

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

April 13, 2021

Christopher M. Wolpert
Clerk of Court

HAZHAR A. SAYED,

Plaintiff - Appellant,

v.

LIEUTENANT VIRGINIA PAGE,
Sterling Correctional Facility; CAPTAIN
MICHAEL TIDWELL, Sterling
Correctional Facility; SERGEANT
HRADECKY, Sterling Correctional
Facility; JOHN DOE, 1, C/O Sterling
Correctional Facility; JOHN DOE, 2, C/O
Sterling Correctional Facility,

Defendants - Appellees.

No. 20-1138
(D.C. No. 1:16-CV-02712-WJM-NRN)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **BALDOCK** and **EID**, Circuit Judges.

Hazhar A. Sayed is a pro se Colorado inmate who appeals the district court's grant of summary judgment for failure to exhaust his First and Eighth Amendment claims.

Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G).* The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

PLAINTIFF'S
EXHIBIT

A

This action arose from an altercation between Sayed and several staff members of Colorado's Sterling Correctional Facility (S.C.F.). According to the amended complaint, Sayed had previously lodged a grievance against Lt. Virginia Page.¹ As recounted by Sayed, on May 2, 2015, Capt. Michael Tidwell summoned Sayed to S.C.F.'s control center, ostensibly to discuss the grievance, but when he arrived, Tidwell struck him in the eye and accused him of being a snitch. Sgt. Robert Hradecky then tackled him and both officers and others beat him while Page watched but did not intervene. Sayed alleged that during the fight, Tidwell willfully and intentionally broke his little finger, declaring, "We're even now." R., Vol. 1 at 37 (internal quotation marks omitted). Tidwell later announced over the prison intercom that Sayed was a federal informant, he was serving a sentence for sexual assault, and he had a fake mittimus. He averred that after making the announcement, Tidwell turned to him and said, "See how we deal with snitches in S.C.F." *Id.* (internal quotation marks omitted). Much of the physical altercation was captured on video, but there is no audio either of the incident or the alleged intercom announcement.²

Sayed later brought this suit, alleging defendants violated his First and Eighth Amendment rights by assaulting him in retaliation for filing the grievance against

¹ Defendants inform us that Lt. Virginia Page was incorrectly identified as Lt. Page Virginia. We have corrected our caption and refer to her accordingly.

² Sayed was convicted on two counts of assault for his role in the melee.

Page. Defendants moved to dismiss under Fed. R. Civ. P. 12(b)(6) based on qualified immunity, but the district court denied the motion, and a panel of this court affirmed, *see Sayed v. Virginia*, No. 17-1445 (10th Cir. July 31, 2018). Upon returning to the district court, defendants moved for summary judgment, arguing, among other things, that Sayed failed to exhaust his administrative remedies. A magistrate judge agreed and recommended granting the motion for lack of exhaustion.³

Over Sayed's objections, the district court adopted the magistrate judge's recommendation and granted summary judgment to defendants on exhaustion grounds. The court determined that Sayed filed grievances on May 8, 2015, and October 18, 2016, but these grievances failed to properly exhaust his claims. The court reasoned that the May 8 grievance sought different relief than that sought in Sayed's amended complaint—*viz.*, the May 8 grievance requested physical therapy for his hand and transfer out of administrative segregation back into the general prison population, while the amended complaint sought damages and a declaratory judgment that defendants violated his First and Eighth Amendment rights. As for the October 18 grievance, the court determined that Sayed failed to specifically object to the magistrate judge's determination that the grievance was untimely. Accordingly, the court reviewed only for clear error and found none.

³ The magistrate judge also determined that Sayed's Eighth Amendment claim was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), and that the video of the incident did not support Sayed's version of events to create a fact issue. The district court declined to adopt those portions of the magistrate judge's report and recommendation, and those issues are not before us.

