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United States District Court,
S.D. New York.

Carlos ROSARIO, Vincent Kimbro, Roger Zydor, Marshall Rosado, Donald Smith, Worley Hall, Vincent Rios, Gilbert Santiago, Roderick Reyes, Individually and on behalf of all others similarly situated, Plaintiffs,
v.
NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES ("DOCS") Commissioner of Policy and Compliance Review, Donna Masterson, DOCS Americans with Disabilities Act Coordinator, Lester Wright, DOCS Deputy Commissioner and Chief Medical Officer, William Massuca, Superintendent, Fishkill Correctional Facility ("CF"), Kenneth Perlman, Superintendent, Mohawk CF, Edward Donnelly, Superintendent, Wende CF, Anne Cole, Deputy Superintendent for the Correctional Health Care Facility, Fishkill CF, Joan Rosado, Deputy Superintendent for the Correctional Health Care Facilty, Walsh Rmu, Susan Post, Deputy Superintendent for the Correctional Health Care Facility, Wende CF, Defendants.

No. 03–CIV–859 (CLB). | Sept. 24, 2003.

In action by State prisoners, alleging New York State Department of Correctional Services denied them access to prison programs because of their disability, prisoners sought class certification and State sought to dismiss. The District Court, Brieant, J., held that prisoners were required to exhaust administrative remedies available through Department of Justice (DOJ) for complaints filed under Americans With Disabilities Act (ADA).

Action dismissed.

West Headnotes (1)

[1] Civil Rights
Criminal law enforcement; prisons

State prisoners, alleging that New York State Department of Correctional Services denied them access to prison programs because of their disability, were required to exhaust Americans With Disabilities Act (ADA) procedures of Department of Justice (DOJ) in order to satisfy exhaustion requirements of Prison Litigation Reform Act of 1995 (PLRA), even if process was largely advisory and DOJ lacked authority to provide relief. Civil Rights of Institutionalized Persons Act, § 7, 42 U.S.C.A. § 1997e; 42 U.S.C.A. § 12101 et seq.; 28 C.F.R. §§ 35.170(a), 35.172.

3 Cases that cite this headnote

Opinion

Memorandum and Order

BRIEANT, J.

***1** On June 27, 2003, two separate motions, Documents 8 and 19, were argued and fully submitted for decision. By motion filed on May 21, 2003 (Docket # 8), Plaintiffs seek certification of a class pursuant to Fed.R.Civ.P. 23 consisting of all present and future prisoners with disabilities housed in the Fishkill, Walsh and Wende Regional Medical Units of the New York State Correctional System. By motion filed June 12, 2003 (Docket # 19), Defendants seek to dismiss the action pursuant to Fed .R. Civ. P. 12(b)(1), (b)(6) and (c), for failure to exhaust all available administrative remedies prior to commencing the action as required by 42 U.S.C. § 1997(e).

The Court considers the Defendants' motion to dismiss first.

Plaintiffs sue for themselves and others similarly situated who are state prisoners with significant physical impairments that substantially limit one or more of their major life activities. They are or were housed in a regional medical unit (RMU) operated at one of the three state correctional facilities: Fishkill Correctional Facility (Fishkill), Wende Correctional Facility (Wende) or the Walsh Regional Medical Unit (Walsh). Regional Medical Units have been established by the Department of Correctional Services (DOCS) to provide long term nursing care and rehabilitative services to inmates whose condition requires a higher level of care than is available in the general prison population. Plaintiffs claim that,

because of their disability, they have been denied access to prison programs available to prisoners who are not disabled. Among the programs said to have been denied are vocational, educational and work programs as well as the complete alcohol and substance abuse treatment program known as SAAT. As a result of being denied the benefits of the programs, members of the putative class are prevented from earning merit time for their voluntary participation that would be personally beneficial and might qualify them for earlier release.

Plaintiffs claim that they and the class members are physically and mentally able to participate in some or all of the programs to which they have been denied access and that Defendants engaged in no individualized assessment of any particular class member's ability to participate but rather have denied program access to all inmates housed in RMU's.

