IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
June 27, 2019
Lyle W. Cayce
Clerk

No. 17-40373
Summary Calendar

BRIAN RICHARDSON,

Plaintiff-Appellant

v.

OFFICER JOSHUA MOORE,

Defendant-Appellee

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:12-CV-359

Before HIGGINBOTHAM, ELROD and DUNCAN, Circuit Judges.

PER CURIAM:*

Brian Richardson, Texas prisoner # 1619900, appeals the summary judgment dismissal of his 42 U.S.C. § 1983 complaint for failure to exhaust administrative remedies. Finding no error we affirm.

We review the grant of summary judgment de novo, applying the same standard as the district court. *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000). A prisoner who wishes to file a § 1983 suit

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

for damages against prison officials must exhaust administrative remedies before doing so. 42 U.S.C. § 1997e(a); *Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012); *Johnson v. Johnson*, 385 F.3d 503, 515 (5th Cir. 2004). The Texas prison system provides a two-step process for filing grievances, and a prisoner must pursue a grievance through both steps to satisfy the exhaustion requirement. *Johnson*, 385 F.3d at 515. Although Richardson filed a Step 1 grievance, it is undisputed that he did not file a Step 2 grievance within the time allowed for doing so. Richardson seeks to supplement the record on appeal with documents purporting to show that he did ultimately file a Step 2 grievance in this matter. That motion is denied. *See Theriot v. Parish of Jefferson*, 185 F.3d 477, 491 n.26 (5th Cir. 1999). Even if we accept as true that Richardson did file a Step 2 grievance in this matter, by doing so in an untimely manner, he failed to properly exhaust his administrative remedies. *See Woodford v. Ngo*, 548 U.S. 81, 89-95 (2006).

Richardson's contention that he was not required to file a Step 2 grievance because his Step 1 grievance was referred to the Office of the Inspector General is without merit. *See Aguirre v. Dyer*, 233 F. App'x 365, 366 (5th Cir. 2007); *Palermo v. Miller*, 196 F. App'x 234, 235 (5th Cir. 2006); *Garza v. Wauson*, No. 02-10920, 2003 WL 147727, 1 (5th Cir. Jan. 7, 2003); *see also Ballard v. Burton*, 444 F.3d 391, 401 & n.7 (5th Cir. 2006) (recognizing that unpublished decisions issued after January 1, 1996, are not controlling precedent but may be considered persuasive authority under 5TH CIR. R. 47.5.4).

We conclude that the district court did not err in determining that Richardson failed to exhaust his administrative remedies. We do not consider Richardson's argument, raised for the first time on appeal, that the flaws inherent in the prison system's grievance process have denied him the

constitutional right to access to the courts. *See Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

BRIAN RICHARDSON	§	
VS.	§	CIVIL ACTION NO. 1:12cv359
JOSHUA MOORE	§	

MEMORANDUM ORDER ADOPTING
THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Brian Richardson, proceeding *pro se*, filed the above-styled civil rights lawsuit. The Court previously referred this matter to the Honorable Zack Hawthorn, United States Magistrate Judge, for consideration pursuant to 28 U.S.C. § 636.

Plaintiff has filed three motions seeking preliminary injunctive relief (doc. nos. 43, 46 and 48). The Magistrate Judge has submitted a Report and Recommendation of United States Magistrate Judge recommending the motions be denied.

The Court has received and considered the Report and Recommendation of United States Magistrate Judge, along with the record and pleadings. No objections were filed to the Report and Recommendation.

ORDER

Accordingly, the findings of fact and conclusions of law of the Magistrate Judge are correct and the report of the Magistrate Judge is **ADOPTED** as the opinion of the Court. Plaintiff's motions for preliminary injunctive relief are **DENIED**.

SIGNED this the **4** day of **August, 2014.**

Thad Heartfield
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

BRIAN RICHARDSON	§	
VS.	§	CIVIL ACTION NO. 1:12cv359
JOSHUA MOORE	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Plaintiff Brian Richardson, an inmate confined within the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se*, brings this civil rights lawsuit against Joshua Moore. Plaintiff alleges that on August 18, 2010, the defendant used excessive force against him.

The above-styled action was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case.

