

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

November 30, 2022

Christopher M. Wolpert
Clerk of Court

LAMONE M. JOHNSON, a/k/a Marylin
Monae Porter,

Plaintiff - Appellant,

v.

LUKE PETTIGREW, Interim Warden; A.
MONDEN, Unit Manager; LEO BROWN,

Defendants - Appellees.

No. 22-6015
(D.C. No. 5:20-CV-00764-R)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before HOLMES, Chief Judge, HARTZ and ROSSMAN, Circuit Judges.

Lamone M. Johnson, a/k/a Marylin Monae Porter (Plaintiff), is an Oklahoma state prisoner proceeding pro se. She filed a civil rights action under 42 U.S.C. § 1983 against prison officials because she has not been permitted to marry another Oklahoma prison inmate. Plaintiff appeals the district court's grant of summary judgment in favor of defendants and its dismissal without prejudice of her complaint

* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

based upon her failure to exhaust her administrative remedies. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Background

Plaintiff is a transgender woman who wishes to marry her fiancé, a gay man incarcerated at a different Oklahoma prison. According to prison officials, Plaintiff and her fiancé have not been allowed to marry because they have not completed certain prerequisites under the prison marriage policy. Plaintiff contends that defendants have unlawfully discriminated against her based upon her LGBTQ status.

A. Procedural History

Plaintiff filed this § 1983 action claiming violations of her rights to substantive due process and equal protection. Defendants are Luke Pettigrew, the Warden at the Joseph Harp Correctional Center (JHCC); A. Monden, a Unit Manager at JHCC; and Leo Brown, the Agency Chaplain.

Defendants moved to dismiss Plaintiff's operative complaint. Among other grounds for dismissal, they argued she failed to exhaust her administrative remedies before filing suit, as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (PLRA). In response, Plaintiff contended that prison officials prevented her from exhausting her administrative remedies.

A magistrate judge issued a report and recommendation (R&R) on defendants' motions. Because defendants relied on documents outside of the complaint, the R&R recommended converting the motions to dismiss to motions for summary judgment. Focusing on the exhaustion issue, the R&R reviewed three grievances Plaintiff had

filed related to her efforts to marry her fiancé. The R&R concluded the prison's administrative remedies were available to Plaintiff, but that she did not fully or correctly complete the grievance process as to any of the three grievances. The R&R therefore recommended that the district court grant summary judgment in favor of defendants. After reviewing Plaintiff's objections de novo, the district court partially adopted the R&R, granted summary judgment in favor of defendants, and dismissed Plaintiff's complaint without prejudice.

B. Prison Grievance Procedure

Under the Oklahoma Department of Corrections (ODOC) grievance procedure, inmates must follow a multi-step process to fully exhaust a grievance. The steps include: (1) an attempt at informal resolution, including a Request to Staff (RTS); (2) a grievance submitted to the reviewing authority (RA); and (3) a grievance appeal submitted to the administrative review authority (ARA). Each RTS, grievance, and appeal must be correctly completed according to the written policy. A noncompliant grievance or appeal will not be answered, but an inmate may be permitted to resubmit the grievance or appeal to correct errors.

Grievances and grievance appeals must also be timely submitted according to the deadlines in the ODOC process. A grievance must be submitted to the RA within fifteen days from the date the inmate receives a response to the RTS. And an appeal must be received by the ARA within fifteen days of the inmate's receipt of the RA's response. There is no "mailbox rule" under the ODOC grievance procedure for the submission of grievances and appeals. Thus, "[t]he documents must be received by

the proper authority in the appropriate office within the required time frame[, and] [t]ime frames will not be considered met by mere deposit of the documents in the mail.” R. at 390.

The ODOC process is shortened for emergency or sensitive grievances, which are submitted directly to the RA or to the ARA if the complaint involves the RA. A sensitive grievance is one that “alleges misconduct by a staff member who either directly supervises the inmate/offender or is the reviewing authority where the inmate/offender is assigned.” *Id.* at 403.

If an inmate is deemed to have abused the ODOC grievance process, she will be placed on grievance restriction. A restricted inmate must submit with any new grievance and grievance appeal an affidavit listing every grievance submitted by the inmate in the previous twelve months and indicating the number assigned and the date, description, and disposition at each level of the process. If the inmate fails to submit a compliant affidavit, the new grievance will not be answered.

“The ruling of the ARA is final and will conclude the internal administrative process available to the inmate/offender within the jurisdiction of ODOC. The inmate/offender will have satisfied the exhaustion of internal administrative remedies required by Oklahoma [law].” *Id.* at 402.

C. Plaintiff’s Grievances

Plaintiff submitted three grievances related to her efforts to marry her fiancé. She was on grievance restriction at the relevant time, so she was required to submit

with her grievances and grievance appeals an affidavit listing all of the grievances she had submitted during the preceding twelve months.

1. Grievance 20-065

Plaintiff submitted an RTS to the Chaplain at JHCC stating that she wanted to marry her fiancé and asking for assistance with obtaining a marriage license. The Chaplain responded stating, “I provided the necessary form to you to fill out and send to the fiancé to complete and send to the Agency Chaplain, Leo Brown.” *Id.* at 442. Plaintiff then submitted grievance 20-065. The RA returned the grievance unanswered because (1) she failed to submit the required grievance affidavit, (2) she had used the wrong form, and (3) the Chaplain had provided information and the necessary forms in response to her RTS.

Plaintiff submitted a grievance appeal to the ARA, along with an affidavit listing previous grievances. The ARA responded that the appeal was improperly filed because Plaintiff’s affidavit was not accurate and failed to comply with the grievance policy. A copy of Plaintiff’s affidavit submitted with her appeal bears a sticky note stating, “Affidavit missing ‘sensitive’ grievance ARA 20-085 5/12/20 – Back page not signed and notarized.” *Id.* at 449. The ARA gave plaintiff ten days from her receipt of the ARA’s response to resubmit a corrected appeal. Plaintiff received the ARA’s response no later than July 10, the date she signed her resubmitted appeal. The ARA did not receive her resubmitted appeal until July 27. The ARA responded that it was improperly filed because (1) Plaintiff’s affidavit was not accurate and failed to comply with the grievance policy, and (2) her resubmitted

appeal was untimely. A copy of Plaintiff's affidavit submitted with her resubmitted appeal bears a sticky note stating, "Affidavit missing: ARA 20-085 'sensitive' grievance 5/12/20." *Id.* at 527.

2. **Grievance 20-090**

Plaintiff submitted an RTS to the Chaplain at JHCC asking for a list of LGBTQ-friendly clergy for her wedding ceremony. The Chaplain responded stating, "I do not have a list. You would have to find one. I don't have that information." *Id.* at 454. Plaintiff then submitted grievance 20-090. She did not include an affidavit listing her previous grievances. The RA returned the grievance unanswered because (1) Plaintiff was on grievance restriction and she did not provide proper documentation, and (2) the issue was not grievable. Plaintiff received the RA's response on June 30.

Plaintiff submitted a grievance appeal to the ARA, along with an affidavit listing previous grievances. The ARA did not receive the appeal until July 23. The ARA responded that the appeal was filed improperly because (1) it was received out of time by the ARA, and (2) Plaintiff's affidavit was not accurate. A copy of Plaintiff's affidavit submitted with her appeal bears a sticky note stating, "Affidavit missing: ARA 20-085 'sensitive' grievance 5/12/20." *Id.* at 458. Plaintiff submitted a request to appeal out of time, claiming the mail room delayed her mail due to the COVID-19 pandemic. That request was denied.

