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United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

August 27, 2021

Lyle W. Cayce
Clerk

No. 20-60349

KENDALL K. MAGEE,

Plaintiff—Appellant,

versus

GLORIA PERRY, CHIEF MEDICAL COMPLIANCE OFFICER,
MISSISSIPPI DEPARTMENT OF CORRECTIONS (MDOC),
INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; NURSE LISSA
COLLINS, MEDICAL ADMINISTRATOR/PRACTITIONER, CENTRAL
MISSISSIPPI CORRECTIONAL FACILITY, CMCF, INDIVIDUALLY
AND IN HER OFFICIAL CAPACITY; NURSE NINA WALTZER,
CMCF, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY;
CHRISTINA CHARCZENKO, CMCF, INDIVIDUALLY AND IN HER
OFFICIAL CAPACITY,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:19-CV-245

Before STEWART, HO, and ENGELHARDT, *Circuit Judges.*

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PER CURIAM:*

Kendall K. Magee, Mississippi prisoner # 180061, appeals pro se the district court's dismissal of his 42 U.S.C. § 1983 complaint against Gloria Perry, Chief Medical Compliance Officer for the Mississippi Department of Corrections ("MDOC"); Nurse Lissa Collins, a medical administrator for Central Mississippi Correctional Facility ("CMCF"); Nurse Nina Waltzer of CMCF; and Nurse Christina Charczenko, also of CMCF; alleging that the defendants violated his constitutional rights by failing to timely make a specialist appointment for a bone fracture in his hand, resulting in serious and permanent damage. We AFFIRM.

I. Facts & Procedural History

Magee filed pro se a 42 U.S.C. § 1983 complaint alleging that the defendants were deliberately indifferent to his serious medical needs. Magee stated that he injured his hand on November 30, 2018, and reported to the prison clinic where staff x-rayed his hand and determined that Magee needed to be transported to the emergency room of a local medical center. According to Magee, staff did not transport him to the emergency room until the following day despite the injury and Magee's high level of pain. Magee alleges that emergency room staff advised him that he had a "boxer fracture," applied a temporary half cast, and made an emergency appointment with a bone specialist for December 3, 2018, to set the hand and evaluate Magee's complaints of pain.

Magee states that staff failed to transport him to the bone specialist on December 3, and that Magee then began a series of calls to medical staff because of his "intense" and worsening pain and repeatedly requested that

* Pursuant to 5TH CIRCUIT RULE 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 CIRCUIT RULE 47.5.4.

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they take him to the bone specialist immediately. According to Magee, staff provided a “limited prescription of pain medications” only once over the course of four sick calls. Although staff acknowledged that the original December 3 appointment had been “messed up” in some way, staff nonetheless scheduled no appointment by January 31, 2019, at which point Magee filed a Request for Administrative Remedy. Six days later, on February 6, 2019, prison staff brought Magee to a specialist at the local medical center. According to Magee, the physician questioned why Magee had not been brought in for his December 3 appointment and advised Magee that the medical team might need to re-break the hand to set it properly. Magee stated that he began a series of appointments with physical therapists and others to treat the injury.

On May 8, 2019, months after Magee’s appointment with the specialist and after Magee filed his April 9, 2019 federal complaint, the prison medical director responded to Magee’s January 31 grievance, stating that Magee had been “seen by an off-site specialist” and was “receiving rehabilitative services.” Magee sought no further review of his grievance. Magee averred that, after his series of rehabilitative services, the bone specialist determined that surgery was required for the hand and thereafter performed surgery. As a result of the delay in treatment of the broken bone, Magee stated that he experienced pain, suffering, and physical disfigurement continuing through the time he filed his complaint.

The three CMCF defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), in which Perry joined. The defendants argued that Magee failed to exhaust his administrative remedies before filing suit. The parties agreed to proceed before a magistrate judge, who held an omnibus hearing. Thereafter, the magistrate judge granted the motion to dismiss for failure to exhaust administrative remedies, finding both

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that Magee untimely filed his administrative complaint and that he failed to complete the grievance process. Magee timely appealed.