Sayed moved the district court to alter or amend the judgment, but before the court ruled on the motion, he filed his notice of appeal. The district court subsequently denied the motion, but Sayed did not amend his notice of appeal. Thus, that ruling is not before us. *See Fed. R. App. P. 4(a)(4)(B)(ii).*

II

We review *de novo* the district court's grant of summary judgment for failure to exhaust. *Tuckel v. Grover*, 660 F.3d 1249, 1251 (10th Cir. 2011). "Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Id.* (internal quotation marks omitted).

The Prison Litigation Reform Act (PLRA) states, "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). This "language is mandatory." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) (internal quotation marks omitted). "Even when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Moreover, the PLRA requires "proper exhaustion." *Woodford v. Ngo*, 548 U.S. 81, 93 (2006). "The level of detail necessary in a grievance to comply with the [prison's] grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not

the PLRA, that define the boundaries of proper exhaustion.” *Jones v. Bock*, 549 U.S. 199, 218 (2007).

On appeal, Sayed does not discuss his October 18 grievance, so any issue regarding that grievance is waived. *See Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020) (“Issues not raised in the opening brief are deemed abandoned or waived.” (internal quotation marks omitted)).

Regarding the May 8 grievance, Sayed offers two arguments, both of which are unavailing. First, he contends it was unnecessary to seek the same relief in his grievance and in his amended complaint because the grievance process permits, but does not require, inmates to specify the relief they seek. But the governing regulatory provision, Colorado Department of Corrections (CDOC) Administrative Regulation (Admin. Reg.) 850-04 § IV.D.6, expressly states that a grievance “shall address only one problem or complaint *and include a description of the relief requested.*” R., Vol. 1 at 285 (emphasis added). This provision plainly requires an inmate to include in the grievance a description of the relief requested. Indeed, the next section of the regulation, § IV.D.7, states that if an inmate fails to request a remedy, the remedy is waived: “A substantive issue or *remedy may not be added at a later step* if it has not been contained in each previous step of that particular grievance. . . . Failure to renew [the] requested relief in subsequent steps *shall be deemed a waiver* of [the] requested remedy.” R., Vol. 1 at 285 (emphasis added). Moreover, § IV.D.9.b, which establishes how grievances must be submitted for review, requires that a “grievance shall clearly state the basis for the grievance and

the relief requested in the space provided on the form.” R., Vol. 1 at 285 (emphasis added).

These provisions clearly state that an inmate waives any remedy he does not request. The implication for Sayed is that if his May 8 grievance failed to include a request for damages and declaratory relief, he waived those remedies and failed to exhaust his claims. That is exactly what happened.

The May 8 grievance described Sayed’s version of the altercation, alleging that Tidwell kicked and struck him. Sayed averred that he sustained contusions, abrasions, and lacerations, and he asserted the assault violated his First, Eighth, and Fourteenth Amendment rights. He then identified the specific relief he was seeking:

Remedy, 1) I am asking for immediate need for physical therapy or other follow-up medical treatment to be evaluated by a medical practitioner with expertise in the treatment and restoration and function of broken hand and a rib; and 2) Immediately release Mr. Sayed from Punitive Segregation and place him in general population, with restoration of all rights and privileges.

Id. at 261. Nowhere did Sayed indicate that he sought damages or declaratory relief. Consequently, he waived those remedies and failed to properly exhaust his claims.

Attempting to avoid this conclusion, Sayed points to another provision of S.C.F.’s grievance process, which he says makes it optional for an inmate to request a remedy in his grievance. Specifically, he cites CDOC Admin. Reg. 850-04 § III.J, which defines “Remedy” as a “response, action, or redress requested by the offender grievant . . . which *may* include modification of facility policy, restoration of or restitution for property, or assurance that abuse will not recur.” R., Vol. 1 at 282

(emphasis added). Sayed contends the word “may” in this definition is permissive and indicates that an inmate can, but need not, specify a particular remedy in his grievance.

We disagree. The definition simply describes the scope of relief available to an inmate, noting three examples of the type of relief that “may” be granted. It does not, however, give an inmate the option of requesting a remedy in his grievance.

