

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEBORAH S. HUNT, Clerk

Defendants-Appellees.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF
KENTUCKY

At the time of the events alleged in his complaint, Barnett was temporarily confined at the Laurel County Detention Center (LCDC) while awaiting an evidentiary hearing at the federal courthouse in London, Kentucky. Barnett alleged that, on April 29, 2015, correctional officers placed him in restraints to transport him from LCDC to the courthouse. Upon arriving at the courthouse, Barnett alleged, the correctional officers made no attempt to assist him in exiting the transportation van. When he attempted to step from the van, Barnett lost control and fell to the concrete floor, incurring severe injuries.

A year later, Barnett filed this complaint pursuant to 42 U.S.C. § 1983 against Laurel County, the Laurel County Sheriff's Department, Sheriff John Root, and LCDC's chief jailer, deputy chief jailer, and correctional officers, all unnamed. Barnett asserted two claims: (1) deprivation of civil rights and (2) failure to adequately train and supervise deputies. In his complaint, Barnett acknowledged that he had not filed a grievance regarding his allegations but asserted that the grievance process did not apply because "I [was] a federal prisoner being housed in a county detention center located in London, KY. I was simply being transported to the U.S. Courthouse for an evidentiary hearing and was not in the prison where I am serving my sentence."

Upon initial screening, the district court dismissed Barnett's complaint with prejudice pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A. The district court concluded that Barnett admitted in his complaint that he did not exhaust his administrative remedies before filing suit and that any grievance would now be untimely. *See* 42 U.S.C. § 1997e(a).

On appeal, this court concluded that the district court properly dismissed Barnett's complaint on the basis that his failure to exhaust his administrative remedies was apparent from the face of the complaint. *Barnett v. Laurel Cty.*, No. 16-5658, 2017 WL 3402075, at *2 (6th Cir. Jan. 30, 2017). However, this court went on to determine that the record did not support the proposition that a grievance would be time-barred and remanded the case to the district court to (1) clarify its basis for concluding that a grievance would be untimely, (2) dismiss the complaint without prejudice, or (3) conduct further proceedings. *Id.*

After this court's decision, Barnett filed a copy of a grievance dated February 12, 2017, that he sent by certified mail to LCDC. The district court subsequently dismissed Barnett's complaint without prejudice to allow him to fully exhaust his administrative remedies with LCDC, pointing out that LCDC's grievance procedure provides for at least one level of appeal. This timely appeal followed.

Under the Prison Litigation Reform Act, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as

are available are exhausted.” 42 U.S.C. § 1997e(a). The prisoner must exhaust his administrative remedies *before* filing a § 1983 action: “The prisoner, therefore, may not exhaust administrative remedies during the pendency of the federal suit.” *Freeman v. Francis*, 196 F.3d 641, 645 (6th Cir. 1999). Barnett sent his grievance to LCDC ten months *after* he filed his complaint. The district court properly dismissed Barnett’s prematurely filed complaint without prejudice to allow him to fully exhaust his administrative remedies with LCDC. *See id.*

On appeal, Barnett argues that LCDC’s administrative remedies would not provide adequate relief and that resort to the administrative process would be futile. As this court has recognized, the exhaustion “requirement is a strong one. To further the purposes behind the PLRA, exhaustion is required even if the prisoner subjectively believes the remedy is not available; even when the state cannot grant the particular relief requested; and even where [the prisoners] believe the procedure to be ineffectual or futile.” *Napier v. Laurel Cty.*, 636 F.3d 218, 222 (6th Cir. 2011) (citations omitted). Barnett further contends that he was never made aware of LCDC’s grievance procedure. But a prisoner’s “failure to exhaust cannot be excused by his ignorance of the law or the grievance policy.” *Id.* at 221 n.2. Barnett also asserts that LCDC has not responded to his grievance. The grievance procedure set forth in LCDC’s 2015 inmate orientation manual provides that a grievance not answered within ten days is deemed denied and that a prisoner dissatisfied with the disposition of a grievance may appeal the grievance up the chain of command. The district court’s dismissal without prejudice allows Barnett to fully exhaust this procedure and then file a new complaint.

For these reasons, we **AFFIRM** the district court’s judgment dismissing Barnett’s complaint without prejudice.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

FILED
Feb 02, 2018
DEBORAH S. HUNT, Clerk

Defendants-Appellees.

ORDER

Wm L. Hunt

Deborah S. Hunt, Clerk

available to him, due to both the passage of time and his transfer out of that facility. [R. 5 at 4-5.]

On appeal, the Sixth Circuit agreed with the first conclusion but disagreed with the second. [R. 13.] LCDC's grievance policy used to require that grievances be filed "promptly following the incident," *Napier v. Laurel Cty., Ky.*, 636 F.3d 218, 222 (6th Cir. 2011), but that language was no longer part of its policy when Barnett was injured in 2015. The Sixth Circuit therefore remanded the action to this Court to either (1) clarify its basis for concluding that Barnett's grievances would be barred as untimely, (2) to dismiss the complaint without prejudice, or (3) to conduct further proceedings. [R. 13 at 4.] The Sixth Circuit has since issued its mandate [*see* R. 16], re-vesting this Court with jurisdiction to proceed.

As a preliminary matter, the Court must confess error in its original opinion regarding the timeliness requirement under LCDC's grievance policy. While the current policy plainly no longer includes such a requirement, *see* http://www.laurelcorrections.com/plugins/show_image.php?id=29 (Revised March 2, 2015), in Barnett's case the Court inadvertently relied upon the prior version described in the Sixth Circuit's *Napier* decision, which included a requirement that grievances be filed "promptly." *See Napier*, 636 F.3d at 222.

Shortly after the Sixth Circuit issued its decision, Barnett filed with the Court a copy of a grievance dated February 12, 2017, which he indicates was sent by certified mail to LCDC. Barnett therefore contends that he satisfied LCDC's grievance policy. [R. 14.] But a prisoner must exhaust his or her administrative remedies, in their entirety, *before* he files suit. "The prisoner . . . may not exhaust administrative remedies *during the pendency of the federal suit.*" *Freeman v. Francis*, 196 F.3d 641, 645 (6th Cir. 1999) (emphasis added). Here, Barnett did not file his inmate grievance until February 2017—ten months *after* he filed this suit—and there is

nothing in the record to indicate that LCDC has responded to his grievance. Because Barnett's suit was premature when he filed it in April 2016, the appropriate course is to dismiss it without prejudice. This will permit Barnett to properly, and fully, exhaust his administrative remedies with LCDC. Once he has done so, he may file a new complaint asserting his claims.

In this regard, Barnett is advised that LCDC's grievance policy states that there shall be at least one level of appeal, and Barnett must complete that process as well to fully exhaust his remedies. Cf. *Liggett v. Mansfield*, 2009 WL 1392604, at *2-3 (E.D. Tenn. May 15, 2009) ("A prisoner who files a grievance but does not appeal to the highest possible administrative level, does not exhaust available administrative remedies.") (citing *Hartsfield v. Vidor*, 199 F.3d 305, 309 (6th Cir. 1999)).

Accordingly, the Court hereby **ORDERS** that:

1. Barnett's complaint [R. 1] is **DISMISSED WITHOUT PREJUDICE**;
2. The Court will enter an appropriate judgment contemporaneously herewith; and
3. This matter is **STRICKEN** from the Court's active docket.

This the 2nd day of June, 2017.



Gregory F. Van Tatenhove
United States District Judge

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