NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 17, 2022*
Decided June 27, 2022

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 21-1588

GEORGIO GAINES,
Plaintiff-Appellant,

v.

SUSAN PRENTICE, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois.

No. 1:18-cv-01373-JBM

Joe Billy McDade,
Judge.

O R D E R

Georgio Gaines, an Illinois prisoner, appeals the entry of summary judgment for failure to exhaust administrative remedies and the dismissal of portions of his complaint. He initially sued various members of prison staff under the Eighth Amendment for using excessive force against him, subjecting him to poor conditions of confinement, and denying him medical care. After the district court dismissed Gaines's

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

conditions-of-confinement and medical claims at screening, it determined that Gaines had failed to exhaust available remedies on his excessive-force claims. Because the district court should have conducted an evidentiary hearing on exhaustion and erroneously dismissed some of Gaines's claims, we vacate the judgment and remand.

All of Gaines's claims center on one incident on February 21, 2018. According to his operative complaint, that night members of the "Special Operations Response Team" (SORT) sprayed him with mace for no reason before removing him from the building in handcuffs to wait in the cold without adequate clothing for hours. When he was taken back inside early the next morning, still handcuffed, officers refused him access to the restroom, so after several more hours he soiled himself. At that point, he asserts, officers placed him in a segregation cell contaminated with feces and mold, where he remained for days without adequate water, cleaning supplies, or medical treatment for the mace exposure. He further alleged in his original complaint that Major Susan Prentice and Warden Michael Melvin failed to prevent his injuries.

The district court screened the original complaint under 28 U.S.C. § 1915A and permitted Gaines to proceed on the excessive-force claims against the SORT officers but dismissed the claims against Prentice and Melvin for failure to allege their personal involvement. The court then determined that Gaines's claims regarding the condition of his cell and medical care could not be joined in the same suit as the claim of excessive force.

Gaines later amended his complaint to identify the names of the SORT officers involved in the excessive-force claim. He also clarified his allegations that Prentice had been directly involved in overseeing the SORT officers and his placement in the filthy cell. The district court screened the amended complaint and found Gaines now stated an excessive-force claim against Prentice. But it again informed Gaines that the conditions-of-confinement claims belonged in a separate suit. Gaines sought to amend his complaint again to add excessive-force claims against Melvin and other prison supervisors for instructing mace use. He also tried to bring back the medical and conditions-of-confinement claims. But the court denied his motion, ruling that the medical and conditions-of-confinement claims could be brought only in a separate suit and that he had failed to state a claim against Melvin.[1]

[1] On appeal, Gaines does not challenge the dismissal of his medical claims or of any defendant other than Melvin.

The remaining defendants then moved for summary judgment, asserting that Gaines had failed to exhaust his administrative remedies. *See* 42 U.S.C. § 1997e(a). They argued that, although Gaines had submitted at least one emergency grievance related to the February 2018 incident in March, he did not properly resubmit his grievances through the standard process, as regulations require, after the warden deemed the issue a non-emergency. *See* ILL. ADMIN. CODE tit. 20, §§ 504.830, 504.840(c). Instead of immediately refiling, Gaines appealed the warden's determination. The review board returned the appeal the next month, asking Gaines to show that he had submitted non-emergency grievances to his counselor—the first step of the standard procedure—as he had been instructed, but Gaines did not send anything more to the board.

Opposing summary judgment, Gaines provided a sworn declaration attesting that he had properly submitted three standard, non-emergency grievances to his counselor in February 2018 and had filed emergency grievances with the warden only when those three went unanswered. The declaration did not specify the content of the three grievances, though Gaines's unsworn brief suggested that they were related to his claims of "excessive force & denial of medical care." Gaines further attested in the declaration that, after the review board's decision, he resubmitted to his counselor copies of the same emergency grievances he had sent the warden, but again received no response.

The district court granted the defendants' motion and entered judgment, concluding there was no genuine dispute that Gaines had not exhausted the administrative remedies available to him. It explained that Gaines had improperly submitted the March 2018 grievances as emergencies and supplied no evidence that the unanswered February submissions related to his claims. Additionally, it concluded there was no evidence that Gaines had resubmitted the emergency grievances through the standard procedure.