3. Grievance 20-131

Plaintiff submitted an RTS to the Warden asking to be allowed to correspond with her fiancé so that she could send him a marriage application for him to fill out his portion. The Warden denied her request, citing a policy prohibiting correspondence between inmates without approval and stating that Plaintiff's fiancé was not on her approved visitors list, as required by another policy. Plaintiff then submitted grievance 20-131. The RA denied the grievance on the same grounds, adding that Plaintiff's fiancé must be on her approved visitors list at least six uninterrupted months prior to the application for marriage.

Plaintiff submitted a grievance appeal to the ARA. The ARA responded that the appeal was filed improperly because she had not submitted an affidavit listing her previous grievances. The ARA gave Plaintiff a final opportunity to properly resubmit her corrected appeal within ten days of her receipt of the ARA's response. Plaintiff took no further action.

II. Discussion

Plaintiff argues the district court erred in granting summary judgment in favor of defendants because prison officials prevented her from fully exhausting her administrative remedies. We review the district court's summary judgment decision *de novo*, including its finding of a failure to exhaust administrative remedies.

See May v. Segovia, 929 F.3d 1223, 1234 (10th Cir. 2019). Because failure to exhaust is an affirmative defense, defendants bore the burden to show the Plaintiff did not complete the grievance process, but she must show that the remedies were

unavailable to her. *See Tuckel v. Grover*, 660 F.3d 1249, 1254 (10th Cir. 2011). We liberally construe Plaintiff's pro se appellate briefs. *See Cummings v. Evans*, 161 F.3d 610, 613 (10th Cir. 1998).¹

Exhaustion of administrative remedies is mandatory under the PLRA and “unexhausted claims cannot be brought in court.” *Thomas v. Parker*, 609 F.3d 1114, 1117 (10th Cir. 2010) (internal quotation marks omitted). “Because the prison’s procedural requirements define the steps necessary for exhaustion, an inmate may only exhaust by properly following all of the steps laid out in the prison system’s grievance procedure.” *Little v. Jones*, 607 F.3d 1245, 1249 (10th Cir. 2010) (citation omitted). “An inmate who begins the grievance process but does not complete it is barred from pursuing a § 1983 claim under PLRA for failure to exhaust his administrative remedies. The doctrine of substantial compliance does not apply.” *Thomas*, 609 F.3d at 1118 (citation, brackets, and internal quotation marks omitted). But the PLRA only requires the exhaustion of administrative remedies “as are available.” 42 U.S.C. § 1997e(a). And “[w]here prison officials prevent, thwart, or hinder a prisoner’s efforts to avail himself of an administrative remedy, they render that remedy ‘unavailable’ and a court will excuse the prisoner’s failure to exhaust.” *Little*, 607 F.3d at 1250. Plaintiff argues the ODOC grievance procedure was

¹ Plaintiff also purports to appeal the denial of her right to marry another inmate, but the district court did not reach the merits of her underlying claims, so there is no merits ruling for her to appeal.

unavailable to her because prison officials prevented her from complying with the process.

A. Refusal to Provide a Grievance Log

Plaintiff contends that she could not file an accurate affidavit of her previous grievances because the Grievance Coordinator at JHCC refused her request for a grievance log. On April 15, 2020, Plaintiff submitted an RTS to the Grievance Coordinator asking for a grievance log. The Grievance Coordinator responded on April 24 stating, “I do not have any past grievances for you in the past 12 months here @ JHCC. You will need to request from other facilities about any other grievances, that is your responsibility.” R. at 867.

Plaintiff does not cite any policy requiring the provision of grievance logs to inmates, but she maintains it is customary to do so and that she had obtained grievance logs at another prison that listed her past grievances from all facilities. Despite her not obtaining a log from the Grievance Coordinator at JHCC, the record shows that Plaintiff was still able to list all of her relevant past grievances, including those from previous facilities, with one exception: grievance 20-085, the grievance that the RA and ARA noted was missing from the affidavits she submitted.

Grievance 20-085 was a sensitive grievance Plaintiff had submitted directly to the ARA. There is little information in the record regarding that grievance. Someone affixed sticky notes to affidavits that Plaintiff submitted with her

grievances and appeals related to her marriage request. Those notes indicated that grievance 20-085 was missing and referenced May 12, 2020.

The district court rejected Plaintiff's contention that the Grievance Coordinator's refusal to provide her with a grievance log caused her failure to exhaust grievance 20-065. The court concluded that, had the Grievance Coordinator provided Plaintiff with a log in April 2020 when she requested it, the log would not have included grievance 20-085, which the ARA did not receive until May 12, 2020. Plaintiff argues that the court erred by failing to apply "tolling" to the grievance process she pursued related to the Grievance Coordinator's denial of a grievance log. After her RTS was denied, Plaintiff submitted grievance 20-067, which the RA returned unanswered on May 29, 2020, because she failed to submit a grievance affidavit and the issue was not grievable. She asserts that the RA could have instead granted her relief on May 29, in which case she would have received a log that included grievance 20-085. But Plaintiff did not make this argument in her objections to the R&R. She instead tied her failure to exhaust in this case to the Grievance Coordinator's denial of her RTS for a grievance log in April, which she emphasized was before she submitted grievance 20-065. Plaintiff therefore waived appellate review of the argument she now raises on appeal. *See Soliz v. Chater*, 82 F.3d 373, 375-76 (10th Cir. 1996) (holding that specific appellate arguments not raised in objections to R&R are waived). We conclude that the interests of justice do not support an exception to our firm waiver rule in this case. *See Casanova v.*

Ulibarri, 595 F.3d 1120, 1123 (10th Cir. 2010) (discussing the factors relevant to determining whether to apply the interests-of-justice exception).

B. Lack of Knowledge of the Missing Sensitive Grievance

Plaintiff claims that she never received a response to sensitive grievance 20-085, so she was not aware of the number the ARA assigned to it and did not have the necessary information (number, date, description, and disposition at each level) that she was required to include in her affidavits. She explains that she was not aware of the sticky notes referencing grievance 20-085 because she received only the response forms from the RA and the ARA, and she did not learn which grievance was missing from her affidavits until defendants filed their motions to dismiss in this case. Plaintiff claims that the prison officials' failure to provide her a response to grievance 20-085 ultimately prevented her from being able to submit a complete affidavit in order to properly exhaust her administrative remedies.

The district court credited Plaintiff's evidence of her lack of knowledge regarding grievance 20-085. *See Tuckel*, 660 F.3d at 1251 (requiring courts to view the evidence in the light most favorable to the non-moving party on summary judgment).² The court nonetheless concluded these facts did not affect its summary judgment analysis because Plaintiff's incomplete affidavit was not the sole basis on

² On appeal, defendants continue to insist that Plaintiff learned that grievance 20-085 was missing from her affidavits based upon the sticky notes affixed to them by a prison official. They ignore that the district court specifically disagreed with the R&R's conclusion on that point. *See R.* at 878 n.6.

which the ARA returned her appeals unanswered. The district court pointed to the untimeliness of Plaintiff's resubmitted appeal regarding grievance 20-065. She now argues that resubmitted appeal was timely, but she did not raise that contention in her objections to the R&R so it is waived on appeal. *See Soliz*, 82 F.3d at 375-76.³ Plaintiff does not dispute that her appeal regarding grievance 20-090 was also deemed untimely. Finally, Plaintiff failed to resubmit her appeal regarding grievance 20-131, as directed by the ARA.⁴ Plaintiff does not demonstrate that the district court erred in concluding that, to the extent her incomplete affidavits were attributable to the actions of prison officials, they were not ultimately the cause of her failure to exhaust her administrative remedies.

