

United States Court of Appeals
For the Eighth Circuit

No. 19-2693

Lorenzo Robertson

Plaintiff - Appellant

v.

Ozell Pace, Corporal, Varner Unit, ADC; Ernest Hester, III, Lieutenant, Varner Unit, ADC; Aviva Smith, Sergeant, Varner Unit, ADC; Jonathan Martin, Captain, Varner Unit, ADC; Wendy Kelley, Director, ADC; James Gibson, Warden

Defendants - Appellees

Appeal from United States District Court
for the Eastern District of Arkansas - Pine Bluff

Submitted: April 1, 2020

Filed: April 9, 2020

[Unpublished]

Before COLLTON, WOLLMAN, and KELLY, Circuit Judges.

PER CURIAM.

Arkansas inmate Lorenzo Robertson appeals the district court's¹ dismissal, without prejudice, of his 42 U.S.C. § 1983 action based on his failure to exhaust his administrative remedies as required by the Prison Litigation Reform Act (PLRA). 42 U.S.C. § 1997e(a).

As a preliminary matter, we conclude that the district court did not abuse its broad discretion in denying Robertson's ongoing attempts to lift the stay of discovery while it resolved the exhaustion issue, see Sheets v. Butera, 389 F.3d 772, 780 (8th Cir. 2004) (explaining that rulings on discovery matters are reviewed under very deferential gross abuse of discretion standard); see also Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008) (concluding that a case should not proceed to pretrial discovery until the PLRA exhaustion is resolved by the district court judge); and, contrary to Robertson's assertions, we discern no judicial bias that warranted disqualification or a change in venue, see Am. Prairie Constr. Co. v. Hoich, 560 F.3d 780, 789-90 (8th Cir. 2009) (explaining that a judge is presumed impartial, and the party moving for disqualification has substantial burden of proving otherwise); Dossett v. First State Bank, 399 F.3d 940, 952-53 (8th Cir. 2005) (concluding that adverse rulings, including the failure to permit discovery, "almost never" constitute a valid basis for recusal). We also note that Robertson does not challenge the dismissal of Director Kelley or Warden Gibson. See Ahlberg v. Chrysler Corp., 481 F.3d 630, 638 (8th Cir. 2007) (points not meaningfully argued on appeal are waived).

Having carefully reviewed the record and the parties' arguments on appeal, we further conclude that the district court properly granted summary judgment based on Robertson's failure to exhaust his administrative remedies. See Porter v. Sturm, 781 F.3d 448, 451 (8th Cir. 2015) (grant of summary judgment is reviewed de novo,

¹The Honorable D.P. Marshall, Jr., Chief Judge, United States District Court for the Eastern District of Arkansas, adopting the report and recommendations of the Honorable Beth Deere, United States Magistrate Judge for the Eastern District of Arkansas.

viewing the record in the light most favorable to nonmovant). Specifically, we conclude that it was beyond genuine dispute that Robertson did not name Correctional Officer Pace, Lieutenant Hester, Sergeant Smith, or Captain Martin in his grievances and did not otherwise follow the Arkansas Department of Correction's policy and procedures when pursing his grievances, and there is no competent evidence that prison officials thwarted his grievance efforts. See Woodford v. Ngo, 548 U.S. 81, 90 (2006) (explaining that proper exhaustion demands compliance with a prison's critical procedural rules); Townsend v. Murphy, 898 F.3d 781, 784 (8th Cir. 2018) (concluding that the boundaries of proper PLRA exhaustion are determined by the prison's specific administrative requirements, that a prisoner cannot opt out of all administrative remedies even when some are unavailable, and that a prisoner failed to exhaust his administrative remedies by not naming the relevant prison officials in his grievance).

Accordingly, the motion to appoint counsel is denied, and the judgment is affirmed. See 8th Cir R. 47B.

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

No: 19-2693

Lorenzo Robertson

Plaintiff - Appellant

v.

Ozell Pace, Corporal, Varner Unit, ADC; Ernest Hester, III, Lieutenant, Varner Unit, ADC;
Aviva Smith, Sergeant, Varner Unit, ADC; Jonathan Martin, Captain, Varner Unit, ADC; Wendy
Kelley, Director, ADC; James Gibson, Warden

Defendants - Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:18-cv-00123-DPM)

JUDGMENT

Before COLLTON, WOLLMAN, and KELLY, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the
district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district
court in this cause is affirmed in accordance with the opinion of this Court.

April 09, 2020

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

LORENZO ROBERTSON
ADC #132212

PLAINTIFF

v.

No. 5:18-cv-123-DPM

OZELL PACE, Corporal, Varner Unit,
ADC; ERNEST HESTER, III, Lieutenant,
Varner Unit, ADC; AVIVA SMITH, Sergeant,
Varner Unit, ADC; and JONATHAN MARTIN,
Captain, Varner Unit, ADC

DEFENDANTS

ORDER

On *de novo* review, the Court adopts Magistrate Judge Deere's recommendation, *No* 86, and overrules Robertson's objections, *No* 88 & *No* 89. FED. R. CIV. P. 72(b)(3). The Court believes Robertson when he says that sending his grievance to the Director was an honest mistake. The Court understands Robertson's frustration with not having his case decided on the merits. But the law on exhaustion is clear and strict; this Court must follow that law; and Robertson's misunderstanding the grievance procedure isn't a sufficient reason to excuse the exhaustion requirement. *Cf. Ross v. Blake*, 136 S. Ct. 1850 (2016). The motion for summary judgment, *No* 36, is therefore granted. Robertson's remaining claims will be dismissed without prejudice for failure to exhaust. All other pending motions are denied as moot.