The defendant has filed a Motion for Summary Judgment Limited to the Defense of Exhaustion of Administrative Remedies (doc. no. 52). Plaintiff has responded. The motion is therefore ripe for consideration

The Motion for Summary Judgment

The defendant asserts he is entitled to summary judgment because plaintiff did not properly exhaust his administrative remedies before filing this lawsuit. The defendant contends that on August 22, 2010, plaintiff submitted a Step 1 Grievance concerning the incident which gave rise to

this lawsuit. The grievance was returned to plaintiff on August 25, 2010. The response to the grievance stated: "A copy of your grievance was forwarded to Major Anders and he has responded with the following referral to Office of the Inspector General. Additionally, a copy of your grievance was included in Use of Force Report #MA 04496-08-10 for further review." The defendant states that while plaintiff filed two Step 2 Grievances between August, 2010, and June, 2011, none of the Step 2 Grievances dealt with the use of force by the defendant. Accordingly, the defendant asserts plaintiff did not fully exhaust his administrative remedies before filing this lawsuit.

Standard of Review

Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 189 (5th Cir. 1996). A dispute about a material fact is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248; *Judwin Props., Inc. v. U.S. Fire Ins. Co.*, 973 F.2d 432, 435 (5th Cir. 1992).

On summary judgment, "[t]he moving party has the burden of proving there is no genuine [dispute] of material fact and that it is entitled to judgment as a matter of law." *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 246 (5th Cir. 2003); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets this burden, "the non-moving party must show that summary judgment is appropriate by setting forth specific facts showing the existence of a genuine issue concerning every component of its case." *Rivera*, 349 F.3d at 247. The nonmovant's burden "is not satisfied with some metaphysical doubt as to the material facts, by conclusory allegations, by

unsubstantiated assertions, or by only a scintilla of evidence." *Willis v. Roche Biomedical Labs., Inc.*, 61 F.3d 313, 315 (5th Cir. 1995); *Brown v. Houston*, 337 F.3d 539, 541 (5th Cir. 2003).

Because summary judgment is a final adjudication on the merits, courts must employ the device cautiously. *Hulsey v. State of Texas*, 929 F.2d 168, 170 (5th Cir. 1991); *Jackson v. Procunier*, 789 F.2d 307 (5th Cir. 1986). In prisoner *pro se* cases, courts must be careful to guard against premature truncation of legitimate lawsuits merely because of unskilled presentations. *Jackson v. Cain*, 864 F.2d 1235, 1241 (5th Cir. 1989) (quoting *Murrell v. Bennett*, 615 F.2d 306, 311 (5th Cir. 1980)). Summary judgment is not appropriate unless, viewing the evidence in the light most favorable to the non-moving party, no reasonable jury could return a verdict for that party. *Rubenstein v. Administrators of the Tulane Educational Fund*, 218 F.3d 392, 399 (5th Cir. 2000).

Analysis

Exhaustion of Administrative Remedies

Title 42 U.S.C. § 1997e(a) requires prisoners to exhaust administrative remedies before filing a civil rights action. The statute provides, "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. § 1997e(a).

Exhaustion of administrative remedies is mandatory and is intended to give correctional officials an opportunity to address complains internally before initiation of a federal lawsuit. *See Porter v. Nussle*, 534 U.S. 516, 525 (2001). The exhaustion requirement applies to all inmate suits concerning prison life, whether they involve general circumstances or particular episodes. *Id.* at 532.

In addition, prisoners must exhaust administrative remedies before filing a lawsuit regardless of the type of relief prayed for in the complaint. *Booth v. Churner*, 532 U.S. 731, 741 (2001).

The United States Court of Appeals for the Fifth Circuit has taken a strict approach to exhaustion. *Days v. Johnson*, 322 F.3d 863, 866 (5th Cir. 2003). "Nothing in the Prison Litigation Reform Act ... prescribes appropriate grievance procedures or enables judges, by creative interpretation of the exhaustion doctrine, to prescribe or oversee prison grievance systems." *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001). "District courts have no discretion to excuse a prisoner's failure to properly exhaust the prison grievance process before filing [a] complaint. *Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012).

In addition, the Supreme Court has "held that to properly exhaust administrative remedies prisoners must complete the administrative review process in accordance with the applicable procedural rules–rules that are defined not by [statute], but by the prison grievance process itself. Compliance with prison grievance procedures, therefore, is all that is required [by statute] to properly exhaust." *Jones v. Brock*, 549 U.S. 199, 218 (2007) (internal quotation marks and citations omitted). But the exhaustion requirement requires "proper exhaustion," meaning that "a prisoner must complete the administrative process in accordance with the applicable procedural rules ... as a precondition to bringing suit in federal court." *Woodford v. Ngo*, 548 U.S. 81, 88 (2006). Accordingly, inmates must exhaust their administrative remedies in a procedurally correct manner. *Dillon v. Rogers*, 596 F.3d 260, 268 (5th Cir. 2010).