³ In any event, it is unclear why Plaintiff believes her resubmitted appeal regarding grievance 20-065 was timely. She received the ARA's initial response no later than July 10, 2022, the date she signed her resubmitted appeal. She was given ten days to resubmit her appeal. The ARA received the resubmitted appeal on July 27, more than 10 days later. Plaintiff notes that the Medical Services Administration received her resubmitted appeal on July 22, but even if that receipt were relevant, it was still untimely.

⁴ The ARA deemed Plaintiff's appeal of grievance 20-131 as improperly filed because she did not submit an affidavit. The district court rejected Plaintiff's contentions that (1) the grievance procedure prohibited her from attaching anything to her appeal, and (2) her affidavit had been forwarded to the ARA electronically along with her RTS and grievance. As the court noted, the grievance policy allows an inmate to attach an affidavit to an appeal where required, and the affidavit is not one of the documents electronically forwarded to the ARA upon an appeal. *See R.* at 400. Although the ARA gave Plaintiff an opportunity to refile the appeal, she did not do so.

III. Conclusion

The district court's judgment is affirmed. Plaintiff's motions for a temporary restraining order and for the appointment of counsel on appeal are denied. Her motion to proceed on appeal without prepayment of fees and costs is granted.

Entered for the Court

Jerome A. Holmes
Chief Judge

**THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

ORDER

Plaintiff filed this action pursuant to 42 U.S.C. § 1983, alleging violation of her civil rights because Defendants are allegedly interfering with her right to marry another inmate, Marquis Porter. Pursuant to 28 U.S.C. § 636(b)(1)(B) and (C) the matter was referred to United States Magistrate Judge Amanda Maxfield Green for preliminary review. On December 3, 2021, Judge Green issued a Report and Recommendation wherein she recommended that the Defendants be granted summary judgment because Plaintiff failed to exhaust her administrative remedies as required by the Prison Litigation Reform Act (“PLRA”), 42 U.S.C. § 1997(e)(a), prior to filing suit. The matter is currently before the Court on Plaintiff’s timely objection to the Report and Recommendation, Doc. No. 41, which gives rise to the Court’s obligation to undertake a *de novo* review of those portions of the Report and Recommendation to which Plaintiff makes specific objection. Having conducted this *de novo* review, the Court finds as follows.

Appendix B

Plaintiff's Amended Complaint names three Defendants, Joseph Harp Correctional Center Warden Luke Pettigrew, Case Manager A. Monden, and Department of Corrections Chaplain Leo Brown. Plaintiff contends the Defendants infringed her right to marry. (Doc. No. 15). Ms. Porter, an inmate, wishes to marry inmate Marquis Porter, whom she first met when they were cellmates at Davis Correctional Facility. She asserts claims under the Fourteenth Amendment that her substantive due process and equal protection rights have been violated by the Defendants' failure to grant permission for the two to wed and failure to facilitate the wedding.¹ Judge Green ordered Plaintiff's custodian to file a special report and to respond to the Amended Complaint. Defendants Pettigrew and Monden filed a joint Motion to Dismiss. Defendant Brown subsequently filed a similar motion. The motions raised a number of defenses, including the failure to exhaust as required by the PLRA. Plaintiff responded to the motion filed by Defendants Pettigrew and Monden, but Judge Green construed her response as directed to both motions. In responding to the motion to dismiss as it addressed exhaustion, Plaintiff mentioned only one grievance -- No. 20-065. She admitted, however, that she "did not exhaust this claim. However, Plaintiff included this [request to staff] RTS in her complaint as evidence to prove that the Defendants did not help her meet certain requirements as such as obtaining a[n] ordained person to marry two LGBT people." (Doc. No. 37, p. 7)(citation omitted). Noting that Plaintiff did not address the other grievances, the Report and Recommendation nevertheless addressed each of the three grievances that Plaintiff unsuccessfully attempted to pursue to the

¹ Plaintiff is no longer incarcerated at the Joseph Harp Correctional Center and is currently housed at the Oklahoma State Penitentiary.

Administrative Review Authority. Because she considered documents beyond the scope of the pleadings, Judge Green concluded the motions to dismiss should be construed as motions for summary judgment and further that Plaintiff had not properly exhausted her available administrative remedies. As a result, she recommends the action be dismissed without prejudice.

Plaintiff does not contend that she properly exhausted Grievance Nos. 20-065, 20-090, or 20-131, the three addressed by the Report and Recommendation.² Rather, she contends that she was prevented from properly exhausting her claims by Department of Corrections personnel, thereby rendering those remedies unavailable. With regard to Grievance No. 20-065, at page 2 of her objection Plaintiff asserts that Warden Pettigrew's assistant is responsible, in part, for Plaintiff's inability to properly exhaust her administrative remedies. Plaintiff submitted a Request to Staff, JHCC 12799, on April 20, 2020. Therein she requested a copy of her grievance log, noting that she had only recently transferred to JHCC and seeking information from her past facilities. (Doc. No. 41-10). The grievance coordinator responded that she had no grievances for her at JHCC during the past twelve months and that it was her responsibility to contact those facilities. (*Id.*). Plaintiff contends that the refusal to provide her with a grievance log prevented her from successfully completing any of her attempts at exhaustion because she needed that information to fulfill the obligations of an inmate on grievance restriction, a status imparted on Plaintiff on November 25, 2019. Such status requires an inmate to list all grievances

² She does not rely on any other attempts at exhaustion to support her obligation under the PLRA.

and results from the twelve months prior to the filing of the current grievance. As set forth below, Plaintiff never successfully submitted such an affidavit because she omitted a sensitive grievance, Grievance No. 20-85, submitted to the administrative review authority, but never returned to her.

On May 6, 2020, Plaintiff submitted Request to Staff (JHCC 12971) regarding her desire to marry. She specifically sought approval of her private wedding ceremony and assistance in obtaining a marriage license. (Doc. No. 28-19, p. 4). The request was directed to the chaplain, who responded that the necessary forms had been provided and that Plaintiff needed to complete the form, send it to her fiancé for signature and then submit the form to the agency chaplain. *Id.* Dissatisfied with this response, Plaintiff submitted Grievance No. 20-65 to the warden requesting that he “approve my private wedding ceremony with my fiancé & help me with obtaining a marriage license as OP-090128 states.” *Id.* p. 2. The warden provided Plaintiff with a form response indicating no answer would be provided because Plaintiff had not included a notarized affidavit listing her grievances for the past year. *Id.* p. 6. The warden further noted that the grievance was on the wrong form, and further that Plaintiff had been provided the appropriate form for marriage by the chaplain. *Id.* Plaintiff proceeded to the next step in the administrative process, appeal to the administrative review authority. Doc. No. 28-20, p. 2. Her request was received by the ARA on June 12, 2020. Plaintiff included an affidavit that purported to contain the grievances filed in the prior year. Doc. No. 28-20, pp. 4-5. Mark Knutson, director’s designee, returned the appeal to Plaintiff, noting that proper documentation was not included, that her grievance affidavit was not accurate, and that she could resubmit the

appeal to the ARA within ten days. *Id.* at p. 6. Plaintiff resubmitted the appeal to the ARA, and it was rejected on August 12, 2020, because it had been resubmitted out of time and her affidavit was not accurate.³ (Doc. No. 28-29, p. 6).

Plaintiff's first challenge to the Report and Recommendation addresses the sufficiency of her affidavit in support of Grievance No. 20-65. She contends that she could not submit an accurate affidavit in support of her grievance because the warden's assistant refused to provide her with list of grievances from Plaintiff's prior facility. The missing grievance on each of Plaintiff's affidavits was sensitive Grievance No. 20-85, filed directly with the Administrative Review Authority. Plaintiff contends that Ms. Caskey's failure to provide a grievance log rendered her unable to comply with Department of Corrections policy because the sensitive grievance was not returned to her and she was not informed until she received the Defendants' motion as to what grievance was missing.

