

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GABRIEL MUNOZ,
Appellant,
vs.
THE STATE OF NEVADA; LT.
BOWMAN; ISIDRO BACA;
REXWINKLE; AND S.E.R.T.,
Respondents.

No. 66977

FILED

SEP 15 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

This is an appeal from a district court order granting a motion to dismiss in a civil rights and state negligence action. First Judicial District Court, Carson City; James Todd Russell, Judge.

Appellant Gabriel Munoz argues the district court erred in granting the respondents' motion to dismiss his complaint. This court reviews a district court's order granting a motion to dismiss de novo. *Munda v. Summerlin Life & Health Ins. Co.*, 127 Nev. ___, ___, 267 P.3d 771, 774 (2011). In addressing Munoz's arguments, we must accept all of the factual allegations of the complaint as true and draw all inferences in favor of Munoz. See *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (explaining that, on appeal, a court rigorously reviews a dismissal for failure to state a claim, accepting all of the factual allegations in the complaint as true, and drawing all inferences in favor of the plaintiff). A motion to dismiss is properly granted when the

plaintiff fails to exhaust administrative remedies prior to seeking judicial relief. *Rosequist v. Int'l Ass'n of Firefighters Local 1908*, 118 Nev. 444, 448, 49 P.3d 651, 653 (2002), *overruled on other grounds by Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 573, 170 P.3d 989, 995 (2007). Having reviewed Munoz's civil appeal statement, the response, the reply, and the record on appeal, we conclude the district court erred in granting the motion to dismiss.

Munoz, an inmate, alleged he was physically attacked by members of the Sureno gang and that the Nevada Department of Corrections (NDOC) defendants were aware he needed protection from those gang members. Munoz asserted the NDOC defendants were deliberately indifferent to his safety in violation of his Eighth Amendment rights and filed his complaint pursuant to 42 U.S.C. § 1983. Munoz also alleged the NDOC defendants were liable under state negligence law. The defendants moved for dismissal of the complaint due to Munoz's failure to exhaust administrative remedies. The district court granted the motion to dismiss pursuant to Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e, and NRS 41.0322(3).

Munoz argues the district court erred in concluding he failed to properly exhaust the NDOC administrative remedies. Here, the district court concluded Munoz did not properly exhaust administrative remedies because he did not submit his administrative claim for more than six months after the accrual of his alleged injury. However, a review of the record reveals the NDOC addressed Munoz's upper-level grievance on the merits and the NDOC did not inform Munoz during the grievance process that he had waited too long to submit a grievance. The record further

demonstrates the NDOC did not attempt to enforce its own grievance process' procedural requirements regarding timeliness until filing its motion to dismiss in the district court.

We first consider application of the PLRA with respect to Munoz's allegation of violation of his civil rights. An inmate alleging a violation of his civil rights pursuant to 42 U.S.C. § 1983 must exhaust the NDOC's administrative remedies prior to seeking judicial relief. *Berry v. Feil*, 131 Nev. ___, ___, P.3d ___, ___ Ct. App. Nev. (Adv. Op. No. 37, June 11, 2015 at 7). "[P]roper exhaustion of administrative remedies . . . means using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits)." *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (internal quotation marks omitted). "The point of the PLRA exhaustion requirement is to allow prison officials a fair opportunity to address grievances on the merits, to correct prison errors that can and should be corrected and to create an administrative record for those disputes that eventually end up in court." *Reed-Bey v. Pramstaller*, 603 F.3d 322, 324 (6th Cir. 2010) (internal quotation marks omitted).

Other courts have held when prison officials choose to ignore the administrative remedy procedural requirements and opt to consider grievances that would otherwise be procedurally defaulted, application of the PLRA requires courts to decline to dismiss an action based upon the ignored procedural rule. *See id.* at 325 (overlooking failure to name all defendants in a grievance, over the objection of the defendants, where prison officials reviewed grievance on the merits); *Riccardo v. Rausch*, 375 F.3d 521, 524 (7th Cir. 2004) (overlooking the untimeliness of a grievance,

over the objection of the defendants, where prison officials reviewed grievance on the merits); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186 (10th Cir. 2004) (same), *abrogated on other grounds by Jones v. Bock*, 549 U.S. 199, 223 (2007); *Camp v. Brennan*, 219 F.3d 279, 281 (3d Cir. 2000) (overlooking failure to file grievance with the proper officials, over the objection of the defendants, where officials ultimately reviewed grievance on the merits). The Nevada United States District Court has likewise held if prison officials address an inmate grievance on the merits despite an inmate's failure to follow proper grievance procedures, the inmate has satisfied the exhaustion requirement. *Jones v. Stewart*, 457 F. Supp. 2d 1131, 1136 (D. Nev. 2006) ("If a plaintiff meets the merits test by having his grievance and appeals addressed on the merits, then the agency has determined whether the plaintiff exhausted the administrative agency's dispute resolution procedures to the agency's satisfaction. If the agency does not address the grievance or appeals on the merits, only then will the court move on to determine whether the inmate nonetheless exhausted available remedies by complying with all critical procedural rules, such as deadlines.").

Here, the NDOC never informed Munoz he had submitted an untimely grievance and responded to his informal and second level grievances on the merits.¹ As the NDOC responded to Munoz on the merits, the NDOC accordingly concluded it had a fair opportunity to

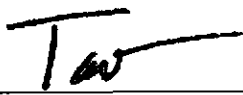
¹Munoz's first level grievance was rejected for Munoz's failure to attach the informal level grievance and response.

address Munoz's concerns. We are persuaded by other courts' examinations of this issue and conclude, because the NDOC did not enforce the grievance process' procedural requirements and addressed Munoz's claims on the merits, Munoz exhausted the NDOC's administrative remedies for his Eighth Amendment deliberate indifference claim. Therefore, the district court erred in dismissing that claim.

Next we consider the district court's decision to dismiss the entirety of the complaint pursuant to NRS 41.0322(3). NRS 41.0322(3) states "[t]he court shall dismiss the action if the person has not timely filed the person's administrative claim." However, NRS 41.0322 only applies to state tort claims and "is inapplicable to [a plaintiff's] § 1983 civil rights claims." See *Berry*, 131 Nev. ___, ___, P.3d ___, ___ Ct. App. Nev. (Adv. Op. No. 37, June 11, 2015 at 9). Therefore, Munoz's state negligence claim was subject to dismissal under NRS 41.0322(3), but his Eighth Amendment deliberate indifference claim brought under § 1983 was not. As Munoz did not timely file his administrative claim, the district court properly dismissed his state negligence claim pursuant to NRS 41.0322(3). However, the district court erred in dismissing Munoz's Eighth Amendment deliberate indifference claim pursuant to NRS 41.0322(3). Therefore, Munoz is entitled to relief regarding his deliberate indifference claim and we reverse the decision to dismiss that claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. James Todd Russell, District Judge
Gabriel Munoz
Attorney General/Carson City
Carson City Clerk

²We also note the district court properly dismissed the "S.E.R.T. TEAM" as a defendant pursuant to NRCP 17(b) because it lacked the capacity to be sued.