APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2826

ALBERT B. KORB,
Appellant

v.

SGT. HAYSTINGS; JOHN E. WETZEL, SRC DOC;
MIKE CLARK, Superintendent Albion

On Appeal from the United States District Court for
the Western District of Pennsylvania
(D.C. Civil No. 1-18-cv-00042)
Magistrate Judge: Honorable Richard A. Lanzillo

Argued May 26, 2021

Before: GREENAWAY, JR., SHWARTZ, Circuit Judges,
and ROBRENO, District Judge*

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* The Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

(Filed: June 8, 2021)

OPINION**

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SHWARTZ, Circuit Judge.

Albert Korb sued three officials at the State Correctional Institution at Albion ("Albion") in

*□□ This disposition is not an opinion of the full court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

Pennsylvania (collectively, "Defendants"), alleging that they violated his constitutional rights when Defendant Sergeant Haystings assaulted Korb. The District Court dismissed Korb's complaint, finding that he failed to exhaust his administrative remedies under the Prison Litigation Reform Act ("PLRA"), see 42 U.S.C. § 1997e(a), and that he did not make specific allegations against Defendants John Wetzel, Secretary of the Department of Corrections, and Mike Clark, Superintendent of Albion. Because the District Court erred in dismissing the complaint with prejudice, we will vacate the dismissal order and remand.

I[1]

Korb is an inmate in Albion's special needs unit. A prison guard directed Korb to go to Haystings's office, and Korb complied. Haystings began speaking to Korb about the cleanliness of his cell, and Korb turned to leave. Haystings then put his arms around Korb, "twisted [him] sideways," and ordered him to sit down. J.A. 26-27. Korb complied because he was afraid that Haystings would harm him.

Following that incident, Korb filed a pro se complaint in the United States District Court for the Western District of Pennsylvania against Haystings, Wetzel, and Clark, alleging that Haystings assaulted

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[1] This appeal arises from an order dismissing the complaint under Federal Rule of Civil Procedure 12(b)(6), so we derive the facts from the complaint and accept them as true. In re Vehicle Carrier Servs. Antitrust Litig., 846 F.3d 71, 78 n.2 (3d Cir. 2017). We construe those facts "in a light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Wayne Land & Min. Grp. LLC v. Del. River Basin Comm'n, 894 F.3d 509, 527 (3d Cir. 2018).

him in violation of his constitutional rights.[2] The complaint mentioned Wetzel and Clark only in its caption. In a letter attached to the complaint, Korb noted that he "must [exhaust the] Albion grievance steps 1-2-3- before [the §] 1983 civil rights lawsuit is valid." J.A. 29. At the time he filed his complaint, he had started but had not yet completed the grievance process.

The District Court granted Korb's motion to proceed in forma pauperis and directed the Clerk of Court to docket his complaint. Thereafter, Korb informed the Court that he completed the grievance process. Nevertheless, Defendants moved to dismiss Korb's complaint, arguing that Korb admitted in the complaint that he had not completed the grievance process and that the complaint lacked any specific allegations against Wetzel or Clark. In response, Korb again asserted that he had exhausted his administrative remedies.

The District Court granted Defendants' motion and dismissed Korb's complaint with prejudice. See Korb v. Haystings, No. 1:18-cv-00042, 2019 WL 1243279, at *3 W.D. Pa. Mar. 18, 2019). The Court dismissed Korb's claims against Haystings because Korb's complaint stated that he had not completed the grievance process. Id. at *2-3 (citing 42 U.S.C. § 1997e(a)). It dismissed Korb's claims against Wetzel and Clark because Korb did not specify their personal involvement in the alleged wrongdoing. Id. at *2. The Court also denied Korb leave to amend the complaint because it found

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[2] Korb's initial complaint named only Haystings, but Korb filed an amended complaint against Wetzel and Clark a few days later. This opinion refers to the amended complaint as "the complaint."

that Korb failed to exhaust his administrative remedies as required by the PLRA and, as a result, any such amendment would be futile. Id. at *2-3.

Korb filed several declarations challenging the District Court's conclusions, which the Court treated as motions to reconsider and denied. Korb appeals.

II[3]

A

We must first determine whether the District Court properly dismissed Korb's complaint with prejudice because he had not exhausted his administrative remedies when he filed his complaint.