Sayed also relies on *Spruill v. Gillis*, 372 F.3d 218, 233 (3d Cir. 2004), in which the Third Circuit held that an inmate was not required to include a request for damages in his grievance because the prison’s grievance process did not mandate the inclusion of a damages request in the grievance. *Spruill* is not controlling, however, because CDOC’s administrative process governs this case. And in any event, the Third Circuit has since recognized that the relevant prison grievance process at issue in *Spruill* was amended to require that damages be sought in the grievance, and, therefore, an inmate who failed to include a request for damages in his grievance (as Sayed did) defaulted his claim for money damages. See *Wright v. Sauers*, 729 F. App’x 225, 227 (3d Cir. 2018) (unpublished).

Sayed’s second argument concerning the May 8 grievance also is unavailing. He contends it would have been futile to request damages in his grievance because the governing prison regulations expressly exclude damages as an available remedy. See R., Vol. 1 at 282 (CDOC Admin. Reg. 850-04 § III.J) (“[D]amages for pain and suffering, and exemplary or punitive damages[,] are not remedies available to offenders.”). Nevertheless, “Congress has mandated exhaustion clearly enough,

regardless of the relief offered through administrative procedures.” *Booth v. Churner*, 532 U.S. 731, 741 (2001). There is no futility exception to the exhaustion requirement, even if a prison “has no power to decree relief,” *id.* at 741 n.6 (ellipsis and internal quotation marks omitted), and even if money damages are not available through the prison’s grievance process, *see Porter*, 534 U.S. at 524. Sayed failed to exhaust his claims, and the district court was correct to dismiss them.

III

The judgment of the district court is affirmed. Sayed’s motion to proceed without prepayment of costs and fees is granted. The Clerk’s Office is directed to file the Reply Brief, which was considered in determining this appeal.

Entered for the Court

Allison H. Eid
Circuit Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez**

Civil Action No. 16-cv-2712-WJM-NRN

HAZHAR A. SAYED,

Plaintiff,

v.

LT. PAGE VIRGINIA, Sterling Corr. Facility,
CAPT. MICHAEL TIDWELL, Sterling Corr. Facility,
SGT. HRADECKY, Sterling Corr. Facility, and
UNKNOWN JOHN DOE 1, C/O Sterling Corr. Facility, and
UNKNOWN JOHN DOE 2, Sterling Corr. Facility,

Defendants.

**ORDER ADOPTING IN PART DECEMBER 3, 2019 RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE AND GRANTING MOTION
FOR SUMMARY JUDGMENT**

On November 3, 2016, Plaintiff Hazhar Sayed ("Sayed"), proceeding *pro se*, brought this action against Defendants Lieutenant (ret.) Virginia Page, Captain Michael Tidwell, and Sergeant Robert Hradecky (collectively, "Defendants") alleging deprivations of his First and Eighth Amendment rights. (ECF Nos. 1 & 11.)

This matter is now before the Court on the December 3, 2019 Recommendation of United States Magistrate Judge N. Reid Neureiter ("Recommendation") (ECF No. 180) that Defendants' Motion for Summary Judgment ("Motion") (ECF No. 126) be granted. The Recommendation is incorporated herein by reference. See 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b).

For the reasons explained below, Sayed's Objection (ECF No. 181) is overruled,

PLAINTIFF'S
EXHIBIT
B

the Recommendation is adopted in part, and summary judgment is granted in favor of Defendants.

I. BACKGROUND

A. Factual History

The followings facts are undisputed unless attributed to a party or otherwise noted.¹

At the time of the incident at the foundation of this lawsuit, Sayed was an inmate at Sterling Correctional Facility ("SCF"). (ECF No. 180 at 2.) On April 17, 2015, Sayed filed a grievance against Defendant Lieutenant Virginia Page. (ECF No. 170-1.)

