[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

C

No. 17-14278
Non-Argument Calendar

D.C. Docket No. 1:17-cv-20192-JEM

EDUARDO MOLINA BRACERO,

Plaintiff-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
COL. RODFREDRICK NEWELL,
individually and in his own capacity, Miami Dade Correctional Institution,
CAPT. DARLENE GREEN,
individually and in her own capacity, Miami Dade Correctional Institution,
DIRECTOR CLASSIF. JAVIER JONES,
individually and in his own capacity, Miami Dade Correctional Institution,
WARDEN, MIAMI DADE CORRECTIONAL INSTITUTION, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(August 14, 2018)

Before WILLIAM PRYOR, ROSENBAUM, and ANDERSON, Circuit Judges.

PER CURIAM:

Eduardo Bracero, a Florida-state prisoner proceeding *pro se*, appeals the district court's dismissal of his 42 U.S.C. § 1983 civil-rights action for failure to exhaust all administrative remedies, as required by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a). Bracero's complaint alleged that prison officials at Dade Correctional Institution failed to protect him from multiple assaults by other inmates—in one instance, an inmate pinned his arms to his side while another inmate slashed his face with a razor blade—and that the prison's tolerance of drug and gang activity jeopardized all inmates' safety and security.

We review *de novo* a district court's interpretation and application of the PLRA's exhaustion requirement. *Johnson v. Meadows*, 418 F.3d 1152, 1155 (11th Cir. 2005). We review the factual findings underlying an exhaustion determination for clear error. *Bryant v. Rich*, 530 F.3d 1368, 1377 (11th Cir. 2008).

The PLRA requires prisoners who wish to challenge some aspect of prison life to exhaust all available administrative remedies *before* resorting to the courts.

Porter v. Nussle, 534 U.S. 516, 532 (2002); *see* 42 U.S.C. § 1997e(a); *Alexander v. Hawk*, 159 F.3d 1321, 1326 (11th Cir. 1998) (stating that a prisoner cannot prove exhaustion with grievances and appeals that he submits after filing his complaint in federal court). Exhaustion is mandatory under the PLRA, and unexhausted claims cannot be brought in court. *Jones v. Bock*, 549 U.S. 199, 211 (2007). The failure to exhaust administrative remedies requires that the action be dismissed. *Chandler v. Crosby*, 379 F.3d 1278, 1286 (11th Cir. 2005).

To satisfy the exhaustion requirement, a prisoner must complete the administrative process in accordance with the applicable grievance procedures established by the prison. *Jones*, 549 U.S. at 218; *Johnson*, 418 F.3d at 1156. In other words, "[t]he PLRA requires 'proper exhaustion' that complies with the 'critical procedural rules' governing the grievance process." *Dimanche v. Brown*, 783 F.3d 1204, 1210 (11th Cir. 2015). Procedurally defective grievances or appeals are not adequate to exhaust. *Woodford v. Ngo*, 548 U.S. 81, 93-95 (2006).

Although proper exhaustion is generally required, a remedy must be "available" before a prisoner is required to exhaust it. *Turner v. Burnside*, 541 F.3d 1077, 1082, 1084 (11th Cir. 2008). The Supreme Court has identified three kinds of circumstances in which an administrative remedy is not available. *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016). First, "an administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it

operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates." *Id.* Next, "an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use." *Id.* And finally, a remedy may be unavailable "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 1860.

In response to a prisoner lawsuit, defendants may file a motion to dismiss and raise as a defense the prisoner's failure to exhaust administrative remedies. *Whatley v. Warden, Ware State Prison*, 802 F.3d 1205, 1209 (11th Cir. 2015). We have established a two-step process for deciding motions to dismiss for failure to exhaust under the PLRA. *Id.* District courts first should compare the factual allegations in the motion to dismiss and those in the prisoner's response and, where there is a conflict, accept the prisoner's view of the facts as true. "The court should dismiss if the facts as stated by the prisoner show a failure to exhaust." *Id.* Second, if dismissal is not warranted at the first stage, the court should make specific findings to resolve disputes of fact, "and should dismiss if, based on those findings, defendants have shown a failure to exhaust." *Id.*

The grievance process applicable to Florida prisoners is set out in § 33-103 of the Florida Administrative Code. Under this process, a prisoner ordinarily "must: (1) file an informal grievance with a designated prison staff member; (2)

file a formal grievance with the institution's warden; and then (3) submit an appeal to the Secretary of the [Florida Department of Corrections ("FDOC")]." *Dimanche*, 783 F.3d at 1211; *see* Fla. Admin. Code §§ 33-103.005–103.007. These steps must be completed in order and within certain time frames, which can be extended. *See* Fla. Admin. Code § 33-103.011(4). A prisoner may proceed to the next step in the process without receiving a response when the prison's time to respond has expired. *Id.* § 33-103.011(4).