The PLRA provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title . . . by a prisoner confined in any jail,

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[3] The parties consented to the United States Magistrate Judges jurisdiction. The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. See Fed. R. Civ. P. 58(a); LeBoon v. Lancaster Jewish Cmty Ctr. Ass'n, 503 F. 3d 217, 223-24 (3d Cir. 2007) ("[I]f a certain order is subject to the separate-document requirement of Federal Rule of Civil Procedure 58 and no separate document exists, an appellant has 180 days to file a notice of appeal—150 for the judgment to be considered 'entered,' plus the usual 30 days from the entry of judgment." (citing Fed. R. App. P. 4(a)(7)(A)(ii))).

We review an order granting a Rule 12(b)(6) motion to dismiss de novo. Garrett v. Wexford Health, 938 F.3d 69, 81 (3d Cir. 2019). We review a district court's construction of a pro se plaintiff's pleadings for an abuse of discretion. See id. at 91-92, 91 n.26 (explaining that because the district court "correctly identified the liberal construction standard applicable to [the plaintiff's] pro se pleadings," the Court "consider[ed] whether the [d]istrict [c]ourt abused its discretion in applying that standard, not the legal question of whether the [d]istrict [c]ourt employed the correct standard in the first instance").

prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). We apply our pre-PLRA procedures to PLRA cases, Shane v. Fauver, 213 F.3d 113, 117 (3d Cir. 2000), which include a directive that when a prisoner does not exhaust his administrative remedies, his "complaint should be dismissed without prejudice to its reinstatement [after exhaustion]," Ghana v. Holland, 226 F.3d 175, 184 n.4 (3d Cir. 2000) (alteration in original). Thus, under the statute and case law, a prisoner typically must exhaust his administrative remedies before he presents his complaint to a federal court. When a court determines that the prisoner has not exhausted his remedies, it should dismiss the complaint without prejudice to enable the prisoner to cure this procedural deficit.

This approach also applies where a prisoner began but did not complete the exhaustion process before he filed his complaint. There too, a district court may dismiss the complaint without prejudice to be refiled after the prisoner completes the grievance process. Thus, dismissal with prejudice in such a situation is improper.

Dismissal with prejudice is also improper in a case like this, where a prisoner shows that he has exhausted his administrative remedies before a motion to dismiss is filed. Under Garrett v. Wexford Health, 938 F.3d 69 (3d Cir. 2019),[4] a district court may view pro se filings

[4] In Garrett, we acknowledged the argument that the PLRA's "[n]o action shall be brought" language, in isolation, suggests that a plaintiff must exhaust his administrative remedies before filing a complaint. 938 F.3d at 90 (alteration in original). Because a complaint is "brought" under the Federal Rules of Civil Procedure, however, we determined that the Rules allow a plaintiff to supplement his complaint to show exhaustion after filing the

informing the court that the prisoner completed the grievance process as supplements to his complaint.[5]

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complaint, and that doing so complies with the PLRA. Id. at 90-91. Moreover, because a supplemental complaint curing filing defects in the original complaint "relates back to the original complaint," id. at 83 (quoting Fed. R. Civ. P. 15(c)(1)(B)), courts should consider the content of the supplement as though it were included in the original complaint when it was "brought," id. at 82-84; see also Downey v. Pa. Dep't of Corr., 968 F.3d 299, 308 (3d Cir. 2020) (noting that "a supplemental complaint filed post-incarceration cures a former inmate's failure to exhaust administrative remedies while imprisoned . . . so long as the . . . supplemental complaint relates back to the initial complaint" (citation omitted)). Accordingly, Rule 15(d) permits a PLRA plaintiff to cure a deficiency based on subsequent exhaustion by filing a supplemental pleading, and such facts are deemed to be part of the complaint that the plaintiff initially presented to the court.

Defendants argue that we should not follow Garrett because it is factually distinguishable from this case. Garrett's holding that the PLRA does not prohibit a plaintiff from filing a supplemental pleading to cure an initial filing defect such as the failure to exhaust administrative remedies, however, is not limited to its facts. 938 F.3d at 91. Rather, the Federal Rules of Civil Procedure apply when addressing events that occur after the original complaint is filed and can be used as a vehicle for presenting facts that arose after the complaint was filed that cure pleading defects. Id. at 87.