On May 2, 2015, Defendant Captain Michael Tidwell ordered Sayed to the vestibule area of his living pod at SCF to discuss the grievance. (ECF No. 180 at 2.) Captain Tidwell, Lieutenant Page, and Sayed all walked down the hallway. (ECF No. 126-1 at 29.) Eventually, there was an altercation between Sayed and Captain Tidwell. (ECF No. 180 at 2.) Lieutenant Page, Defendant Sergeant Robert Hradecky, and others responded to the altercation. (*Id.*) Captain Tidwell and Sayed were both injured. (*Id.*) Sayed claims he suffered injury to his right eye and a broken pinky finger, which later caused permanent injury to his right hand. (ECF No. 163 at 3.) Sayed also claims that Captain Tidwell announced over the SCF speaker system that Sayed was a sex offender and federal informant. (*Id.* at 4.) On May 4, 2015, Sayed was transferred from SCF to the Colorado State Penitentiary. (ECF No. 180 at 2.) A jury later convicted Sayed of third degree assault for the altercation with Captain Tidwell. (ECF

¹ All ECF page citations are to the page number in the CM/ECF header, which does not always match the document's internal pagination, particularly in exhibits.

No. 126-9 at 3.)

Sayed filed two sets of grievances related to the May 2 incident, first a set of grievances filed beginning on May 8, 2015 ("May 8 Grievances") (ECF No. 126-6 at 1–4), and then another set of grievances filed beginning on October 18, 2016 ("October 18 Grievances") (*id.* at 5–8).

1. May 8 Grievances

On May 8, 2015, Sayed filed a Step 1 grievance claiming that Captain Tidwell and other correctional officers assaulted him even though he was not violating any prison rules or acting disruptively, and thereby violated his First, Eighth, and Fourteenth Amendment rights. (*Id.* at 1.) As a remedy, Sayed sought physical therapy or other medical treatment, and immediate release from segregation and a return to the general population. (*Id.*) A grievance responder found that Sayed's request for medical treatment had already been granted. (*Id.*) He denied Sayed's request for a change in housing status because placement was in accordance with prison policy and Sayed's offender classification. (*Id.*)

Sayed then filed a Step 2 grievance reiterating that Captain Tidwell broke his hand and announced that Sayed was a snitch. (*Id.* at 2.) Sayed again requested release from segregation. (*Id.*) His grievance was again denied because the responding grievance coordinator "reviewed the video of the incident" and found that Sayed "violently, and without provocation, attacked a staff." (*Id.*)

Sayed pursued a Step 3 grievance, reiterating the same constitutional violation, and requesting the same remedy. (*Id.* at 3.) On July 17, 2015, Grievance Officer

Anthony DeCesaro responded, stating that the subject of Sayed's grievance—classification and placement in segregation—is not an issue which the grievance process is designed to address." (*Id.* at 4.) DeCesaro concluded that "[b]ecause this [grievance process] is not a valid method for review of your issue, you have not exhausted your administrative remedies. This is the final administrative action in this matter." (*Id.*)

Indeed, Department of Corrections ("DOC") Administrative Regulation 850-04 ("AR 850-04"), which sets forth the grievance procedure used by Sayed, states that the procedure may not be used to seek review of inmate classification. (ECF No. 126-10 at 4.) Instead, DOC maintains that Administrative Regulation 600-01, which sets forth the policy for offender classifications, governs challenges to an offender's classification. (ECF No. 126 at 26; see ECF No. 170-3.)

2. October 18 Grievances

On October 18, 2016, Sayed filed another Step 1 grievance claiming that he was assaulted and intentionally injured by Captain Tidwell. (ECF No. 126-6 at 5.) He also complained that he had requested physical therapy, but had not received any. (*Id.*) As a remedy, he requested that he "never be subject to these conditions again" and that he receive physical therapy as directed by his doctor on July 30, 2015. (*Id.*)

AR 850-04 requires that a Step 1 grievance "must be filed no later than 30 calendar days from the date the offender knew, or should have known, of the facts given rise to the grievance." (ECF No. 126-10 at 8.) Thus, a grievance responder denied Sayed's request as untimely because both the May 2015 incident in which Sayed's hand was broken, and the denial of physical therapy in July 2015, were outside the 30-

day time period in which to submit a grievance. (ECF No. 126-6 at 5.)

