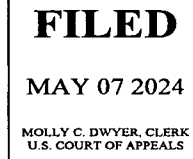


Memorandum of U.S. Appellate Court for the 9th Circuit denied the case and affirmed U.S. District Court's dismissal (01/19/2024).

Case: 22-15432, 05/07/2024, ID: 12882874, DktEntry: 34, Page 1 of 1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT



ISSA DOREH,

Plaintiff - Appellant,

v.

UNKNOWN RODRIGUEZ, named as
Ms. Rodriguez, Housing Unit Manager
at FCI Tucson; et al.,

Defendants - Appellees.

No. 22-15432

D.C. No. 4:16-cv-00108-JAS
U.S. District Court for Arizona,
Tucson

MANDATE

The judgment of this Court, entered January 19, 2024, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule
41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 19 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ISSA DOREH,

Plaintiff-Appellant,

v.

UNKNOWN RODRIGUEZ, named as Ms.
Rodriguez, Housing Unit Manager at FCI
Tucson; UNITED STATES OF AMERICA;
W. PRATT, named as Mr. W. Pratt, Food
Manager at FCI Tucson; L. R. MOLINAR,
named as Ms. Rodriguez, Mail-Room Staff
Supervisor at FCI Tucson; FEDERAL
BUREAU OF PRISONS,

Defendants-Appellees.

No. 22-15432

D.C. No. 4:16-cv-00108-JAS

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
James Alan Soto, District Judge, Presiding

Submitted January 17, 2024**

Before: S.R. THOMAS, McKEOWN, and HURWITZ, Circuit Judges.

Former federal prisoner Issa Doreh appeals pro se from the district court's

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

judgment dismissing for failure to exhaust administrative remedies his action brought under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging an Eighth Amendment claim. We review for clear error the district court's factual findings relevant to its exhaustion determination. *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc). We affirm.

The district court did not commit clear error by finding, following an evidentiary hearing, that Doreh failed to exhaust administrative remedies on his Eighth Amendment failure-to-protect claim, and that Doreh's administrative remedies were not effectively unavailable. *See Ross v. Blake*, 578 U.S. 632, 638, 642-44 (2016) (explaining that an inmate must exhaust "such administrative remedies as are available" before bringing suit, and describing limited circumstances under which administrative remedies are effectively unavailable); *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002) ("[I]f the district court's findings are plausible in light of the record viewed in its entirety, the appellate court cannot reverse even if it is convinced it would have found differently.").

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on

appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

Appendix B: (U.S. District Court Opinion)

Case 4:16-cv-00108-JAS Document 120 Filed 03/14/22 Page 1 of 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Issa Doreh,

Plaintiff,

v.

Federal Bureau of Prisons, et al.,

Defendants.

NO. CV-16-00108-TUC-JAS

**JUDGMENT OF DISMISSAL IN A
CIVIL CASE**

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed March 14, 2022, judgment of dismissal is entered. Plaintiff to take nothing, and the second amended complaint and action are dismissed.

Debra D. Lucas
District Court Executive/Clerk of Court

March 14, 2022

By s/ M. Espinoza
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Issa Doreh,

Plaintiff,

v.

Unknown Rodriguez, et al.,

Defendants.

No. CV-16-00108-TUC-JAS

ORDER

December 2, 2021 Evidentiary Hearing Regarding Exhaustion

On December 2, 2021, the Court held an evidentiary hearing to assess the narrow issue of whether Plaintiff exhausted available prison administrative remedies as to a single grievance (Remedy ID #854264) pertaining to Count One as to one Defendant (Maria Rodriguez). *See* Doc. 89 at p. 2 (3/23/21 Order pertaining to Defendants' motion for summary judgment for failure to exhaust prison administrative remedies; "Thus, the [only] remaining claim [in this case] is the Eighth Amendment threat-to-safety claim in Count I against Defendant Rodriguez, in which Plaintiff alleges that he provided Defendant Rodriguez with medical orders requiring that he be given a lower bunk on the first floor, Rodriguez refused to comply with these orders, and Plaintiff was injured as a result.).¹

The Court's 3/23/21 Order (Doc. 89) discussed pertinent background issues leading up to the December 2, 2021 evidentiary hearing; the Order stated in part:

¹ The 3/23/21 Order (Doc. 89) discussed in detail the procedural history, background, exhaustion process, and the necessity of the December 2, 2021 evidentiary hearing at issue in this case; the Court incorporates that previous discussion in this Order, and focuses on assessing credibility issues in this Order as to the December 2, 2021 evidentiary hearing.

