

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 18-7305

UMADINE HATCH,

Plaintiff - Appellant,

v.

DR. WILSON, NC Correctional Institution for Women; KENNETH PRICE, M.D.;
UNC HOSPITALS,

Defendants - Appellees,

and

DR. BUCKMIRE, Ear, Nose & Throat - UNC Medical Center,

Defendant.

Appeal from the United States District Court for the Eastern District of North Carolina, at
Raleigh. Terrence W. Boyle, Chief District Judge. (5:17-ct-03030-BO)

Submitted: December 20, 2018

Decided: December 27, 2018

Before DIAZ and RICHARDSON, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Umadine Hatch, Appellant Pro Se. Elizabeth Pharr McCullough, Madeleine Michelle
Pfefferle, YOUNG MOORE & HENDERSON, PA, Raleigh, North Carolina, for

Appellee Stephen M. Wilson.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Umadine Hatch seeks to appeal the district court's order granting summary judgment and dismissing, for failure to exhaust administrative remedies, Hatch's claims of deliberate indifference to her medical needs when she was a North Carolina prisoner. We dismiss the appeal for lack of jurisdiction because the notice of appeal was not timely filed.

Parties are accorded 30 days after the entry of the district court's final judgment or order to note an appeal, Fed. R. App. P. 4(a)(1)(A), unless the district court extends the appeal period under Fed. R. App. P. 4(a)(5), or reopens the appeal period under Fed. R. App. P. 4(a)(6). "[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

The district court's order was entered on the docket on September 12, 2018. The notice of appeal was filed on October 18, 2018.* Because Hatch failed to file a timely notice of appeal or to obtain an extension or reopening of the appeal period, we deny leave to proceed in forma pauperis and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

*For the purpose of this appeal, we assume that the date appearing on the notice of appeal is the earliest date it could have been properly delivered to prison officials for mailing to the court. Fed. R. App. P. 4(c); *Houston v. Lack*, 487 U.S. 266 (1988).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

UMADINE HATCH,
Plaintiff,

v.

DR. WILSON, KENNETH PRICE, DR.
BUCKMIRE, and UNC HOSPITALS,
Defendants.

Judgment in a Civil Case

Civil Case Number: 5:17-CT-3030-BO

Decision by Court.

This case came before the Honorable Terrence W. Boyle, United States District Judge, for review of defendant Dr. Wilson's motion for summary judgment.

IT IS ORDERED AND ADJUDGED that defendant's motion is allowed and plaintiff's complaint is dismissed without prejudice against all defendants.


This Judgment Filed and Entered on September 12, 2018, with service on:
Umadine Hatch, 1710 Gardner Street, New Bern, NC 28560.
(via U.S. Mail)

Elizabeth Pharr McCullough, Young, Moore & Henderson, P. O. Box 31627, Raleigh, NC 27622;
Kelly Street Brown, Young, Moore & Henderson, P.A., P.O. Box 31627, 3101 Glenwood Avenue,
Suite 200, Raleigh, NC 27622.
(via CM/ECF Notice of Electronic Filing)

September 12, 2018

/s/ Peter A. Moore, Jr.

Clerk of Court

By: 
Deputy Clerk

NO. 5:17-CT-3030-BO

Defendants.

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Id. at p. 8. At frivolity review, the court dismissed plaintiff's claims against Buckmire. [DE-9], p. 2. Plaintiff's remaining claims survived review. Id.

The court issued requests for waiver of service to all defendants. Wilson executed a waiver of service on November 20, 2017 [DE-11], and filed the instant motion for summary judgment on January 19, 2018 [DE-16]. In this motion, Wilson argues that plaintiff did not exhaust her administrative remedies before filing suit. [DE-16]. Alternatively, Wilson seeks dismissal of plaintiff's claims on the merits pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff responded to Wilson's summary judgment motion, although her one page response does not address exhaustion. [DE-22]. No other defendant executed a waiver of service. [DE-23].

On February 4, 2018, the court directed the North Carolina Attorney General ("NCAG") to file a response providing the court with the full name and last known address of the remaining defendants. Id. In his response, the NCAG noted that neither Price nor Chapel Hill Hospital are North Carolina Department of Public Safety employees from whom waivers of service could be obtained. [DE-24], p.1. In addition, the NCAG stated that Price is actually Dr. Kenneth Price, and that Chapel Hill Hospital likely refers to UNC Hospitals. Id. at pp. 1-2. The court amended the caption of the case accordingly. [DE-26].

The court then issued another summons to Price. [DE-25]. The summons was returned unexecuted. [DE-27]. At this stage of the proceedings, Price and UNC Hospitals remain unserved.

II. Discussion

Wilson's motion for summary judgment seeks dismissal of plaintiff's claims on the ground that she failed to exhaust her administrative remedies. Title 42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act ("PLRA") requires a prisoner to exhaust her administrative remedies before

filing an action under 42 U.S.C. § 1983 concerning her confinement. Ross v. Blake, ___ U.S. ___, 136 S. Ct. 1850, 1856 (2016) (“[A] court may not excuse a failure to exhaust, even to take [special circumstances] into account.”); Woodford v. Ngo, 548 U.S. 81, 83-85 (2006); see Jones v. Bock, 549 U.S. 199, 217 (2007) (“failure to exhaust is an affirmative defense under [42 U.S.C. § 1997e]”). The PLRA states that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner . . . until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a); see Woodford, 548 U.S. at 84. Exhaustion is mandatory. Woodford, 548 U.S. at 85; Porter v. Nussle, 534 U.S. 516, 524 (2002) (“Once within the discretion of the district court, exhaustion in cases covered by § 1997e(a) is now mandatory.”); Anderson, 407 F.3d at 677. A prisoner must exhaust her administrative remedies even if the relief requested is not available under the administrative process. Booth v. Churner, 532 U.S. 731, 741 (2001). “[U]nexhausted claims cannot be brought in court.” Jones, 549 U.S. at 211.