II. Discussion

We review de novo the district court's dismissal of Magee's complaint. *Ruiz v. Brennan*, 851 F.3d 464, 468 (5th Cir. 2017).

Under the Prison Litigation Reform Act (PLRA), prisoners are required to exhaust "such administrative remedies as are available" before bringing an action regarding prison conditions under § 1983. 42 U.S.C. § 1997e(a); *see also Woodford v. Ngo*, 548 U.S. 81, 85 (2006). To properly exhaust his or her claims, a prisoner must pursue all of the available avenues of relief and must comply with all administrative deadlines and procedural rules. *Woodford*, 548 U.S. at 90–91; *see Cowart v. Erwin*, 837 F.3d 444, 451 (5th Cir. 2016). The sole exception to the exhaustion requirement is that "the remedies must indeed be 'available' to the prisoner." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) (citation omitted).

Under MDOC's two-step Administrative Remedy Process ("ARP"), inmates must first submit a letter requesting an administrative remedy within 30 days of the event that is the subject of the grievance. If a response is not made within forty days from the date that the first-step request is received, the inmate may move to the second step in the process.

Here, the district court concluded that Magee did not exhaust his administrative remedies because his first-step grievance was untimely. Magee's missed appointment was on December 3, 2018, but he did not file an ARP grievance until January 31, 2019. Magee contends that his ARP request was not untimely because the failure to take him to see a bone specialist was a "continuing wrong" and not an incident that can be isolated to a single day. However, we need not consider this argument because even

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if Magee's grievance was timely, he failed to provide prison officials with proper notice of the subject of his federal complaint.

While Magee successfully grieved his specific issue regarding the prison's failure to take him to his scheduled medical appointment, the subject of the federal suit before us involves a different problem. This court has explained that the "primary purpose of a grievance is to alert prison officials to a problem." *Johnson v. Johnson*, 385 F.3d 503, 522 (5th Cir. 2004). Moreover, the grievance must alert the officials in a manner sufficiently specific to allow the officials to address or remedy the discrete problem of which the prisoner complains. *Id.*

From December 4, 2018, to January 31, 2019, Magee was aggrieved by the prison staff's failure to schedule and transport him to a specialist for his hand injury. At his appointment with the specialist on February 6, 2019, however, Magee discovered a problem separate from the one he grieved. As Magee explained at the hearing on his complaint, "I became aware that . . . the delay in treating my injury had actually caused my injury to become serious and[,] . . . it will need extensive medical care." Magee's original grievance said nothing about serious or potentially permanent damage caused by the lack of treatment and, more importantly, nothing about a remedy other than the specialist appointment. If Magee himself was unaware of the permanent damage caused to his hand by the delay in receiving treatment until the specialist appointment, we cannot expect that prison officials would have been aware, either. In an analogous situation, this court has concluded that a claim was unexhausted where an inmate grieved the merits and process of a disciplinary proceeding without any mention that the disciplinary case was a product of retaliation or that the restrictions resulting from the disciplinary charge were constitutionally infirm, as the inmate alleged in his federal complaint. *See Emmett v. Ebner*, 423 F. App'x 492, 493-94 (5th Cir. 2011).

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In light of these facts, the district court did not err in concluding that Magee could not rely on his original first-step grievance to show complete exhaustion of the issue of the orthopedic damage to his hand caused by prison officials' delay in obtaining treatment. If there was no administrative remedy available for the lasting damage caused by the delay following resolution of the first-step grievance, as Magee avers, then that absence is because the original grievance, whether timely filed or not, did not present to prison officials the problem of the continuing and lasting damage to Magee's hand from the delayed treatment. Magee filed no timely grievance as to the injury he alleged in his federal complaint which he claims he discovered during and after his February 6, 2019, meeting with the specialist. Therefore, he failed to exhaust his administrative remedies.

III. Conclusion

For the foregoing reasons, the judgment of the district court is **AFFIRMED.**

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

KENDALL K. MAGEE

PLAINTIFF

VS.