At Step 2, Sayed repeated his request to never be subject to the same conditions again and for physical therapy. (*Id.* at 6.) Sayed also raised concerns about co-payments for medical services. (*Id.*) A grievance responder advised Sayed to submit a kite for medical care, and denied the grievance as untimely. (*Id.* at 6.)

At Step 3, Sayed once again requested medical treatment. (*Id.* at 7.) On January 4, 2017, DeCesaro denied his grievance because the “action occurred 7/20/15 and you did not file the Step 1 until 10/18/16.” (*Id.* at 8.) Accordingly, DeCesaro determined that Sayed “failed to follow the grievance procedure in this matter” and had “not exhausted [his] administrative remedies.” (*Id.*)

B. Procedural History

On November 3, 2016, Sayed filed this lawsuit *pro se* alleging deprivation of his First and Eighth Amendment rights by SCF correctional officers. Defendants moved to dismiss. (ECF No. 37.) U.S. Magistrate Judge Michael J. Watanabe entered a Recommendation recommending that Defendants’ motion be granted. (ECF No. 55.) Sayed objected, and the Court sustained that objection in part, finding that Defendants were not entitled to qualified immunity, that Sayed had plausibly pled facts to state a claim, and that Sayed’s conviction for assaulting Captain Tidwell was not a bar to Sayed’s lawsuit under *Heck v. Humphrey*, 512 U.S. 477 (1994). (ECF No. 61.) The Tenth Circuit affirmed this Court’s denial of qualified immunity, and dismissed the remainder of the appeal for lack of jurisdiction. (ECF No. 94.)

On August 15, 2019, Defendants filed the instant Motion arguing for summary

judgment on three separate bases: (1) Sayed fails to establish a genuine issue of material fact particularly in light of the video evidence; (2) Sayed's claim are barred by *Heck* because Sayed now states that he did not assault Captain Tidwell; and (3) Sayed failed to exhaust his administrative remedies. (ECF No. 126.) Judge Neureiter agreed on all three bases. (ECF No. 180.) On administrative exhaustion, Judge Neureiter found that Sayed's May 8 Grievances raised non-grievable issues and the October 18 Grievances were untimely. (*Id.* at 7.) He thus concluded that Sayed had failed to comply with the grievance procedures and failed to exhaust his administrative remedies. (*Id.* at 7–8.) Sayed timely objected to the Recommendation. (ECF No. 181.)

II. LEGAL STANDARD

A. Rule 72(b) Standard

When a magistrate judge issues a recommendation on a dispositive matter, Federal Rule of Civil Procedure 72(b)(3) requires that the district judge “determine de novo any part of the magistrate judge’s [recommendation] that has been properly objected to.” An objection to a recommendation is properly made if it is both timely and specific. *United States v. 2121 East 30th St.*, 73 F.3d 1057, 1059–60 (10th Cir. 1996). An objection is sufficiently specific if it “enables the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties’ dispute.” *Id.* at 1059. In conducting its review, “[t]he district judge may accept, reject, or modify the [recommendation]; receive further evidence; or return the matter to the magistrate judge with instructions.” Fed. R. Civ. P. 72(b)(3).

In considering the Recommendation, the Court is mindful of Sayed's *pro se* status, and accordingly reads his pleadings and filings liberally. *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972); *Trackwell v. United States Gov't*, 472 F.3d 1242, 1243 (10th Cir. 2007). The Court, however, cannot act as advocate for Sayed, who still must comply with the fundamental requirements of the Federal Rules of Civil Procedure. See *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991); see also *Ledbetter v. City of Topeka, Kan.*, 318 F.3d 1183, 1188 (10th Cir. 2003).