Grievances or appeals may be returned to the inmate without further processing for numerous reasons, including if the inmate has written his complaint outside of the boundaries of the space provided on the requisite form. *Id.* § 33-103.014(1)(k). Returned grievances may be corrected and refiled. *Id.* 33-103.014(2).

For specific types of grievances, including those alleging emergencies or involving protective management issues, prisoners may elect to skip the first two steps and file a grievance directly with the Secretary of the FDOC. *Id.* § 33-103.005(1). Such a "direct grievance" is filed using Form DC1-303, "Request for Administrative Remedy or Appeal." *Id.* § 33-103.007(6)(a). Direct grievances must be identified on the form as such and the prisoner "must clearly state the reason for not initially bringing the complaint to the attention of institutional staff

and by-passing the informal and formal grievance steps of the institution or facility." *Id.* § 33-103.007(6)(a)1.–2.

Here, the district court did not err in dismissing Bracero's complaint for failure to exhaust administrative remedies. The facts alleged and evidence presented by Bracero, viewed alongside uncontradicted evidence offered by the FDOC, established that Bracero's attempts to exhaust his administrative remedies were ineffective to satisfy the requirement of "proper exhaustion."

Bracero did not comply with the normal three-step process. Although he submitted at least two informal grievances in September 2016 on the requisite forms that discussed his attacks by other inmates and the prison's drug and gang activity, these grievances were insufficient to initiate the three-step process because they were procedurally defective. *See Woodford*, 548 U.S. at 93-95. Specifically, the prison returned these grievances without further action for non-compliance with the rule requiring an inmate to write his complaint within the boundaries of the space provided on the form. *See* Fla. Admin. Code § 33-103.014(1)(k). Indeed, Bracero wrote part of his grievances below the line that expressly stated, "Do not write below this line."

Bracero complains that the prison refused to answer his grievances, and it is not difficult to understand why he would be frustrated, given that the grievances were still legible and just a few lines were outside the boundaries of the space

provided. Yet the PLRA demands that prisoners complete the administrative process in accordance with the applicable grievance procedure set by the prison. *Jones*, 549 U.S. at 218; *Johnson*, 418 F.3d at 1156. And the prison here acted according to the clear guidelines of the grievance procedure.

Furthermore, nothing in the record indicates that Bracero either refiled his informal grievances or attempted to proceed to the next step in the process when prison officials returned the September 2016 informal grievances for failure to comply with the proper procedure. *See* Fla. Admin. Code §§ 33-103.006(1)(a), 33-103.007. While the defendants' records showed that Bracero filed three direct grievances and appeals in 2016, none of these addressed the incidents he complained of in the informal grievances.

With regard to the direct-grievance route to exhaustion, we cannot conclude that the district court erred in finding a failure to exhaust. The letters that Bracero sent directly to the Secretary of the FDOC were not submitted on the required forms and did not contain necessary information, and there is nothing in the record to indicate that the Secretary treated these letters as direct grievances, let alone properly filed ones. *See* Fla. Admin. Code § 33-103.007(6)(a); *Woodford*, 548 U.S. at 93–95. While Bracero produced an October 27, 2016, letter he received from the FDOC relating to this correspondence, this letter simply notes that his

correspondence was being forwarded for review and response. It does not show proper exhaustion under § 33-103.007.

Nor does the prison's refusal to address the substance of his non-compliant grievances render the administrative remedies provided by the grievance procedure unavailable. The record established that the FDOC employees responded to Bracero's informal grievances, formal grievances, and appeals in accordance with the grievance procedure, and each denial informed Bracero of his right to appeal. Moreover, despite his arguments to the contrary, the record does not support Bracero's claim that the defendants prevented or thwarted him from bringing his grievances or otherwise complying with the grievance procedure.

