

## UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Room 2722 - 219 S. Dearborn Street  
Chicago, Illinois 60604



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## PLRA C.R. 3(b) FINAL ORDER

October 17, 2019

No. 19-2304	DEVILLE MCCANTS, Plaintiff - Appellant  v.  CHERYL HANSEN, et al., Defendants - Appellees
<b>Originating Case Information:</b>	
District Court No: 1:18-cv-01423-CSB Central District of Illinois District Judge Colin S. Bruce	

The pro se appellant was DENIED leave to proceed on appeal in forma pauperis by the appellate court on September 18, 2019 and was given fourteen (14) days to pay the \$505.00 filing fee. The pro se appellant has not paid the \$505.00 appellate fee. Accordingly,

**IT IS ORDERED** that this appeal is **DISMISSED** for failure to pay the required docketing fee pursuant to Circuit Rule 3(b).

**IT IS FURTHER ORDERED** that the appellant pay the appellate fee of \$505.00 to the clerk of the district court. The clerk of the district court shall collect the appellate fees from the prisoner's trust fund account using the mechanism of *Section 1915(b)*. *Newlin v. Helman*, 123 F.3d 429, 433 (7th Cir. 1997).

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF ILLINOIS

DEVILLE MCCANTS,

Plaintiff,

v.

CHERYL HANSEN, *et al.*,

Defendants.

No.: 18-1423-CSB

ORDER

COLIN S. BRUCE, U.S. District Judge:

This cause is before the Court on Defendants' motions for summary judgment for failure to exhaust administrative remedies. Defendants are entitled to the summary judgment that they seek because the undisputed evidence shows that Plaintiff Deville McCants failed to properly exhaust his administrative remedies prior to filing this suit as required by the Prison Litigation Reform Act.

The Prison Litigation Reform Act requires an inmate to exhaust the available administrative remedies before filing a § 1983 lawsuit. 42 U.S.C. § 1997e(a) ("[n]o action shall be brought with respect to prison conditions . . . by a prisoner . . . until such administrative remedies as are available are exhausted."); *Massey v. Wheeler*, 221 F.3d 1030, 1034 (7<sup>th</sup> Cir. 2000). Exhaustion is mandatory. *Woodford v. Ngo*, 548 U.S. 81, 95 (2006) ("The benefits of exhaustion can be realized only if the prison grievance system is given a fair opportunity to consider the grievance. The prison grievance system will not

have such an opportunity unless the grievant complies with the system's critical procedural rules."); *Dole v. Chandler*, 43 F.3d 804, 809 (7<sup>th</sup> Cir. 2006).

No futility, sham, or substantial compliance exception exists to this requirement, and a plaintiff seeking only monetary damages for ongoing conditions must still utilize the grievance procedure in place before filing suit. *Massey*, 259 F.3d at 646 (inmate alleging failure to repair a hernia timely must exhaust administrative remedies even though surgery was performed and only money damages claim remained); *Booth v. Churner*, 532 U.S. 731, 736-37 (2001) (the PLRA requires administrative exhaustion even where grievance process does not permit award of money damages, if "some action" in response to a grievance can be taken). Likewise, the exhaustion requirement includes claims that only seek equitable relief. *Falcon v. United States Bureau of Prisons*, 52 F.3d 137, 139 (7<sup>th</sup> Cir. 1995).

Exhaustion means properly and timely taking each step in the administrative process established by the applicable procedures. *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7<sup>th</sup> Cir. 2002) (failure to file timely administrative appeal constitutes failure to exhaust administrative remedies and bars a § 1983 suit). "[I]f a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, the prisoner must utilize that administrative system before filing a claim." *Massey v. Helman*, 196 F.3d 727, 733 (7<sup>th</sup> Cir. 1999). A dismissal for failure to exhaust is without prejudice, so reinstatement is not barred unless the time for exhaustion has expired. *Walker v. Thompson*, 288 F.3d 1005, 1009 (7<sup>th</sup> Cir. 2002).