B. Summary Judgment Standard

Summary judgment is warranted under Federal Rule of Civil Procedure 56 "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." Fed. R. Civ. P. 56(a); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986). Whether there is a genuine dispute as to a material fact depends upon whether the evidence presents a sufficient disagreement to require submission to the factfinder or, conversely, is so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 251–52; *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132 (10th Cir. 2000). A fact is "material" if, under the relevant substantive law, it is essential to proper disposition of the claim. *Wright v. Abbott Labs., Inc.*, 259 F.3d 1226, 1231–32 (10th Cir. 2001). An issue is "genuine" if the evidence is such that it might lead a reasonable trier of fact to return a verdict for the nonmoving party. *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997).

In analyzing a motion for summary judgment, a court must view the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving

party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In addition, the Court must resolve factual ambiguities against the moving party, thus favoring the right to a trial. See *Houston v. Nat'l Gen. Ins. Co.*, 817 F.2d 83, 85 (10th Cir. 1987).

III. ANALYSIS

The Court need only address the administrative exhaustion issue, which is dispositive of Sayed's claim.

Defendants argue that Sayed failed to satisfactorily exhaust all available administrative remedies. (ECF No. 126 at 23–26.) Judge Neureiter agreed, and recommended granting the Motion. (ECF No. 180 at 8.)

Sayed did not object to the Recommendation's conclusion that the October 18 Grievances were untimely, and thus were properly denied on procedural grounds. (See ECF No. 180 at 7.) Because Sayed did not specifically object to Judge Neureiter's ruling with respect to the October 18 Grievances, the Court reviews that determination for clear error, and finds none. See *Bertolo v. Benezee*, 2013 WL 1189508, at *1 (D. Colo. Mar. 22, 2013) (“In the absence of a timely and specific objection, ‘the district court may review a magistrate . . . [judge’s] report under any standard it deems appropriate’”) (quoting *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991), *aff’d*, 601 F. App’x 636 (10th Cir. 2015)).

Sayed did, however, timely and specifically object to that portion of the Recommendation related to the May 8 Grievances, and thus the Court reviews *de novo*

whether Sayed failed to exhaust his administrative remedies with respect to the May 8 Grievances. (ECF No. 181 at 6–9.) Sayed argues that the May 8 Grievances complied with the grievance procedure, and that he properly exhausted his administrative remedies. (*Id.* at 7–9.) Specifically, he argues that “an inmate can and does exhaust his administrative remedies even if the requested relief is unavailable.” (*Id.* at 8.)

The PLRA states that “[n]o 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). “[E]xhaustion is mandatory under the PLRA and . . . unexhausted claims cannot be brought in court.” *Jones v. Bock*, 549 U.S. 199, 211 (2007); see *Woodford v. Ngo*, 548 U.S. 81, 85 (2006) (describing exhaustion as mandatory); *Booth v. Churner*, 532 U.S. 731, 738 (“The available remedy must be exhausted before a complaint under § 1983 may be entertained.” (internal quotation marks omitted and alteration incorporated)). A “court claim that was not alleged at the administrative level could not have been exhausted there.” *Williams v. Wilkinson*, 659 F. App’x 512, 515 (10th Cir. 2016). Under the PLRA, failure to exhaust is an affirmative defense, and the burden of proof lies with the defendant. *Jones*, 549 U.S. at 216; *Roberts v. Barreras*, 484 F.3d 1236, 1241 (10th Cir. 2007).

The PLRA requires administrative exhaustion in part to provide the agency “an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court.” *Woodford*, 548 U.S. at 89. For example, the

Supreme Court has repeatedly stated that when a prisoner brings a constitutional claim seeking monetary damages, the prisoner must first ask for monetary damages and exhaust administrative remedies through the grievance procedure, even when monetary damages are not available in the grievance process. *Booth*, 532 U.S. at 740–41; *Woodford*, 548 U.S. at 85. This directly suggests that there must be some relationship between the administrative remedies sought in the grievance process and the prayer for relief.