To the extent Bracero claims that the prison's lack of response to certain grievances prevented him from going forward with the three-step process, he is incorrect. The grievance procedure permitted Bracero to correct and refile the grievances that were returned to him, Fla. Admin. Code § 33-103.014(2), and also to proceed with the next step in the three-step process after the expiration of the prison's time to respond to a grievance, *id.* § 33-103.011(4) ("[E]xpiration of a time limit at any step in the process shall entitle the complainant to proceed to the next step of the grievance process."). While the PLRA does not require prisoners to grieve a breakdown in the grievance process, Bracero has not shown such a breakdown. And the PLRA required him to pursue the procedures that were

available to him. *Cf. Turner*, 541 F.3d at 1084 (stating that a prison's failure to respond to a formal grievance did not relieve the prisoner of his obligation to file an appeal when the grievance procedure provided that prisoners could file an appeal if they did not receive a response to a formal grievance within 30 days).

Bracero's other efforts to overcome the exhaustion requirement are unavailing. He asserts that his complaint should not have been dismissed before granting injunctive relief because he alleged imminent danger, but exhaustion is a prerequisite for any prisoner suit. *Johnson*, 418 F.3d at 1155; *Alexander*, 159 F.3d at 1326. Finally, while Bracero argues that Fla. Stat. § 768.28(9)(a) somehow excuses him from exhaustion, that provision is a state statute related to immunity and does not mention exhaustion or the PLRA. Fla. Stat. § 768.28(9)(a).

Because a grievance process was available to Bracero and he did not follow the proper procedures, the district court properly determined that he failed to exhaust all available administrative remedies. Accordingly, we affirm the dismissal of his complaint for failure to exhaust under the PLRA, § 42 U.S.C. § 1997e(a).

AFFIRMED.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division
Case Number: 17-20192-MARTINEZ-WHITE

A

EDUARDO MOLINA BRACERO,
Plaintiff,

vs.

GLENN MORRIS, *et al.*,
Defendants.
_____/

ORDER ADOPTING REPORT AND RECOMMENDATION

THE MATTER was referred to the Honorable Patrick A. White, United States Magistrate Judge, for a Report and Recommendation on Plaintiff's *pro se* civil rights complaint [ECF No. 1]. Magistrate Judge White filed a Report and Recommendation [ECF No. 14], recommending that (a) Defendants' Motion to Dismiss [ECF No. 8] be granted; (b) this case be dismissed in its entirety for Plaintiff's failure to exhaust available administrative remedies; and (c) the case be closed. The Court has reviewed the entire file and record and has made a *de novo* review of the issues that the objections to the Magistrate Judge's Report and Recommendation present. After careful consideration, it is hereby:

ADJUDGED that United States Magistrate Judge White's Report and Recommendation [ECF No. 14] is **AFFIRMED** and **ADOPTED**. Accordingly, it is:

ADJUDGED that Defendant's Motion to Dismiss [ECF No. 8] is **GRANTED**. This case is **DISMISSED** in its entirety for Plaintiff's failure to exhaust available administrative remedies. This case is **CLOSED**, and all pending motions are **DENIED as MOOT**.

DONE AND ORDERED in Chambers at Miami, Florida, this 28 day of July, 2017.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge White
All Counsel of Record
Eduardo Molina Bracero, *pro se*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-20192-Civ-MARTINEZ
MAGISTRATE JUDGE P.A. WHITE

EDUARDO MOLINA BRACERO,

Plaintiff,

B

vs.

GLENN MORRIS, et al.,

Defendants.
_____/

REPORT OF MAGISTRATE JUDGE RE DEFENDANTS' MOTION TO DISMISS (DE# 8)

I. Introduction

The plaintiff Eduardo Molina Bracero filed a pro se civil rights action in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida on December 8, 2016 against Defendants Warden of Dade Corrections Institution ("Dade CI") Glenn Morris, Dade CI Officer Rodfredrick Newell, Dade CI Captain Darlene Green, and Dade CI Director of Classified Department Javier Jones in case no. 2016-031340-CA-01. (DE# 1, Ex. A). Summonses were issued and served upon the defendants on December 15, 2016 and December 16, 2016. (DE# 1:1-2). Defendants filed a Notice of Removal on January 17, 2017. (DE# 1). The defendants paid the $400.00 removal fee. (DE# 1). Defendants Morris, Newell, Green, and Jones filed a motion to dismiss on January 17, 2017. (DE# 8).

The case has been previously referred to the undersigned for the issuance of all preliminary orders and any recommendations to

the district court regarding dispositive motions. See 28 U.S.C. §636(b)(1)(B), (C); Fed.R.Civ.P. 72(b), S.D.Fla. Local Rule 1(f) governing Magistrate Judges, and S.D. Fla. Admin. Order 2003-19.