CIVIL ACTION NO. 3:19-CV-245-LRA

**GLORIA PERRY, Chief Medical
Compliance Officer, Mississippi
Department of Corrections (MDOC),
Individually and in their Official
Capacities; NURSE LISSA COLLINS,
Medical Administrator/Practitioner,
Central Mississippi Correctional Facility,
CMCF, Individually and in their Official
Capacities; NURSE NINA WALTZER,
CMCF, Individually and in their Official
Capacities; and CHRISTINA
CHARCZENKO, CMCF, Individually
and in their Official Capacities**

DEFENDANTS

**MEMORANDUM OPINION AND ORDER
GRANTING DEFENDANTS' MOTION TO DISMISS**

This matter came before the Court on the Centurion Defendants' Motion to Dismiss Complaint (Doc. #20), which was joined by Defendant Gloria Perry (Doc. #22). Plaintiff Kendall Magee's claim is based upon an injury to his hand that he received as the result of an incident at the Central Mississippi Correctional Facility (CMCF). The injury occurred on November 30, 2018, and he claims that it was exacerbated by a delay in treatment. The bases for the Defendants' Motion to Dismiss are: Magee did not file a grievance within 30 days of his injury; he failed to name specific Defendants; and he did not see the ARP process through to its conclusion. For the reasons set out more fully below, the Court is of the opinion that the Motion to Dismiss should be granted.

Magee's complete allegations are set forth in his Complaint and his supplemental pleadings and were augmented by his testimony at the omnibus hearing held on December 3, 2019. In the context of a motion to dismiss, a court must review the complaint, accepting factual matter asserted therein as true, and determine whether the plaintiff has stated "a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although exhaustion is an affirmative defense that must be established by the defendant, the case may be dismissed if the complaint makes it clear on its face that the claims were not exhausted. *Carbe v. Lappin*, 492 F.3d 325, 328 (5th Cir. 2007).

As stated earlier, Magee was injured on November 30, 2018, when he was helping an older inmate retrieve noodles out of a locker box, and the lid closed on his hand. The medical staff at CMCF advised that he should be taken to the hospital, and Magee was taken to the emergency room at Merit Health the next day. Medical staff there advised Magee that he had a "boxer fracture," and a temporary half cast was applied to his hand. The ER doctor made an emergency appointment with a specialist for December 3, 2018. Despite numerous sick call requests, Magee did not see a specialist until February 6, 2019.

The Mississippi Department of Corrections has an Administrative Remedy Program that applies to prisoners at CMCF (Doc. #24, Exhibit B, hereafter referred to as Grievance Procedures). The initial complaint, or First Step, should be in the form of a letter from the inmate, written "within thirty days of an alleged event." (Grievance

Procedures, p. 4). A response should be made within forty days from the date that the First Step request is received. (Grievance Procedures, p. 5). Expiration of that response time entitles the inmate to move to the next step in the process.

Magee filed a grievance through the ARP program on January 31, 2019.

According to Magee's Complaint, the grievance contained the following claim:

On November 31, 2018, after an incident in my zone where I injured my hand, I reported to the Clinic here at CMCF-720 where x-rays were taken to determine the extent of the injury. At that time, it was determined that I needed to go immediately to the Emergency Room (E.R.), but I wasn't taken until the next day on December 1st. At the E.R., I was advised that I had a "boxer fracture" and a temporary half cast was put on the hand until further treatment could be applied. The doctor at the E.R. also made an appointment with a bone specialist for December 3rd to properly set my hand. As of the date of this A.R.P., I have never been taken to this appointment to properly treat my hand by the bone specialist, despite putting in several sick calls and requesting help. I have been in terrible pain during this entire time, with shooting pains constantly going up my arm, and have been unable to sleep as a result of this injury. The medical department has ignored all my requests to do something about this situation and I am forced to seek administrative remedy at this time.

Please provide me an appointment with the bone specialist which was originally requested by the E.R. doctor immediately and any medication available diminish my pain.

(Complaint, pp. 7-8). Magee did not receive an answer to the grievance before the time for responding had run; however, he was taken to a specialist on February 6, 2019—six days after submitting it. He filed this Complaint on April 9, 2019. A month later, on May 8, 2019, Dr. William Brazier, the Medical Director of CMCF, issued a First Step Response Form, stating, "Mr. Kendall Magee #180061 [illegible three words] patient seen by off-site specialist and receiving rehabilitation services" (Doc. #24, Exhibit A).

