

Appendix A

NOT RECOMMENDED FOR PUBLICATION

No. 23-5342

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 1, 2024
KELLY L. STEPHENS, Clerk

DARNELL ANDERSON,
Plaintiff-Appellant,
v.
AARON FUSON, et al.,
Defendants-Appellees.

ORDER

Before: STRANCH, BUSH, and MATHIS, Circuit Judges.

Before: STRANCH, BUSH, and
Darnell Anderson, a pro se federal prisoner, appeals the district court's judgment
dismissing his complaint filed pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau
of Narcotics*, 403 U.S. 388 (1971). He also moves for the appointment of counsel. This case has
been referred to a panel of the court that, upon examination, unanimously agrees that oral argument
is not needed. See Fed. R. App. P. 34(a). For the following reasons, we affirm.
Anderson sued United States Penitentiary (USP) McCreary employee
Whitaker, and Lieutenant

In June 2020, Anderson sued United States Penitentiary (USP) McCreary employees Officer A. Fuson, Officer D. Gabbard, Lieutenant L. Chaney, Officer Whitaker, and Lieutenant Posey for Eighth Amendment violations. According to the complaint, Fuson escorted Anderson to a cell in the special housing unit for cell rotation. Because Anderson was afraid of the other inmate in the cell, he refused to enter. Fuson pushed Anderson into the cell and the officers attempted to remove Anderson's hand restraints, but Anderson refused to let them. Gabbard then stuck his arm through the food tray slot to grab Anderson, but he was unable to do so. The officers then opened the door and pulled Anderson out of the cell.

After his refusal to enter the cell and submit to the removal of his restraints, officers took Anderson to a different cell and placed him in four-point restraints, a waist chain, and leg restraints. He remained in these restraints for seven to eight hours. During this time, Anderson suffered an anxiety attack, urinated on himself, and missed his evening meal because the restraints were too tight. The "most excruciating pain" Anderson experienced during this time was when Whitaker and Posey ignored the tightness of the waist chain and pushed Anderson on the bed to remove the leg restraints, which Whitaker acknowledged was "going to hurt." Compl., R. 1, PageID 15. Anderson alleged that it "felt like razor-wire tearing into his skin," which he endured "all over again" when the officers later pulled him from the bed. *Id.*

Anderson alleged that he filed a grievance one week after the events but that he never received a response. In June 2020, he filed this lawsuit. The defendants filed a motion to dismiss or, in the alternative, for summary judgment. The district court granted the motion in part and dismissed the claims against Whittaker and Posey without prejudice for failure to exhaust. The district court denied the motion as to the remaining defendants.

After discovery, the remaining defendants again moved for dismissal or summary judgment. The district court adopted a magistrate judge's recommendation to grant the defendants' motion and deny Anderson's various motions as moot. In adopting the recommendation, the court noted that *Bivens* does not provide a monetary remedy for Eighth Amendment excessive-force claims. The court then received, considered, and overruled Anderson's objections to the report and recommendation. Specifically, the court noted that nothing in Anderson's objections changed its conclusion that there was no federal cause of action for Anderson's claims. And because the action was foreclosed, the district court reasoned that the magistrate judge properly concluded that Anderson's motions were moot.

Anderson filed a motion for reconsideration, arguing that he pled a viable deliberate-indifference claim. The district court treated his motion as a Federal Rule of Civil Procedure 59(e) motion and denied it, reasoning that the circumstances supporting a recognized deliberate-

indifference claim under *Bivens* differ “markedly” from Anderson’s allegations. Memorandum Order, R. 200, PageID 2095.

On appeal, Anderson argues that the district court erred in denying his motion for reconsideration; granting summary judgment in favor of the defendants; and denying his motions for a discovery extension, appointment of counsel, and a fee waiver. He does not challenge the dismissal of Whitaker and Posey for failure to exhaust, so his claims against them are not before us. See *United States v. Russell*, 26 F.4th 371, 374 (6th Cir.), *cert. denied*, 143 S. Ct. 385 (2022).

I. Summary judgment and reconsideration

We review the district court’s grant of summary judgment de novo. *Hurst v. Caliber Home Loans, Inc.*, 44 F.4th 418, 424 (6th Cir. 2022). Summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). We review the denial of a Rule 59(e) motion for an abuse of discretion. See *Intera Corp. v. Henderson*, 428 F.3d 605, 619 (6th Cir. 2005). A district court may grant a Rule 59(e) motion “if there is: (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice.” *Id.* at 620.

To establish a claim under *Bivens*, a plaintiff must show that he was “deprived of rights secured by the Constitution or laws of the United States” and that “the defendants who allegedly deprived [him] of those rights acted under color of federal law.” *Marie v. Am. Red Cross*, 771 F.3d 344, 364 (6th Cir. 2014) (emphasis omitted) (citing *Bivens*, 403 U.S. at 397). The Supreme Court has explicitly recognized only three contexts in which a private right of action for damages may be properly brought against federal officials for constitutional violations: (1) under the Fourth Amendment for violations of the prohibition against unreasonable searches and seizures, *Bivens*, 403 U.S. at 397; (2) under the Fifth Amendment Due Process Clause for gender discrimination, *Davis v. Passman*, 442 U.S. 228, 248-49 (1979); and (3) under the Eighth Amendment for failing to provide adequate medical treatment to a prisoner, *Carlson v. Green*, 446 U.S. 14, 14-15 (1980).

Expanding the reach of *Bivens* “is now a ‘disfavored’ judicial activity.” *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)); *see also Egbert v. Boule*, 596 U.S. 482, 491 (2022). Thus, in determining whether *Bivens* can afford relief in a particular case, a court must first ask “whether the case presents ‘a new *Bivens* context.’” *Egbert*, 596 U.S. at 492 (quoting *Ziglar*, 582 U.S. at 139-40). A new *Bivens* context is where a case is “‘meaningful[ly]’ different from the three cases in which the Court has implied a damages action.” *Id.* (alteration in original) (quoting *Ziglar*, 582 U.S. at 139). If a case presents a new *Bivens* context, then a court must determine “if there are ‘special factors’ indicating that the Judiciary is at least arguably less equipped than Congress to ‘weigh the costs and benefits of allowing a damages action to proceed.’” *Id.* (quoting *Ziglar*, 582 U.S. at 136). “If there is even a single ‘reason to pause before applying *Bivens* in a new context,’ a court may not recognize a *Bivens* remedy.” *Id.* (quoting *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020)).