Defendants take the position that Plaintiffs have not adequately exhausted the internal remedies available to them under the Inmate Grievance Program and also they have not pursued the administrative remedies available through the United States Department of Justice.

Our Court of Appeals has held at least by implication that exhaustion of administrative remedies is not jurisdictional. See *Jenkins v. Haubert,* 179 F.3d 19, 28–29 (2d Cir.1999); *Snider v. Melindez,* 199 F.3d 108–112 (2d Cir.1999). In any event, the Amended Complaint founds subject matter jurisdiction on 42 U.S.C. § 12101 et seq. the Americans With Disabilities Act, U.S.C. §§ 1331 and 1343(3) and (4). This Court has subject matter jurisdiction of all such cases. So much of the motion as is based on Rule 12(b)(1) is denied. See *Bell v. Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

***2** Whether the Amended Complaint states a claim upon which relief may be granted is cognizable under Rule 12(b)(6) and is discussed below. An issue of substantive law is presented as to whether the Plaintiff in such a case can prevail on the merits if he or she has not exhausted administrative remedies. That issue goes to the merits, and may be decided on a Rule 12(b)(6) motion. See *Pani v. Empire Blue Cross Blue Shield,* 152 F.3d 67, 71 (2d Cir.1998).

The Court is required to read a complaint generously, drawing all reasonable inferences from the complaint's allegations. *California Motor Transp. Co. v. Trucking Unlimited,* 404 U.S. 508, 515, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). "In ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, the court is required to accept the material facts alleged in the complaint as true." *Frasier v. General Elec. Co.,* 930 F.2d 1004, 1007 (2d Cir.1991). Dismissal under Rule 12(b)(6) is appropriate only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

Administrative Exhaustion

Section 1997e(a) of the Prison Litigation Reform Act of 1995 ("PLRA") requires prisoners to exhaust administrative remedies prior to bringing suit in federal court. "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, or other correction facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The Supreme Court, in *Porter v. Nussle,* 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002), *rev'g Nussle v. Willette,* 224 F.3d 95 (2d Cir.2000), ruled that "[a]ll available remedies must now be exhausted; those remedies need not meet federal standards, nor must they be plain speedy and effective." *Id.* at 524 (internal quotations omitted). Exhaustion is required even if the relief the prisoner seeks is not available in grievance or other administrative proceedings. *Id.* The Court noted that the 1996 amendment expanded exhaustion requirements beyond § 1983 claims to "all actions ... brought with respect to prison conditions, whether under § 1983, or any other federal law." *Id.* (internal quotations omitted).

Defendants move to dismiss Plaintiffs' claims for failure to exhaust administrative remedies in accordance with PLRA § 1997e(a). Defendants argue that Plaintiffs did not properly exhaust the internal procedures established by the DOCS regulations and that Plaintiffs failed to pursue an available remedy through the United States Department of Justice. (See Defs.' Mem. in Supp. of Mot. to Dismiss at 3–4 ("Defs.' Mem.")).

Although it is unclear whether all Plaintiffs exhausted the internal DOCS grievance process (see Pl.s' Memo at 2, Def.'s Memo at 3), Plaintiffs admit that they have not exhausted the Department of Justice (DOJ) administrative procedures for disability complaints. (Pl.s' Memo at 3). Plaintiffs assert that the exhaustion requirement in section 1997e(a) of the PLRA does not require Plaintiffs to exhaust *external* administrative procedures such as those offered prisoners by the DOJ. Rather, they believe that the exhaustion requirement of the PLRA applies only to administrative remedies within prison systems, i.e. *internal* prison grievance procedures. (Pl.'s mem. at 3).

***3** Title 42 of the U.S.C. § 12134(a) authorizes the United States Attorney General and the United States Department of Justice to establish procedures for the resolution of complaints filed under the ADA. Complaints may be filed with the DOJ on behalf of individuals or a specified class of individuals who believe they have been subjected to discrimination in the services provided by a state agency.

