

APPENDIX - A₍₁₎

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-60058

United States Court of Appeals
Fifth Circuit

FILED

January 29, 2019

Lyle W. Cayce
Clerk

DOUGLAS TAYLOR,

Plaintiff-Appellant

v.

OFFICER TERRIZINA JONES,

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 5:17-CV-47

Before DENNIS, CLEMENT, and COSTA, Circuit Judges.

PER CURIAM:*

Douglas Taylor, Mississippi prisoner # T5273, moves for leave to proceed in forma pauperis (IFP) on appeal. He filed a 42 U.S.C. § 1983 complaint against Officer Terrizina Jones alleging that she failed to protect him from being injured by other inmates incarcerated at the Wilkinson County Correctional Facility (WCCF). The district court granted Jones's motion for summary judgment and dismissed without prejudice the complaint based on

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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Taylor's failure to exhaust his administrative remedies. The district court also certified that Taylor's appeal was not taken in good faith.

By moving to proceed IFP, Taylor is challenging the district court's good-faith certification. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). Our inquiry into an appellant's good faith "is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous)." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks and citations omitted). We may dismiss the appeal if it is frivolous. *See Baugh*, 117 F.3d at 202 n.24.

In his motion, Taylor has failed to challenge the district court's dismissal of his complaint based on his failure to exhaust his administrative remedies prior to filing the instant complaint. Thus, he has abandoned the dispositive issue on appeal. *See Brinkmann v. Dallas County Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987); *see also Jones v. Bock*, 549 U.S. 199, 211 (2007); *Gonzalez v. Seal*, 702 F.3d 785, 787-88 (5th Cir. 2012). Further, the documents attached to Taylor's motion do not show that he completed the exhaustion process prior to filing this § 1983 complaint. *See Gonzalez*, 702 F.3d at 787-88.

Taylor has not shown that a genuine factual dispute exists as to his failure to exhaust his administrative remedies prior to filing this suit and, thus, Officer Jones was entitled to summary judgment. *See Jones*, 549 U.S. at 211; FED. R. CIV. P. 56(a). Because Taylor has failed to show that his appeal has any arguable merit, it is frivolous. *See Howard*, 707 F.2d at 220. Taylor's motion for leave to proceed IFP on appeal is denied, and his appeal is dismissed as frivolous. *See Baugh*, 117 F.3d at 202 n.24; 5TH CIR. R. 42.2.

The dismissal of Taylor's appeal counts as a strike for purposes of 28 U.S.C. § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 387-88 (5th Cir. 1996). Taylor is cautioned that if he accumulates three strikes, he will not be

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able to proceed IFP in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. See § 1915(g).

MOTION DENIED; APPEAL DISMISSED AS FRIVOLOUS;
SANCTION WARNING ISSUED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

January 29, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 18-60058 Douglas Taylor v. WCCF
USDC No. 5:17-CV-47

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH Cir. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

Deborah M. Graham

By:

Debbie T. Graham, Deputy Clerk

Enclosure(s)

Mr. Steven James Griffin
Mr. Douglas Taylor

APPENDIX - B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

DOUGLAS TAYLOR

PLAINTIFF

v.

CIVIL ACTION NO. 5:17-CV-47-KS-MTP

TERRIZINA JONES

DEFENDANT

JUDGMENT

This matter having come on to be heard on this date upon the Report and Recommendation of the United States Magistrate Judge entered herein on November 8, 2017, and the Court, after a full review of the record, having adopted said Report and Recommendation as the finding of this Court, finds that this matter should be **dismissed without prejudice**.

The petitioner is hereby notified that, pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure, he has the right to appeal this Order to the United States Court of Appeals for the Fifth Circuit within thirty (30) days of the entry of the final judgment in this matter.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the above captioned cause be, and the same hereby is, **dismissed**.

SO ORDERED AND ADJUDGED, on this, the 2nd day of January, 2018.

s/Keith Starrett

UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION**

DOUGLAS TAYLOR

PLAINTIFF

v.

CIVIL ACTION NO. 5:17-cv-47-KS-MTP

TERRIZINA JONES

DEFENDANT

REPORT AND RECOMMENDATION

THIS MATTER is before the Court on Defendant's Motion for Summary Judgment [28]. Having considered the parties' submissions and the applicable law, the undersigned recommends that the Motion for Summary Judgment [28] be granted and that this action be dismissed without prejudice.

BACKGROUND

On April 21, 2017, Plaintiff Douglas Taylor, proceeding *pro se* and *in forma pauperis*, filed his Complaint [1] pursuant to 42 U.S.C. § 1983. Plaintiff's claims arose while he was a post-conviction inmate at Wilkinson County Correctional Facility.¹ Plaintiff alleges the Defendant failed to protect him from an attack by his fellow inmates on March 23, 2017.

On September 11, 2017, Defendant filed her Motion for Summary Judgment [28], arguing that Plaintiff failed to exhaust his administrative remedies. Plaintiff responded to the Motion on October 19, 2017, and the Motion is ripe for disposition.

STANDARD FOR SUMMARY JUDGMENT

A motion for summary judgment will be granted only when "the record indicates that there is 'no genuine issue as to any material fact and that the moving party is entitled to judgment

¹ Plaintiff is currently incarcerated at South Mississippi Correctional Institution.

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as a matter of law.” *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004) (citing Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). The Court must view “the evidence in the light most favorable to the nonmoving party.” *Id.* The nonmoving party, however, “cannot defeat summary judgment with conclusory allegations, unsubstantiated assertions, or ‘only a scintilla of evidence.’” *Turner v. Baylor Richardson Med. Center*, 476 F.3d 337, 343 (5th Cir. 2007) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)). In the absence of proof, the Court does not “assume that the nonmoving party could or would prove the necessary facts.” *Little*, 37 F.3d at 1075 (emphasis omitted).

ANALYSIS

The Prison Litigation Reform Act (“PLRA”), 42 U.S.C. § 1997e(a), requires prisoners to exhaust any available administrative remedies prior to filing suit under 42 U.S.C. § 1983. “Whether a prisoner has exhausted administrative remedies is a mixed question of law and fact.” *Dillon v. Rogers*, 596 F.3d 260, 266 (5th Cir. 2010). The Fifth Circuit held that “[s]ince exhaustion is a threshold issue that courts must address to determine whether litigation is being conducted in the right forum at the right time, . . . judges may resolve factual disputes concerning exhaustion without the participation of a jury.” *Id.* at 272. Because exhaustion is an affirmative defense, Defendant bears the burden of demonstrating that Plaintiff failed to exhaust available administrative remedies. *Id.* at 266.

The Fifth Circuit takes “a strict approach” to the PLRA’s exhaustion requirement. *Johnson v. Ford*, 261 Fed. App’x 752, 755 (5th Cir. 2008) (citing *Days v. Johnson*, 322 F.3d 863, 866 (5th Cir. 2003)). A prisoner cannot satisfy the exhaustion requirement “by filing an untimely or otherwise procedurally defective administrative grievance or appeal” because “proper exhaustion of administrative remedies is necessary.” *Woodford v. Ngo*, 548 U.S. 81, 83-

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C(5)

84 (2006). It is not enough to merely initiate the grievance process or to put prison officials on notice of a complaint; the grievance process must be carried through to its conclusion. *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001).

Mississippi Code § 47-5-801 grants the Mississippi Department of Corrections (“MDOC”) the authority to adopt an administrative review procedure at each of its correctional facilities. Pursuant to this statutory authority, the MDOC has set up an Administrative Remedy Program (“ARP”) through which an inmate may seek formal review of a complaint relating to any aspect of his incarceration. *See* MISSISSIPPI DEPARTMENT OF CORRECTIONS HANDBOOK¹ at Ch. VIII.

The ARP is a two-step process.² An inmate is required to submit his initial grievance or request, in writing, through the Inmate Legal Assistance Program (“ILAP”) within thirty days of an alleged incident. If, after screening, the grievance or request is accepted into the ARP, an official will issue a First Step Response. If the inmate is unsatisfied with the First Step Response, he may continue to the Second Step by using ARP form ARP-2. *See* MISSISSIPPI DEPARTMENT OF CORRECTIONS HANDBOOK at Ch. VIII.