[5] There is a difference between amended and supplemental pleadings. Federal Rule of Civil Procedure 15(a) "provides for the amendment of pleadings" and functions "to enable a party to assert matters that were overlooked or were unknown at the time the party interposed the original complaint." Garrett, 938 F.3d at 82 (quoting 6 C. Wright & A. Miller, Federal Practice and Procedure, § 1473 (3d ed. 2019)). Rule 15(a) "ensur[es] that an inadvertent error in, or omission from, an original pleading will not preclude a party from securing relief on the merits of his claim." Id. Generally, "an amended pleading supersedes the original pleading and renders the original pleading a nullity." Id. Supplemental pleadings, on the other hand, are governed by Rule

See id. at 81 n.17 (rejecting the defendants' argument that a filing could not qualify as a supplemental complaint because the plaintiff did not move for leave to supplement).[6]

Here, even before Defendants filed their motion to dismiss, Korb sent letters to the District Court proving that he complied with Albion's grievance process after he had filed his complaint, thus "setting out an[] . . . occurrence[] or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d). Those filings constituted Rule 15(d) supplemental pleadings. See Garrett, 938 F.3d at 81 n.17 (concluding that the pro se plaintiff's filing titled as an amended complaint should be construed as a supplemental complaint based on its substance). Thus, under Garrett, the Court should have viewed Korb's pre-motion-to-dismiss filings as supplements to the complaint,[7] treated the events alleged therein as part

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15(d), and, "rather than set forth additional events that occurred before the original complaint was filed, . . . a supplemental pleading under Rule 15(d) presents more recent events." Id. A supplemental pleading adds post-complaint events to the operative pleading and does not supersede it. Here, because Korb's exhaustion took place after he filed his original complaint, his filings informing the Court that he had completed the grievance process were supplemental, as opposed to amended, pleadings. A supplemental pleading may cure jurisdictional defects, Matthews v. Diaz, 426 U.S. 67, 74 (1976), and non-jurisdictional defects, T Mobile Ne. LLC v. City of Wilmington, Del., 913 F.3d 311, 324-26 (3d Cir. 2019), such as the PLRA's affirmative defense of exhaustion, Jones v. Bock, 549 U.S. 199, 212 (2007).

[6] Exhaustion under the PLRA is not a pleading requirement. Jones, 549 U.S. at 212.

[7] The need to supplement a complaint to indicate exhaustion can be avoided if the plaintiff fully exhausts his administrative remedies before bringing suit and so indicates in the pleadings.

of the original complaint, and considered whether they demonstrated that Korb had exhausted his administrative remedies.[8] Because the Court instead dismissed Korb's claim against Haystings with prejudice without considering that he has completed the exhaustion process before a motion to dismiss was filed, we will vacate the dismissal order.

B

We next examine whether the District Court properly dismissed with prejudice the claims against Wetzel and Clark. Although the Court correctly determined that the complaint was deficient regarding the claims against those Defendants because Korb failed to allege that they were personally involved in the incident, see Evancho v. Fisher, 423 F.3d 347, 353 (3d Cir. 2005) ("A[n individual government] defendant in a civil rights action must have personal involvement in the alleged wrongdoing . . . [which] can be shown through allegations of personal direction or of actual knowledge and acquiescence." (first alteration in original)), it erred in failing to permit a curative amendment, see Alston v. Parker, 363 F.3d 229, 235 (3d Cir. 2004) ("We have held that even when a plaintiff does not seek leave to amend, if a complaint is vulnerable to 12(b)(6) dismissal, a District Court must permit a curative amendment, unless an amendment would be inequitable or futile."). The Court concluded that a curative amendment as to the claims against Wetzel and Clark would be futile because Korb had not

[8] If a district court is unsure whether a pro se plaintiff intends to supplement a complaint with a subsequent filing, it may first issue an order inquiring whether the plaintiff intends to supplement the complaint before dismissing the action entirely. Cf. Alston v. Parker, 363 F.3d 229, 235 (3d Cir. 2004).

exhausted his administrative remedies and therefore his complaint would be dismissed regardless of whether he stated a claim against them. Korb, 2019 WL 1243279, at *3. Because, for the reasons discussed, Korb adequately supplemented his complaint to show that he had exhausted his administrative remedies, the Court relied on an improper ground for concluding that a curative amendment would be futile. Accordingly, on remand, the Court should permit Korb to amend his complaint to attempt to cure the pleading deficiencies.[9]

III

For the foregoing reasons, we will vacate the District Court's order dismissing Korb's complaint and remand for proceedings consistent with this opinion.