28 C.F.R. § 35.170(a). The DOJ must either resolve the complaint or issue a "Letter of Findings containing findings of fact and conclusions of law and a description of a remedy for each violation found." 28 C.F.R. § 35.172. By its plain meaning, the statute and the Regulation extend to the ADA complaints of the plaintiff class.

While there are clearly established procedures for filing a claim, the ADA does not require exhaustion of those procedures prior to bringing a private lawsuit.

Some courts have held that under the PLRA, State external administrative remedies need not be exhausted, see, e.g., *Rumbles v. Hill,* 82 F.3d 1064 (9th Cir.1999) (holding that a prisoner was not required to exhaust state tort claim procedures prior to bringing a § 1983 lawsuit); *Blas v. Endicot,* 31 F.Supp.2d 1131 (E.D.Wis.1999). These cases were decided prior to the Supreme Court's decisions concerning exhaustion in *Booth v. Churner,* 532 U.S. 731, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001) and in *Porter v. Nussle,* 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002), and do not relate to federal administrative remedies. In footnote 6, the Court in *Booth* held:

> That Congress has mandated exhaustion in either case defeats the argument of Booth and supporting amici that this reading of § 1997e (1994 ed., Supp. V) is at odds with traditional doctrines of administrative exhaustion, under which a litigant need not apply to an agency that has "no power to decree ... relief," *Reiter v. Cooper,* 507 U.S. 258, 269, 113 S.Ct. 1213, 122 L.Ed.2d 604,(1993), or need not exhaust where doing so would otherwise be futile. *See* Brief for Petitioner 24–27; Brief for Brennan Center for Justice et al. as Amici Curiae. Without getting into the force of this claim generally, we stress the point (which Booth acknowledges, see Reply Brief for Petitioner 4) that we will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise.

Booth, 532 U.S. at 741, n. 6.

Plaintiffs' contend that the DOJ remedial procedure under the ADA is not an "available" remedy within the meaning of the PLRA, because "[a] remedy that is available on paper but does not in practice respond to the kind of complaint that prisoners seek to litigate is not an available remedy within the meaning of the PLRA." (Pl.'s mem. at 13). In making this argument, Plaintiffs cite our Court of Appeals decision in *Snider v. Melindez,* 199 F.3d 108 (1999), which held that when a court is considering a dismissal for non-exhaustion, it must "establish the availability of an administrative remedy from a legally sufficient source." *Id.* at 114. The Court in *Snider* was not presented with the issue of whether a prisoner must pursue administrative procedures that were inadequate as a practical matter, but rather procedures that were wholly inapplicable to the subject matter of the prisoner's complaint. In any event, *Snider* was decided prior to the Supreme Court's ruling in *Nussle* and must be deemed overruled as to that point.

***4** The ADA, which is in *pari materia* with the Rehabilitation Act, also relied on, is implemented by a regulatory scheme that specifically makes an administrative remedy available to state prisoners. Whether the ADA procedures are "adequate" in providing Plaintiffs with their desired relief is not material in light of the Supreme Court's holding in *Nussle.* "Even when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit ... And unlike the previous provisions which encompassed only § 1983 suits, exhaustion is now required for all 'action[s] ... brought with respect to prison conditions[.]" ' *Nussle,* 534 U.S. 516, 524, 122 S.Ct. 983, 152 L.Ed.2d 12.

Plaintiffs must exhaust the DOJ's ADA procedures, even if the process, as Plaintiffs contend, is largely "advisory" and lacks the authority actually to provide relief. Accordingly, this Court concludes that Plaintiffs must exhaust their available administrative remedies including federal administrative remedies extraneous to the prison system, prior to commencing a lawsuit.

Conclusion

The action is dismissed without prejudice and without costs for failure of exhaustion. No purpose will be served by deciding Plaintiff's motion for class certifications at this time. The Clerk shall file a final judgment.

SO ORDERED.