In support of her argument that Plaintiff failed to exhaust his administrative remedies, Defendant submitted an affidavit from the ARP Coordinator at WCCF, Janice Williams. In her affidavit, Williams states that Plaintiff has not submitted any ARP requests pertaining to an

¹ *See* <http://www.mdoc.ms.gov/Inmate-Info/Pages/Inmate-Handbook.aspx>. (Last visited November 3, 2017).

² Effective September 19, 2010, the ARP was changed from a three-step process to a two-step process. *See Threadgill v. Moore*, 2011 WL 4388832, at *3 n.6 (S.D. Miss. July 25, 2011).

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altercation with other inmates in March or 2017 or alleging that Defendant failed to protect him from harm. *See* Affidavit [28-1].

In his Response [33] filed on October 19, 2017, Defendant asserts that he has now filed an ARP grievance and is currently waiting on a response. The grievance process, however, must be completed *prior* to filing suit in federal court. The United States Court of Appeals for the Fifth Circuit has stated as follows:

District courts have no discretion to excuse a prisoner's failure to properly exhaust the prison grievance process before filing their complaint. It is irrelevant whether exhaustion is achieved during the federal proceeding. Pre-filing exhaustion is mandatory, and the case must be dismissed if available administrative remedies were not exhausted.

Gonzalez v. Seal, 702 F.3d 785, 788 (5th Cir. 2012)

One of the principal purposes of the administrative exhaustion requirement is to provide fair notice to prison officials of an inmate's specific complaints so as to provide "time and opportunity to address complaints internally." *Johnson v. Johnson*, 385 F.3d 503, 517 (5th Cir. 2004). The record, including Plaintiff's own assertions, confirms that Plaintiff failed to exhaust his administrative remedies prior to filing this action. Thus, he may not proceed in this case.²

RECOMMENDATION

For the foregoing reasons, the undersigned recommends that Defendant's Motion for Summary Judgment [28] be GRANTED and this action be dismissed without prejudice.

*² Exceptions to the exhaustion requirement are only appropriate where the administrative remedies are unavailable or wholly inappropriate to the relief sought, or where the attempt to exhaust such remedies would itself be patently futile. *Fuller v. Rich*, 11 F.3d 61, 62 (5th Cir. 1994). The Fifth Circuit has taken the position that exceptions to the exhaustion requirement only apply in "extraordinary circumstances," and that the prisoner bears the burden of demonstrating the futility or unavailability of administrative review. *Id.* Plaintiff has not made such a showing.

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NOTICE OF RIGHT TO OBJECT

In accordance with the Rules of this Court, any party, within fourteen days after being served a copy of this recommendation, may serve and file written objections to the recommendations, with a copy to the District Judge, the U.S. Magistrate Judge, and the opposing party. The District Judge at that time may accept, reject or modify in whole or in part, the recommendation of the Magistrate Judge, or may receive further evidence or recommit the matter to this Court with instructions. Failure to timely file written objections to proposed findings, conclusions, and recommendations contained in this report will bar an aggrieved party, except on the grounds of plain error, from attacking on appeal unobjected to proposed factual findings and legal conclusions accepted by the District Court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996).

This the 8th day of November, 2017.

s/ Michael T. Parker
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

DOUGLAS TAYLOR

PLAINTIFF

v.

CIVIL ACTION NO. 5:17-CV-47-KS-MTP

TERRIZINA JONES

DEFENDANT

ORDER ADOPTING REPORT AND RECOMMENDATION

This cause came on this date to be heard upon the Report and Recommendation [35] of the United States Magistrate Judge entered herein on November 8, 2017, after referral of hearing by this Court, no objections having been filed as to the Report and Recommendation [35], and the Court, having fully reviewed the same as well as the record in this matter, and being duly advised in the premises, finds that said Report and Recommendation [35] should be adopted as the opinion of this Court.

IT IS, THEREFORE, ORDERED that the Report and Recommendation [35] be, and the same hereby is, adopted as the finding of this Court. The Motion for Summary Judgment [28] is **granted**, and this action is **dismissed without prejudice**.

SO ORDERED AND ADJUDGED this the 2nd day of January, 2018.

s/Keith Starrett
UNITED STATES DISTRICT JUDGE

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