DPS has a three step administrative remedy procedure which governs the filing of grievances. See, e.g., Moore v. Bennette, 517 F.3d 717, 721 (4th Cir. 2008). The DPS’s Administrative Remedy Procedure (“ARP”) first encourages inmates to attempt informal communication with responsible authorities at the facility in which the problem arose. DOC ARP § .0301(a). If informal resolution is unsuccessful, the DPS ARP provides that any inmate in DPS custody may submit a written grievance on Form DC-410. DOC ARP § .0310(a). If the inmate is not satisfied with the decision reached at the step one level of the grievance process, she may request relief from the Facility Head. Id. at § .0310(b)(1). If the inmate is not satisfied with the decision reached by the Facility Head, she may appeal her grievance to the Secretary of Correction through the inmate grievance examiner. Id. § .0310(c)(1). The decision by the [Inmate Grievance Examiner] or a modification by the Secretary of Correction shall constitute the final step of the Administrative Remedy Procedure. Id. § .0310(c)(6).

Here, the summary judgment record indicates that plaintiff exhausted seven grievances from January 1, 2009 through February 2, 2017. Grande Aff. [DE-19-1] ¶ 3. Only one of these grievances relates in any way to her sarcoidosis. See Def. Ex. B-H [DE-19-3 through 19-9]. Specifically, on April 17, 2014, at approximately 4:30 a.m., plaintiff complained that Officer Townsend refused to provide her with “some hot water” for a sarcoidosis “flare-up.” Def. Ex. D. [19-5], pp. 2-4. Townsend denied plaintiff’s request because the “drinking of beverages is [not] authorized at the bed area.” Id. at p. 3. This grievance was ultimately rejected. Id. at p. 4.

To satisfy the exhaustion requirement, grievances must be sufficient in detail to alert the prison to the nature of the wrong for which redress is sought. See Moore v. Bennette, 517 F.3d 717, 726 (4th Cir. 2008); Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002). The court finds that a grievance complaining that a non-defendant correctional officer refused to provide plaintiff with a cup of hot water for a sarcoidosis flare-up is insufficient to alert prison officials that plaintiff sought redress for the instant defendants’ alleged deliberate indifference.

In Ross, the Supreme Court emphasized the PLRA’s “mandatory language” concerning exhaustion. Ross, 136 S. Ct. at 1856–57 (stating that “mandatory exhaustion statutes like the PLRA establish mandatory exhaustion regimes, foreclosing judicial discretion”). Nevertheless, the Court identified “three kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief.” Id. at 1859. First, an administrative remedy may be unavailable when “it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates.” Id. Second, a remedy might be “so opaque that it becomes, practically speaking, incapable of use” because “no ordinary prisoner can discern or navigate it” or “make sense of what it demands.” Id. (citations omitted). Third, an administrative remedy may be unavailable “when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.” Id. at 1860; see Hill

v. Haynes, 380 F. App'x 268, 270 (4th Cir. 2010) (per curiam) (unpublished). Here, the summary judgment record indicates that plaintiff fully exhausted several grievances unrelated to her claim here. Likewise, plaintiff's summary judgment response does not address exhaustion. Accordingly, plaintiff has not established that administrative remedies were unavailable to her.

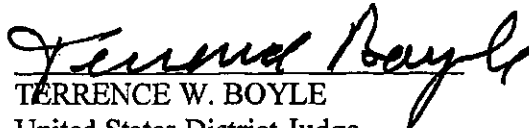
In sum, plaintiff failed to exhaust her available administrative remedies. Filing suit before exhausting administrative remedies dooms plaintiff's claims against all defendants. See, e.g., Celia v. N. Cent. Corr. Facility, No. C13-3003-MWB, 2014 WL 4961450, at *2 (N.D. Iowa Oct. 3, 2014) ("because [plaintiff's] failure to exhaust his administrative remedies bars all of [plaintiff's] claims against all of the individual defendants, including [the unserved defendant] Kinney, summary judgment shall also be granted in favor of Kinney."); Crymes v. NJ Dep't of Corr., No. CIV. 09-3277 NLH/KMW, 2011 WL 6756915, at *1 (D.N.J. Dec. 21, 2011) ("based on the Court's finding infra that Plaintiff's claims under Section 1983 must be dismissed based on his failure to exhaust administrative remedies, the Court finds that providing notice to Plaintiff of the potential Rule 4(m) dismissal would be futile. Accordingly, Plaintiff's claims against [an unserved defendant] are dismissed without prejudice"); Deere v. Grady County Sheriff, No. CIV-07-82-W, 2007 WL 4463749, at *1 (W.D. Okla. Dec. 17, 2007) (unpublished) (finding that unserved defendants should be dismissed *sua sponte* due to plaintiff's failure to exhaust his administrative remedies). Based upon the foregoing, Wilson's motion for summary judgment [DE-25] is ALLOWED, and plaintiff's claims against all defendants are DISMISSED without prejudice for failure to exhaust administrative remedies.²

² In this posture, the court declines to address Wilson's argument that plaintiff's claims are also subject to dismissal under Rule 12(b)(6). However, the court reiterates that plaintiff's allegations regarding her untreated sarcoidosis state a non-frivolous deliberate indifference claim.

III. Conclusion

In sum, for the aforementioned reasons, Wilson's motion to dismiss [DE-16] is ALLOWED. Plaintiff's complaint is DISMISSED without prejudice and the clerk of court is DIRECTED to close the case.

SO ORDERED, this the 11 day of September, 2018.


TERRENCE W. BOYLE
United States District Judge