Anderson’s Eighth Amendment excessive-force claims arise in a new context. *See Greene v. United States*, No. 21-5398, 2022 WL 13638916, at *4 (6th Cir. Sept. 13, 2022) (order); *Silva v. United States*, 45 F.4th 1134, 1137 (10th Cir. 2022) (declining to expand *Bivens* to a federal prisoner’s Eighth Amendment excessive-force claim). Despite recognizing a deliberate-indifference claim under the Eighth Amendment, *see Carlson*, 446 U.S. at 19, the Supreme Court has never recognized an excessive-force claim. “A claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized.” *Hernandez*, 140 S. Ct. at 743.

And special factors advise against recognizing a *Bivens* claim in this context. First, “alternative processes exist for protecting” Anderson’s Eighth Amendment rights. *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 524 (6th Cir. 2020). Anderson has “full access to remedial mechanisms” through the Federal Bureau of Prisons (BOP), “including suits in federal court for injunctive relief and grievances filed through the BOP’s Administrative Remedy Program.” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001). We have recognized that the BOP’s inmate grievance process “is substantial” in that “it contains its own statutes of limitations, filing

procedures, and appeals process" and allows for prisoners to retain counsel to assist with the process. *Callahan*, 965 F.3d at 524. The presence of one of these alternative processes "alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Ziglar*, 582 U.S. at 137.

Second, Congress enacted the Prison Litigation Reform Act, which "does not provide for a standalone damages remedy against federal jailers." *Callahan*, 965 F.3d at 524 (quoting *Ziglar*, 582 U.S. at 149). "[T]his suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment." *Ziglar*, 582 U.S. at 149. Lastly, there are "separation of powers concerns" here, because excessive-force claims against federal prison employees "present a risk of interference with prison administration," which is a task "peculiarly within the province of the legislative and executive branches." *Callahan*, 965 F.3d at 524 (quoting *Turner v. Safley*, 482 U.S. 78, 84-85 (1987)).

In sum, we decline to extend *Bivens* to Anderson's Eighth Amendment excessive-force claims. To the extent that Anderson claims that the district court should have liberally construed his complaint as a *Carlson* deliberate-indifference claim, this argument also fails. Anderson did not attempt to bring his claim within the framework of *Carlson*. Despite pro se complaints being entitled to liberal construction, *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam), the district court did not err in declining to construe a *Bivens* claim where the Supreme Court has cautioned that expanding the reach of *Bivens* is "a 'disfavored' judicial activity," *Ziglar*, 582 U.S. at 135 (quoting *Iqbal*, 556 U.S. at 675).

Even if his complaint attempts to state a deliberate-indifference claim, Anderson's allegations are "'meaningful[ly]' different" from *Carlson*, such that we would have to infer a new *Bivens* cause of action. *Egbert*, 596 U.S. at 492 (quoting *Ziglar*, 582 U.S. at 139-40). In *Carlson*, the Court applied *Bivens* to an Eighth Amendment claim for inadequate medical treatment of a federal prisoner after he died from an asthma attack due to prison officials being "deliberately indifferent" to his "serious medical needs." 446 U.S. at 16 & n.1, 18-19. Here, Anderson alleged that officers failed to conduct a medical examination when his restraints were removed and that he

suffered “significant injuries” to his waist area and lasting anxiety. These allegations differ markedly from a prisoner dying after an asthma attack where his asthma was not properly treated. *See Egbert*, 596 U.S. at 492; *Hernandez*, 140 S. Ct. at 743 (“[O]ur understanding of a ‘new context’ is broad.”).

And for the same reasons stated above, special factors advise against recognizing a *Bivens* claim in this context. Thus, the district court did not err in granting summary judgment to the defendants on Anderson’s excessive-force claims. Nor did the court abuse its discretion in denying Anderson’s Rule 59(e) motion on the grounds that Anderson’s complaint failed to state a deliberate-indifference claim similar to *Carlson*. *See Intera Corp.*, 428 F.3d at 619.

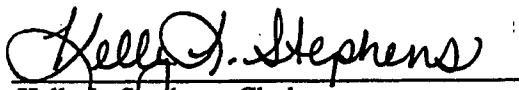
II. Anderson’s motions

Anderson argues the district court erred in denying his motions for the appointment of counsel, a discovery extension, and a fee waiver. Anderson does not elaborate on how the district court erred in denying these motions, and thus he has forfeited these issues. *See United States v. Clark*, 469 F.3d 568, 570 (6th Cir. 2006) (“[A]n issue is deemed forfeited on appeal if it is merely mentioned and not developed.”).

Finally, absent exceptional circumstances, there is no right to counsel in a civil case. *See United States v. Augustin*, 16 F.4th 227, 234 (6th Cir. 2021). Because no exceptional circumstances exist in this case, Anderson’s request for counsel is denied. *Id.*

For these reasons, we **AFFIRM** the district court’s judgment and **DENY** Anderson’s motion to appoint counsel.

ENTERED BY ORDER OF THE COURT


Kelly L. Stephens, Clerk

Appendix B

DARNELL ANDERSON, Plaintiff, v. A. FUSON, et al., Defendants.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, SOUTHERN
DIVISION
2023 U.S. Dist. LEXIS 70930
Civil Action No. 6: 20-118-DCR
March 28, 2023, Decided
March 28, 2023, Filed

Editorial Information: Subsequent History

Affirmed by *Anderson v. Fuson*, 2024 U.S. App. LEXIS 2299 (6th Cir. Ky., Feb. 1, 2024)

Editorial Information: Prior History

Anderson v. Fuson, 2023 U.S. Dist. LEXIS 24629, 2023 WL 1991559 (E.D. Ky., Feb. 14, 2023)

Counsel {2023 U.S. Dist. LEXIS 1}For D. Gabbard, A. Fuson, L. Chaney, Defendants: Cheryl D. Morgan, LEAD ATTORNEY, U.S. Attorney's Office EDKY, Lexington, KY.

Darnell Anderson, Plaintiff, Pro se, Tucson, AZ.

Judges: Danny C. Reeves, Chief United States District Judge.

Opinion

Opinion by: Danny C. Reeves

Opinion

MEMORANDUM ORDER

Pro se Plaintiff Darnell Anderson has filed a motion for reconsideration of the Court's February 22, 2023 Memorandum Order overruling his objections to the Magistrate Judge's Report and Recommendation.¹ [See Record Nos. 199, 196.] Anderson has failed to identify any intervening change in law, evidence not previously available that has become available, or clear error of law. Therefore, the motion will be denied.

Although the Federal Rules of Civil Procedure do not provide for motions for reconsideration, such motions typically are considered motions to alter or amend judgment pursuant to Rule 59(e). As Anderson recognizes, such motions for reconsideration may generally be granted based on an intervening change in law, evidence that was not previously available, to correct a clear error of law or to prevent manifest injustice. See *Huff v. Met. Life Ins. Co.*, 675 F.2d 119, 122 (6th Cir. 1982). A motion for reconsideration is not a proper vehicle for rearguing one's case and is not appropriate simply because{2023 U.S. Dist. LEXIS 2} a party disagrees with the Court's decision. See *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998).