The Texas Department of Criminal Justice, Correctional Institutions Division, has a two-step grievance procedure available to inmates. *Wendell v. Asher*, 162 F.3d 887, 891 (5th Cir. 1998). The

prisoner must pursue the grievance through both steps of the procedure for his claim to be considered exhausted. *Johnson v. Johnson*, 385 F.3d 503, 515 (5th Cir. 2004).

Application

The parties agree that plaintiff did not file a Step 2 Grievance regarding the use of force by the defendant. As set forth above, the response to plaintiff's Step 1 Grievance stated that the matter had been referred to the Inspector General. Plaintiff states that in this instance he was not required to file a Step 2Grievance because he agreed with and was satisfied by the response he received to his Step 1 grievance.

This case is similar to *Aguire v. Dyer*, 233 F. App'x 365 (5th Cir. 2007). In *Aguire*, the plaintiff's grievance was referred to the internal affairs division. The plaintiff contended he was therefore not required to file a Step 2 grievance. The Fifth Circuit disagreed and affirmed the dismissal of the lawsuit.

In contrast to *Aguire*, is *Rosa v. Littles*, 336 F. App'x 424 (5th Cir. 2009). In *Rosa*, the response the plaintiff received to his Step 1 grievance stated that due to the nature of the plaintiff's complaint, "a copy of this grievance was forwarded to the Office of Inspector General. Following their review, OIG Case # IF.CC.05002042GL was opened by them. All further correspondence concerning this matter should be forwarded to the OIG citing the above-mentioned case number." *Id.* at 425. The Fifth Circuit held that under such circumstances, the plaintiff was not required to file a Step 2 grievance. The court stated that as the commencement of an investigation into the defendant's actions was all the relief the plaintiff could have obtained through the grievance process, he was not required to proceed to Step 2 of the process. The defendant had cited *Aguire* in support

of his contention that the plaintiff had not fully exhausted his remedies. However, the Fifth Circuit concluded *Aguire* was distinguishable.

Fifth Circuit Local Rule 47.5.4 provides that an unpublished opinion issued after January 1, 1996, is not precedential, but may be persuasive. *Bellard v. Burton*, 444 F.3d 391, 401 & n. 7 (5th Cir. 2006). The undersigned finds the holding in *Aguire* to be persuasive. The response plaintiff received to his Step 1 grievance, like the response the plaintiff in *Aguire* received, stated no more than that the matter had been referred to the Inspector General. There was no indication in the response to plaintiff's Step 1 grievance that he should not appeal the Step 1 response or that he did not have the right to appeal the response. Nor was there any indication that he would be required to wait and see whether an investigation was opened before filing his Step 2 grievance. This response is distinguishable from the response the plaintiff received in *Rosa*, where he was directed to send further correspondence regarding the matter to the Office of Inspector General, indicating that a Step 2 grievance should not be filed and that the grievance process was concluded.

As the response plaintiff received to his Step 1 grievance stated that the matter had been referred to the Office of Inspector General, rather than that an investigation had been opened by the Office of Inspector General, it cannot be concluded plaintiff was not required to file a Step 2 Grievance. Since no Step 2 Grievance was filed, plaintiff did not did not fully exhaust his administrative remedies before filing his lawsuit. As there is no dispute of fact as to whether a Step 2 Grievance was filed, and as the defendant is entitled to judgment as a matter of law, his motion for summary judgment should be granted.

Recommendation

The defendant's motion for summary judgment should be granted.

Objections

Objections must be (1) specific, (2) in writing, and (3) served and filed within ten days after being served with a copy of this report. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 6(a), 6(b) and 72(b).

A party's failure to object bars that party from (1) entitlement to *de novo* review by a district judge of proposed findings and recommendations, *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988), and (2) appellate review, except on grounds of plain error, of unobjected-to factual findings and legal conclusions accepted by the district court, *Douglass v. United Serv. Auto. Ass'n.*, 79 F.3d 1415, 1429 (5th Cir. 1996) (*en banc*).

SIGNED this 24th day of May, 2016.

Zack Hawthorn
United States Magistrate Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40373

BRIAN RICHARDSON,

Plaintiff - Appellant

v.

OFFICER JOSHUA MOORE,

Defendant - Appellee

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, ELROD, and DUNCAN Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/Patrick E. Higginbotham
UNITED STATES CIRCUIT JUDGE