

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DUSHON NICHALOS GREEN,
Appellant,
vs.
TERRY LINDBERG; RENEE BAKER;
JAMES DZURENDA; AND ROY
LORTON,
Respondents.

No. 78002-COA

FILED

JUN 30 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Dushon Nichalos Green appeals from a district court order granting summary judgment in a civil rights action. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Green appeals from a district court order granting summary judgment for respondents Terry Lindberg, Property Sergeant; Renee Baker, Warden of Lovelock Correctional Center; James Dzurenda, Director of Nevada Department of Corrections (NDOC); and Roy Lorton, Correctional Officer.¹ While incarcerated, Green received authorization in 2010 to order special sneakers (in size 9-1/2 EEE) from a list of pre-approved outside vendors to alleviate his chronic foot pain. In 2017, Green ordered a pair of shoes that a prison sergeant confiscated as unauthorized property, alleging in an "Unauthorized Property Notification" that this particular pair of shoes (a pair of Adidas sneakers) constituted contraband because it was purchased from an unapproved vendor. Green filed an administrative grievance that the prison dismissed because it was not accompanied by the required supporting documentation. Rather than re-file the grievance with the proper documents, Green instead filed a pro se complaint in district

¹We do not recount the facts except as necessary to our disposition.

court against respondents alleging they violated his 8th and 14th amendment rights by confiscating his special shoes. Green also alleged negligence and breach of contract under state law.

Respondents moved for summary judgment, arguing that Green failed to exhaust his remedies under the Prison Litigation Reform Act (PLRA) because Green did not submit a corrected informal grievance, after respondents dismissed his original informal grievance for failing to provide supporting documentation. In his written opposition, Green argued that he had exhausted his remedies and cited his previously-dismissed grievance as the only proof of exhaustion. He offered no other evidence, such as affidavits or other documents, but nonetheless argued that there existed a genuine issue of material fact as to whether he exhausted his remedies because respondents failed to properly maintain his grievance records. The district court granted summary judgment, concluding that Green failed to exhaust his administrative remedies because his grievance history report was void of any such grievance. The district court also dismissed Green's negligence and breach of contract claims because Green failed to name the State of Nevada as a defendant as required by NRS 41.031(2) and NRS 41.0337.

On appeal, Green argues that the district court erred by dismissing his civil rights claims because respondents failed to overcome their burden of showing that Green failed to exhaust his administrative remedies. *See* 42 U.S.C. § 1983 (2012). More specifically, Green argues that since he alleged that respondents failed to maintain his grievance history records, the burden shifted to respondents to explain why the record was

incomplete and provide evidence that Green nonetheless failed to exhaust his administrative remedies.²

We “review[] a district court’s grant of summary judgment de novo.” *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper when the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* To withstand summary judgment, the nonmoving party must present specific facts demonstrating the existence of a genuine factual issue supporting his or her claims. NRCP 56(e); *see also Wood*, 121 Nev. at 731, 121 P.3d at 1030-31.

Green’s civil rights claims are subject to the PLRA, which requires that a prisoner challenging prison conditions exhaust available administrative remedies before filing suit. 42 U.S.C. § 1997e(a); *Berry v. Feil*, 131 Nev. 339, 345, 357 P.3d 344, 347 (Ct. App. 2015). Proper exhaustion requires “using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits)” and “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.” *Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006) (internal quotation marks omitted).

The failure to exhaust administrative remedies is “an affirmative defense the defendant must plead and prove.” *Albino v. Baca*,

²In light of our disposition, we need not address the parties’ arguments regarding whether Green’s claim is barred by the statute of limitations and whether Green argued that respondents thwarted his attempt to exhaust his administrative remedies.

747 F.3d 1162, 1166 (9th Cir. 2014) (quoting *Jones v. Bock*, 549 U.S. 199, 204 (2007)). When the failure to exhaust is not clear from the face of the complaint, the defendant must raise the defense in a motion for summary judgment. *Id.* “If undisputed evidence viewed in the light most favorable to the prisoner shows a failure to exhaust, a defendant is entitled to summary judgment” *Id.* However, “[i]f material facts are disputed, summary judgment should be denied, and the district judge . . . should determine the facts.” *Id.* “If discovery is appropriate, the district court may in its discretion limit discovery to evidence concerning exhaustion, leaving until later—if it becomes necessary—discovery directed to the merits of the suit.” *Id.* at 1170 (citing *Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008)).

Here, Green contends that he exhausted his administrative remedies because he filed an informal grievance regarding the shoes on September 18, 2017. However, respondents note that the informal grievance was dismissed as incomplete because it lacked the required supporting documentation, Green never attempted to refile the grievance with the missing documents, and this failure to refile constitutes a lack of exhaustion. Although respondents did not provide a copy of this grievance with their summary judgment motion, Green attached a copy of it to his complaint. Notably, Green does not dispute that the informal grievance was incomplete because it lacked supporting documentation, and he does not allege that the prison acted inappropriately in dismissing it. Consequently, Green fails to demonstrate that there exists any factual disputes that are either “genuine” or “material,” meaning that if a jury believed his version of the facts, it could render a verdict in his favor. *See Wood*, 121 Nev. at 731, 121 P.3d at 1030-31.

Green argues that the prison waived any failure to exhaust administrative remedies by nonetheless responding to his claim on the merits when he raised the same complaint in an informal “kite” (handwritten letter) sent to the warden. The record indicates that Green mailed a kite to the warden complaining about the confiscation of his shoes. *See* AR 740.04(1) (“Inmates are expected to resolve grievable issues through discussion with staff whose duties fall within the issue prior to initiating the informal grievance process. . . . Inmates are encouraged to use a kite to bring issues to the attention of staff instead of immediately filing a grievance.”). However, the informal “kite” that Green sent cannot satisfy the requirement that Green pursue his administrative remedies because it fails to fully comply with any of the grievance procedures set forth in Administrative Regulation 740. *See* AR 740.05(1) (“[A]n inmate shall file a grievance (Form DOC-2091) after failing to resolve the matter by other means such as discussion with staff or submitting a kite.”). Further, the kite was not sent to the proper administrative tribunal that would have considered the merits of a grievance, but rather appeared to have been informally mailed to the warden’s office, and thus any response to it would not have constituted an adjudication on the merits by the tribunal empowered to issue such adjudications. Accordingly, the fact that the Administrative Regulations encourage inmates to try to resolve issues through kites before filing a grievance demonstrates that the two are not the same thing, and pursuing one does not waive the other, but rather one is a precursor to the other. *See* AR 740.05(1).

Finally, Green argues that summary judgment is inappropriate because respondents did not submit a copy of his grievance with their summary judgment motion, and that the prison may have failed to keep the

records properly. Administrative Regulation 740 places the burden to preserve and maintain all inmate records on the NDOC and its employees. *See* AR 740.01(5) (2017) (“The Grievance Coordinator should record receipts, transmittals, actions, and responses on all grievances to OITS [Offender Issue Tracking System]/NOTIS [Nevada Offender Tracking Information System] within three (3) working days of receipt.”); AR 740.02(1) (2017) (“Grievance documents shall be stored at the facility/institution where the grievance issue occurred.”); AR 740.02(1)(A) (2017) (“Grievance files shall be in separate files for each inmate and maintained in alphabetical order”); AR 740.02(2) (2017) (“Grievance files shall be maintained at each institution for a minimum of five (5) years following final disposition of the grievance.”).³

In some jurisdictions, courts have held that defendants are not entitled to summary judgment when prison records pertaining to inmate grievances are incomplete. *See Kimbro v. Miranda*, 735 F. App’x 275, 278 (9th Cir. 2018) (“Where prison officials fail to retain records relating to the filing or processing of an inmate’s grievance, the prisoner should be deemed to have exhausted administrative remedies.” (citing *Andres v. Marshall*, 867 F.3d 1076, 1079 (9th Cir. 2017)); *Carrillo v. Moore*, No. 2:18-cv-00708-SB, 2019 WL 7556264, at *2 (D. Or. Dec. 20, 2019) (concluding that defendants could not establish that the inmate failed to exhaust his

³AR 740 was amended in 2018. Relevant here, AR 740.01(1) (2018) now states “[a]ll grievances, *whether accepted or not*, will be entered into NOTIS.” (Emphasis added.) Further, AR 740.02(1) (2018) now provides, “Grievance documents shall be stored at the facility/institution where the grievance issue occurred. The results of the grievance shall be stored in NOTIS.” These two amendments further demonstrate NDOC and its employees’ obligation to maintain *all* inmate grievances in NOTIS, regardless of whether they are accepted, denied, or dismissed as incomplete.

administrative remedies when the defendants admittedly failed to maintain a copy of the inmate's grievances); *Roe v. Tubbs*, No. 2:15-CV-588-JNP, 2018 WL 1406598, at *2 (D. Utah Mar. 19, 2018) (rejecting the defendant's argument that it could "block [the inmate] from exhausting his administrative remedies by simply neglecting to retain copies of the forms submitted to them"); *but see Morton v. Hall*, 599 F.3d 942, 945-46 (9th Cir. 2010) (concluding that the defendants met the burden for administrative exhaustion by presenting the prison's record keeper who testified that the prison had no record of the inmate's grievance because the inmate never filed any such grievance); *Hanslovan v. Blades*, No. CV08-100-S-BLW, 2009 WL 1635374, at *3 (D. Idaho June 10, 2009) (holding that even when the prison did not begin maintaining records of grievances until a year after the inmates injury, the inmate failed to allege and provide evidence that he exhausted his administrative remedies).

In this case, Green is correct that the prison's tabulation of grievances submitted in support of its summary judgment motion appears to omit the grievance Green filed on September 18, 2017. The respondents' explanation is that their regular practice is not to include in this tabulation any grievances that were improperly filed and immediately dismissed on technical grounds (such as missing supporting documents), as such, grievances do not comply with Administrative Regulation 740. This appeal does not require us to engage in a detailed technical analysis and determine whether Administrative Regulation 740 required the prison to keep records of grievances immediately dismissed on technical grounds. Even if it is true that the prison failed to comply with the regulations, Green attached a copy of the grievance to his complaint, and furthermore he does not dispute that it was incomplete and therefore properly dismissed. Moreover, in his

opposition to summary judgment, Green argued that this grievance alone proved that he exhausted his administrative remedies without supplying any other evidence or suggesting that he ever filed any other documents relating to the confiscation of the shoes that are missing from the record. Whether or not the prison maintained other unrelated records properly in compliance with the regulations, the appellate record contains all of the documents necessary for us to determine that Green failed to exhaust his administrative remedies regarding the shoes by filing an incomplete grievance unaccompanied by required supporting documents, and then failing to attempt to refile the grievance with the supporting documents before initiating this suit.⁴

Based upon the record we have, summary judgment was properly granted. The respondents submitted records that, on their face, indicate that Green failed to exhaust his administrative remedies, thus shifting the burden to Green to respond. In response, Green argued that those records were incomplete and improperly kept in violation of Administrative Regulation 740, an assertion that we cannot determine to be true or false but, for purposes of summary judgment, will accept to be true. But even if it is true that the prison may have violated Administrative Regulation 740 in some abstract way, Green failed to identify any records that might be missing that are material to the question of whether he exhausted his administrative remedies or not. Consequently, even if it is true that the prison's recordkeeping is incomplete, Green has failed to

⁴Additionally, we affirm the district court's dismissal of Green's negligence and breach of contract claims brought under state law for failure to name the State of Nevada or an appropriate political subdivision as a defendant because Green did not challenge the dismissal on appeal.

demonstrate that the poor recordkeeping matters to his claim in any material way. Quite to the contrary, Green argued to the district court that the only record necessary to prove exhaustion was the one he submitted with his complaint, and that document confirms that he did not exhaust his administrative remedies.

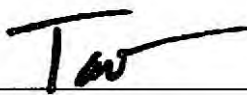
Exhaustion of administrative remedies is required to satisfy a number of policy objectives. First, the administrative process offers the prison a speedy method of addressing, and possibly remedying, any error without the need to engage in expensive and protracted litigation that (like this case) may consume years before any resolution is reached. Second, because few inmates can afford the assistance of an attorney, it offers inmates a method of bringing errors to the attention of prison officials through a procedure that is less expensive than litigation and relatively easier to navigate without the assistance of counsel. Third, even if the administrative grievance is denied, the procedure requires the prison to place its factual justification for its action into the administrative record before the litigation is filed, thus focusing and expediting any litigation that results.

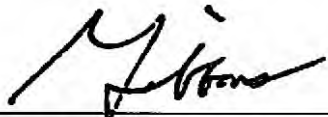
Here, had Green first filed a proper administrative grievance with supporting documents, the prison might have returned the shoes well before Green filed this appeal if it had indeed erred in confiscating them. If, on the other hand, he filed a proper administrative grievance and the prison refused to return his shoes, then we would now have a much more complete record regarding the prison's reasons for its refusal. But because he failed to re-file his administrative grievance after being notified that it was missing supporting documents, the record before us is woefully incomplete and the prison has never had to formally justify the confiscation

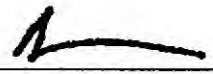
of his shoes. Without that administrative record, we are unable to conclude that the confiscation was either right or wrong, justified or unjustified. As things stand, years have passed and there is some suggestion that the administrative statute of limitations for filing any claim may have expired, thus precluding Green from challenging the confiscation in the future (thus rendering moot the district court's attempt to give Green a second chance by classifying its dismissal as one without prejudice against re-filing). See AR 740.05(4)(A) (providing that the inmate must file an informal grievance within six months when the issue pertains to the loss of personal property). Nonetheless, based upon the record we have, we cannot conclude that the district court erred in granting summary judgment.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Tao


_____, C.J.
Gibbons


_____, J.
Bulla

cc: Hon. Barry L. Breslow, District Judge
Little Mendelson, P.C./Las Vegas
Attorney General/Carson City
Attorney General/Las Vegas
Barbara Buckley
Snell & Wilmer/Kelly H. Dove
Anne R. Traum
Washoe District Court Clerk