The Court rejects this argument because the missing information on the grievance log, a May 2020 sensitive grievance, post-dates Plaintiff's April 2020 request to Ms. Caskey. According to the records submitted by Defendants the omitted sensitive grievance was filed on May 12, 2020, after Plaintiff submitted the request to staff that evolved into Grievance No. 20-065. Even if Ms. Caskey had provided the grievance log requested by Plaintiff in April 2020, it would not have contained information about the May 12, 2020 sensitive grievance. Accordingly, Caskey's failure to provide a grievance log in April 2020 was not the cause of Plaintiff's inability to properly exhaust Grievance No. 20-065.

³ Plaintiff did fix one error with her affidavit, which was required by OP-090124 § X.B.2.a to be signed on each page.

Plaintiff makes no other arguments regarding Grievance No. 20-065 and accordingly, the Court finds no basis in the objection for concluding that the actions of employees of the Department of Corrections rendered the process unavailable to her.

Plaintiff's next objection addresses the Magistrate Judge's conclusion with regard to Grievance No. 20-131, which was returned to her by the administrative review authority because she did not submit the affidavit required for those on grievance restriction.⁴ (Doc. No. 28-24, p. 4). Plaintiff had submitted the affidavit with her grievance, but not with her appeal to the ARA. (Doc. No. 28-23, pp. 6-7). Plaintiff contends that, because the form for appeal to the administrative review authority specifically states that no additional documents should be appended thereto, the ARA was incorrect in rejecting her appeal on this basis. *See e.g.* Doc. No. 28-24, p. 2. She further argues that because OP-090124 dictates that the ARA is to be provided certain documents in electronic form, specifically the RTS, Inmate/Offender Grievance and Grievance Decision from Reviewing Authority, that Mark Knutson, who rejected the ARA appeal, knew she had filed an affidavit with her grievance.

Although the form utilized to submit an appeal to the ARA indicates no additional documents should be appended, Plaintiff was clearly aware of the Policy requirement that mandated the affidavit, because she had submitted one with her prior appeal to the ARA for Grievance No. 20-090. Additionally, the grievance policy, OP-090124(VIII)(B)(1)(d), which addresses appeals to the administrative review authority, provides, “[n]o additional

⁴ The July 14, 2020 Request to Staff, number 13372, requested that the warden approve correspondence between Plaintiff and her fiancé so that the fiancé could be provided the marriage application for completion. The warden denied the request and Plaintiff filed an appeal with the reviewing authority, which included the required affidavit. Although the affidavit did not include the sensitive grievance the reviewing authority did not reject the request on that basis, rather it addressed the merits. (Doc. No. 28-23, pp. 6-7, p. 8). This rejection led Plaintiff to the ARA.

attachments, except an affidavit if required, are allowed.” Doc. 28-16, p. 14. The ARA notifies the facility of the appeal. The facility then provides the underlying documentation, specifically the RTS, grievance and response. This policy does not excuse an inmate from providing an affidavit to the ARA.⁵ Accordingly, Plaintiff cannot support her contention that Department of Corrections’ employees prevented her from exhausting properly because she failed to follow the requirements of the policy. Finally, and critically, Plaintiff was given an opportunity to correct the absence of the affidavit but chose not to do so. Ultimately it was Plaintiff’s failure to resubmit her appeal to the ARA that terminated the unsuccessful exhaustion process and her decision precludes her from successfully arguing that Department of Corrections employee interference rendered administrative remedies unavailable.

With regard to Grievance No. 20-090, Plaintiff complains that it was incorrectly rejected by the ARA as untimely, because she delivered it to the mailroom but staff were working remotely due to a covid outbreak at JHCC. She asks that the Court obtain “clock in and clock out” documents so she can prove that she timely submitted her ARA appeal to support her contention that the administrative remedies were unavailable to her. Although Defendants’ Motion to Dismiss addressed all three of the grievances set forth above, Plaintiff’s response thereto was limited to addressing 20-065. In her response to the Motion to Dismiss before Judge Green, Plaintiff did not tender any arguments regarding

⁵ Due to the lapse of time between filing a grievance and receiving and appealing a response, an inmate could conceivably file additional grievances, and therefore it is not a foregone conclusion that an affidavit submitted to the reviewing authority in support of a grievance would be the same as one subsequently submitted to the ARA in appealing denial of that same grievance.

the absence of mailroom employees from the JHCC which allegedly resulted in the late submission of her documents to the ARA. Issues raised for the first time in an objection to the Report and Recommendation are deemed waived under the firm waiver rule. *See Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996); *United States v. Garfinkle*, 261 F.3d 1030, 1030-31 (10th Cir. 2001) (“In this circuit, theories raised for the first time in objections to the magistrate judge's report are deemed waived.”).

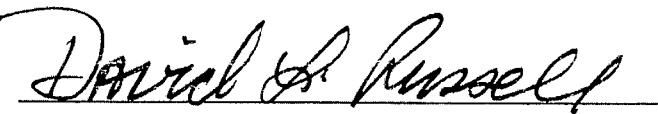
Additionally, even if the argument was not waived, the only issue addressed by Grievance No. 20-90 was the failure of officials to provide Plaintiff with a list of LGBT-friendly clergy to perform a wedding; the grievance did not address the underlying constitutional issue -- whether the Department of Corrections employees or its policies unconstitutionally infringe on Plaintiff's right to marry. The request did not seek permission to wed, but rather sought to compel information that would be needed once the request had been granted. Accordingly, even if exhausted the claim would not provide a basis for § 1983 relief.

With regard to ARA-20-085, the sensitive grievance allegedly omitted from Plaintiff's affidavits, Plaintiff argued in response to the motion to dismiss that the ARA neither answered nor returned the grievance and therefore she could not be aware thereof in completing her affidavit. As set forth above with regard to Plaintiff's appeal of the denial of grievance 20-131, Plaintiff did not resubmit her appeal as directed and therefore cannot argue that the insufficiency of the affidavit was the result of actions by Department of Corrections personnel in failing to return sensitive Grievance 20-85. As to Grievance 20-90, the process terminated when Plaintiff failed to meet the deadline for submitting her

appeal to the ARA, not because of the insufficiency of the affidavit. Finally, on Grievance No. 20-65, Plaintiff's attempt to re-submit the appeal to the ARA was untimely. Although the ARA noted that the affidavit remained deficient, it also cited the untimeliness as a basis for returning the re-submitted final appeal unanswered.⁶

For the reasons set forth herein, and with the caveats set forth above, the Court hereby adopts the Report and Recommendation, construes the motions to dismiss as motions for summary judgment and grants the motions. This action is dismissed without prejudice in light of Plaintiff's failure to exhaust available administrative remedies prior to initiating this action.⁷

IT IS SO ORDERED this 10th day of January 2022.



DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

⁶ In the Report and Recommendation Judge Green concluded that Plaintiff should have known about what grievance was missing from her affidavit based on the "sticky note" attached to the affidavit and identifying the missing sensitive grievance. In response to the Motion to Dismiss, Plaintiff submitted an affidavit indicating that she was unaware of the number of the missing grievance until she was served with the motion to dismiss. (Doc. No. 37-2). She elaborates in her objection, noting that upon rejection of an appeal only the form indicating the basis for rejection is provided to the inmate. Accordingly, the Court rejects Judge Green's conclusion as it relates to her finding that Plaintiff should have been aware that the deficiency in his grievance affidavit was the absence of Grievance No. 20-085. This conclusion, however, does not alter the outcome of the Defendants' motions.