[9] The District Court should address any other defenses to the complaint. See Alston, 363 F.3d at 236.

APPENDIX B

AMENDED DLD-145 **August 14, 2020**
July 16, 2020
April 7, 2020
March 20, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-2826**

ALBERT B. KORB, Appellant
v.
SGT. HAYSTINS; ET AL.
(W.D. Pa. Civ. No. 1:18-cv-00042)

Present: RESTREPO, PORTER, and SCIRICA, Circuit Judges

Submitted are:

(1) By the Clerk for a determination under 28 U.S.C. § 1915(e)(2) or for summary action under Third Circuit L.A.R. 27.4 and I.O.P. 10.6;
(2) Appellant's motion for counsel;
(3) Appellant's argument in support of appeal;
(4) Appellant's motion to expedite;
(5) Appellant's second motion to expedite;
(6) Appellant's third motion to expedite; and
(7) Appellant's second argument in support of appeal
(8) Appellant's third argument in support of appeal
(9) Appellant's fourth argument in support of appeal; and
(10) ***Appellant's fifth argument in support of appeal**

in the above captioned case.

(Continued)
ALBERT KORB, Appellant
v.
SGT. HAYSTINGS; ET AL.
C.A. No. **19-2826**
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Respectfully,

Clerk

ORDER

We decline to dismiss the appeal under 28 U.S.C. § 1915(e)(2) or take summary action under Third Circuit L.A.R. 27.4 and I.O.P. 10.6. Appellant's motion for appointment of pro bono counsel is granted. All other pending motions are denied.

The Clerk shall issue a briefing schedule after counsel in due course is secured. Among any other issues the parties wish to address in their briefs, they should discuss the following:

(1) Can the Court exercise appellate jurisdiction to review the District Court's March 18, 2019 order? See Fed. R. Civ. P. 58; Fed. R. App. 4(a)(7)(A); cf. LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 223 (3d Cir. 2007);

(2) Did the District Court err in dismissing Korb's claim against Sgt. Haystings with, rather than without, prejudice, based on a failure to exhaust institutional remedies? See Garrett v. Wexford Health, 938 F.3d 69, 81 (3d Cir. 2019), cert. denied 140 S. Ct. 1611 (May 18, 2020);

(3) Does the holding in Pearson v. Secretary Department of Corrections, 775 F.3d 598, 603

(3d Cir. 2015)—that "the PLRA is a statutory prohibition that tolls Pennsylvania's statute of limitations while a prisoner exhausts administrative remedies"—apply to a litigant's exhaustion during the pendency of his case?;

(4) The District Court dismissed the case below before we issued our decision in Garrett v. Wexford Health, 938 F.3d 69 (3d Cir. 2019), cert. denied 140 S. Ct. 1611 (May 18, 2020). Under Garrett, could the District Court have permissibly construed one of Korb's pro se filings as a motion for leave to file a supplemental complaint under Federal Rule of Civil Procedure 15(d), based on his exhaustion of institutional remedies after filing suit? See id. at 81; see also U.S. ex rel. Gadbois v. PharMerica Corp., 809 F.3d 1, 5-6 (1st Cir. 2015); and

(5) Should this Court's sua sponte amendment rule in civil rights cases be extended, such that District Courts in such cases must consider whether to grant, sua sponte, leave to file a supplemental complaint under Rule 15(d) prior to dismissing a complaint with prejudice? See Garrett, 938 F.3d at 82; cf. Alston v. Parker, 363 F.3d 229, 235 (3d Cir. 2004); Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir. 2002); Shane v. Fauver, 213 F.3d 113, 116 (3d Cir. 2000).

By the Court,

s/L. Felipe Restrepo
Circuit Judge

Dated: September 23, 2020

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

ALBERT B. KORB Plaintiff vs. SGT. HAYSTINGS; JOHN WETZEL; SR DOC; MIKE CLARK, SUPERINTENDENT ALBION Defendants	)))))))))))))	Case No. 1:18-cv-0042 (ERIE) Richard A. Lanzillo United States Magistrate Judge Memorandum Opinion and Order on Defendants' Motion to Dismiss (ECF No. 34).

Now before the Court is Defendants' Motion to Dismiss Plaintiff's Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6). ECF No. 34. For the reasons discussed below, the motion will be **GRANTED.**[1]

I. Introduction and Background

Plaintiff Albert B. Korb commenced this action by filing a Motion for Leave to Proceed *informa pauperis*. The Court granted that motion [ECF No. 8], and Korb's *pro se* Complaint was docketed on April 17, 2018. ECF No. 9. Korb filed his Amended Complaint on June 12,

[1] The parties have consented to the jurisdiction of a United States Magistrate Judge to conduct all proceedings in this case, including the entry of final judgment, as authorized by 28 U.S.C. § 636(c).

2018. ECF No. 15.[2] Defendants moved to dismiss the Amended Complaint on August 29, 2018. ECF Nos. 34, 35.

The Amended Complaint concerns an alleged assault upon Korb by Defendant Haystings. Specifically, Korb alleges: "I was physically assaulted by Sgt. Haystings 1-30-18 at Block Sgts office - 5:30 PM APX. I want this matter justified. [Unintelligible] jury–compensation–whatever else." ECF No. 15, at 4-5. Korb further avers that Defendant Haystings "put his arms around me twisted me sideways - and ordered me back to his office." *Id.* at 3. The Amended Complaint does not include any allegations against Defendants Wetzel or Clark beyond identifying them as Defendants.

Korb appears to assert a claim based upon a violation of his Constitutional rights under the Eighth Amendment.[3] Because he does not have a direct cause of action under the United States Constitution, a liberal reading of the Amended Complaint would require the Court to presume that Korb is attempting to state his Eighth Amendment claim pursuant to 42 U.S.C.§ 1983. *See, e.g.*, *Parks v. SCI-Camp Hill*, 2018 WL 7269792 at *1 (W.D. Pa. Nov. 23, 2018) (citing *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001) ("a litigant complaining of a violation of a constitutional right does not have a direct

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[2] Korb's Amended Complaint is a rambling, barely legible document which does not follow the Federal Rules of Civil Procedure in that it fails to state his claims in numbered paragraphs. *See* Fed. R. Civ. P. 1O(b). When referencing or quoting this filing, the Court will use page citations.

[3] Filed with this Amended Complaint a notification to the Clerk of Court in which Korb references is "1983 civil rights lawsuit." ECF No. 15 at 5.

cause of action under the United States Constitution but must utilize 42 U.S.C. § 1983.")). Therefore, this Court construes the Amended Complaint as alleging a cause of action under Section 1983.

II. Defendants' Motion to Dismiss and the Standard of Review

The Defendants base their motion to dismiss the Amended Complaint on two main points: first, that Korb failed to allege the personal involvement of Defendants Wetzel and Clark, and, indeed, failed to mention these two Defendants at all; and second, that Korb failed to exhaust his administrative remedies as to his claim against Defendant Haystings. *See* ECF No. 34 at 2.

"When considering a Rule 12(b)(6) motion, we accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Wayne Land & Mineral Grp. LLC v. Delaware River Basin Comm'n*, 894 F.3d 509, 526-27 (3d Cir. 2018) (internal quotation marks and citations omitted). To survive dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). Plausibility means "more than a sheer possibility that a defendant has acted unlawfully." *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly,* 550 U.S. at 556).

III. Discussion

A. The Amended Complaint Fails to State a Claim against Defendants Wetzel and Clark.

The Court will dismiss Korb's claims against Defendants Wetzel and Clark for the simple reason that the Amended Complaint includes no allegations against them. Beyond their designation as Defendants, Korb's filing does not mention either of these two individuals. No allegations are made connecting or implicating these Defendants in the assault Defendant Haystings allegedly committed upon Korb. To plead a § 1983 claim, the plaintiff must allege each defendant's personal involvement in the alleged wrongdoing. *Beausoleil v. Erie County Prison*, 2019 WL 119674, at * 1 (W.D. Pa. Jan. 7, 2019) (citing *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988)). Because the Amended Complaint is devoid of any allegations or claims against Defendant Wetzel or Clark on which relief may be granted, Korb's claims against them must be dismissed.

B. Korb Failed to Exhaust Administrative Remedies as to his Claims Against Defendant Haystings.

The Prison Litigation Reform Act ("PLRA") "mandates early judicial screening of prisoner complaints and requires prisoners to exhaust prison grievance procedures before filing suit." *See* 42 U.S.C. § 1997(e)(a); *Jones v. Bock*, 549 U.S. 199 (2007). Section 1997(a) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of the Revised Statutes of the United States, 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. § 1997(a).

The Supreme Court has explicitly provided that all prisoners must exhaust their administrative remedies as to any claim that arises in the prison setting, regardless of the kind of relief sought. *See Porter v. Nussle*, 534 U.S. 516, 532 (2002). Moreover, the exhaustion of available administrative remedies is required before filing a civil rights action under § 1983. *See* 42 U.S.C. § 1997(e)(a)); *Perazzo v. Fisher*, 2012 WL 1964419, at *1 (M.D. Pa. May 31, 2012) (dismissing case for failure to exhaust administrative remedies where plaintiff revealed in the complaint that the grievance process was not complete but was at the "last stage"); *Jones v. Lorady*, 2011 WL 2461982 (M.D. Pa. June 17, 2011) (dismissing prisoner complaint for failure to exhaust administrative remedies prior to starting federal action); *Booth v. Churner*, 2016 F.3d 289 (3d Cir. 2000) (affirming dismissal where prisoner plaintiff conceded that he did not exhaust administrative remedies). "[I]t is beyond the power ... of any [court] to excuse compliance with the exhaustion requirement" of § 1997(e). *Nyhuis v. Reno*, 204 F.3d 65, 73 (3d Cir. 2000); *see also Spruill v. Gillis*, 372 F.3d 218, 230 (3d Cir. 2004).

Korb admits on the face of his Amended Complaint that he did not exhaust his administrative remedies before filing this action. Korb acknowledges that he "must expire Albion grievance steps 1-2-3 before [his] 1983 civil rights complaint is valid - so as of 2-5-18 [he was] filing step #1 of grievance system 2-3 will follow." ECF No. 15, at 5. By Korb's own admission then, his claims against Defendant Haystings are not exhausted because he has not completed the prescribed grievance

procedure. As a result, Korb's claim against Defendant Haystings will be dismissed.

IV. Leave to Amend is Denied as Futile.

Given the liberal standards afforded *pro se* pleadings, a plaintiff should generally be granted leave to amend before the Court dismisses a claim that is merely deficient. *See Grayson v. Mayview State Hosp.,* 293 F.3d 103, 108 (3d Cir. 2002). The federal rules allow for liberal amendments given the "principle that the purpose of pleading is to facilitate a proper decision on the merits." *Farnan v. Davis,* 371 U.S. 178, 182 (1962) (citations and internal quotations omitted). The Court may deny a motion to amend where there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment." *Id.* The Court must also determine that a proposed amendment would be futile if the complaint, as amended, would not survive a motion to dismiss for failure to state a claim. *In re NAHC, Inc. Sec. Litig.,* 306 F.3d 1314, 1332 (3d Cir. 2002).

Based upon Korb's admitted failure to exhaust prison grievance procedures, the Court finds that allowing Korb to further amend his pleading would be futile. The PLRA requires exhaustion before the initiation of Korb's claims in federal court, and this Court cannot excuse compliance with those requirements. Where, as here, the plaintiff has failed to exhaust his administrative remedies, amendment would be futile because amendment cannot cure such a failure. *See, e.g., Griffin v. Maliska ,* 2018 WL 5437743 (M.D. Pa. Oct. 29, 2018); *Farnan,* 371 U.S. at 182.

Further, because Korb cannot file an action without first exhausting his claims against Defendant Haystings, he cannot bring any associated claims against Defendants Wetzel and Clark. Thus, any amendment of the claims against those two Defendants would likewise be futile. *Id.*

V. Order.

Based upon the foregoing, the Court orders:

1. Defendants' Motion to Dismiss to Plaintiff's Complaint [ECF No. 34] is **GRANTED.** Plaintiff's Amended Complaint [ECF No. 15] is **DISMISSED** with prejudice;

2. On March 12, 2019, Plaintiff filed a "Motion for Reply" addressed to United States Magistrate Judge Lisa Pupo Lenihan in which he appears to ask that his case be re-opened. ECF No. 54. In this motion, Korb references a video recording of the alleged assault by Defendant Haystings. *Id.* The motion is **DENIED** because there was no case to reopen when it was filed. Furthermore, any video evidence of the alleged assault would be evidence in an action filed after Korb exhausts his administrative remedies for that claim.

3. The Clerk of Court is directed to close this case.

So ordered.

/s/ Richard A. Lanzillo
Richard A. Lanzillo
United States Magistrate Judge

Entered this 18th day of March, 2019.