If issues of fact exist in determining whether an inmate has exhausted his administrative remedies, a judge should hold a hearing and resolve these factual disputes. *Pavey v. Conley*, 544 F.3d 739, 742 (7<sup>th</sup> Cir. 2008). The Court is permitted to make findings of fact and credibility assessments of witnesses at such an evidentiary hearing. *Pavey v. Conley*, 663 F.3d 899, 904 (7<sup>th</sup> Cir. 2011). If the Court finds that the prisoner exhausted his administrative remedies, "the case will proceed to pretrial discovery, and if necessary a trial, on the merits." *Pavey*, 544 F.3d at 742. If the Court finds that the prisoner did not exhaust his administrative remedies, the Court determines whether: (a) the plaintiff has unexhausted remedies, and so he must go back and exhaust; (b) or, although he has no unexhausted remedies, the failure to exhaust was innocent (as where prison officials prevent a prisoner from exhausting his remedies), in which event he will be allowed to go back and exhaust; or (c) the failure to exhaust was the prisoner's fault, in which event the case is over. *Id.* No evidentiary hearing is necessary, however, if there are "no disputed facts regarding exhaustion" and "only a legal question" is presented. *Doss v. Gilkey*, 649 F. Supp. 2d 905, 912 (S.D. Ill. 2009).

Illinois has established an internal administrative grievance system for prisoners to complete in order to correct a problem that the prisoner encounters within the prison setting. 20 Ill. Admin. Code § 504.810 *et seq.* Under the current grievance procedures, a prisoner may file a written grievance with his grievance officer within sixty (60) days of discovery of the dispute. *Id.* The grievance should include "factual details regarding each aspect of the offender's complaint, including what happened, when, where, and

the name of each person who is the subject of or who is otherwise involved in the complaint . . . [or] as much descriptive information about the individual as possible." *Id.*

The grievance officer is then required to review the grievance and report findings and recommendations to the Chief Administrative Officer ("CAO"). 20 Ill. Adm. Code § 504.810(c). The prisoner then has the opportunity to review the CAO's response. 20 Ill. Adm. Code § 504.830(e). If the prisoner is unsatisfied with the institution's resolution of the grievance, he may file an appeal to the Director through the Administrative Review Board ("ARB") within thirty (30) days of the CAO's decision. 20 Ill. Adm. Code § 504.850. The ARB is required to make a final determination of the grievance within six months after receiving it. *Id.* Completion of this process exhausts a prisoner's administrative remedies.

Plaintiff Deville McCants filed this suit under 42 U.S.C. § 1983 on November 21, 2018, alleging that, when he was an Illinois Department of Corrections inmate at the Pontiac Correctional Center, the named Defendants violated his Constitutional rights by depriving him of his Eighth Amendment right to receive medical attention for his broken finger. Thereafter, the Court conducted a merit review of McCants' Complaint and determined that his Complaint stated a claim against Defendants for allegedly acting with deliberate indifference towards his serious medical needs.

Before McCants filed this suit, however, he needed to exhaust properly and fully his administrative remedies. The undisputed facts demonstrate that McCants did not do this. Therefore, Defendants are entitled to summary judgment based upon McCants' failure to exhaust properly his administrative remedies prior to filing this suit.

The undisputed facts show that McCants submitted an emergency grievance regarding the allegations in his Complaint on September 21, 2018. On September 26, 2018, the Chief Administrative Officer at Pontiac received McCants' grievance. On September 26, 2018, McCants' grievance was determined to be non-emergent, and he was instructed to submit his grievance in the normal manner. McCants' grievance was returned to him on September 26, 2018, and he was advised that, if he rejected the warden's decision, he may choose to forward his complaint utilizing the "grievance only" mail box in order to be responded to at the counselor's first level.

On October 4, 2018, Counselor Wykes received McCants' grievance. On October 5, 2018, Counselor Wykes advised McCants to forward his grievance to the grievance officer because McCants' grievance concerned a medical issue. After receiving the counselor's response, McCants submitted his grievance to the Administrative Review Board ("ARB"). The ARB received McCants' grievance on October 17, 2018. On October 19, 2018, the ARB returned McCants' grievance to him because it was procedurally defective and instructed McCants to provide a copy of the response to offender's grievance, including the grievance officer's and Chief Administrative Officer's response.

These facts demonstrate that McCants failed to exhaust his administrative remedies properly before he filed this suit. The ARB directed him to submit further documentation and information so that it could make a proper determination of his appeal. McCants has not submitted any evidence that he provided the documentation requested by the ARB, and more importantly, he has not even asserted that he ever sent

or provided the information to the ARB that it required. As such, McCants failed to exhaust his administrative remedies prior to filing this suit. *E.g., Ford v. Johnson*, 362 F.3d 395, 398 (7<sup>th</sup> Cir. 2004)(affirming dismissal for failure to exhaust where inmate “jumped the gun” in filing suit before IDOC announced final decision on inmate’s grievance appeal); *Wilson v. Obaisi*, 2016 WL 3640412, \* 3-4 (N.D. Ill. July 7, 2016) (dismissing an inmate’s suit for failure to exhaust because ARB appeal was still pending at time inmate filed suit).