⁷ Plaintiff argues throughout her objection that officials as JHCC did not want LGBTQ inmates to marry and set up roadblocks to avoid having to approve such marriages. The Court's ruling is limited to whether Plaintiff exhausted her available administrative remedies without regard to the merits of her underlying claim.

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

LAMONE JOHNSON, a/k/a/)
MARYLIN MONAE PORTER,)
)
Plaintiff,)
)
v.) Case No. CIV-20-764-R
)
LUKE PETTIGREW, Interim)
Warden, et al.,)
)
Defendants.)

REPORT AND RECOMMENDATION

Plaintiff Lamone Johnson, a/k/a Marylin Monae Porter (“Plaintiff”), a state prisoner appearing *pro se* and *in forma pauperis*, filed this action under 42 U.S.C. § 1983, alleging civil rights violations. (Doc. 15). United States District Judge David L. Russell referred the matter to United States Magistrate Judge Suzanne Mitchell for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B), (C). (Doc. 5). That referral was transferred to the undersigned Magistrate Judge. (Doc. 16).

Before the court are Defendants Luke Pettigrew and Ancilla Monden’s Motion to Dismiss (Doc. 29) and Defendant Leo Brown’s Motion to Dismiss. (Doc. 36).¹ Plaintiff filed a response (Doc. 37),² and the Motions are at issue. For the reasons set forth fully

¹ Citations to the parties’ filings and attached exhibits will refer to this court’s CM/ECF pagination. Except for changes in capitalization, quotations are verbatim unless indicated.

² Plaintiff’s response is directed only to Defendants Luke Pettigrew and Ancilla Monden’s Motion. (Doc. 37, at 1). Given the similarity between the two defense Motions, the undersigned construes Plaintiff’s filing to respond to both motions.

Appendix C

below, the undersigned recommends that the Motions to Dismiss, converted to Motions for Summary Judgment, be **granted**.

I. Procedural History and the Instant Motion

Plaintiff filed an Amended Complaint asserting two claims against Defendants Luke Pettigrew, Ancilla Monden, and Leo Brown, in their individual and official capacities, related to her unsuccessful efforts to marry another state inmate who is housed at a different facility. (Doc. 15). Plaintiff makes the following two claims against each Defendant:

- a violation of the Fourteenth Amendment's right to substantive due process when Defendants refused to allow Plaintiff to marry her fiancé, Marquis Porter, who is an inmate at another facility. (*Id.* at 8-12). Plaintiff seeks \$7,000 in punitive damages from each defendant, the "cost for suit," and a permanent injunction ordering Defendants to allow her to marry Mr. Porter. (*Id.* at 12).
- a violation of Plaintiff's equal protection rights under the Fourteenth Amendment by discriminating against her because she is a male-to-female transgender woman who "seeks to marry a gay male." (*Id.* at 12-13). She claims "any 'transgender related matter' ends with discrimination." (*Id.* at 13). Plaintiff seeks \$3,000 from each defendant in punitive damages and the "cost of [the] suit." (*Id.*)

Defendants filed the instant Motions requesting that the court dismiss this action because (1) Plaintiff failed to exhaust her administrative remedies; (2) Defendants did not personally participate in a constitutional violation; (3) Defendants did not violate Plaintiff's Fourteenth Amendment Rights; (4) Plaintiff is not entitled to injunctive relief; and (5) Defendants are entitled to qualified immunity. (*See* Docs. 29, 36).

Defendants rely on documents outside of the pleadings in their Motions to Dismiss. (*See* Docs. 29, 36). The parties were advised that "if a Defendant files a Fed. R. Civ. P. 12(b)(6) motion and relies on materials not attached to or incorporated by reference in the Amended Complaint, the court will convert the motion to dismiss into a motion for

summary judgment, pursuant to Fed. R. Civ. P. 12(d).³ (Doc. 17, at 2). Because the undersigned does not exclude the documents presented outside of the pleadings, Defendants' Motions to Dismiss should be converted to Motions for Summary Judgment. Fed. R. Civ. P. 12(d).

II. Standard of Review for Summary Judgment

Summary judgment shall be granted where 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). Parties may establish the existence or nonexistence of a material disputed fact through:

- submission of "depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials; or"
- demonstration "that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."

Fed. R. Civ. P. 56(c)(1)(A)-(B). The cited evidence should be viewed "in the light most favorable to the non-moving party." *Pepsi-Cola Bottling Co. of Pittsburgh, Inc. v. PepsiCo, Inc.*, 431 F.3d 1241, 1255 (10th Cir. 2005) (citation omitted).

When a defendant asserts an affirmative defense, such as the failure to exhaust administrative remedies, in a motion for summary judgment, he or she "must demonstrate that no disputed material fact exists regarding the affirmative defense asserted when the

³ "Notice to the parties is required to prevent unfair surprise when a judge converts a 12(b)(6) motion into a Rule 56 motion." *Arnold v. Air Midwest, Inc.*, 100 F.3d 857, 859 n.2 (10th Cir. 1996).

evidence is viewed in the light most favorable to the plaintiff.” *Kramer v. Wasatch Cnty. Sheriff's Office*, 743 F. 3d 726, 746 (10th Cir. 2014) (internal quotation marks and citation omitted). If the defendant satisfies this burden, the plaintiff would incur a duty to “demonstrate with specificity the existence of a disputed material fact” or “show that remedies were unavailable to [her] as a result of” the actions of prison officials. *Tuckel v. Grover*, 660 F.3d 1249, 1254 (10th Cir. 2011). In the absence of either showing, the defendant would be entitled to summary judgment on the affirmative defense. *See id.*

III. Analysis: Exhaustion of Administrative Remedies

A. The Exhaustion Requirement

The Prison Litigation Reform Act (“PLRA”) provides that “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983] . . . by a prisoner . . . until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Because exhaustion of available remedies “is mandatory under the PLRA[,] . . . unexhausted claims cannot be brought in court.” *Jones v. Bock*, 549 U.S. 199, 211 (2007). “Proper exhaustion demands compliance with an agency’s deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings.” *Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006). This means a prisoner must use “all steps that the agency holds out, and do[] so *properly* (so that the agency addresses the issues on the merits).” *Id.* at 90 (internal quotation omitted).

But, as noted above, the PLRA’s exhaustion requirement is limited to such administrative remedies as are “available” to be exhausted. “Administrative remedies are

deemed unavailable if, among other things, ‘prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.’” *May v. Segovia*, 929 F.3d 1223, 1234 (10th Cir. 2019) (quoting *Ross v. Blake*, 578 U.S. 632, 644 (2016)). The court liberally construes grievances filed by unrepresented inmates. *Greer v. Dowling*, 947 F.3d 1297, 1302 (10th Cir. 2020).

B. The ODOC Grievance Procedure

The Oklahoma Department of Corrections (“ODOC”) Operations Memorandum OP-090124 establishes the offender grievance process for state inmates. (Doc. 28, Ex. 16, at 2-28). The first step in the grievance process is “informal resolution,” including submitting a “Request to Staff” (“RTS”) if the complaint is not resolved. (*Id.* at 7-9). The informal resolution process must occur before a grievance can be submitted. (*Id.* at 7). The RTS “must be specific as to the complaint, dates, places, personnel involved and how the inmate/offender was affected.” (*Id.*)

When an issue is not resolved with the informal RTS process, the inmate must submit a grievance form. (*Id.* at 9). The policy provides that “[i]f the inmate/offender does not follow instructions as explained in this procedure and on the grievance forms, the grievance may not be answered.” (*Id.* at 10). The reviewing authority screens grievances to determine, among other things, whether the inmate followed proper procedures for submitting a grievance and whether the grievance and/or RTS contained more than one issue. (*Id.* at 11-12). “The reviewing authority will notify the inmate/offender when a grievance is submitted improperly” and the “inmate/offender will be given one opportunity to correct any errors and properly resubmit within ten (10) days of the date the

inmate/offender is notified of the improper submission.” (*Id.* at 12-13). If the inmate fails to correct the errors, the grievance “will be not be answered and the inmate/offender will have waived/forfeited the opportunity to proceed in the grievance process.” (*Id.* at 13).

The final step in the grievance procedure is an appeal to the Administrative Review Authority (“ARA”). (*Id.*) The appeal must be based on newly discovered or newly available evidence or probable error committed by the reviewing authority. (*Id.*) If an appeal is submitted improperly, “the inmate/offender will be given one opportunity to correct any errors, which must be received by the ARA within 10 days of the time the inmate/offender is notified of improper submission.” (*Id.* at 14). “If the inmate/offender fails to correct the errors or properly resubmit, the grievance or grievance appeal will not be answered and the inmate/offender will have waived/forfeited the opportunity to proceed in the grievance process.” (*Id.* at 15).

The grievance policy allows the reviewing authority to “determine there is abuse or misuse of the grievance process and may restrict an inmate’s/offender’s ability to submit a grievance.” (*Id.* at 18). “If abuse of the process is determined,” the inmate/offender is “placed on grievance restriction.” (*Id.* at 19). When placed on grievance restriction, “for all grievances and appeals submitted during the restriction period, the inmate/offender is required to show cause as to why they should be permitted to grieve.” (*Id.*) To do so, the inmate/offender must submit a verified affidavit including “a complete, accurate, and legible list by grievance number, date, description, and disposition at each level, of all grievances previously submitted by the inmate/offender within the last 12 months” and a statement “that all contents of the grievance are true and correct to the best of the

inmate's/offender's knowledge." (*Id.*) "Each page of the affidavit must be legible and signed, verified, and notarized at the end of the text." (*Id.*) "[B]efore considering the merits of the grievance or appeal, the reviewing authority will determine whether the inmate/offender has complied with the requirements for being permitted to submit a grievance or appeal." (*Id.*) If the inmate/offender has not complied with all such requirements, "the inmate/offender will be provided written notification and the grievance or appeal will not be answered." (*Id.*) But, "the grievance or appeal may proceed when the inmate/offender meets the guidelines outlined in [the] procedure." (*Id.* at 20).

C. Plaintiff's Grievance Timeline

Plaintiff filed three grievances related to her efforts to marry Mr. Porter.⁴ The three grievances – No. 20-065, No. 20-90, and No. 20-131 – and related Requests to Staff and appeals are substantiated by exhibits attached to the Amended Complaint (Doc. 15) and the Special Report (Doc. 28). Those documents establish the following timeline:

Grievance No. 20-065

- May 8, 2020:⁵ Plaintiff submitted an RTS to "Chaplain Ruby," asserting she wanted to marry her fiancé, who was an inmate at Lawton Correctional Facility. (Doc. 15, Ex. 3,

⁴ Plaintiff also filed nine Requests to Staff that she did not advance to the grievance stage. (*See* Doc. 15, Ex. 2; *id.* at Ex. 6; *id.* at Ex. 8, at 10-11; *id.* at Ex. 9, at 2; Doc. 28, Ex. 17, at 7, 10, 19; *id.* at Ex. 18, at 2, 4).

⁵ ODOC Operations Memorandum OP-090124 states "[t]here is no mailbox rule regarding submission of requests to staff or grievances and grievance appeals. The document must be received in the appropriate office within the required time frame." (Doc. 28, Ex. 16, at 4). Thus, Plaintiff's administrative filings are listed by the dates on which they were received and not the dates on which she completed the forms.

at 4-5). Plaintiff noted there is an ODOC policy addressing inmate marriages (OP-090128).

(*Id.*) She also cited a case decided by United States Supreme Court, *Turner v. Safley*, 482 U.S. 78, 100 (1987), which established that inmates have a right to marry other inmates. (Doc. 15, Ex. 3, at 4-5). Plaintiff noted her requested marriage did not affect the security of the prison and that she was supposed to receive assistance in obtaining a marriage license. (*Id.*) Plaintiff specifically requested approval of a private wedding ceremony with her fiancé and help obtaining a marriage license. (*Id.* at 4).

- May 13, 2020: A staff member sent a response to Plaintiff, stating: “I provided the necessary form to you to fill out and send to the fiancé to complete and send to the Agency Chaplain, Leo Brown.” (*Id.*)
- May 21, 2020: Plaintiff submitted Grievance No. 20-065 to Defendant Pettigrew, in which she asserted the same facts and requested the same relief as in her RTS. (Doc. 15, Ex. 3, at 2-3).
- May 29, 2020: The grievance was returned to Plaintiff unanswered for the following reasons:

You are on grievance restriction and/or proper documentation not included. Per OP-090124, you must submit a duly verified notarized affidavit with a listing containing a complete, accurate and legible list of grievances previously submitted.

* * *

Only the current and correct DOC grievance (OP-090124A- Revised 4/2019) and Request to Staff forms will be accepted. The updated forms may be provided by the Law Library.

* * *

Other: Per the Request to Staff, information was provided to you by the facility chaplain. In addition, the chaplain stated on send the forms to once complete [sic].

(*Id.* at 1).

- June 12, 2020: Plaintiff submitted a grievance appeal to the ARA asserting probable error by the reviewing authority. (Doc. 28, Ex. 20, at 2-3). Plaintiff also attached a notarized affidavit listing grievances she filed within the prior twelve months. (*Id.* at 4-5).
- July 8, 2020: The ARA noted Plaintiff's grievance was filed improperly because: "Inmate on grievance restriction and/or proper documentation not included." (*Id.* at 6). Specifically, the response stated that Plaintiff's "affidavit [was] not accurate and [was] not in compliance with OP-090124, Section X.B.2.a." (*Id.*) The response advised Plaintiff she had "one final" opportunity to resubmit a corrected grievance within ten days of receiving the form. (*Id.*) A note on Plaintiff's affidavit signed by "MK" indicates the affidavit was missing "'sensitive' grievance ARA 20-085" from May 12, 2020, and that the back page was not signed and notarized.⁶ (Doc. 28, Ex. 20, at 5).
- July 27, 2020: Plaintiff resubmitted her grievance and notarized affidavit. (Doc. 28, Ex. 29, at 2-5).
- August 12, 2020: The ARA responded that the grievance was filed improperly because the "resubmitted appeal was out of time and [Plaintiff's] affidavit [was] not accurate or in compliance with OP-090124, Section X.B.2.a." (*Id.* at 6). The response also advised Plaintiff that she was "now out of time" to appeal. (*Id.*) A note on Plaintiff's

⁶ Mark Knutson was the Director's Designee who responded to the appeal on behalf of the ARA. (Doc. 28, Ex. 20, at 6).

affidavit indicates it was missing “ARA 20-085 ‘sensitive’ grievance” from May 12, 2020. (*Id.* at 4).

Grievance No. 20-90

- May 13, 2020: Plaintiff filed an RTS to “Chaplain,” seeking a list of names and addresses of Oklahoma clergy who perform LGBT (lesbian, gay, bisexual, transgender) wedding ceremonies. (Doc. 15, Ex. 7, at 3).
- May 22, 2020: A staff member responded to Plaintiff, writing: “I do not have a list. You would have to find one. I don’t have that information.” (*Id.*)
- June 5, 2020: Plaintiff filed grievance No. 20-90, making the same request as in her RTS. (*Id.* at 2; Doc. 28, Ex. 21, at 2-3).
- June 15, 2020: Plaintiff’s grievance was returned unanswered because: (1) she was on grievance restriction and the proper documentation was not included, and (2) the issue was not considered grievable by ODOC. (Doc. 15, Ex. 7, at 1).
- July 23, 2020: Plaintiff filed an appeal contending there was both newly discovered evidence not considered by the reviewing authority and probable error committed by the reviewing authority. (Doc. 28, Ex. 22, at 2). Specifically, Plaintiff wrote that: “OP-090128 states that there is someone who is to be appointed at the facility to make sure all ‘prerequisites’ are met. This facility doesn’t seem to have one.” (*Id.*) Plaintiff also submitted an affidavit listing grievances she had filed. (*Id.* at 3-4).
- August 12, 2020: The ARA responded that Plaintiff’s grievance was filed improperly because (1) it was received out of time, (2) Plaintiff was on grievance restriction

and proper documentation was not included, and (3) because her affidavit was not accurate or in compliance with OP-090124, Section X.B.2.a. (*Id.* at 5). A notation on Plaintiff's grievance indicates the affidavit was missing "ARA 20-085 'sensitive' grievance" from May 12, 2020. (*Id.* at 3).

- September 1, 2020: Plaintiff filed a Request to Director to Submit a Misconduct/Grievance Appeal Out of Time because the mail room delayed her mail due to COVID-19. (*Id.* at 6-7).
- September 8, 2020: The Director's Designee denied Plaintiff's Request to Director to Submit a Misconduct/Grievance Appeal Out of Time. (*Id.* at 6).

Grievance No. 20-131

- July 14, 2020: Plaintiff submitted an RTS to Defendant Warden Pettigrew, stating:

On 7-13-20, I spoke with you at my cell . . . about approving my correspondence to my fiancé Marquis Porter . . . at Lawton Corr. Facility. I wish to marry him. Chaplain Ruby has gave me a marriage application[.] My part is filled out, my fiancé has to fill out his part, but to send it to him, I need approved correspondence[.]. My name has already been changed to his last name, it is inside my field file, for 1 year, 3 months I have had his name. The records do reflect that he is my fiancé[.] In September 1st 2020, it will be 2 years we been together.

(Doc. 15, Ex. 10, at 4-5). Plaintiff requested Defendant Pettigrew approve her request to send correspondence to Mr. Porter so that Plaintiff could send him a marriage application. (*Id.* at 4).

- July 17, 2020: Defendant Pettigrew denied the request, stating: "Per OP-090128, fiancé must be on approved visiting list. Per OP-030117, 'There will be no correspondence

between inmates and those under agency supervision’ ‘except as approved by the appropriate facility head/deputy director.’” (*Id.*)

- July 29, 2020: Plaintiff submitted grievance No. 20-131, alleging the same facts and requesting the same relief as her RTS. (*Id.* at 2-3).
- August 6, 2020: Defendant Pettigrew denied Plaintiff’s grievance because OP-030117 allows for correspondence between inmates if they are immediate family members and no correspondence was allowed between inmates and those under other agency supervision. He further noted that OP-090128 requires that a fiancé be on an inmate’s approved visitors list for at least six uninterrupted months prior to an application for marriage. (*Id.* at 1).

- August 17, 2020: Plaintiff filed an appeal which states:

The warden has denied me, marriage rights, & corresponding rights, the policy speaks of “inmate-to-civilian” marriages, it says NOTHING about “inmate-to-inmate” marriages, the warden’s error is clearly implying “OP-090128 . . . inmate marriages” to inmate-to-inmate marriages. The U.S. Supreme Court case *Turner v. Safley*, 482 U.S. 78 (1987) clearly defines that inmates may [marry] other inmates, it is a inmate’s right. This should be reversed and remanded and my marriage ceremony and correspondence rights should be granted to me and my common law husband (fiancé).

(Doc. 28, Ex. 24, at 2-3).

- September 8, 2020: The ARA determined that Plaintiff improperly filed her appeal because she was on a grievance restriction and the appeal did not contain the required affidavit. (*Id.* at 4).

D. Defendants are Entitled to Summary Judgment Because Plaintiff Failed to Exhaust Her Administrative Remedies.

Defendants argue Plaintiff did not exhaust her administrative remedies because she did not “fully or correctly complete the grievance process” with regard to the claims at issue in this case. (Doc. 29, at 16-17; Doc. 36, at 17 (emphasis omitted)). An inmate fails to exhaust her administrative remedies when she makes procedural errors at the grievance and appeal stages – such as failing to comply with grievance-restriction requirements – and forfeits her opportunity to proceed with the grievance process. *See Morris v. Fallin*, 798 F. App’x 261, 268-69 (10th Cir. 2020) (holding an inmate failed to properly exhaust his claims where his appeal to the administrative review authority was returned unanswered for, among other reasons, failing to comply with his grievance restrictions). “The PLRA clearly prohibits a district court from overlooking grievance procedures set by prison officials. . . . Even substantial compliance is insufficient.” *Smith v. Jones*, 606 F. App’x 899, 902 (10th Cir. 2015).

In her filing and appealing Grievance No. 20-131, Plaintiff did not file an affidavit listing her prior grievances as required by her grievance restrictions. (Doc. 28, Ex. 24, at 4). (*See* Doc. 28, Ex. 16, at 19 (imposing affidavit requirement “for all grievances and appeals submitted during the restriction period”)). Thus, Plaintiff did not exhaust her administrative remedies with regard to Grievance No. 20-131. *See Craft v. Null*, 543 F. App’x 778, 779-80 (10th Cir. 2013) (“We conclude that Mr. Craft did not exhaust available administrative remedies. Though he filed a grievance, he did not file the affidavit or list that was required as a result of the grievance restriction.”); *Morris*, 798 F. App’x at 268-

69. Further, in Plaintiff's appeals of Grievance No. 20-065 and No. 20-90, her affidavits were incomplete because they did not include grievance "ARA 20-085," a sensitive grievance filed on May 12, 2020.⁷ (Doc. 28, Ex. 20, at 5; *id.* at Ex. 22, at 3; *id.* at Ex. 29, at 4). Plaintiff's failure to include all of the required grievances in her affidavit mandates a finding that she failed to exhaust her administrative remedies. *See Dopp v. Larimer*, 731 F. App'x 748, 753 (10th Cir. 2018) (holding where prison officials return a grievance because the "accompanying affidavit was insufficient" and the inmate was aware of the affidavit requirement, the inmate "may not successfully argue that he had exhausted his administrative remedies"). Thus, because Plaintiff was on grievance restrictions and her appeals were returned for failure to provide a correct affidavit, she failed to exhaust her administrative remedies.

Plaintiff admits she did not exhaust Grievance No. 20-065, in which she expressed her desire to marry Mr. Porter.⁸ (Doc. 37, at 7). But Plaintiff makes several arguments attempting to excuse her non-exhaustion on the basis that the grievance procedure was unavailable to her. (Doc. 37, at 4-5, 7-11). First, Plaintiff generally contends the Defendants use their grievance policy to "trip up" inmates and interfere with the grievance process, such that the grievance procedure is unavailable. (*Id.* at 9-10). This argument has

⁷ Plaintiff's appeals of Grievance No. 20-065 were procedurally deficient for additional reasons. Her first appeal was deficient because she did not notarize each page, as required by the ODOC grievance procedure. (Doc. 28, Ex. 16, at 19; *id.* at Ex. 20, at 4-5). Her second appeal was submitted out of time. (*Id.* at Ex. 29, at 6).