Although the defendants raise several arguments, the motion to dismiss should be granted based on the sole argument that the Plaintiff failed to exhaust his administrative remedies. (DE# 8:5-7).

II. Legal Standard

A. Motion to Dismiss

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a complaint where the plaintiff has failed to state a claim upon which relief may be granted. See Fed.R.Civ.P. 12(b)(6). In considering a Rule 12(b)(6) motion, the courts read plaintiff's *pro se* allegations liberally, pursuant to Haines v. Kerner, 404 U.S. 519 (1972), accepts all factual allegations in the complaint as true, and evaluates all reasonable inferences derived from those facts in the light most favorable to the plaintiff. Hunnings v. Texaco, Inc., 29 F.3d 1480, 1483 (11th Cir. 1994). The complaint may be dismissed if the plaintiff does not plead facts that state a claim to relief that is plausible on its face. See Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007)(retiring the oft-criticized "no set of facts" language previously used to describe the motion to dismiss standard and determining that because plaintiffs had "not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed" for failure to state a claim); Watts v. FIU, 495 F.3d 1289 (11 Cir. 2007).

In other words, a Rule 12(b)(6) motion tests the legality of a plaintiff's claim, and the court construes all allegations as set forth in plaintiff's complaint as true, and resolves all inferences in favor of the plaintiff. United States v. Gaubert, 499 U.S. 315, 327, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991); Powell v. Lennon, 914 F.2d 1459, 1463 (11th Cir. 1990).

"As a general rule, conclusory allegations and unwarranted deductions of fact are not admitted as true in a motion to dismiss." South Fla. Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 408 n.10 (11th Cir. 1996). However, the threshold is "exceedingly low" for a complaint to survive a motion to dismiss for failure to state a claim. Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 703 (11th Cir. 1985). Notwithstanding, a plaintiff's claim must be "plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)(internal citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. at 678 (internal citations omitted). However, a plaintiff's allegations require "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554-555, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929 (2007).

The rules of pleading do "not require heightened fact pleading of specifics...." The Court's inquiry at this stage focuses on whether the challenged pleadings "give the defendant fair notice of what the...claim is and the grounds upon which it rests." Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007)(quoting Twombly, 127 S.Ct. at 1964).

The Court must hold the allegations of a pro se civil rights complaint to a less stringent standard than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519 (1972), and such a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief. Haines v. Kerner, supra; Conley v. Gibson, 355 U.S. 41 (1957).

B. Exhaustion Standard

Title 42 U.S.C. §1997e provides, in relevant part: "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. §1997(e)(a). Exhaustion of all available administrative remedies is a mandatory pre-condition to suit. See Booth v. Churner, 532 U.S. 731, 739, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001); see also, Porter v. Nussle, 534 U.S. 516, 524-25, 122 S.Ct. 983, 988, 152 L.Ed.2d 12 (2002)("Beyond doubt, Congress enacted §1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case."); Parzyck v Prison Health Serv., Inc., 627 F.3d 1215, 1217 (11th Cir. 2010). The exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes. See Porter, 534 U.S. at 524. Exhaustion is required whether the plaintiff seeks declaratory and injunctive relief, monetary damages, or both. See Booth, 532 U.S. at 734. The requirement is not subject to waiver by a court, or futility or inadequacy exceptions. Id. at 741 n.6; McCarthy v. Madigan, 503

U.S. 140, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992)("Where Congress specifically mandates, exhaustion is required."); Alexander v. Hawk, 159 F.3d 1321 (11th Cir. 1998).

It is well settled in the Eleventh Circuit that the PLRA's exhaustion requirement requires proper exhaustion through the administrative grievance procedure created by the agency (in this case, the Florida FDOC), including compliance with the agency's deadlines and other critical procedural rules. See Johnson v. Meadows, 418 F.3d 1152, 1159 (11th Cir. 2005). In other words, the PLRA's exhaustion requirement contains a procedural default component that requires prisoners to comply with applicable deadlines or the good-cause standards for failure to comply, contained in the administrative grievance procedures before filing a federal claim. Johnson, 418 F.3d at 1158. "[A] prisoner who does not properly take each step within the administrative process has failed to exhaust state remedies, and thus is foreclosed by §1997e(a) from state remedies, and thus is foreclosed by from litigating.... [T]o exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require.'" Id. (quoting Pozo v. McCaughty, 286 F.3d 1022, 1024-25 (7th Cir. 2002)); Brown v. Sikes, 212 F.3d 1205, 1207 (11th Cir. 2000); Harper v. Jenkin, 179 F.3d 1311, 1321 (11th Cir. 1999)(*per curiam*); accord Woodford, 548 U.S. at 90-91, 94.