DOC denied Sayed's Step 3 grievance, and expressly informed Sayed in that denial that he had not exhausted his administrative remedies because he had not pursued a "valid method of review" of the classification issue he raised. (ECF No. 126-6 at 4.) Defendants contend that Sayed thus failed to exhaust his administrative remedies because he had not pursued a valid method of review. (ECF No. 126 at 25; ECF No. 188 at 7.)

The unavailability of relief through the grievance process is not why Sayed failed to exhaust his administrative remedies. Indeed, in *Booth*, the Supreme Court held that a prisoner must complete the grievance process, regardless of the relief offered through administrative procedures. 532 U.S. at 741. "If the unavailability of the requested remedy was sufficient to render a grievance unexhausted, the rule of *Booth* and *Woodford* would be irrelevant—it would be impossible to exhaust a grievance where the requested relief was not available." *Gandy v. Raemisch*, 2014 WL 1292799, at *9 (D. Colo. Mar. 31, 2014). For example, had Sayed requested and been denied monetary damages—another remedy unavailable under the grievance procedure—in his May 8

Grievances, he would have exhausted his administrative remedies with respect to such monetary damages, and then could have brought a lawsuit to recover monetary damages. See *Booth*, 532 U.S. at 741.

Rather, Sayed failed to exhaust his administrative remedies because he seeks remedies in this lawsuit that he did not seek in his May 8 Grievances. Defendants hint at this issue—failure to exhaust forms of relief available to Sayed and relevant to the instant litigation—without fully understanding its import, in part because Defendants so heavily rely on their erroneous interpretation of Sayed’s argument as raising the same question as in *Booth*. (See ECF No. 188 at 7–8.) In the instant action, Sayed seeks compensatory relief, a declaration that Defendants violated the First and Eighth Amendments, nominal and punitive damages, and any other relief available. (ECF No. 11 at 11.) Sayed’s May 8 Grievances did not seek any remedy for placement in segregation; rather, the remedy sought was *release from segregation*. These are plainly not the same, and did not give Defendants an opportunity to correct its alleged mistakes. See *Woodford*, 548 U.S. at 89. Moreover, Sayed does not argue that his placement in segregation was a continuation of the First Amendment retaliation against him, or that his grievance should be read as a request that the facility stop retaliating against him.

Because Sayed failed to pursue the remedies requested in his lawsuit at the administrative level, the Court finds that he failed to properly exhaust his administrative remedies. See *Williams*, 659 F. App’x at 515. Despite the availability of administrative remedies that would have provided Sayed the relief he seeks in his lawsuit (see ECF

No. 126-10 at 2), Sayed did not seek a change in policy, assurance that the alleged abuse would not recur, payment of restitution, or restoration of his property (see ECF No. 126-6 at 1–3). In addition, Sayed never sought monetary damages in the May 8 Grievances, but now seeks such relief in his complaint.

Gandy is distinguishable and instructive. 2014 WL 1292799. In *Gandy*, the court found that a plaintiff who sought remedies expressly prohibited by the grievance procedure had indeed exhausted his administrative remedies, despite the unavailability of the remedies sought. *Id.* at *9. Like Sayed, the *Gandy* plaintiff claimed that the prison changed his conditions of confinement in retaliation for exercising his First Amendment rights. See *id.* at *8. However, the *Gandy* plaintiff filed a grievance for transferring him between facilities, and, as a remedy, asked for written acknowledgment of the retaliation and reasonable compensation. *Id.* He also pursued monetary relief in his lawsuit. *Gandy v. Barber*, Civ. No. 12-cv-3331 (D. Colo. filed March 4, 2013) ECF No. 9 at 9. The Court thus found that the plaintiff had adequately exhausted his administrative remedies. *Gandy*, 2014 WL 1292799, at *10. Sayed, by contrast, did not seek remedies in the May 8 Grievances that he now seeks in his lawsuit.