McCants argues that, because his original grievance was an “emergency” grievance, it should have been resolved differently than a regular or normal grievance, and he challenges the determination that his grievance was not an emergency.<sup>1</sup> However, McCants has provided no authority to show that a grievance that has been determined not to constitute an emergency grievance need not receive a final determination from the Director or the ARB in order for the inmate to have exhausted his administrative remedies. McCants never received a final determination before he filed this suit, and therefore, he failed to exhaust his administrative remedies.

Finally, the ARB’s October 19, 2018 response cannot be considered a final determination for purposes of McCants’ exhaustion requirements. In its October 19, 2018 correspondence to McCants, the ARB sought further, specific information from McCants so that the ARB could make its final determination on his grievance. Again,

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<sup>1</sup> McCants also appears to argue that he could not provide the information to the ARB without violating HIPAA. However, McCants’ placed his medical condition at issue when he filed a grievance, and in any event, he could have waived his right to privacy by providing the documents without it constituting a HIPAA violation.

McCants has offered no evidence that he provided this information or that the ARB ever issued a final determination after receiving the requested information.

The purpose of a grievance procedure in a prison setting is to allow a prisoner to resolve his issues or disputes with prison officials and staff at the institutional level without having to seek judicial help. *Dettlaff v. Wayne*, 2018 WL 5793596, \* 10 (W.D. Wis. Nov. 5, 2018)(citing *Woodford v. Ngo*, 548 U.S. 81, 88-89 (2006))("The purpose of this exhaustion requirement is to give the prison administrators a fair opportunity to resolve the grievance without litigation."). By ignoring the ARB's request for additional documentation and by failing to follow the clear instructions provided to him as to how to exhaust his administrative remedies, McCants thwarted the purpose of the administrative process and, thereby, failed to exhaust his administrative remedies. *Id.*; *Edens v. O'Brien*, 2016 WL 4191756 (N.D. Ill. Aug. 9, 2016).

"To exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require." *Pozo*, 286 F.3d at 1025. "[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 litigating." *Id.* "[P]ursuing a premature, procedurally flawed grievance through the entire administrative process does not constitute exhaustion. The rules governing the filing and prosecution of a grievance, including the appeal, must be followed to achieve exhaustion; substantial compliance is insufficient." *Wilder v. Sutton*, 2008 WL 515506, \* 9 (S.D. Ill. Feb. 22, 2008)(citing *Lewis v. Washington* 300 F.3d 829, 833-834 (7<sup>th</sup> Cir. 2002)).



In short, premature suits must be dismissed because such suits do not comply with the administrative remedies provided by the IDOC to its inmates. *Perez v.*

*Wisconsin Dep't of Corr.*, 182 F.3d 532, 535 (7<sup>th</sup> Cir. 1999)(holding that "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed.").

McCants failed to comply with the IDOC's rules regarding exhaustion before he filed this suit. Accordingly, Defendants are entitled to the summary judgment that they seek.

**IT IS, THEREFORE, ORDERED:**

1. Defendants' motions for summary judgment on the issue of exhaustion of administrative remedies [24 & 30] are GRANTED. The Clerk of the Court is directed to enter judgment in Defendants' favor and against Plaintiff. All other pending motions are denied as moot, and this case is terminated with the Parties to bear their own costs. All deadlines and settings on the Court's calendar are vacated.

2. If Plaintiff wishes to appeal this judgment, he must file a notice of appeal with this Court within thirty (30) days of the entry of judgment. Fed. R. App. P. 4(a)(4).

3. If Plaintiff wishes to proceed *in forma pauperis* on appeal, his motion for leave to appeal *in forma pauperis* must identify the issues that he will present on appeal to assist the Court in determining whether the appeal is taken in good faith. Fed. R. App. P. 24(a)(1)(c); *Celske v. Edwards*, 164 F.3d 396, 398 (7<sup>th</sup> Cir. 1999)(an appellant should be given an opportunity to submit a statement of his grounds for appealing so that the district judge "can make a responsible assessment of the issue

of good faith."); *Walker v. O'Brien*, 216 F.3d 626, 632 (7<sup>th</sup> Cir. 2000)(providing that a good faith appeal is an appeal that "a reasonable person could suppose . . . has some merit" from a legal perspective). If Plaintiff chooses to appeal, he will be liable for the \$505.00 appellate filing fee regardless of the outcome of the appeal.

ENTERED this 22nd day of April, 2019

s/ Colin S. Bruce  
COLIN S. BRUCE  
UNITED STATES DISTRICT JUDGE