Anderson accepts that actions under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), have been limited to a few contexts. He insists, however, that his case is sufficiently similar to *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980), in which a *Bivens* remedy was recognized, such that he

should be permitted to proceed with his claims. But contrary to Anderson's suggestion, the circumstances in *Carlson* differ markedly from those alleged in his Complaint. See *Green v. Carlson*, 581 F.2d 669 (7th Cir. 1978) (after being admitted to the hospital with asthma attack, prisoner was deprived of medication and eventually given contraindicated medication, which led to respiratory arrest and death). Construed in the light most favorable to him, Anderson's allegations regarding the defendants' mishandling of him and misuse of four-point restraints are easily distinguishable from *Carlson* and, for the reasons the Court has previously explained at length, cannot form the basis of a new type of *Bivens* action. [See Record Nos. 192, 193.]

Next, Anderson has not identified any clear error of law regarding the Court's determinations involving his failure to exhaust administrative remedies. He contends that a genuine factual issue exists as to whether the defendants' actions rendered the Bureau of Prisons Administrative{2023 U.S. Dist. LEXIS 3} Remedy Program unavailable. However, the Court noted Anderson's own deposition testimony in which he stated that he did not receive a response to the BP-9 (Request for Administrative Remedy) he filed on August 18, 2019. Anderson could not recall a reason for waiting more than three months to file a BP-11 (Central Office Administrative Remedy Appeal). [Record No. 158-3, p. 50] Nonetheless, the lack of a private right of action for damages regarding Anderson's Eighth Amendment claims is outcome determinative, regardless of his failure to exhaust administrative remedies.

Based on the foregoing, it is hereby

ORDERED that the motion for reconsideration [Record No. 199] is **DENIED**.

Dated: March 28, 2023.

/s/ Danny C. Reeves

Danny C. Reeves, Chief Judge

United States District Court

Eastern District of Kentucky

Footnotes

1

The Court received Anderson's objections 22 days after issuance of the R&R. A Memorandum Opinion and Order and Judgment adopting the R&R in full was filed on February 14, 2023, following the expiration of the 14-day objection period.

DARNELL ANDERSON, Plaintiff, v. A. FUSON, et al., Defendants.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, SOUTHERN
DIVISION
2023 U.S. Dist. LEXIS 70947
Civil Action No. 6: 20-118-DCR
February 22, 2023, Decided
February 22, 2023, Filed

Counsel {2023 U.S. Dist. LEXIS 1}For D. Gabbard, A. Fuson, L. Chaney,
Defendants: Cheryl D. Morgan, LEAD ATTORNEY, U.S. Attorney's Office EDKY, Lexington,
KY.

Darnell Anderson, Plaintiff, Pro se, Tucson, AZ.

Judges: Danny C. Reeves, Chief United States District Judge.

Opinion

Opinion by: Danny C. Reeves

Opinion

MEMORANDUM ORDER

Plaintiff Darnell Anderson filed a Complaint alleging that the defendants, correctional staff at USP McCreary, exerted excessive force against him in violation of Eighth Amendment to the United States Constitution. United States Magistrate Judge Matthew A. Stinnett issued a Report and Recommendation (R&R) on January 26, 2023, recommending that the Court grant the defendants' motion to dismiss Anderson's claims or, in the alternative, grant summary judgment in the defendant's favor. Anderson had 14 days after being served a copy of the R&R to file objections. Although the Court did not receive any objections, it reviewed the R&R *de novo* and adopted the Magistrate Judge's findings in full on February 14, 2023. Notably, the Magistrate Judge determined, and the undersigned agreed, that Anderson's claims would impermissibly create a new implied cause of action in the vein of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). See *Egbert v. Boule*, 142 S. Ct. 1793, 213 L. Ed. 2d 54 (2022).

The Court has now received correspondence from Anderson styled "Plaintiff's objection to the Magistrate's{2023 U.S. Dist. LEXIS 2} Report and Recommendation."1 [Record No. 195] The Court has considered Anderson's objections, but they do not change the undersigned's previous analysis and conclusions.

Contrary to Anderson's suggestion, his Complaint was not dismissed for failure to prosecute. To the extent Anderson contends that the Supreme Court previously recognized an implied right of action for claims like his in *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980), that case involved a claim of deliberate indifference to an inmate's serious medical need, not excessive force as alleged by Anderson. And when considering whether a claim arises in a new *Bivens* context, "the context is new if it differs in virtually any way from the *Bivens* trilogy." *Elhady v. Unidentified CBP Agents*, 18 F.4th 880, 883 (6th Cir. 2021) (citing *Ziglar v. Abbasi*, 582 U.S. 120, 137 S. Ct.

1843, 1859, 198 L. Ed. 2d 290 (2017)). Thus, Anderson's claims are not among those to which the Supreme Court has extended *Bivens* liability.

Anderson also disputes the Magistrate Judge's determination that special factors indicate that Congress, not the courts, should decide whether a damages action should be allowed. However, the Court previously explained that the availability of alternative remedies provides a reason to "refrain from providing a new and freestanding remedy in damages." *Ziglar*, 137 S. Ct. at 1858. And it does not matter whether the existing remedies provide complete relief.{2023 U.S. Dist. LEXIS 3} *Egbert*, 142 S. Ct. at 1804. Here, the Bureau of Prisons Administrative Remedies Program ("ARP") was an avenue of relief available to Anderson. See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001) (observing that the ARP provides a "means through which allegedly unconstitutional actions and policies can be brought to the attention of the BOP and prevented from recurring.").

Anderson discussed his pursuit of administrative relief during his deposition on July 8, 2022. He indicated that he filed a timely Request for Administrative Remedy, Form BP-9 (sensitive), on August 18, 2019. [Record No. 158-3, p. 47] Months passed and Anderson did not receive a response, which is deemed a denial under 28 C.F.R. § 542.18. He subsequently was transferred to USP Atwater, where he filed an administrative appeal in late January 2020. *Id.* at 50. However, according to Anderson, he received a rejection notice from Central Office stating that he should "start a staff misconduct at USP Atwater." *Id.* Anderson filed a new BP-9, which was returned to him the next day with instructions to "file that to the regional office" because it included a request to expunge an incident report. *Id.* at 51. Anderson did not pursue further administrative relief and, after "wait[ing] a few months," filed his Complaint{2023 U.S. Dist. LEXIS 4} in federal court. *Id.* at 54.

Assuming *arguendo* that it is proper to conduct a case-specific analysis of these circumstances, the Court is unpersuaded by Anderson's argument that the defendants' "improper actions rendered [the] Administrative Remedy Program unavailable to him." See *Egbert*, 142 S. Ct. at 1810 (J. Gorsuch, concurring). Anderson's testimony indicates that he did not pursue administrative relief diligently, as he did not act for several months after allegedly not receiving a response to his initial BP-9. When asked why he waited until after his transfer to USP Atwater to seek an administrative appeal, Anderson could not identify a reason. Further, after being transferred, he reportedly was told to pursue relief with the Regional Office but he opted to "wait a few months" and file a Complaint in court, instead. Simply put, Anderson has not alleged facts indicating that the defendants or other third parties preventing him from taking advantage of administrative remedies.2

Because the success of Anderson's Eighth Amendment claims is foreclosed by *Egbert*, 142 S. Ct. 1793, and related cases, the Magistrate Judge did not err in recommending denial of his remaining motions for an extension of time, waiver of fees, and the appointment of counsel.{2023 U.S. Dist. LEXIS 5}

Based on the foregoing analysis, it is hereby

ORDERED that Plaintiff Anderson's objections to the Magistrate Judge's Report and Recommendation [Record No. 195] are **OVERRULED**.

Dated: February 22, 2023.

/s/ Danny C. Reeves

Danny C. Reeves, Chief Judge

United States District Court

Footnotes

1

Anderson reports that he received the R & R on February 1, 2023. The envelope containing the objections bears the following written notation: "Given to USP Tucson Prison Officials on 2-13-2023."
2

Anderson contends that there are disputed factual issues regarding administrative exhaustion, making summary judgment inappropriate. But Anderson's own testimony indicates that he did not exhaust his administrative remedies. Regardless, it is not dispositive because he cannot proceed on his Eighth Amendment claims under *Bivens*.

DARNELL ANDERSON, Plaintiff, v. A. FUSON, et al., Defendants.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, SOUTHERN
DIVISION
2023 U.S. Dist. LEXIS 41305
NO. 6:20-cv-00118-DCR-MAS
January 26, 2023, Decided
January 26, 2023, Filed

Editorial Information: Subsequent History

Adopted by, Summary judgment granted by, Motion denied by, As moot, Dismissed by, Judgment entered by Anderson v. Fuson, 2023 U.S. Dist. LEXIS 24629, 2023 WL 1991559 (E.D. Ky., Feb. 14, 2023) Objection overruled by Anderson v. Fuson, 2023 U.S. Dist. LEXIS 70947, 2023 WL 3034331 (E.D. Ky., Feb. 22, 2023)

Editorial Information: Prior History

Anderson v. Chaney, 2021 U.S. Dist. LEXIS 72064, 2021 WL 1414211 (E.D. Ky., Apr. 14, 2021)

Counsel {2023 U.S. Dist. LEXIS 1}For D. Gabbard, Defendant: Cheryl D. Morgan, LEAD ATTORNEY, U.S. Attorney's Office EDKY, Lexington KY.
For A. Fuson, Defendant: Cheryl D. Morgan, LEAD ATTORNEY, U.S. Attorney's Office EDKY, Lexington KY.
Darnell Anderson, Plaintiff, Pro se, Tucson AZ.
For L. Chaney, Defendant: Cheryl D. Morgan, LEAD ATTORNEY, U.S. Attorney's Office EDKY, Lexington KY.

Judges: MATTHEW A. STINNETT, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: MATTHEW A. STINNETT

Opinion

REPORT AND RECOMMENDATION

Plaintiff Darnell Anderson ("Anderson") filed this action against five employees of USP McCreary, claiming violations of his Eighth Amendment right and seeking damages pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 288 (1971), from an incident at USP McCreary on August 11, 2019. [DE 9 (Amended Complaint)]. Defendants previously filed a Motion to Dismiss on February 1, 2021. [DE 32]. The Court granted the motion in part, dismissing the claims against Defendants Posey and Whitaker because Anderson failed to exhaust his administrative remedies with respect to those claims. [DE 52, Page ID# 958-59]. The Court denied the motion with respect to the claims against Defendants Fuson, Chaney, and Gabbard (collectively, "Defendants"), however, finding that there were genuine factual questions as to whether Anderson{2023 U.S. Dist. LEXIS 2} fully exhausted his administrative remedies. [*Id.* at Page ID# 959-60]. Additionally, the Court also determined that it could not yet resolve whether Anderson's claims against Defendants should be dismissed because it presents a new *Bivens* context, citing the early stage in the litigation and the

lack of discovery. [*Id.* at Page ID# 961].

Discovery in this case has concluded, and Defendants again move to dismiss the remaining claims, or, in the alternative, for summary judgment. [DE 158 ("Motion for Summary Judgment")].

Defendants assert that recent Supreme Court precedent, *Egbert v. Boule*, __ U.S. __, 142 S. Ct. 1793, 213 L. Ed. 2d 54 (2022), mandates dismissal. Additionally, Defendants again assert that the remaining claims should be dismissed because Anderson failed to exhaust his administrative remedies. Chief Judge Reeves referred this matter to the undersigned for a report and recommendation. [DE 52]. Anderson having failed to respond to the motion to dismiss and the deadline to do so having since passed, this matter is now ripe for review.

I. FACTUAL BACKGROUND

The District Court previously set forth the facts of this case in its Memorandum Opinion and Order on Defendants' February 1, 2021, Motion to Dismiss, which are as follows:

Anderson alleges{2023 U.S. Dist. LEXIS 3} that, on August 11, 2019, Officer Fuson escorted him to a cell in the special housing unit (SHU) at USP - McCreary. [See Record No. 9 at 2 (citing Record No. 1).] He asserts that he told Fuson that he was afraid of the other inmate in the cell because that inmate had been involved in several fights with prior cellmates. [See Record No. 1 at 4.] Anderson then claims that he refused to enter the cell, but Officer Fuson pushed him inside and closed the door. [See *id.* at 5.] Officer Fuson and two of his colleagues, Officer D. Gabbard and Lieutenant L. Chaney, then allegedly sought to remove the restraints from Anderson's wrists, but he "refused to submit." [*Id.*] Anderson says that Officer Gabbard then tried to grab him through the food tray slot in the cell door but was unable to do so. [*Id.*]

At this point, Anderson claims that the officers opened the cell door and pulled him out. [*Id.*] Anderson alleges that Lieutenant Chaney then "whispered to [him] that 'this is what happens to people who file on my officers,' a reference to several complaints that [Anderson] had filed against officers in the SHU." [*Id.*] According to Anderson, Officer Gabbard "fabricated an incident report to allege{2023 U.S. Dist. LEXIS 4} that [Anderson] assaulted him," and, as a result, the officers moved him to a different cell and placed him in four-point restraints for several hours. [Record No. 9 at 2-3] Anderson states the restraints were too tight, causing him shortness of breath and an anxiety attack. [See *id.* at 3] Nevertheless, Anderson contends that the officers kept him in the restraints for at least seven hours. [See *id.*]

Anderson then says that two other prison officials, Officer Whitaker and Lieutenant Posey, entered his cell and ordered him "to lay on the bed so that his leg restraints could be removed." [*Id.*] Anderson, however, claims that he was physically unable to lay down "due to the tightness of the weight chain," which the officers refused to loosen. [*Id.* at 9] Anderson then alleges that Officer Whitaker approached him, told him "this is going to hurt," grabbed him by his upper body, and placed him on the bed. [*Id.*] Anderson states that "this process was the most excruciating pain throughout this entire ordeal" and that he "felt like razor-wire [was] tearing into his skin." [*Id.*] Anderson then contends that he "was forced to endure this exact same pain all over again upon being lifted from the{2023 U.S. Dist. LEXIS 5} bed." [*Id.*] Anderson also alleges that, during his time in restraints, he could not retrieve his evening meal and was unable to use the toilet, causing him to urinate on himself. [See *id.*; see also Record No. 1 at 14).]

Anderson states that he filed a sensitive administrative remedy request just one week later, complaining about the "staff misconduct" committed by Officer Fuson, Officer Gabbard, and Lieutenant Chaney. [Record No. 1 at 3; No. 1-5 at 2] He claims he filed this request directly with the Bureau of Prisons' (BOP's) Mid-Atlantic Regional Office, consistent with the federal

regulations governing sensitive issues. [See Record No. 1 at 3-4 (citing 28 C.F.R. § 542.14(d)(1)).] Anderson, however, asserts that he did not receive a response. Thus, Anderson claims that, in January of 2020, shortly after he was transferred from USP - McCreary to USP - Atwater, he filed an appeal with the BOP's Central Office, but that office rejected his submission and directed him to initiate his staff misconduct claims at the institutional level. [See Record No. 1 at 6; No. 1-7 at 2; No. 1-9 at 2; No. 9 at 4] While Anderson argues that this decision was incorrect, he says he nevertheless continued to pursue his administrative{2023 U.S. Dist. LEXIS 6} remedies, both back at his prison and through submissions to other BOP officials. [See Record No. 1 at 3-7; No. 1-5 at 2-6; No. 1-6 at 2; and No. 1-8 at 2-3] The status of these subsequent administrative remedy requests, however, is unclear.

Anderson eventually filed this lawsuit against Officer Fuson, Officer Gabbard, Lieutenant Chaney, Officer Whitaker, and Lieutenant Posey. [Record No. 1; No. 9]. Anderson argues that each of the named defendants acted "maliciously and sadistically" [Record No. 1 at 12]. And violated his right under the Eighth Amendment. [Record No. 1 at 12; No. 9 at 4].[DE 52 at Page ID# 955-56]. The District Court denied the motion to dismiss as to all claims, except the District Court granted the motion to dismiss as to Anderson's claims against Officer Whitaker and Lieutenant Posey, finding that Anderson did not fully exhaust his administrative remedies with respect to his claims against these defendants. [DE 52]. Following that decision, the parties engaged in discovery and a copious motion practice, most of which was initiated by Anderson. The factual narrative as previously described by the District Court has not changed.

II. DISPOSITIVE MOTION STANDARDS

A motion to dismiss{2023 U.S. Dist. LEXIS 7} under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of the complaint. *Gardner v. Quicken Loans, Inc.*, 567 F. App'x 362, 364 (6th Cir. 2014). In assessing a motion to dismiss under Rule 12(b)(6), the "court construes the complaint in the light most favorable to the plaintiff, accepts the plaintiff's factual allegations as true, and determines whether the complaint 'contain[s] sufficient factual matter, accepted as true to state a claim for relief that is plausible on its face.'" *Id.* (quoting *Heinrich v. Waiting Angels Adoption Servs., Inc.*, 668 F.3d 393, 403 (6th Cir. 2012)). Anderson is a prisoner proceeding without an attorney, so the Court reads his complaint liberally and "accept[s] as true all non-conclusory allegations in the complaint and determine[s] whether they state a plausible claim for relief." *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012) (quoting *Delay v. Rosenthal Collins Group, LLC*, 585 F.3d 1003, 1005 (6th Cir. 2009)).

Defendants move to dismiss the complaint and for summary judgment in the alternative, and they attach and rely upon materials outside of the pleadings. [See DE 158; DE 158-1, 2, 3]. Thus, the Court treats Defendants' motion as a motion for summary judgment under Rule 56. See Fed. R. Civ. P. 12(d) (requiring that, in a motion to dismiss under Rule 12(b)(6), "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one of summary judgment under Rule 56"); *Ball v. Union Carbide Corp.*, 385 F.3d 713, 719 (6th Cir. 2004) (stating that plaintiff is on notice that summary judgment is being requested where defendants move{2023 U.S. Dist. LEXIS 8} both to dismiss and for summary judgment in the alternative).

Summary judgment is appropriate if no genuine disputes of material fact exists and if the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-moving party's case." *Bass v. Robinson*, 167 F.3d 1041, 1044 (6th Cir. 1999) (citing *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989)). Once the initial burden is met, the

nonmovant must come forward with "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324. The nonmovant may not rest on his pleadings and must instead present affirmative evidence to support his claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In considering a motion for summary judgment, the Court views all inferences drawn from the underlying facts in the light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538, (1986).

III. ANALYSIS

Defendants assert two bases for dismissal of Anderson's claims. First, Defendants argue Anderson's claims must be dismissed because they present a new context for a *Bivens* action and there are special factors counseling against extending a *Bivens* remedy to that context. Second, Defendants assert Anderson's claims must be dismissed because he failed to fully exhaust his administrative remedies.^{2023 U.S. Dist. LEXIS 9} The undersigned agrees with both grounds.

A. Availability of a *Bivens* Remedy Under *Egbert*

Defendants argue that Anderson's Eighth Amendment claims based on his allegations of excessive force, including the allegation that Defendants fabricated disciplinary charges against him to place him in restraints, must be dismissed because they present a new context for a *Bivens* action and there are special factors counseling against extending a *Bivens* remedy to this context. On this point, Defendants rely heavily on a recent United States Supreme Court case, *Egbert v. Boule*, __ U.S. __, 142 S. Ct. 1793, 213 L. Ed. 2d 54 (2022).

In certain contexts, a plaintiff may recover damages for a constitutional violation by a federal actor under the doctrine announced in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 (1971). In that case, the Supreme Court held that, "even absent statutory authorization, it would enforce a damages remedy to compensate persons injured by federal officers who violated the prohibition against unreasonable search and seizures." *Ziglar v. Abbasi*, 582 U.S. 120, 137 S. Ct. 1843, 1854, 198 L. Ed. 2d 290 (2017) (citing *Bivens*, 402 U.S. at 397). The Court acknowledged that the Fourth Amendment did not expressly provide for a damages remedy. *Bivens*, 403 U.S. at 396. Nonetheless, because Congress had not explicitly declared "that person's injured by federal officer's violation of the Fourth Amendment may not recover money damages from agents" and because the case "involved^{2023 U.S. Dist. LEXIS 10} no special factors counseling hesitation in the absence of affirmative action by Congress[.]" the Court concluded that it could authorize such a remedy under general principles of federal jurisdiction. *Id.* at 396-97.

However, including *Bivens*, the Court has approved of an implied damages remedy under the Constitution itself in only three instances: (1) where federal agents searched a private residence without probable cause and in the process manacled the plaintiff and threatened his family in violation of the Fourth Amendment, *Id.* at 389, 296; (2) where a congressman terminated an employee because she was a woman in violation of the Fifth Amendment Due Process Clause, *Davis v. Passman*, 442 U.S. 228, 249, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979); and (3) where federal prison officials displayed deliberate indifference by failing to treat a prisoner's asthma in violation of the Eighth Amendment's Cruel and Unusual Punishments Clause, *Carlson v. Green*, 446 U.S. 14, 19, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980).

Since fashioning these new causes of action, the Court has "come 'to appreciate more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power.'" *Egbert*, 142 S. Ct. at 1802 (quoting *Hernández v. Mesa*, 140 S. Ct. 735, 741 (2020)) ("At bottom, creating a cause of action is a legislative endeavor."). As a result, over the past

42 years, the Court has "declined 11 times to imply a similar cause of action for other alleged constitutional violations." *Id.* at 1799 (collecting{2023 U.S. Dist. LEXIS 11} cases). Thus, "[w]hat started out as a presumption in favor of implied rights of action has become a firm presumption against them." *Callahan v. Federal Bureau of Prisons*, 965 F.3d 520, 523 (6th Cir. 2020). The Supreme Court "has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Ziglar*, 137 S. Ct. at 1857 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 675, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)).

Now, after decades of demarcating the *Bivens* doctrine, the Court must employ the two-step test under *Ziglar* to determine whether an implied damages remedy for alleged constitutional misconduct by federal officials is available. First, the Court must determine whether the plaintiff's claim presents a "new context" or involves a "new category of defendants" for application of *Bivens*. *Hernández*, 140 S. Ct. at 743 (citations omitted). A "new context" is understood broadly as "'new' if it is 'different in a meaningful way from previous *Bivens* cases decided by this Court.'" *Id.* (quoting *Ziglar*, 137 S. Ct. at 1859). A case might differ in a meaningful way because of "the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the{2023 U.S. Dist. LEXIS 12} functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider[,] for example. *Ziglar*, 137 S. Ct. at 1860.

Second, if the Court concludes that a claim arises in a new context, then it must consider whether there are "special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 1857 (quoting *Carlson*, 446 U.S. at 18). At this step, the Court "must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1857-58. "[I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy[,] the [C]ourt[] must refrain from creating [it]." *Ziglar*, 137 S. Ct. at 1858. "Put another way, 'the most important question is who should decide whether to provide for a damages remedy, Congress or the courts?'" *Egbert*, 142 S. Ct. at 1803 (quoting *Hernández*, 140 S. Ct. at 750). "If there is a rational reason to think that the answer is 'Congress'-as it will be in most every case-no *Bivens* action may lie." *Id.* (citation omitted) (citing *Ziglar* 137 S. Ct. at 1857-58). See also *Egbert*, 142 S. Ct. at 1803 ("[E]ven a single sound reason to defer to Congress' is enough to require a court to refrain from creating such a remedy." (quoting *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931, 1937, 210 L. Ed. 2d 207 (2021) (plurality opinion))).{2023 U.S. Dist. LEXIS 13}

1. Anderson's claims present a new *Bivens* context.

In this case, Anderson's Eighth Amendment claims based on his allegations that officers used excessive force against him, including the allegation that Defendants fabricated disciplinary charges against him to place him in restraints, presents a context that is new and meaningfully different from those previously recognized by the Supreme Court as cognizable under *Bivens*. Although Anderson's claims, like those in *Carlson*, are based on the Eighth Amendment, "[a] claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized." *Hernández*, 140 S. Ct. at 743. "Plainly, a prisoner's claim that excessive force was used against him by a prison staff is a different context than the claim in *Carlson* of deliberate indifference to a prisoner's medical needs." *Morel v. Dep't of Justice*, No. 7:22-015-DCR, 2022 U.S. Dist. LEXIS 162900, 2022 WL 4125070, at *5 (Sept. 9, 2022). See also *Hower v. Damron*, No. 2105996, 2022 U.S. App. LEXIS 24676, 2022 WL 16578864, at *3 (6th Cir. Aug. 31, 2022) ("[Plaintiff's] Eighth Amendment claim presents a new context because it involves Damron's alleged harassment and threats and Streeval's alleged failure to protect him from the

same, whereas *Carlson* involved the alleged failure to provide adequate medical care to a prisoner." (citing *Carlson*, 446 U.S. at 16 n.1)). The official actions in this case and in *Carlson* are significantly different, so this case seeks{2023 U.S. Dist. LEXIS 14} to extend *Carlson* to a new context. Given that even a "modest extension" of a prior judicially implied remedy constitutes a new context, *Ziglar*, 137 S. Ct. at 1864, the first step of the *Ziglar* test is met.

2. Special factors counsel against creating a new *Bivens* cause of action in this context.

Anderson's claims also fail under *Ziglar*'s second step, as there are several special factors that counsel against extending the *Bivens* remedy to this new context. *Ziglar*, 1367 S. Ct. at 1857. See also *Elhady v. Unidentified CBP Agents*, 18 F.4th 880, 883 (6th Cir. 2021) ("The Supreme Court . . . has explained that the separation of powers should be a guiding light . . . and has told us that we must not create a cause of action if there's 'a single sound' reason to leave that choice to Congress." (quoting *Nestlé USA, Inc.*, 141 S. Ct. at 1937)).

First, "legislative action suggesting that Congress does not want a damages remedy" counsels hesitation to extend the *Bivens* remedy in this case. *Ziglar*, 137 S. Ct. at 1865. Specifically, Congress passed the Prison Litigation Reform Act of 1995 some 15 years after *Carlson* was decided. *Id.* The Act "made comprehensive changes to the way prisoner abuse claims must be brought in federal court." *Id.* (citing 42 U.S.C. § 1997e). With the passage of this legislation, Congress presumably "had specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs[.]" yet "the{2023 U.S. Dist. LEXIS 15} Act itself does not provide for a standalone damages remedy against federal jailers." *Id.* As *Ziglar* recognized, this alone may suggest "Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment." *Id.*

Second, an alternative remedial structure exists in the form of BOP regulations. See *Egbert*, 142 S. Ct. at 1807 (noting that a remedial scheme created by "Congress or the Executive" which those branches find sufficient to secure an adequate level of deterrence precludes the Judiciary from superimposing a *Bivens* remedy (emphasis added)). For federal inmates, the BOP's Administrative Remedy Program (ARP) "provides a ready and viable mechanism to challenge alleged misconduct by staff." *Morel*, 2022 U.S. Dist. LEXIS 162900, 2022 WL 4125070, at *6 (citing *Correctional Serv's Corp. v. Malesko*, 534 U.S. 61, 61 (2001)); 28 CFR § 542.10 (2001) (explaining that the ARP provides "a process through which inmates may seek formal review of an issue which relates to any aspect of their confinement"). Even assuming the ARP does not provide the complete relief Anderson seeks or that it would leave unaddressed a wrong Anderson asserts, its existence demonstrates that political branches other than the Judiciary are better equipped to create a damages remedy in this new context. See *Egbert*, 142 S. Ct. at 1804 ("[T]he relevant question is not whether a *Bivens*{2023 U.S. Dist. LEXIS 16} action would 'disrupt[t]' a remedial scheme, or whether the court 'should provide for a wrong that would otherwise go unaddressed[.]' Nor does it matter that 'existing remedies do not provide complete relief. Rather, the court must ask only whether it, rather than the political branches, is better equipped to decide whether the existing remedies 'should be augmented by the creation of a new judicial remedy.'" (citations omitted)). As such, the ARP alone is reason enough to decline to infer a new *Bivens* claim in this context. *Egbert*, 142 S. Ct. at 1804. And "courts have consistently held that the BOP's inmate grievance program provides a viable alternative remedy counseling against inferring a remedy under *Bivens*." *Morel*, 2022 U.S. Dist. LEXIS 162900, 2022 WL 4125070, at *6 (collecting cases).

In addition to the BOP's inmate grievance program, the Federal Tort Claims Act, 28 U.S.C. § 2670, *et seq.* ("FTCA"), provides another alternative remedial structure. The FTCA "is a limited waiver of the federal government's sovereign immunity permitting an action against the United States for

negligent or intentional acts committed by its employees during the course of their employment." *Morel*, 2022 U.S. Dist. LEXIS 162900, 2022 WL 4125070, at *6 (citing 28 U.S.C. § 1346(b)(1)). Like the ARP regulations, the existence of the FTCA counsels against extending the *Bivens* remedy to this context.

Third, extending{2023 U.S. Dist. LEXIS 17} a *Bivens* claim to this prison-based context risks unduly interfering with prison administration under separation-of-powers principles. "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources." *Callahan*, 965 F.3d at 524 (quoting *Turner v. Safley*, 482 U.S. 78, 84-85, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)). "Given the array of challenges facing prison administration and the complexity of those problems, 'separation of powers concerns counsel a policy of judicial[.]'" *Id.* (quoting *Safley*, 482 U.S. at 85). In other words, separation-of-powers principles counsel against the judiciary creating new causes of action for prison-based claims, like the ones Anderson asserts here. *Id.*

In sum, Anderson's claims involve alleged excessive force by federal prison officials, which present a context that is new and meaningfully different from those previously recognized by the Supreme Court as cognizable under *Bivens*, the closest of which appearing in *Carlson* some 30 years ago. Moreover, the considerations discussed above offer plenty of reasons to "hesitate" about extending a *Bivens* remedy to Anderson's claims. *Ziglar*, 137 S. Ct. at 1858. The Court must therefore decline to extend a new *Bivens* action for Anderson's excessive force claims. And because the Court finds that *Bivens* does{2023 U.S. Dist. LEXIS 18} not provide a monetary remedy for Anderson's Eighth Amendment claims based on his allegations of excessive force, his Complaint fails to state a claim for which the relief he seeks may be granted. The undersigned thus recommends the District Court grant Defendants' Motion for Summary Judgement [DE 158] and dismiss Anderson's remaining claims.

B. Administrative Exhaustion

The undersigned's recommendation that the District Court dismiss Anderson's remaining claims because *Egbert* and *Ziglar* require the Court to decline to extend a *Bivens* remedy to this context is dispositive of this case. In the interest of complete consideration of Defendants' arguments, however, the Court also recommends dismissal of Anderson's remaining claims because he has failed to show that he exhausted his administrative remedies.¹

Defendants argue that Anderson's claims must be dismissed because he failed to exhaust his administrative remedies prior to filing his lawsuit. The statutory language of the PLRA unequivocally requires that "[n]o action shall be brought with respect to prison conditions under . . . any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative{2023 U.S. Dist. LEXIS 19} remedies as are available are exhausted." 42 U.S.C. § 1997e(a). "There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court." *Jones v. Bock*, 549 U.S. 199, 211, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007). See also *Woodford v. Ngo*, 548 U.S. 81, 85, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006) ("Exhaustion is no longer left to the discretion of the district court, but is mandatory.") (citation omitted); *Napier v. Laurel Cty., Ky.*, 636 F.3d 218, 222 (6th Cir. 2011) (the exhaustion requirement is a "strong one"); *Fazzini v. Northeast Ohio Corr. Ctr.*, 473 F.3d 229, 231 (6th Cir. 2006).

The BOP's Administrative Remedy Program requires a federal prisoner to follow a four-step process to administratively exhaust his remedies. 28 C.F.R. §§ 542.10-542.19. First, the inmate must seek informal resolution of any issue with staff. 28 C.F.R. § 542.13. If a matter cannot be resolved informally, the prisoner must file an Administrative Remedy Request Form (form "BP-9"). See 28 C.F.R. §§ 542.14(a). If the prisoner is not satisfied with the Warden's response, he must use a BP-10 Form to appeal to the applicable Regional Director. See 28 C.F.R. §§ 542.15. If the prisoner is not

satisfied with the Regional Director's response, he may use a BP-11 Form to appeal to the General Counsel. See 28 C.F.R. §§ 542.15. See also BOP Program Statement 1300.16. At each of these steps, the prison officials have strictly proscribed times by which to respond to the grievance. See 28 C.F.R. § 542.18. At any level, "[i]f the inmate does not receive a response within the time allotted{2023 U.S. Dist. LEXIS 20} for reply, including extension, the inmate may consider the absence of a response to be a denial at that level." 28 C.F.R. § 542.18. "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules[.]" *Woodford*, 548 U.S. at 90.

Failure to exhaust administrative remedies is an affirmative defense. *Jones*, 549 U.S. at 212. "When the defendants in prisoner civil rights litigation move for summary judgment on administrative exhaustion grounds, they must prove that no reasonable jury could find that the plaintiff exhausted his administrative remedies." *Mattox v. Edelman*, 851 F.3d 583, 590 (6th Cir. 2017) (citing *Surles v. Andison*, 678 F.3d 452, 455-56 (6th Cir. 2012)). Once an inmate makes "some affirmative efforts to comply with the administrative procedures," the Court will analyze "whether an inmate's efforts to exhaust were sufficient under the circumstances." *Napier*, 636 F.3d at 223-24. Summary judgment is appropriate where "a defendant establishes that there is no genuine dispute of material fact that the plaintiff failed to exhaust." *Doe 8-10 v. Snyder*, 945 F.3d 951, 961 (6th Cir. 2019).

On this record, the Court finds that Anderson did not exhaust his administrative remedies as required by the PLRA prior to filing this case. Anderson indicated in his Amended Complaint that he submitted remedy requests at the Regional Director and Office of General Counsel levels on August 18, 2019, and February{2023 U.S. Dist. LEXIS 21} 2, 2020, respectively. [DE 9, Page ID# 99]. He also provided details concerning these submissions in his deposition testimony. Specifically, Anderson stated that he filed a "sensitive request" BP-9 on August 18, 2019. [DE 158-1, Page ID# 1751]. If true, the regional office would have had up to 60 days in which to submit its response. 28 C.F.R. § 542.18. Defendants claim the regional office never received a B-9, and Anderson acknowledged in his deposition that he did not receive a response from the BOP regional office within 60 days. [DE 158-1, Page ID# 1752].

However, Anderson acknowledged in his deposition that, despite not receiving a response to the sensitive submission, he did not take further action until January 2020, when he finally followed up on the sensitive submission. [*Id.* at Page ID# 1752-53]. The BOP's Administrative Remedy Program requires that "[i]f the inmate does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level." 28 C.F.R. § 542.18. This means that once mid-October 2019 came and went, Anderson should have assumed that his BP-9 was denied, and if he wished to pursue his administrative remedies,{2023 U.S. Dist. LEXIS 22} he had to use a BP-10 Form to appeal to the applicable Regional Director. Anderson failed to do so in the timeframe required by the regulation and offers no excuse for his delay.

Failure to exhaust is an affirmative defense upon which defendants bear the burden. A defendants' initial burden is satisfied by showing that there was a generally available administrative remedy that the prisoner did not exhaust. *Albino v. Baca*, 747 F.3d 1152, 1172 (9th Cir. 2014). Once the defendants put forth evidence of a valid administrative process, a plaintiff must present evidence to rebut the availability of that remedy to defeat the defendants' motion for summary judgment. *Napier*, 636 F.3d at 225-26. Anderson, in failing to respond to the Motion for Summary Judgment, has not sustained this burden. His lack of response on his failure to exhaust dooms his claims. *Nali v. Ekman*, 355 F. App'x 909, 912 (6th Cir. 2009) (Sutton, J., dissenting) ("No doubt, we expect less of pro se litigants than we do of counseled litigants - and appropriately so. But those modest expectations are not non-existent. '[P]ro se parties must still brief the issues advanced with some

effort at developed argumentation."") (quoting *Coleman v. Shoney's, Inc.*, 79 F. App'x 155, 157 (6th Cir. 2003)).

Accordingly, the undersigned alternatively recommends the District Court grant Defendants' Motion for Summary Judgment [DE{2023 U.S. Dist. LEXIS 23} 158] and dismiss Anderson's remaining claims on the grounds that he failed to exhaust his administrative remedy prior to filing his civil action as required by 42 U.S.C. § 1997e(a).

I. CONCLUSION

For the reasons discussed above, the Court **RECOMMENDS** as follows:

1. That the District Court **GRANT** Defendants' Motion for Judgement on the Pleadings, or in the Alternative for Summary Judgment [DE 158]; and
2. That the District Court **DENY AS MOOT** the following motions:
 - a. Anderson's Motion to Determine Sufficiency of Answer or Objection [DE 150];
 - b. Anderson's Motion for Extension [DE 180];
 - c. Anderson's Motion for Waiver of Fees [DE 188];
 - d. Anderson's Motion to Amend and/or Supplement [DE 189]; and
 - e. Anderson's Motion to Appoint Counsel [DE 190].

The undersigned enters this Memorandum Opinion pursuant to 28 U.S.C. § 636(b)(1)(A). Within fourteen (14) days after being served with a copy of this Memorandum Opinion, either party may appeal this decision to the presiding District Judge pursuant § 636(b)(1)(A) and Fed. R. Civ. P. 72(a).

Entered this 26th day of January, 2023.

/s/ Matthew A. Stinnett

MATTHEW A. STINNETT

UNITED STATES MAGISTRATE JUDGE

EASTERN DISTRICT OF KENTUCKY

Footnotes

1

The undersigned recognizes the general principle that federal courts should decline to address alternative grounds of dismissal when no cause of action exists, especially in cases, like this one, where precedent can easily resolve *Biven*'s applicability. See *Elhady*, 18 F.4th 880, 884-85 ("Plaintiffs like Elhady often have no cause of action unless we extend *Bivens*. And if there is no cause of action, courts should stop there. After all, Article III bars federal courts from giving 'opinions advising what the law would be upon a hypothetical state of facts.'"). However, the undersigned addresses Defendants' alternative argument to provide an alternate recommendation to which the District Court may turn in the event it rejects the first recommended basis of dismissal.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Apr 9, 2024

KELLY L. STEPHENS, Clerk

DARNELL ANDERSON,
Plaintiff-Appellant,
v.
AARON FUSON, ET AL.,
Defendants-Appellees.

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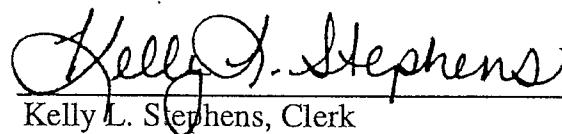
O R D E R

BEFORE: STRANCH, BUSH, and MATHIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk