.[1] The Court HEREBY ORDERS that this action shall be DISMISSED WITHOUT PREJUDICE to allow Plaintiffs to properly exhaust their claims.

IT IS SO ORDERED.

Dated: JUL 01 2003

LAWRENCE P. ZATKOFF
CHIEF UNITED STATES DISTRICT JUDGE

[1]Even though Defendants William Overton and George Pramstaller did not join in Defendants' CMS and Hutchinson's Motion to Dismiss, the Court finds, for reasons set forth above, that Plaintiffs' Complaint should be dismissed in its entirety.

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