1 Defendant Rodriguez has presented evidence that an administrative remedy
2 procedure was available to Plaintiff and that Plaintiff did not properly
3 complete that procedure with respect to his claim against Defendant. The
4 Court finds that Defendant has met her initial burden to show that Plaintiff
5 failed to properly exhaust his administrative remedies with respect to this
6 claim. Thus, the burden shifts to Plaintiff to either demonstrate that he, in
7 fact, exhausted administrative remedies or "come forward with evidence
8 showing that there is something in his particular case that made the existing
9 and generally available administrative remedies effectively unavailable to
10 him." . . . In his Response to Defendant Rodriguez's Motion for Summary
11 Judgment, Plaintiff repeatedly complains that Defendant has not provided
12 copies of the administrative remedy forms themselves, and he therefore
13 cannot "understand or [] respond [to] plain Remedy ID [] numbers from the
14 BOP record." . . . However, any administrative remedies that pre-date the
15 February 2016 fall are irrelevant. Thus, it is inconsequential that Defendant
16 did not provide copies of documents relating to any other administrative
17 remedy . . . Plaintiff asserts that Remedy I.D. #854264 is not the only
18 administrative remedy he submitted regarding the alleged violation of his
19 Eighth Amendment rights with respect to his placement in a second-floor cell
20 . . . However, although Plaintiff submitted other administrative remedy
21 requests with respect to his medical order for a first-floor cell and his health
22 issues, those requests pre-date the February 2016 fall. These remedies are
23 therefore irrelevant to the question of whether Plaintiff exhausted all
24 available administrative remedies with respect to the incident that forms the
25 basis of his claim against Defendant Rodriguez, the only remaining claim at
26 issue . . . Plaintiff also contends the administrative remedy procedures were
27 unavailable to him . . . He asserts that Defendant Rodriguez delayed Remedy
28 I.D. #854264 "on purpose," and on April 1, 2016, he "complain[ed] about
delaying the remedy to [the] Warden." . . . Plaintiff claims he submitted
"multiple" complaints to the Warden regarding Defendant Rodriguez
delaying and blocking Plaintiff's efforts "to step into the next level" of the
remedy process . . . Plaintiff also asserts that Defendant Rodriguez threatened
him, stating, "if you don't stop writing grievances you will go to the SHU
[Special Housing Unit]." . . . Plaintiff asserts that Defendant Rodriguez kept
the BP-9s from the Regional response "to block [Plaintiff]" from appealing
to the Central Office . . . In her Reply to Plaintiff's Response, Defendant
Rodriguez asserts that Plaintiff has not presented evidence that Defendant
"was behind the delays in his unrelated remedies." . . . Defendant contends
that the memoranda Plaintiff's Unit Counselor wrote regarding the delay in
responding to Plaintiff's BP-8 make no reference to Defendant and, "if
anything," demonstrate that the process worked, "even when staff error
causes delay." . . . Defendant also observes that both memoranda were
written before the Regional Director responded to the only relevant remedy

1 appeal in this case, on May 23, 2016 . . . With respect to Plaintiff's April 1,
2 2016 e-mail to Warden McClintock, Defendant contends the nature of
3 Plaintiff's request is not discernible, but the e-mail references sending
4 documents to Plaintiff's counselor, Mr. Ashworth . . . As Defendant notes,
5 the Administrative Remedy Coordinator's response to the e-mail indicates
6 that Plaintiff was complaining at least in part about not receiving a response
7 to Remedy I.D. #854264-F1. The Warden responded to Remedy I.D.
8 #854264-F1 on April 18, 2016. Despite these delays, according to Defendant,
9 Plaintiff successfully appealed to the Regional Director on May 4, 2016, and
10 the Regional Director responded on May 23, 2016 . . . Defendant Rodriguez
11 contends that Plaintiff provides no support for the allegation that she refused
12 to give him administrative remedy forms and instructed SHU officers not to
13 give him the forms. Defendant Rodriguez also asserts that Plaintiff presents
14 no admissible evidence that she threatened Plaintiff because it is not included
15 in Plaintiff's affidavit. However, on summary judgment, the Court can only
16 consider evidence that would be admissible *at trial* . . . Thus, "[m]aterial in
17 a form not admissible in evidence may be used to avoid, but not to obtain
18 summary judgment . . . Hearsay evidence is not admissible, and,
19 consequently, may not be considered on summary judgment . . . However, a
20 verbal threat made by Defendant Rodriguez directly to Plaintiff is not hearsay
21 . . . At trial, Plaintiff could testify about the alleged threat based on his
22 personal knowledge. Plaintiff could also testify that Defendant Rodriguez
23 directly refused to provide administrative remedy forms to him . . . Thus,
24 although Plaintiff did not refer to Defendant Rodriguez's threat in his
25 Affidavit, the Court may consider the threat and must assume that it occurred,
26 as well as that Defendant refused to provide administrative remedy forms to
27 Plaintiff . . . **Based on the available evidence, the Court cannot resolve
28 whether Plaintiff properly exhausted available administrative remedies.
Although Defendant points to the lack of documentary evidence of
threats to Plaintiff regarding his grievances, Plaintiff alleges that
Rodriguez verbally threatened him. The Court cannot resolve this
factual dispute based on the documentary record and without
determining Plaintiff and Defendant's respective credibility.
Accordingly, the Court will schedule an evidentiary hearing regarding
exhaustion.** See *Albino*, 747 F.3d at 1170 ("Exhaustion should be decided,
if feasible, before reaching the merits of a prisoner's claim. . . . [I]f feasible,
disputed factual questions relevant to exhaustion should be decided at the
very beginning of the litigation.").

See 3/23/21 Order at Doc. 89 at pages 11-13 (emphasis added).²

² Under the Prison Litigation Reform Act, a prisoner must exhaust "available" administrative remedies before filing an action in federal court. See 42 U.S.C. § 1997e(a); *Vaden v. Summerhill*, 449 F.3d 1047, 1050 (9th Cir. 2006); *Brown v. Valoff*, 422 F.3d 926,

1
2 As discussed in the Court's 3/23/21 Order, the issue of exhaustion was narrowed to
3 whether Plaintiff fully exhausted Remedy ID # 854264 (i.e., the only remedy pertinent to
4 his final remaining claim in this case – against Defendant Rodriguez). Plaintiff went
5 through nearly all of the steps to exhaust Remedy ID #854264. While there were some
6 delays, Plaintiff was able to appeal all the way to the Regional Director on May 4, 2016.
7 On May 23, 2016, the Regional Director denied Plaintiff's appeal. Plaintiff, however, did
8 not properly complete the entire exhaustion process as he did not appeal the Regional
9 Director's decision to the General Counsel. In addition, Plaintiff never submitted an
10 administrative remedy request or appeal regarding any aspect of his placement in the
11 Special Housing Unit ("SHU") from May 16, 2016, to June 20, 2016. As he did not exhaust
12 Remedy ID #854264 to the highest level, or submit any remedy for his claim concerning
13 Defendant Rodriguez when he was in the SHU, Plaintiff failed to properly exhaust in this
14 case. As Plaintiff alleged at summary judgment that Defendant Rodriguez verbally
15 threatened him and explicitly refused to provide administrative remedy forms to him, the
16 Court scheduled an evidentiary hearing to resolve the factual dispute and determine
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22 934-35 (9th Cir. 2005). The prisoner must complete the administrative review process in
23 accordance with the applicable rules. *See Woodford v. Ngo*, 548 U.S. 81, 92 (2006).
24 Exhaustion is required for all suits about prison life, *Porter v. Nussle*, 534 U.S. 516, 523
25 (2002), regardless of the type of relief offered through the administrative process, *Booth v.*
26 *Churner*, 532 U.S. 731, 741 (2001). The defendant bears the initial burden to show that
27 there was an available administrative remedy and that the prisoner did not exhaust it.
28 *Albino v. Baca*, 747 F.3d 1162, 1169, 1172 (9th Cir. 2014); *see Brown*, 422 F.3d at 936-37
(a defendant must demonstrate that applicable relief remained available in the grievance
process). Once that showing is made, the burden shifts to the prisoner, who must either
demonstrate that he, in fact, exhausted administrative remedies or "come forward with
evidence showing that there is something in his particular case that made the existing and
generally available administrative remedies effectively unavailable to him." *Albino*, 747
F.3d at 1172. The ultimate burden, however, rests with the defendant. *Id.*

1 credibility of the pertinent witnesses. On December 2, 2021, the Court held the evidentiary
2 hearing to assess credibility.

3
4 At the December 2, 2021 evidentiary hearing, the parties presented documentary
5 evidence and live testimony. There were a total of three live witnesses at the evidentiary
6 hearing: Plaintiff testified on behalf of himself, and Defendant Maria Rodriguez (who was
7 the prison Unit Manager for Plaintiff) and Thomas Ashworth (who was Plaintiff's
8 Correctional Counselor) testified on behalf of Defendants.³

9
10 The Court found the testimony of both Rodriguez and Ashworth to be highly
11 credible. In contrast, the Court found Plaintiff's testimony to lack credibility. The Court
12 credits the testimony of Rodriguez and Ashworth over Plaintiff's testimony, and rejects
13 Plaintiff's testimony as he was not credible. In making these credibility determinations,
14 the Court's assessment of the witnesses' testimony included: the opportunity and ability to
15 see or hear or know the things testified to, the clarity of their memories, the manner while
16 testifying, any interest in the outcome of the case, any bias or prejudice, whether other
17 evidence contradicted their testimony, the reasonableness of the testimony in light of all
18 the evidence, and any other factors that impacted their believability. The Court finds that
19 these factors positively weigh in favor of the testimony of Rodriguez and Ashworth, and
20 negatively weigh against Plaintiff's testimony. For example, as to testimony by both
21 Rodriguez and Ashworth: they appeared to be simply relaying facts that they encountered

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27 ³ If summary judgment is denied, disputed factual questions relevant to exhaustion should
28 be decided by the judge; a plaintiff is not entitled to a jury trial on the issue of exhaustion.
Albino, 747 F.3d at 1170-71. But if a court finds that the prisoner exhausted administrative
remedies, that administrative remedies were not available, or that the failure to exhaust
administrative remedies should be excused, the case proceeds to the merits. *Id.* at 1171

1 while performing routine, everyday duties that they were required to do as part of his
2 normal job functions; they did not exhibit any type of interest in any particular outcome in
3 this case; their testimony pertained to only issues properly within their knowledge and were
4 clear and forthright; and their testimony was not contradicted by any credible evidence. In
5 contrast, Plaintiff's testimony was self-serving, illogical, unnecessarily argumentative and
6 contradicted by much more credible testimony and evidence presented at the evidentiary
7 hearing. Accordingly, crediting the testimony of Rodriguez and Ashworth, and rejecting
8 the testimony of Plaintiff, the Court finds that Plaintiff failed to properly exhaust his
9 remedies in this case.

10
11
12 The testimony at the evidentiary hearing reflected that prison administrative
13 remedies were fully available to Plaintiff, Plaintiff knew how to pursue those remedies,
14 Defendants did nothing to hinder his efforts to fully pursue his administrative remedies,
15 and Plaintiff failed to properly pursue those remedies.

16
17 The Court, for example, rejects Plaintiff's claims that Rodriguez refused to give him
18 administrative remedy forms and instructed SHU officers not to give him forms to pursue
19 his remedies. The credible testimony reflected that Plaintiff's Correctional Counselor
20 (Ashworth) was responsible for providing all grievance forms to Plaintiff (not the Unit
21 Manager – Defendant Rodriguez), that Ashworth provided any and all grievance forms to
22 Plaintiff upon his request, and that the grievance forms and grievance appeal process was
23 fully available to Plaintiff at all relevant times, and that Plaintiff received administrative
24 remedy responses from his Correctional Counselor. The Court credits the testimony of
25 Ashworth and Rodriguez reflecting that: Rodriguez never told Ashworth (or anyone else
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1 at the prison) to not provide Plaintiff with administrative remedy forms, Rodriguez never
2 threatened Plaintiff verbally (or in any other manner) with retaliation for pursuing any
3 administrative remedies, and Rodriguez and prison officials did nothing to hinder
4 Plaintiff's ability to pursue his administrative remedies which were fully available to him
5 at all pertinent times. Furthermore, to the extent there were any delays in the process (i.e.,
6 such as staffing issues, more time needed to adequately respond to grievances), such
7 delays/extensions of time were contemplated by the administrative process, Plaintiff was
8 kept abreast of these issues, and Plaintiff was not hindered from pursuing his administrative
9 appeals in light of any delays. In addition, to the extent Plaintiff had any valid reason for
10 delay in seeking an appeal, Correctional Counselors (such as Ashworth) routinely provided
11 memos on behalf of prisoners explaining why an appeal was delayed (such that more time
12 was allotted for appeals), and therefore prisoners were not penalized or prejudiced in any
13 way in pursuing administrative appeals. *See, e.g., Nigro v. Sullivan*, 40 F.3d 990, 998 (9th
14 Cir. 1994); *McRae v. Von Blanckensee*, No. CV2000427TUCRMMMSA, 2021 WL
15 5088824, at *3 (D. Ariz. May 20, 2021), report and recommendation adopted, No. CV-20-
16 00427-TUC-RM, 2021 WL 5084194 (D. Ariz. Nov. 1, 2021). To the extent Plaintiff
17 asserts that he never received the denial of his Regional Appeal (which the Court does not
18 find credible and therefore rejects), he nevertheless could have treated the purported failure
19 to respond as a denial and appealed to the Central Office (which he failed to do) to fully
20 exhaust the administrative remedy process. *See, e.g.,* 28 C.F.R. § 542.18; *McRae*, 2021
21 WL 5088824, at *3; *Douglas v. Johns*, 2011 WL 2173627, at *2 (E.D.N.C. June 2, 2011);
22 *Crum v. Attorney General*, 2007 WL 781935, at *6 (S.D.W.Va. Mar.13, 2007), *aff'd*, 282

1 Fed. App'x 223 (4th Cir.2008).⁴


2 In light of the foregoing, based on this Court's credibility findings stemming from
3 the December 2, 2021 evidentiary hearing, the Court finds that Plaintiff failed to exhaust
4 his administrative remedies as to the final claim in this case against Defendant Rodriguez;
5 as such, the final claim in this case is dismissed.
6

7 **Conclusion**
8

9 Accordingly, IT IS HEREBY ORDERED as follows:

- 10 (1) The final claim in this case pending against Defendant Rodriguez is dismissed.
11 (2) As all remaining claims have been dismissed, this entire case is dismissed, and the Clerk
12 of the Court shall enter judgment and close the file in this case.⁵
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14 Dated this 11th day of March, 2022.
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18 Honorable James A. Soto
19 United States District Judge
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26 ⁴ The Court sustains Defendant's objection to Plaintiff's Exhibit 101; it was not previously
27 disclosed, there was no proper authentication, and is an improper effort to untimely respond
(again) to Defendant's previous Motion for Summary Judgment.

28 ⁵ Defendant's renewal of summary judgment is denied as moot; the ruling in this Order is
based on credibility determinations stemming from the December 2, 2021 evidentiary
hearing.

Appendix C: (Appellate Court Opinion)

Ninth Circuit's Order denied timely filed petition for rehearing (4/29/2024).

Case: 22-15432, 04/29/2024, ID: 12881064, DktEntry: 33, Page 1 of 1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

APR 29 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ISSA DOREH,

Plaintiff-Appellant,

v.

UNKNOWN RODRIGUEZ, named as Ms.
Rodriguez, Housing Unit Manager at FCI
Tucson; et al.,

Defendants-Appellees.

No. 22-15432

D.C. No. 4:16-cv-00108-JAS
District of Arizona,
Tucson

ORDER

Before: S.R. THOMAS, McKEOWN, and HURWITZ, Circuit Judges.

Doreh's petition for panel rehearing (Docket Entry No. 32) is denied.

No further filings will be entertained in this closed case.

OSA159

**Additional material
from this filing is
available in the
Clerk's Office.**