So Ordered.

D.P. Marshall Jr.
D.P. Marshall Jr.
United States District Judge

25 July 2019

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

NOTE TO PUBLIC ACCESS USERS There is no charge for viewing opinions.

U.S. District Court

Eastern District of Arkansas

Notice of Electronic Filing

The following transaction was entered on 7/25/2019 at 10:47 AM CDT and filed on 7/25/2019

Case Name: Robertson v. Pace et al

Case Number: 5:18-cv-00123-DPM

Filer:

WARNING: CASE CLOSED on 07/25/2019

Document Number: 91

Docket Text:

JUDGMENT: Robertson's complaint is dismissed without prejudice. Signed by Chief Judge D. P. Marshall Jr. on 7/25/2019. (jak)

5:18-cv-00123-DPM Notice has been electronically mailed to:

Reid Phillip Adkins reid.adkins@arkansasag.gov, agcivil@arkansasag.gov, katie.wilson@arkansasag.gov

5:18-cv-00123-DPM Notice has been delivered by other means to:

Lorenzo Robertson
ADC #132212
PINE BLUFF UNIT
Arkansas Department of Correction
890 Free Line Drive
Pine Bluff, AR 71603-1498

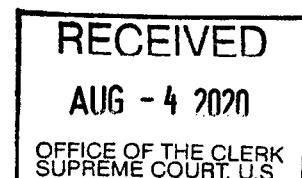
The following document(s) are associated with this transaction:

Document description: Main Document

Original filename: n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1095794525 [Date=7/25/2019] [FileNumber=8324848-0] [45e854df4c8cf756ca140f5ec0d082c765d3a6713f48be5167b955a4dece008203e abd021b219279ffb6c788df36f9f6b01dedfle07a84c42f61b7cdc02190cc]]



**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

**LORENZO ROBERTSON,
ADC #132212**

PLAINTIFF

V. CASE NO. 5:18-CV-123-DPM-BD

OZELL PACE, *et al.*

DEFENDANTS

RECOMMENDED DISPOSITION

I. Procedures for Filing Objections

This Recommended Disposition (Recommendation) has been sent to Judge D.P. Marshall Jr. Any party may file written objections to the Recommendation's findings and conclusion. Objections should be specific and should include the factual or legal basis for the objection.

To be considered, objections must be filed with the Clerk of Court within 14 days of this Recommendation. If no objections are filed Judge Marshall can adopt this Recommendation without independently reviewing the record. Also, if parties do not file objections, they risk waiving the right to appeal questions of fact.

II. Background

Plaintiff Lorenzo Robertson, an inmate in the Arkansas Department of Correction (ADC), filed this lawsuit without the help of a lawyer under 42 U.S.C. § 1983. (Docket entry #2) Mr. Robertson claims that Defendants Pace, Hester, Martin, and Smith (Defendants) failed to conduct routine security checks and property searches at the

ADC's Varner Unit. He alleges that a fellow inmate stabbed him on January 29, 2018, as a direct result of the Defendants' failure. (#2)

Defendants moved for summary judgment, contending that Mr. Robertson had not fully exhausted his administrative remedies at the time he filed this lawsuit. (#36) After reviewing the Defendants' evidence in support of their motion, this Court recommended that the motion be denied because Defendants had not met their burden to show that Mr. Robertson did not exhaust his grievance. (#46); see *Porter v. Sturm*, 781 F.3d 448, 451 (8th Cir. 2015) (citing *Jones v. Bock*, 549 U.S. 199, 211-12, (2007)) (holding that failure to exhaust is an affirmative defense; thus, defendants have the burden of raising and proving the absence of exhaustion).

Defendants objected to the partial recommendation and, in their objection, included supplemental material for Judge Marshall to consider. (#49) In light of the new evidence, Judge Marshall remanded the case for further consideration of the exhaustion issue. (#57)

On May 6, 2019, Mr. Robertson appealed the order denying appointment of counsel (#12), the order staying discovery (#35), and the order denying Mr. Robertson's motion for trial (#56). (#72) The Eighth Circuit has now dismissed Mr. Robertson's appeal for lack of jurisdiction. (#85) Accordingly, the issue of exhaustion is now ripe for review.

III. Discussion

There are four grievance forms in the record relevant to the claims raised in this lawsuit: VU-18-00085 (#38-3, p.1); VU-18-00145 (#38-3, p.4); an unnumbered unit level grievance form submitted to a staff member on February 1, 2018 (Grievance A) (#39, p.3); and an unnumbered unit-level grievance Mr. Robertson dated February 9, 2018 (Grievance B) (#39, p.4).

It is undisputed that Mr. Robertson failed to fully exhaust grievances VU-18-00085 and VU-18-00145.¹ It is also clear he did not fully exhaust Grievance B, given that the section indicating that the grievance was submitted to a problem solver for a resolution at step one is blank.² (#39 at 4)

That leaves Grievance A. As with the other three grievances, Grievance A was not fully exhausted. It was signed by a staff member on February 1, 2018, but it did not proceed far enough into the process to be assigned a number. The question remains as to whether Mr. Robertson should be excused for failing to fully exhaust Grievance A.

In Grievance A, which was written after he was stabbed, Mr. Robertson complained that he had written an inmate request to Warden Jared (not a Defendant) and

¹ Mr. Robertson did not properly appeal VU-18-00085 to the deputy director; and he failed to attach the form to his appeal in VU-18-00145. (#38-2; #38-3)

² Grievance B appears to be identical to VU-18-00085, except that Grievance B is unnumbered and bears a stamp toward the bottom of the sheet: "RETURNED TO INMATE FOR THE FOLLOWING REASON(S): NOT PROCESSED ANSWERED/REJECTED OR A DUPLICATE."

to Classification asking to be moved. In Grievance A, Mr. Robertson stated that he did not feel safe due to multiple stabbings that had occurred in his barracks. (#39, p.3)

A staff member noted on Grievance A that it was received and dated it February 1, 2018. (*Id.*) As with Grievance B, a stamp on the form indicates that the grievance was, “RETURNED TO INMATE FOR THE FOLLOWING REASON(S): NOT PROCESSED ANSWERED/REJECTED OR A DUPLICATE.” (*Id.*) As noted in the previous recommendation, the Defendants offered no explanation in their summary judgment motion, beyond the stamped information, as to why Grievance A was rejected. (#46 at 5).

Because grievances VU-18-00085 and VU-18-00145 were filed *after* Mr. Robertson submitted Grievance A, his complaints in Grievance A could not have been “previously answered/rejected” in—or duplicative of—VU-18-00085 or VU-18-00145. The only remaining option is “not processed.” The Court was left to speculate as to why Grievance A was “not processed.” If ADC officials’ failure to process Grievance A was in violation of ADC policy, they could not successfully argue that Mr. Robertson failed to exhaust his administrative remedies prior to filing this lawsuit. See *Green v. Harmon*, No. 2:07-CV-3-JMM (E.D. Ark. Feb. 8, 2007) (while failure to process a grievance is not actionable, it may defeat an affirmative defense of failure-to-exhaust). As noted in the October 31, 2018 Recommendation, failure to exhaust administrative remedies is an affirmative defense and must be supported by admissible evidence. (#46)

In their objection to the October Recommendation, Defendants explained, for the first time, why Grievance A was not processed: Mr. Robertson sent his copy of Grievance

A to the wrong place. (#49) That is, he sent it to the grievance coordinator's office at ADC's central office rather than depositing it in the grievance box or giving it to a staff member. (*Id.*) Under the ADC's grievance procedure, set out in Administrative Directive (AD) 14-16, an inmate may submit a grievance by only two means—i.e., by depositing it in the grievance box or by giving it to a staff member; otherwise, the grievance will not be "processed." (#38-1 at 8)

Mr. Robertson has presented no evidence to rebut the Defendants' new evidence showing that he erroneously sent Grievance A to the grievance coordinator's office. Likewise, there is no evidence to show that ADC officials interfered with Mr. Robertson's attempt to properly file Grievance A or that they failed to process a Grievance A in contravention of the grievance policy.

Mr. Robertson argues that he should be excused from the exhaustion requirement because Grievance A was never returned to him. (#51) Under the explicit terms of the Grievance Policy, inmates may proceed through the process even if officials fail to return a grievance within the time specified in the policy.

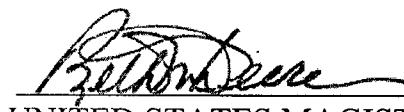
Defendants have met their burden to show that Mr. Robertson did not fully exhaust any of the claims he raises here before filing his complaint. They are entitled to dismissal without prejudice.

IV. Conclusion

The Court recommends that Defendants' motion for summary judgment on the issue of exhaustion (#36) be GRANTED and that this case be DISMISSED, without prejudice.

If the motion is granted, Mr. Robertson's pending motion to compel discovery (#61), motion to change venue (#62), motion to lift the discovery stay (#64), second motion to lift the discovery stay (#66), motion for a direct verdict (#70), motion for a status update (#71), third motion to lift the discovery stay (#76), motion for evidentiary hearing (#78), motion for acknowledgment (#83), and second motion for a direct verdict (#84) should all be DENIED, as moot.

DATED this 1st day of July, 2019.



UNITED STATES MAGISTRATE JUDGE

ITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2693

Lorenzo Robertson

Appellant

v.

Ozell Pace, Corporal, Varner Unit, ADC, et al.

Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:18-cv-00123-DPM)

ORDER

The petition for rehearing by the panel is denied.

May 12, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans