

No. 20-5069

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

FILED  
Oct. 29, 2020  
DEBORAH S. HUNT, Clerk

JAMES HIGHTOWER,

Plaintiff-Appellant,

v.

LADONNA H. THOMPSON, FORMER COMMISSIONER,  
KENTUCKY DEPARTMENT OF CORRECTIONS, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: ROGERS, NALBANDIAN, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

**NOT RECOMMENDED FOR PUBLICATION**

No. 20-5069

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**FILED**

Aug 11, 2020

DEBORAH S. HUNT, Clerk

JAMES HIGHTOWER,

Plaintiff-Appellant,

v.

LADONNA H. THOMPSON, former  
Commissioner, Kentucky Department of  
Corrections, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED  
STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF  
KENTUCKY**ORDER**

Before: ROGERS, NALBANDIAN, and MURPHY, Circuit Judges.

James Hightower, a Kentucky prisoner proceeding pro se, appeals the district court's denial of his Federal Rule of Civil Procedure 60(b) motion for relief from judgment, which challenged the district court's dismissal of his civil rights case, filed pursuant to 42 U.S.C. § 1983.

In 2015, Hightower sued Kentucky Department of Corrections Commissioner LaDonna Thompson, Deputy Commissioner James Erwin, and Director of Classification James Sweat; Kentucky State Penitentiary Warden Randy White, Deputy Warden Joel Dunlap, and Deputy Warden of Programs Skyla Grief; and Eastern Kentucky Correctional Complex Warden Gary Beckstrom and Deputy Warden Keith Helton. The suit arose from Hightower's transfer from the Kentucky State Penitentiary to the Eastern Kentucky Correctional Complex, where he was attacked while he slept. Hightower alleged that Dunlap told him that the transfer was in retaliation for "filing Grievances and writing letters to the administration," which violated the First Amendment. In addition, Hightower alleged that the transfer demonstrated the defendants'

deliberate indifference to his safety because he "had been at the Eastern Kentucky Correctional Complex in 2012 and 2013 [and] his life had been threatened three different times."

The defendants moved to dismiss the suit, arguing that Hightower failed to allege that any of the named defendants were personally involved in unconstitutional conduct, the defendants were immune from suit to the extent that they were sued in their official capacities, and Hightower had failed to exhaust his administrative remedies. The district court construed the defendants' motion as a motion for summary judgment. It granted the motion, finding that Hightower had failed to exhaust his administrative remedies and failed to allege that the named defendants were personally involved in unconstitutional conduct. The district court denied Hightower's motions to supplement and amend his complaint, finding that amendment would be futile in light of Hightower's failure to exhaust his administrative remedies and the fact that the proposed amendment would not relate back to the filing of the original complaint. We affirmed the district court's judgment, holding that Hightower had failed to exhaust his administrative remedies and that the district court properly found that allowing Hightower to amend his complaint would have been futile. *Hightower v. Thompson*, No. 16-6737, slip op. at 3 (6th Cir. July 7, 2017) (order).

On December 30, 2019, Hightower filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6), arguing that the district court abused its discretion by dismissing his complaint for failing to exhaust his administrative remedies. He alleged that he first learned from the defendants' reply to his § 1983 complaint that his transfer had been ordered during a September 11, 2014, meeting of the classification committee. He argued that he could not administratively appeal the transfer decision because he did not know about it. Citing *Ross v. Blake*, 136 S. Ct. 1850 (2016), and *Goebert v. Lee County*, 510 F.3d 1312 (11th Cir. 2007), he argued that he was not required to exhaust his administrative remedies because, by failing to inform him of the transfer decision, prison officials prevented him from filing a grievance.

The district court denied the Rule 60(b)(6) motion, finding that Hightower's reliance upon *Ross* fell under Rule 60(b)(1) and that a motion filed under that section had to be filed

within one year of the entry of judgment. The district court alternatively found that Hightower was not entitled to relief under Rule 60(b)(6), because his "motion [did] not address the dismissal of his complaint for failure to name a responsible defendant" and because *Ross* was decided four months before the district court dismissed Hightower's complaint.