Absent a connection between the remedies sought in the lawsuit and the remedies sought in the May 8 Grievances, the Court finds that Sayed failed to exhaust his administrative remedies. Accordingly, the Court adopts that part of the Recommendation that recommends granting the Motion for failure to exhaust administrative remedies. The Court need not consider the other bases for summary judgment discussed in the Recommendation.

IV. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. The Magistrate Judge's December 3, 2019 Recommendation (ECF No. 180) is ADOPTED IN PART, as modified;
2. Plaintiff's Objection (ECF No. 181) is OVERRULED;
3. Defendants' Motion for Summary Judgment (ECF No. 126) is GRANTED;
4. Plaintiff's Objection to the Minute Order Granting Motion to Withdraw as Counsel For Plaintiff (ECF No. 153) is OVERRULED as moot;
5. Plaintiff's Motion to Exclude Evidence of Certain Grievances (ECF No. 164), Plaintiff's Motion in Limine to Exclude Evidence of Prior Conviction and Length of Sentence (ECF No. 165), Plaintiff's Motion to Exclude Evidence of Plaintiff's Other Lawsuits (ECF No. 172), and Plaintiff's Motion to Supplement the Record with a Complete Video-tape (ECF No. 183) are DENIED AS MOOT;
6. The Final Trial Preparation Conference and Jury Trial in this matter are VACATED;
7. The Clerk of the Court shall enter judgment in favor of Defendants and against Plaintiff, and terminate the case; and
8. The parties shall bear their own costs.

Dated this 9th day of March, 2020.

BY THE COURT:



William J. Martinez
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

April 27, 2021

Christopher M. Wolpert
Clerk of Court

HAZHAR A. SAYED,

Plaintiff - Appellant,

v.

LIEUTENANT VIRGINIA PAGE,
Sterling Correctional Facility, et al.,

Defendants - Appellees.

No. 20-1138
(D.C. No. 1:16-CV-02712-WJM-NRN)
(D. Colo.)

ORDER

Before **TYMKOVICH**, Chief Judge, **BALDOCK**, and **EID**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

PLAINTIFF'S
EXHIBIT
C



COLORADO
Department of Corrections

Office of Legal Services
1250 Academy Park Loop, Suite 1400
Colorado Springs, CO 80910
P 719.226.4236

Step 3 Grievance Office

August 22, 2019

RE: Grievance #C-AV18/19-153176

Dear Mr. David Jenner #92839:

I have reviewed your Step 3 grievance that you filed with regard to medical issues with total right hip and knee replacement.

The Step 3 grievance that you filed in this matter is inconsistent with your Step 1 and/or Step 2 grievances that were previously considered. The grievance procedure is outlined in Administrative Regulation 850-04. Only one issue may be addressed, per grievance. In AR 850-04 at D. 7, it states, "All issues and remedies contained in the original grievance must be incorporated into each subsequent step of the grievance. Failure to renew each element of the complaint and/or requested relief in subsequent steps shall be deemed a waiver of those elements and/or requested remedy."

The Step 1 & 2 Remedies requests an appointment with the orthopedic surgeon, physical therapy. However, the Step 3 Remedy requests financial compensation and injunctive relief for a DOC medical review system. This is inconsistent.

The grievance procedure is outlined in Administrative Regulation 850-04. In the definitional section titled Remedy, it states in part that, "DOC employee, contract worker, or volunteer discipline/reprimand, damages for pain and suffering, and exemplary or punitive damages are not remedies available to offenders." In your grievance the remedy you seek is not available, therefore this grievance is denied. A request for injunctive relief is equivalent to discipline/reprimand. A request for financial compensation is not available.

You failed to follow the grievance procedure in this matter, and failed to satisfactorily request allowable relief; you have not exhausted your administrative remedies. This is the final administrative action in this matter.

Sincerely,

Anthony A. DeCesaro

Grievance Officer

cc: working file

grievance file

Jared Polis, Governor | Dean Williams, Executive Director

PLAINTIFF'S
EXHIBIT