FILED
United States Court of Appeals
Tenth Circuit

July 14, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

VICTORIA DAWN WRIGHT,

Plaintiff - Appellant,

v.

ROBERT J. GESS,

Defendant - Appellee.

No. 22-1179
(D.C. No. 1:18-CV-03338-STV)
(D. Colo.)

ORDER AND JUDGMENT[*]

Before **MATHESON**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

In this Eighth Amendment excessive-force case, Victoria Dawn Wright appeals from a district court order granting Sergeant Robert J. Gess's motion for summary judgment. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

BACKGROUND[1]

Ms. Wright alleges that on September 25, 2018, while she was incarcerated in the Denver Women's Correctional Facility, Sergeant Gess injured her when escorting her down a hallway. She "eventually began to fall," and claims Sergeant Gess, "instead of preventing [her] fall," "threw/pushed [her] [the] remainder of the way onto [the] concrete floor," severely injuring her. Aplt. App., Vol. I at 79. Ms. Wright was taken to a hospital, where she received stitches for lacerations to her head.

Ms. Wright alleges she submitted an informal-resolution form to her case manager two days after the incident. On the form, Ms. Wright described what happened and requested, among other things, an investigation, additional medical care, and monetary compensation. *See id.* at 244. She received no response.

Ms. Wright then initiated the Colorado Department of Corrections' (CDOC) grievance process against Sergeant Gess. Under that process, "[o]ffenders will file Step 1, Step 2, and Step 3 grievances . . . with their case manager," who must "record the date that he/she received the grievance . . . on the grievance form" and then "forward [it] to the grievance coordinator" for processing. *Id.* at 253 (Admin. Reg. 850-04, § IV(C)(5)(a), (b) (eff. Nov. 15, 2017)).

According to Ms. Wright, she submitted a step-one grievance to her case manager on October 7, 2018, by placing it in the prison mail system. In the grievance, she again

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[1] Because this is an appeal from summary judgment, we "view[] the evidence and draw[] all reasonable inferences therefrom in the light most favorable to the nonmoving party," Ms. Wright. *Cruz v. Farmers Ins. Exch.*, 42 F.4th 1205, 1210 (10th Cir. 2022).

described the incident and requested the same relief she had identified in her request for informal resolution.

The grievance regulations require CDOC to respond in writing to a step-one grievance "within 25 calendar days of its receipt by the case manager." *Id.* at 257 (Admin. Reg. 850-04, § IV(F)(1)(b)). If CDOC does not so respond, "the offender may proceed to the next step within five calendar days of the date the response was due." *Id.* (Admin. Reg. 850-04, § IV(F)(1)(e)).

The 25-day deadline for CDOC's response to Ms. Wright's step-one grievance could have been no earlier than November 1, assuming a receipt date that matched Ms. Wright's submission date. When CDOC did not respond, the grievance regulations allowed Ms. Wright to proceed to the next step within five calendar days of November 1. *See id.* (Admin. Reg. 850-04, § IV(F)(1)(e)).

However, on October 17, Ms. Wright submitted a step-two grievance, and on October 27, she submitted a step-three grievance. Her step-two and step-three grievances largely mirrored her initial grievance. Ms. Wright sent handwritten "duplicate cop[ies]" of her grievances to her criminal appellate attorney, Suzan Trinh Almony, and said she had obtained no response to any of her submissions. *Id.* at 270. On November 11, 2018, Ms. Almony mailed the grievance copies to Ms. Wright's case manager but received no response.

On December 26, 2018, Ms. Wright filed a pro se civil-rights complaint in federal district court in Colorado against Sergeant Gess and other CDOC defendants regarding the use-of-force incident and other matters. She alleged Sergeant Gess used excessive

force by intentionally slamming her onto the concrete floor with "the maximum degree of force [he] could physically generate," causing her to lose consciousness. *Id.* at 38. She further alleged CDOC failed to investigate the incident and withheld video-surveillance evidence of the incident from Ms. Almony. Ms. Wright also raised claims about access to a proper Messianic Jewish diet, her vindication in a criminal case alleging she assaulted a corrections officer, and her inability to afford postage stamps for non-legal mail.

The district court granted Ms. Wright in forma pauperis status, screened her complaint, and ordered her to file an amended complaint to address various deficiencies. After Ms. Wright filed an amended complaint, the district court sua sponte dismissed all of the claims except her excessive-force claim against Sergeant Gess.

Sergeant Gess then moved to dismiss the amended complaint, arguing Ms. Wright failed to exhaust her administrative remedies, as CDOC could find no grievances pertaining to his use of force. The district court denied the motion, explaining that Ms. Wright alleged proper exhaustion in her amended complaint. Also, the district court ordered the appointment of counsel for Ms. Wright.

Sergeant Gess filed an answer and then moved for summary judgment on the issue of exhaustion. According to Sergeant Gess, CDOC's grievance officer could find no grievance filed by Ms. Wright against Sergeant Gess. Ms. Wright opposed summary judgment, asserting through appointed counsel (1) CDOC's failure to respond to her step-one grievance rendered the grievance process unavailable; (2) her and Ms. Almony's declarations show "that she completed the grievance process according to the terms of the

Grievance Policy," *id.* at 221; and (3) whether she submitted grievances presents a factual dispute that should be resolved by a jury. In reply, Sergeant Gess argued there was no exhaustion because even assuming Ms. Wright submitted grievances related to the incident, she failed to follow the grievance process when she submitted her step-two and step-three grievances before CDOC's step-one response was due.[2]

The district court granted Sergeant Gess's motion for summary judgment, concluding that Ms. Wright failed to exhaust her excessive-force claim. First, the district court explained Ms. Wright's own evidence showed she failed to comply with the grievance process by submitting her step-two grievance before CDOC's step-one response was due. Next, the district court concluded CDOC's failure to respond did not render the process unavailable, because the regulations allow an inmate to proceed to the next step absent a response.

Ms. Wright unsuccessfully sought reconsideration and then filed this appeal.[3]

DISCUSSION

I. Standards of Review

We review de novo an order granting summary judgment, affirming if "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a

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[2] For purposes of summary judgment on the issue of exhaustion, Sergeant Gess has conceded Ms. Wright's submission of grievances on October 7, 17, and 27, 2018. *See* Aplt. App., Vol. II at 311 & n.2.

[3] Ms. Wright does not challenge in her opening brief the denial of reconsideration. The issue is therefore waived. *See Burke v. Regalado*, 935 F.3d 960, 995 (10th Cir. 2019) ("The failure to raise an issue in an opening brief waives that issue." (internal quotation marks omitted)).

matter of law." *Cruz v. Farmers Ins. Exch.*, 42 F.4th 1205, 1210 (10th Cir. 2022) (internal quotation marks omitted). A prisoner's failure to exhaust administrative remedies is an affirmative defense. *Jones v. Bock*, 549 U.S. 199, 211-12 (2007). "Where, as here, a defendant moves for summary judgment to test an affirmative defense, the defendant must demonstrate that no disputed material fact exists regarding the affirmative defense asserted." *Helm v. Kansas*, 656 F.3d 1277, 1284 (10th Cir. 2011) (alterations and internal quotation marks omitted). If the defendant satisfies that burden and the plaintiff cannot "then demonstrate with specificity the existence of a disputed material fact," the defendant's "affirmative defense bars her claim," warranting summary judgment. *Id.* (brackets and internal quotation marks omitted).

II. Exhaustion

The Prison Litigation Reform Act (PLRA) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of . . . title [42], 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). Exhaustion is mandatory, meaning "[a]n inmate . . . may not bring any action[] absent exhaustion of available administrative remedies." *Ross v. Blake*, 578 U.S. 632, 638 (2016). "The PLRA attempts to eliminate unwarranted federal-court interference with the administration of prisons, and thus seeks to afford corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Woodford v. Ngo*, 548 U.S. 81, 93 (2006) (brackets, footnote, and internal quotation marks omitted).

The PLRA "requires proper exhaustion." *Id.* "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." *Id.* at 90-91. In other words, "to properly exhaust administrative remedies[,] prisoners must complete the administrative review process in accordance with the applicable procedural rules," which "are defined not by the PLRA, but by the prison grievance process itself." *Jones*, 549 U.S. at 218 (internal quotation marks omitted).

Ms. Wright argues CDOC's failure to respond to her step-one grievance rendered the administrative process unavailable. The Supreme Court has made clear "[a]n inmate . . . need not exhaust unavailable [remedies]." *Ross*, 578 U.S. at 642. A remedy is considered unavailable if "it operates as a simple dead end," if it is "so opaque that it becomes, practically speaking, incapable of use," or "when prison administrators thwart inmates from taking advantage of a grievance process." *Id.* at 643-44.

Here, CDOC's inaction could not have affected Ms. Wright's use of the administrative process. CDOC has 25 calendar days within which to respond to a step-one grievance. Aplt. App., Vol. I at 257 (Admin. Reg. 850-04, § IV(F)(1)(b)). That 25-day period begins when the case manager receives the grievance. *Id.* Even if Ms. Wright had no way of knowing the date of receipt, the earliest possible due date for CDOC to respond was 25 days from the date Ms. Wright submitted her step-one

grievance. But a grievance cannot be received before it is submitted.[4] Yet, Ms. Wright proceeded to step two of the grievance process before the earliest possible date that CDOC's step-one response could have been due. She also moved on to step three of the grievance process before the earliest possible deadline for CDOC's step-one response. The grievance regulations clearly dictate the process to be used when CDOC does not respond to a step-one grievance. Ms. Wright did not follow that procedure, so we cannot say she exhausted her administrative remedies. *See id.* (Admin. Reg. 850-04, § IV(F)(1)(e) (requiring "expir[ation]" of the time limit for CDOC's response before the offender may proceed to the "next step")).[5] Further, we conclude Ms. Wright's premature submissions were not the result of an administrative procedure that "operates as a simple dead end," is "so opaque that it becomes, practically speaking, incapable of

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[4] Ms. Wright contends that "pegg[ing] the date that [she] submitted her Step 1 grievance to the same day that CDOC received it . . . resolve[s] a disputed fact in favor of the movant." Aplt. Opening Br. at 21. We disagree. Construing the date of receipt as the date of submission views the evidence in the light *most favorable to Ms. Wright* by providing the shortest possible window for CDOC's response. But even under that view, Ms. Wright filed her step-two grievance (and step-three grievance) too soon, i.e., before the expiration of CDOC's step-one response time.

[5] Ms. Wright suggests that Ms. Almony's submission of her grievances to her case manager cured any lack of proper exhaustion. We are not persuaded. First, the regulations prohibit attorney involvement in the grievance process. *See* Aplt. App., Vol. I at 254 (Admin. Reg. 850-04, § IV(D)(5)). Second, Ms. Almony mailed the step-one, -two, and -three grievances together on November 11. Ms. Wright identifies no part of the regulations that allows the submission of all three grievances at the same time. Rather, the regulations prescribe a step-by-step process. *See id.* at 257 (Admin. Reg. 850-04, § IV(F)(1)(e)). The Supreme Court clearly requires that "prisoners . . . complete the administrative review process in accordance with the applicable procedural rules," as set forth "by the prison grievance process itself." *Jones*, 549 U.S. at 218 (internal quotation marks omitted).

use," or is susceptible to manipulation by "prison administrators [who] thwart inmates from taking advantage of [the] grievance process through machination, misrepresentation, or intimidation." *Ross*, 578 U.S. at 643-44.

Ms. Wright's reliance on *Jernigan v. Stuchell*, 304 F.3d 1030 (10th Cir. 2002), to show unavailability is misplaced. There, this court stated "that the failure to respond to a grievance within the time limits contained in the grievance policy renders an administrative remedy unavailable." *Id.* at 1032. But we then held the statement did not apply because the prison's grievance policy allowed an inmate who "does not receive a response . . . [to] send the grievance with evidence of its prior submission to an administrative review authority." *Id.* at 1033. Similarly, here, the applicable grievance policy allows an inmate who does not receive a grievance response to "proceed to the next step within five calendar days of the date the response was due." Aplt. App., Vol. I at 257 (Admin. Reg. 850-04, § IV(F)(1)(e)). Under the circumstances here, we conclude CDOC's failure to respond to Ms. Wright's grievance did not render administrative remedies unavailable.

CONCLUSION

We affirm the district court's judgment.

Entered for the Court

Veronica S. Rossman
Circuit Judge