Because Magee had seen a specialist, which was the basis for his grievance, he did not proceed to the second step of the grievance procedure.

Since seeing the specialist, Magee has had three surgeries on that hand. He says that he has a permanent injury because of the delay in treatment, in that his pinkie finger on that hand does not work, and he cannot make a fist. Medical personnel have told him that the delay made his injury worse. Magee's claims against the individual Defendants are as follows: Gloria Perry and Lissa Collins were medical officers, and they failed to get him to see a specialist. Nurse Nina Waltzer admitted to Magee that it was partly her fault that the appointment was not made. Christina Charczenko supervised the nurses.

For purposes of analyzing whether Magee had exhausted his administrative remedies, the timeline is this:

11/30/18	Magee injures his hand
12/1/18	Magee is taken to the E.R.; doctor makes appointment with a specialist for 12/3/18
12/3/18	Magee is not taken to the specialist
12/3/18- 1/31/19	Magee makes numerous sick call requests, where he is seen by medical personnel, but is not taken to the specialist; his girlfriend calls Gloria Perry, but no action is taken
1/31/19	Magee files his ARP grievance (59 days after missed appointment); notes that he was supposed to see a specialist on 12/3
2/6/19	Magee sees specialist
4/9/19	Magee files lawsuit

5/8/19 CMCF responds to Magee's First Step grievance (97 days after it was submitted)

Magee's complaint is that he was not seen by a specialist on the date ordered by the emergency room doctor. This was the complaint he made to CMCF medical personnel on every post-injury visit until he filed his grievance. It is still his complaint. (Doc. #1, p. 11) ("Defendant and its policymakers knew of Plaintiff's serious medical needs, which required Defendants to provide an emergency trip to an appointment with the bone specialist, yet Defendants intentionally and with full knowledge failed to provide adequate medical treatment until Plaintiff sought his administrative remedy two months after the injury.") Magee knew by December 4, 2018, that he had not been taken to a hand specialist as scheduled and that he was in serious pain. That was the date of the injury about which he complains, and he should have submitted his ARP grievance within thirty days of that date.

This Court can only grant a motion to dismiss for failure to state a claim if it has accepted all well-pleaded facts as true and viewed those facts in the light most favorable to the plaintiff. *True v. Robles*, 571 F.3d 412, 417 (5th Cir.2009). To survive a motion to dismiss, the plaintiff must plead enough facts "to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 677. Courts construe pleadings filed by pro se litigants under a less stringent standard of review. *Haines v. Kerner*, 404 U.S. 519 (1972) (per curiam). Under this standard, "[a] document filed pro se is 'to be liberally construed,' *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), and 'a pro se complaint, however inartfully

pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.’ ” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Nevertheless, a court may dismiss a *pro se* litigant’s suit for failure to state a claim upon which relief may be granted. 28 U.S.C. § 1915(e)(2)(B)(ii). Tracking the same language as Rule 12(b)(6) of the Federal Rules of Civil Procedure, and applying the same standards, Section 1915(e)(2)(B)(ii) provides for dismissal if, accepting plaintiff’s factual allegations as true, it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations. *Hale v. King*, 642 F.3d 492, 497–99 (5th Cir. 2011).

Under the Prison Litigation Reform Act (PLRA): “No action shall be brought with respect to prison ... 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). The Supreme Court has made it clear that exhaustion is an absolute prerequisite and that the administrative remedies should be invoked in a timely manner and pursued to their conclusion. *Woodford v. Ngo*, 548 U.S. 81, 84 (2006). The petitioner must have “pursue[d] the grievance remedy to conclusion”—substantial compliance with administrative procedures is not enough. *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001).

In *Woodford*, the Court dismissed an untimely claim as unexhausted, holding “Exhaustion is no longer left to the discretion of the district court, but is mandatory.” *Id.* at 85. The exhaustion requirement of the PLRA attempts to reduce federal interference with the administration of state prisons. To that end, it seeks to give prison officials time

and opportunity to address complaints internally. In a later case, the Court instructed, “There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court.” *Jones v. Bock*, 549 U.S. 199, 211 (2007). The Court stated, “All agree that no unexhausted claim may be considered.” *Id.* at 219–20. According to the Court, however, exhaustion is an affirmative defense, and the burden is on the defendants to establish that the prisoner’s claims have not been exhausted. *Id.* at 216.

The doctrine of exhaustion requires compliance with an agency's deadlines. *Woodford*, 548 U.S. at 90. Moreover, where the available remedy procedure has more than one step, a prisoner has not exhausted his remedies until he has completed each one. *See Bargher v. White*, 928 F.3d 439, 447 (5th Cir. 2019); *Dillon v. Rogers*, 596 F.3d 260, 265–66 (5th Cir. 2010). Under MDOC’s grievance procedures, a prisoner who does not receive a timely response to his initial ARP grievance is entitled to proceed to the second-step, and he must do so to exhaust his claim.

Here, Magee’s Complaint shows on its face that he failed to submit his grievance within thirty days of December 4, 2018. That is the date when he would have known that CMCF had failed to send him to the specialist, as had been recommended by the emergency room doctor. Thus, his claim is subject to dismissal as unexhausted. He argues that his claim should not be dismissed because, during that thirty days, he was pursuing relief informally, as is contemplated by MDOC’s policy. He also argues that

the deadline was implicitly waived because it was not raised as grounds for rejection of his claim in Dr. Brazier's response.

MDOC encourages informal attempts to resolve concerns in its policy: "Before initiating the formal process, offenders should always try to resolve their problems informally within the institution." (Grievance Procedures, p. 3). The policy also states, however, that the letter that initiates the First Step "will be written to the ARP Director within 30 days of an alleged event." (Grievance Procedures, p. 5). There is a provision for that deadline to be waived, but that decision is left to the ARP Director, and there is no indication that there was an explicit waiver in this case. Thus, neither of Magee's arguments provides an excuse for missing the deadline set out in the ARP procedures. *Johnson v. Ford*, 261 Fed. App'x 752, 757 (5th Cir. 2008).

As for the third argument advanced by the Defendants – that Magee failed to provide sufficient detail in his First Step letter, there is insufficient evidence in the pleadings before the Court to determine that issue. "The level of detail necessary in a grievance to comply with the 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*, 549 U.S. at 219. In *Jones*, the defendants argued that the prisoner had failed to name the officials whom he later claimed were responsible for his injury. The Court held that, as the prison's procedures made no mention of naming particular officials, the court's rule imposing that as a prerequisite to proper exhaustion was unwarranted. *Jones*, 549 U.S. at 219. Here, the Defendants

argue that the MDOC Handbook's guidelines show the level of detail required to exhaust a claim. However, the only evidence before the Court is MDOC's grievance procedures, which, like the institution in *Jones*, are silent on that point. Since it is the Defendants' responsibility to establish that Magee failed to offer a sufficiently detailed claim, the Court cannot hold in their favor on this issue.

This case may be dismissed on the Defendants' other arguments, however. After *Woodford* and *Jones*, there can be no doubt that pre-filing exhaustion of prison grievance processes is mandatory, and district courts have no discretion to excuse a prisoner's failure to properly exhaust the prison grievance process before filing their complaint. Magee's case must be dismissed if available administrative remedies were not exhausted, and, by submitting an untimely claim and failing to proceed to the Second Step, Magee failed to exhaust the MDOC Grievance Procedures. Consequently, Defendants' Motion to Dismiss Complaint [Doc. #20], which was joined by Defendant Gloria Perry [Doc. #22], will be granted, and Magee's complaint will be dismissed without prejudice.

IT IS, THEREFORE, ORDERED AND ADJUDGED that Defendants' Motion to Dismiss Complaint [Doc. #20] is hereby GRANTED, and this case be dismissed without prejudice. A separate Judgment will be entered.

SO ORDERED, this the 27th day of March 2020.

/s/ Linda R. Anderson
UNITED STATES MAGISTRATE JUDGE