⁸ Plaintiff does not directly address her other grievances, but her arguments seeking to excuse the failure to exhaust apply equally to all of them.

been rejected by the Tenth Circuit. *See Gray v. Ade*, 818 F. App'x 792, 796 (10th Cir. 2020) (“Nor can we accept Gray’s alternative argument – that the defendants instituted excessive procedural technicalities as a means to prevent him from exhausting the administrative remedies. That there are multiple procedural steps Gray must comply with to properly exhaust the process does not excuse an inmate’s failure to abide by the rules.”); *Morris*, 798 F. App’x at 269 (“Although [the inmate] asserts prison officials thwarted his efforts to exhaust by imposing ‘fraudulent’ grievance restrictions . . . we have rejected similar arguments.”); *Thomas v. Parker*, 609 F.3d 1114, 1118 (10th Cir. 2010) (holding “[t]he district court did not err in concluding that [the inmate] failed to exhaust his administrative remedies when he did not properly complete all three required written steps” even where he argued “that defendants made the grievance process unavailable by placing him on grievance restriction and by requiring him to comply with their interpretations of the grievance-restriction requirements”).

Second, Plaintiff asserts she attempted to request a list of her grievances from prison staff in order to obtain her grievance log so that her affidavit would be accurate. (Doc. 37, at 8; *id.* at Ex. 8, at 71). Plaintiff contends the official responded that she did not have any records of grievances at JHCC and that Plaintiff would need to request records from other facilities regarding grievances Plaintiff made while housed at those facilities. (*Id.*) Plaintiff contends this was tantamount to a denial of her request for a grievance log and resulted in Plaintiff’s inability to accurately complete a grievance log to fulfill the requirements of her grievance restrictions. (*Id.* at Ex. 2, at 1). Plaintiff contends she “submitted her affidavit’s knowing they were inaccurate because the defendants knew

Plaintiff could not do a correct grievance without a grievance log.” (*Id.* at 9). Plaintiff claims if the grievance log had been sent, “then [she] would have known what grievance entry was missing to apply and fix the grievance affidavit.” (*Id.* at 11).

In support of her argument, Plaintiff cites *Shaheed-Muhammad v. Dipaolo*, 393 F. Supp. 2d 80, 97 (D. Mass. 2005). In that case, the court addressed the grievance procedure in Massachusetts, which is not relevant here. *Id.* Further, the court found that the defendants could not argue the inmate’s lack of compliance with the grievance procedures barred his claims where the defendants “failed to abide by the strictures of their own regulations.” *Id.* But Plaintiff points to no ODOC policy requiring a prison official to provide a prisoner with a grievance log. To the contrary, when addressing ODOC’s grievance procedure, courts have found prisoners failed to exhaust their administrative remedies even where prison staff did not provide assistance upon an inmate’s request. *See Smith*, 606 F. App’x at 901-02 (holding administrative remedies were not “effectively unavailable” when the inmate alleged prison staff “declined to identify [the inmate’s] mistakes for him or answer certain questions about the complex grievance procedure”). Indeed, Plaintiff’s allegation is similar to another case where the ARA returned an inmate’s appeal because the affidavit was incorrect and missing information. *Greer v. Fallin*, 2018 WL 1354454, at *8 (W.D. Okla. Feb. 15, 2018), *adopted*, 2018 WL 1352182 (W.D. Okla. Mar. 15, 2018). In *Greer*, the inmate filed an RTS after the appeal was returned, stating that the ARA did not identify the perceived defect or what was missing and, as a result, “it [was] impossible for [him] to ‘correct’ it” and that the ARA was preventing him from correcting the affidavit. *Id.* at *9. The RTS was sent to the ARA, which explained: “It is

your responsibility to keep and maintain copies in order to comply with the provisions of your grievance restrictions.” *Id.* The court rejected the inmate’s claim that “prison officials somehow thwarted the grievance process by failing to help him.” *Id.* at *10. Here, prison staff also put the onus on Plaintiff to obtain grievances she filed. (Doc. 37, Ex. 8, at 71). Thus, Plaintiff’s argument that prison staff did not assist her in obtaining a grievance log did not render the grievance procedure unavailable.

Additionally, Plaintiff acknowledges filing a sensitive grievance with the ARA, but she claims she “never heard anything back” and “never knew [it] was ruled on.” (Doc. 37, at 4, 9). She questions how the ARA expected Plaintiff to include “ARA 20-85” in the grievance log and contends the inaccuracy was not her fault. (*Id.* at 4-5). Even assuming that Plaintiff’s version of events is correct, her failure to include information on the affidavit is not excused. If Plaintiff did not have the grievance number of the sole missing item (which she did have by at least July 8, 2020, through the notations on the returned appeal of No. 20-065), she could have included in the affidavit the information she did know – the date, description, and the lack of disposition of the sensitive grievance. Therefore, the undersigned does not find that Plaintiff’s ability to complete the grievance procedure was thwarted because of the ARA’s determination that “ARA 20-85” was missing from Plaintiff’s affidavit.

Finally, Plaintiff contends granting Defendant’s Motion on the basis of failure to exhaust would violate her First Amendment to petition the government for redress of grievances. (Doc. 37, at 9-10). But Plaintiff “has reasonable access to the courts; the PLRA specifies how to access them.” *Haywood v. Baylor*, 804 F. App’x 401, 404 (7th Cir.

2020) (where an inmate argued “the PLRA’s exhaustion requirement is an unconstitutional denial of his First Amendment right to access the courts”); *see also Steele v. Fed. Bureau of Prisons*, 355 F.3d 1204, 1213, n.5 (10th Cir. 2003) (noting that “the Supreme Court has twice interpreted and enforced the rule of 42 U.S.C. § 1997e(a) that prisoners must exhaust administrative remedies before filing in federal court” in response to the inmate’s argument that the PLRA’s exhaustion requirement was unconstitutional); *abrogated on other grounds by Jones v. Bock*, 549 U.S. 199, 211 (2007). Thus, the undersigned finds Plaintiff’s argument is without merit.⁹

Because Plaintiff did not exhaust her administrative remedies, and because those remedies were available to her, the court should enter summary judgment in favor of Defendants. In light of the recommendation herein, it is unnecessary for the undersigned to address Defendants’ remaining arguments.

IV. Recommended Ruling and Notice of Right to Object.

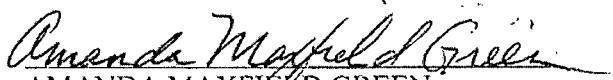
For the reasons discussed above, the court recommends that Defendants Luke Pettigrew and Ancilla Monden’s Motion to Dismiss (Doc. 29) and Defendant Leo Brown’s Motion to Dismiss (Doc. 36) be converted to Motions for Summary Judgment and **GRANTED**.

⁹ Plaintiff also objects to Defendants Monden and Pettigrew’s Motion because they filed it on the same date as the Special Report. (Doc. 37, at 1-2). The court directed Defendants to “not file an answer and/or dispositive motion until ten days following the filing of the Special Report.” (Doc. 17, at 2). While Plaintiff is correct that Defendants Monden and Pettigrew did not follow the court’s order by filing their Motion to Dismiss on the same date as the Special Report, the court finds Plaintiff was not prejudiced by their actions because she asked for and received two extensions of time to respond. (Docs. 30, 31, 33, 35).

The undersigned advises the parties of their right to object to this Report and Recommendation by December 27, 2021, under 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(2). Failure to file a timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal issues contained herein. See *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

This Report and Recommendation disposes of all issues and terminates the referral to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 3rd day of December, 2021.


AMANDA MAXFIELD GREEN
UNITED STATES MAGISTRATE JUDGE