On appeal, Hightower argues that the district court abused its discretion by denying his Rule 60(b) motion because various post-judgment pleadings—a petition for reconsideration and his appeal to this court and the United States Supreme Court—tolled the period for filing a motion under Rule 60(b)(1). He contends that his motion falls under Rule 60(b)(6) in any event, because he is not contending that he misapprehended a point of law. He states that he raised the arguments presented in his Rule 60(b) motion previously and that the district court erred in rejecting them.

We review a district court's denial of a Rule 60(b) motion for an abuse of discretion. *Coyer v. HSBC Mortg. Servs., Inc.*, 701 F.3d 1104, 1110 (6th Cir. 2012) (per curiam). "Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment." *Id.* (quoting *Thompson v. Bell*, 580 F.3d 423, 442 (6th Cir. 2009)).

A court may grant relief under Federal Rule of Civil Procedure 60(b)(1) if the movant shows that the court's judgment was based on "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). However, a motion filed under that subsection must be filed within one year of the entry of judgment. Fed. R. Civ. P. 60(c)(1). A motion filed under Rule 60(b)(6) is not subject to the one-year limitations period but "must be made within a reasonable time." *Id.* Rule 60(b)(6) allows a court to grant relief "for any *other* reason that justifies relief." Fed. R. Civ. P. 60(b)(6) (emphasis added). However, relief under that subsection should be granted only in "unusual and extreme situations where principles of equity *mandate* relief." *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990).

The district court did not abuse its discretion in finding that relief was not available under Rule 60(b)(1), because Hightower did not file his motion for relief from judgment within one year of the issuance of the district court's final judgment. Fed. R. Civ. P. 60(c)(1). Hightower

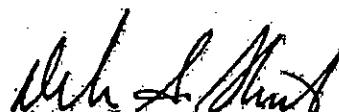
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cites no authority to support his contention that the one-year limitations period may be tolled during the pendency of an appeal or other motion. Hightower's argument was premised upon his contention that the district court committed a "mistake"—by issuing a decision that conflicted with *Ross and Goebert*. His claim therefore fell under Rule 60(b)(1). Even if Hightower's claim could be examined under Rule 60(b)(6), relief was not warranted. As the district court noted, the cases that Hightower cited in support of his arguments were available and could have been cited before the district court entered its final judgment. The district court did not abuse its discretion in concluding that Hightower failed to identify exceptional circumstances that would warrant granting relief under Rule 60(b)(6). *See Ollie*, 910 F.2d at 365.

Accordingly, we **AFFIRM** the district court's order.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
NORTHERN DIVISION at ASHLAND

Eastern District of Kentucky

FILED

JAN 06 2020

AT ASHLAND  
ROBERT R. CARR  
CLERK U.S. DISTRICT COURT

JAMES HIGHTOWER,

Plaintiff,

v.

LADONNA THOMPSON, et al.,

Defendants.

Civil No. 0:15-93-HRW

ORDER

\*\*\* \* \*\*\* \*\*\* - \*\*\*

In September 2016, this Court dismissed the complaint filed by plaintiff James Hightower because he did not properly exhaust his administrative remedies regarding a prison classification decision and because he failed to establish that the defendants named in his complaint were personally involved in that decision. [D. E. No. 30] The Sixth Circuit affirmed that dismissal in July 2017 for the same reasons articulated by this Court. [D. E. No. 44]

More than three years after the dismissal of his complaint, Hightower now moves to re-open this case pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. Hightower refers to the Supreme Court's decision in *Ross v. Blake*, 136 S. Ct. 1850, 1859-60 (2016), and contends that the grievance procedure was "unavailable" to him in 2015 because he was unaware at that time that a Classification Committee made the decision to transfer him. [D. E. No. 49 at 10-12]

Hightower has also filed a motion requesting a temporary restraining order preventing his transfer away from the Kentucky State Penitentiary where he is currently housed. The motion is not directed towards any identified official. [D. E. No. 50] Hightower also moves for *pauper* status. [D. E. No. 51]

The Court will deny Hightower's motion to vacate on both procedural and substantive grounds. Rule 60(b)(6) permits a district court to vacate a judgment for "any *other* reason that justifies relief," (emphasis added), meaning only where the first five grounds for relief don't apply under the circumstances presented.

*Cummings v. Greater Cleveland Regional Transit Authority*, 865 F.3d 844, 847 (6th Cir. 2017). But Hightower relies on *Ross*, a 2016 decision issued four months before this Court dismissed his complaint and well over a year before the Sixth Circuit affirmed that dismissal. As the Sixth Circuit explained in *Cummings*, a party's failure to comprehend the consequences of existing law at the time presents an issue only under Rule 60(b)(1), not under other subdivisions. *Id.* And a motion seeking relief under Rule 60(b)(1) must be filed within one year after entry of judgment. Fed. R. Civ. P. 60(c)(1). Hightower's present motion is filed more than three years after entry of the judgment and is therefore untimely.

In any event, Hightower's motion fails to establish viable grounds for relief. First, Hightower's motion does not address the dismissal of his complaint for failure to name a responsible defendant. Second, Hightower could have made an argument



under *Ross* before the Court's dismissal of his complaint and in his motion for relief under Rule 59(e), but he failed to do so. Because "Rule 60(b) does not allow a defeated litigant a second chance to convince the court to rule in his or her favor by presenting new explanations, legal theories, or proof," *Jinks v. Allied Signal, Inc.*, 250 F. 3d 381, 385 (6th Cir. 2001), Hightower's motion should be denied. And most importantly, both before and after *Ross* an inmate's lack of awareness of the grievance procedure does not, without more, render it unavailable. Cf. *Davis v. Hernandez*, 798 F.3d 290, 295 (5th Cir. 2015) ("Courts may not deem grievance procedures unavailable merely because an inmate was ignorant of them, so long as the inmate had a fair, reasonable opportunity to apprise himself of the procedures."); *Beals v. Jay*, 730 F. App'x 633, 637 (10th Cir. 2018); *Allen v. Lutz*, C.A. No. 9:18-2542-HMH, 2019 WL 117314, at \*3 (D.S.C. Jan. 7, 2019); *Adams v. Southwest Va. Reg'l Jail*, No. 7: 12cv462, 2014 WL 3828392, at \*3 (W.D. Va. Aug. 4, 2014)) ("[A]ny contention that plaintiff's failure-to-exhaust should be excused merely on the basis of his ignorance about the process fails.") (collecting cases), *aff'd sub nom. Adams v. Ofought*, 592 F. App'x 225 (4th Cir. 2015). Hightower's complaint and numerous supplemental filings, as well as the grievances and correspondence he attached to them, see [D. E. Nos. 1, 12, 20, 21, 22, 24, 25, 26] demonstrate years-long back and forth between himself and prison officials regarding his placement, demonstrating that he had ample opportunity to learn the proper means to grieve

transfer and placement decisions. For all of the foregoing reasons, Hightower's Rule 60(b) motion will be denied, and his ancillary motions will be denied as moot.

Accordingly, the Court **ORDERS** as follows:

1. The Court **DENIES** Hightower's motion to re-open the case pursuant to Rule 60(b) [D. E. No. 49].
2. The Court **DENIES AS MOOT** Hightower's motions for a temporary restraining order [D. E. No. 50] and to proceed *in forma pauperis* [D. E. No. 51].

This the 16 day of December, 2019.



Signed By:  
Henry R. Wilhoit, Jr.  
United States District Judge