To exhaust administrative remedies in Florida, a prisoner in FDOC custody must complete the administrative review process established under regulations promulgated by the Secretary of the FDOC. Fla.Stat.Ann. §944.09(1)(d)("The department has authority to adopt rules ... to implement its statutory authority. The rules must include rules relating to .... [g]rievance procedures which shall conform to 42 U.S.C. §1997e." Under the administrative review

process established by the Secretary of the FDOC, a prisoner must (1) file an informal grievance with a designated prison staff member, (2) file a formal grievance with the warden's office, and then (3) submit an appeal to the Secretary of the FDOC. Chandler v. Crosby, 379 F.3d 1278, 1288 (11th Cir. 2004) (citing Fla.Admin.Code Ann. §§33-103.001-103.019). Once a prisoner had completed this process, he has properly exhausted his administrative remedies. Id.

In Bryant v. Rich, 530 F.3d 1368 (11th Cir. 2008), the Eleventh Circuit outlined the procedure district courts should follow when presented with a motion to dismiss for failure to exhaust. The court held that the defense of failure to exhaust should be treated as a matter in abatement under Fed.R.Civ.P. 12, and not an adjudication on the merits. Id. at 1374-75. "This means that procedurally the defense is treated 'like a defense for lack of jurisdiction,' although it is not a jurisdictional matter." Turner v. Burnside, 541 F.3d 1077, 1082 (11th Cir. 2008) (quoting Bryant, 530 F.3d at 1374). Because exhaustion is a matter in abatement, "it should be raised in a motion to dismiss, or be treated as such if raised in a motion for summary judgment." Bryant, 530 F.3d at 1374-75 (citation and internal quotations omitted). Where exhaustion is treated as a matter in abatement and not an adjudication on the merits, it is proper for the district court to consider facts outside of the pleadings and resolve factual disputes so long as the factual disputes do not decide the merits, and the parties have sufficient opportunity to develop a record. Id. at 1376; Singleton v. Dep't of Corr's, 323 Fed.Appx. 783, 785 (11th Cir. 2009).

The Bryant court noted that it decided only the case before it: one where dismissal was without prejudice and where neither party evidenced that administrative remedies were absolutely time barred or otherwise "clearly infeasible." 530 F.3d at 1375 n.11.

The court then clarified, "We do not mean to say today that a failure to exhaust can never correctly result in a dismissal with prejudice." Id. (citing Johnson, 418 F.3d at 1157, 1159 and Berry v. Kerik, 366 F.3d 85, 87-88 (2d Cir. 2004)(indicating that dismissal with prejudice would be appropriate where "administrative remedies have become unavailable after the prisoner had ample opportunity to use them and no special circumstances justified failure to exhaust")).

Deciding a motion to dismiss for failure to exhaust administrative remedies requires a two-step process as established in Turner v. Burnside, 541 F.3d 1077, 1082 (11th Cir. 2008). First, the court "looks to the factual allegations in the defendant's motion to dismiss and those in the plaintiff's response, and if they conflict, take plaintiff's version of the facts as true. If, in that light, the defendant is entitled to have the complaint dismissed for failure to exhaust administrative remedies, it must be dismissed." Id. at 1082; Whatley v. Warden, __ F.3d ___, 2015 WL 5568465 at *5 (11th Cir. 2015)(at first Turner step, district court must accept plaintiff's facts as true "and make the exhaustion determination on [plaintiff's] view of the facts."); Bryant, 530 F.3d at 1373-74. If the complaint is not subject to dismissal at the first step, "the court proceeds to make specific findings in order to resolve the disputed factual issues related to exhaustion." Turner, 541 F.3d at 1082 (citing Bryant, 530 F.3d at 1373-74, 1376); Whatley, 2015 WL 5568465 at *6. "The defendants bear the burden of proving that the plaintiff has failed to exhaust his available administrative remedies." Turner, 541 F.3d at 1082. Upon making findings on the disputed issues of fact, the court then decides whether, under those findings, the plaintiff has exhausted his available administrative remedies.

In opposing dismissal on grounds of exhaustion, an inmate may assert that he was unfairly prevented or thwarted from pursuing his administrative remedies, for instance in situations where prison officials fail to respond to an inmate's grievances or prevent grievances from being filed, in effect rendering the administrative remedy unavailable to the inmate. Tilus v. Kelly, 510 Fed.Appx. 864, 866 (11th Cir. 2013)(citing Bryant, 530 F.3d at 1373 n.6). Another instance is where officials act in a retaliatory or threatening manner, effectively preventing the inmate from filing grievances. In that regard, the Eleventh Circuit has held, as follows:

> We conclude that a prison official's serious threats of substantial retaliation against an inmate for lodging or pursuing in good faith a grievance make the administrative remedy "unavailable," and thus lift the exhaustion requirement as to the affected parts of the process if both of these conditions are met: (1) the threat actually did deter the plaintiff inmate from lodging a grievance or pursuing a particular part of the process; and (2) the threat is one that would deter a reasonable inmate of ordinary firmness and fortitude from lodging a grievance or pursuing the part of the grievance process that the inmate failed to exhaust.

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530 F.3d 1368

Turner, 541 F.3d at 1085 (citations omitted). Therefore, to successfully excuse a failure to exhaust, courts have generally concluded an inmate must allege more than just threats of retaliation, but instead must allege both threats of retaliation, as well as, the use of physical force against the inmate in response to the filing of grievances. See e.g., Hemphill v New York, 380 F.3d 680, 689 (2d Cir. 2004); Kaba v. Stepp, 458 F.3d 678, 684-86 (7th Cir. 2006). "Once a defendant proves that a plaintiff failed to exhaust...the onus falls on the plaintiff to

show that remedies were unavailable to him as a result of intimidation by prison officials." Tuckel v. Grover, 660 F.3d 1249, 1255 (10th Cir. 2011).

Further, conclusory or unsupported assertions by the plaintiff that he was threatened and that deterred him from filing the grievance will not suffice. Williams v. Barrow, 559 Fed.Appx. 979, 987-88 (11th Cir. 2014)(finding inmate's conclusory allegation that "escalating retaliation" prevents him from exhausting his grievance remedies insufficient to avoid dismissal for lack of exhaustion); Tilus, 510 Fed.Appx. at 866; Kozuh v. Nichols, 185 Fed.Appx. 874, 877-78 (11th Cir. 2006)(dismissing petitioner's complaint on exhaustion because there was no evidence from the inmate to support his arguments that he was thwarted by threats from bringing his grievances and that prison officials failed to respond to his grievances).

As an inmate at Dade Correctional Institution, the Plaintiff was in the custody of the **Florida Department of Corrections**. The grievance procedures promulgated for inmates for the FDOC require an inmate to: (1) file an informal grievance with a designated prison staff member, (2) file a formal grievance with the warden's office, and then (3) submit an appeal to the Office of the Secretary ("Central Office"). See Fla. Admin. Code. rr.33-103.005 to 33-103.007; see also, Parzyck, 627 F.3d at 1218. If an inmate is filing a grievance, challenging the conditions of his confinement within the FDOC, in order to exhaust his administrative remedies, he must follow the administrative procedures set forth in Chapter 33 of the Florida Administrative Code. Fla. Admin. Code r.33-103.001.

Thus, "[a] Florida inmate's administrative remedies are not

exhausted until his grievance has finally been appealed to, and denied by, the Secretary of the Florida Department of Corrections." Lyons v. Trinity Serv. Group, Inc., 401 F.Supp.2d 1290, 1295 (S.D. Fla. 2005). The first step in the grievance procedure regarding a Eighth Amendment violation would be for the inmate to submit an informal grievance at the institutional level, using form DC6-236. See Fla. Admin. Code. r.33-103.002(12) and r.33-103.005(1). An inmate may file an informal grievance regarding almost any category of complaint, with the exception of a HIPPA violation, which must be addressed directly to the Secretary of the FDOC. Fla. Admin. Code. r.33-103.005(1) and r.33-103.007(6)(a). The informal grievance, however, must be received by the designated prison official within 20 calendar days of the incident date. Fla. Admin. Code. r.33-103.011(1)(a).

If an inmate is filing an emergency grievance, a grievance of retaliation (known as a "grievance of reprisal"), medical grievance, or certain other special types of grievances, he may bypass use of informal and formal grievances and begin the process with a formal grievance with the warden's office, using Form DC1-303, or with a direct grievance to the Central Office. Fla. Admin. Code. at rr.33-103.002(5), 33-103.005(1), 33-103.006(3)(c), and 33-103.007(6)(a),(b). Direct grievances to the Secretary of the FDOC are filed using DC1-303. Fla. Admin. Code r.33-103.002(7) and r.33-103.007(1). If an inmate files a direct grievance that bypasses the informal and/or formal grievance process, he must clearly state the reason for bypassing the earlier step(s). Id. at rr.33-103.006(4); 33-103.007(6)(a)2. Upon review of the grievance, if it is determined that the grievance is not an emergency grievance, grievance of reprisal, or grievance of a sensitive nature, the grievance must be returned to the inmate with the reasons for return specified and an advisement that the inmate resubmit his

grievance at the appropriate level. Id. at rr.33-103.006(5)(d); 33-103.014(1)(f); 33-103.007(6)(d).

A formal grievance must be received no later than 15 calendar days from the date of the response to the informal grievance, and a grievance appeal to the Central Office must be received within 15 calendar days from the date of the response to the formal grievance. Id. at rr. 33-103.011(1)(b),(c),(d). When a grievance is filed at the formal grievance or at the Central Office level, as with the specialized grievances addressed above, it must be filed within 15 calendar days from the date on which the incident or action which is the subject of the grievance occurred. Id. at rr.33-103.011(1)(b),(d). An appeal that is submitted late or is otherwise not in compliance with Chapter 33 will be returned to the inmate without further processing. Fla. Admin. Code. r.33-103.014(1).

However, the grievance procedure does provide for an extension of time frames as follows:

> (2) An extension of the above-stated time periods shall be granted when it is clearly demonstrated by the inmate to the satisfaction of the reviewing authority...or the Secretary that it was not feasible to file the grievance within the relevant time periods and that the inmate made a good faith effort to file in a timely manner. The granting of such an extension shall apply to the filing of an original grievance or when re-filing a grievance after correcting one or more deficiencies cited in Rule 33-103.104, F.A.C.

Fla. Admin. Code. r.33-103.011(2). In order to properly engage the grievance process, the inmate must refile a corrected grievance within the applicable time frames discussed above. Fla. Admin.

Code. r.33-103.011 and r.33-103.014(2).

Should an inmate's institutional level grievance, whether formal or informal be denied, he must then participate in the grievance appeals process in order to properly exhaust his claims. Lyons, 401 F.Supp.2d at 1295. Under Rule 33-103.014, a grievance may be returned to the inmate without processing if it contains one of the enumerated deficiencies provided in the rule, one such deficiency being that the grievance did not include the required attachments. A formal grievance must have the informal grievance and response attached, and a grievance appeal must have the formal grievance and response attached. Fla. Admin. Code r.33-103.014(1)(g). If the inmate did not provide a valid reason for bypassing the previous levels of review as required under Fla. Admin. Code r.33-103.007(6)(a) or the reason provided is not acceptable, a grievance may also be returned. Fla. Admin. Code r.33-103.014(1)(f). An inmate who has a grievance returned to him for reasons stated in subsections (f) or (g) may re-file the grievance correcting the stated deficiency within allowable time frames. Id. r.33-103.014(2).

When a grievance is returned to an inmate for being improperly filed, the inmate shall be told why the grievance was returned and told that in order for him to receive administrative review of his complaint, he must correct the defects and resubmit the grievance within the time frames set forth in r. 33-103.011, unless instructed otherwise in the grievance response. Id. Chapter 33 also establishes the procedural requirements with regard to the use of the appropriate forms, time frames, and forums for the filing of grievances, including the content and structure of grievances. For example, the administrative grievance procedures requires that a single grievance shall only address one issue, Fla. Admin. Code.

r.33-103.005(2)(b)(2), r.33-103.006(2)(f), and r.33-103.007(2)(f). It also requires that when the inmate needs additional writing space to state his grievance, he shall utilize attachment sheets, rather than multiple DC1-303 Forms. Fla. Admin. Code. r.33-103.006(c), r.33-103.014(1). Additionally, each grievance must state a complaint, rather than simply ask a question or seek information. Fla. Admin. Code. r.33-103.002(6) and r.33-103.005(2)(b)(1).

Further, only grievances and appeals that are filed before a plaintiff initially files his complaint in federal court are sufficient to satisfy the exhaustion requirement. See McDaniel v. Crosby, 194 Fed.Appx. 610, 613 (11th Cir. 2006)("To the extent McDaniel relies upon the grievances and appeals he submitted after filing his initial complaint, such grievances and appeals cannot be used to support his claim that he exhausted his administrative remedies, because satisfaction of the exhaustion requirement was a precondition to the filing of his suit, and thus, must have occurred before the suit was filed.")(emphasis added).

III. Discussion

The Defendants have filed a motion to dismiss, arguing that the Plaintiff has failed to exhaust his available remedies as to his Eighth Amendment claim because he never completed the exhaustion process by filing proper grievances, as required by Chapter 33 of the Florida Administrative Code, prior to filing this Complaint. (DE#8:5-7).

Rather than recounting the claims against the defendants, this court need only focus on the facts regarding the Plaintiff's efforts to exhaust his administrative remedies.

In the complaint, Plaintiff concedes that he was required to exhaust administrative remedies. (DE# 1-1: Complaint, p. 11). He claims that "no exhaustion is necessary" in his case because the Defendants exhibited a "wanton and wilful disregard for the Plaintiff's human rights, safety, or personal property." (Id.). In his "Exhaustion of Legal Remedies" section, Plaintiff states "when certain information cannot be put in [grievance] forms, Plaintiff choose to write everything in detail (also when the forms has not enough space), in lined papers and placed in sealed envelopes." (DE# 1-1, p. 17). Plaintiff suggests that this should relieve him of his obligation to comply with FDOC's grievance procedure because "in anyway, Defendants always received Plaintiff communications in a safe and more direct manner" than the grievance procedure. (Id.).

As will be recalled, suits against the FDOC require the Plaintiff to comply with Chapter 33 of the Florida Administrative Code, which directs that an inmate's administrative remedy is not exhausted until his grievance has finally been appealed to and denied by the Secretary for the FDOC. See Lyons v. Trinity Services Group, Inc., 401 F.Supp.2d 1290 (S.D. Fla. 2005). As applied here, from careful review of the complaint, it is evident that the Defendants have satisfied their burden of proving that Plaintiff failed to properly exhaust available administrative remedies prior to filing this federal lawsuit. Thus, the court concludes that even had the subject complained of in this §1983 action been raised in the "lined papers placed in sealed envelopes," exhaustion was still not accomplished because the grievances were non-compliant with the Florida Administrative Code and were rejected or otherwise returned with no action. Therefore, exhaustion was not properly accomplished. The Plaintiff concedes that he did not comply with the Florida Administrative Code and asserts only a conclusory statement that he could not do so because the Defendants

disregarded his rights. This is insufficient to absolve him from the requirement that he exhaust his administrative remedies before filing his complaint.

Plaintiff also argues that Fla. Stat. §768.28(9)(a) creates an exception to the exhaustion requirement. (DE# 1-1, pg. 11). Section 768.28(9)(a) references the extent to which state employees may be held liable for actions taken in the course of their employment. It makes no mention of the PLRA's exhaustion requirement, and creates no exceptions.

Finally, any attempt by the Plaintiff to argue that he lacks knowledge of the grievance procedure will not suffice to excuse his failure to timely and properly exhaust his administrative remedies prior to filing this suit. See Albino v. Baca, 697 F.3d 1023, 1036 (9th Cir. 2012). Here, Plaintiff does not state that he was unaware of the existence of the grievance procedure, but rather he preferred to write down his grievances and place the papers in sealed envelopes. Consequently, any argument by the Plaintiff that he be excused from his failure to exhaust the prison's grievance procedure, because doing so would be a futile exercise, at this point fails. Exhaustion is always mandatory under the PLRA. Alexander, 159 F.3d at 1326.

IV. Conclusion

It is clear that none of the claims raised in this §1983 proceeding have ever been properly exhausted by the Plaintiff in the FDOC prison grievance system. Therefore, the complaint in its entirety is subject to dismissal for failure to exhaust.

It is therefore recommended that the Defendants' Motion to

Dismiss (DE# 8) be GRANTED; that this case be DISMISSED in its entirety for Plaintiff's failure to exhaust available administrative remedies, that the Clerk be directed to enter judgment, and the case be closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report. Failure to file timely objections shall bar plaintiff from a *de novo* determination by the district judge of an issue covered in this report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the district judge except upon grounds of plain error or manifest injustice. See 28 U.S.C. §636(b)(1); Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F.2d 790,794 (1989); LoConte v. Dugger, 847 F.2d 745 (11th Cir. 1988); RTC v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993).

Signed this 27th day of February, 2017.

UNITED STATES MAGISTRATE JUDGE

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Additional material from this filing is available in the Clerk's Office.