Prior to judgment, Gaines had also repeatedly sought recruited counsel. The district court denied each motion because Gaines failed to demonstrate that he had made a good-faith effort to find counsel willing to take his case. *See Pruitt v. Mote*, 503 F.3d 647, 654 (7th Cir. 2007) (en banc). Only in his fourth and final motion did he offer evidence that he had received responses from attorneys he contacted: two letters, one from a law firm declining to represent him and the other from a law-school clinic asking him to send more information about the case. The court found that this did not satisfy his burden.

On appeal, Gaines first contends that the district court erred in entering summary judgment. He renews his argument that he followed the proper procedures by submitting three non-emergency grievances in February 2018 and resubmitting his emergency grievances as non-emergencies, but that prison staff never responded, blocking him from exhausting his remedies.

Inmates must exhaust "such administrative remedies as are available" before turning to the courts. 42 U.S.C. § 1997e(a); *Ross v. Blake*, 578 U.S. 632, 638 (2016). Failure to exhaust is an affirmative defense, so defendants bear the burden of proving that there was an available remedy that went unexhausted. *Gooch v. Young*, 24 F.4th 624, 627 (7th Cir. 2022). Because the district judge, not a jury, is the factfinder on issues of exhaustion, if there are disputed factual issues, then they must be resolved with an evidentiary hearing. *See Pavey v. Conley*, 544 F.3d 739, 741 (7th Cir. 2008). We review de novo a district judge's decision to enter summary judgment and not hold a *Pavey* hearing. *See Wagoner v. Lemmon*, 778 F.3d 586, 590 (7th Cir. 2015).

Gaines's declaration created a genuine dispute whether administrative remedies were "available" to him, so the district court was obligated to conduct a *Pavey* hearing to resolve the dispute. The defendants provided evidence suggesting that Gaines did not exhaust his remedies because there is no record that the counselor received any relevant grievances from him. The district court erroneously stated in its order that Gaines had admitted to failing to follow the warden's instructions, but in his sworn declaration, Gaines attested that he sent the counselor several standard grievances—including his rejected emergency grievances that the defendants concede were relevant—and never received a response to any of them. If his declaration is true, which we must assume at the summary judgment stage, then administrative remedies were not available to him. *See Reid v. Balota*, 962 F.3d 325, 331 (7th Cir. 2020); *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006). The district court should have held a *Pavey* hearing to determine whether his declaration is, in fact, true and thus whether the defendants carried their burden of showing that administrative remedies were available to Gaines. *See Roberts v. Neal*, 745 F.3d 232, 236 (7th Cir. 2014); *Lewis v. Washington*, 300 F.3d 829, 835 (7th Cir. 2002). We therefore remand for the court to conduct such a hearing.

Gaines next argues that the district court erred in dismissing his excessive-force claim against Warden Melvin for failure to allege Melvin's personal involvement. Gaines maintains that Melvin was personally involved because he, in the words of the second amended complaint, "instructed SORT members to assemble and to use excessive amounts of tear gas/mace." Because the district court here denied leave to file

the second amended complaint on the grounds that Gaines failed to state a claim against Melvin, we review that denial de novo rather than deferentially. *See Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 335 (7th Cir. 2021).

We agree with Gaines that the district court erred. In rejecting the second amended complaint, the court characterized Gaines as alleging only Melvin's implied consent and awareness of the excessive force. Such an allegation would not state a claim under § 1983. *See Gossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1997). But the district court overlooked Gaines's allegation that Melvin personally ordered the unnecessary and excessive use of mace. This allegation must be accepted as true at the pleading stage and suffices to state a claim of excessive force under the Eighth Amendment against both the officers who allegedly sprayed the mace without any justification and Melvin, who allegedly directed them to do so. *See Locke v. Haessig*, 788 F.3d 662, 669 (7th Cir. 2015) (holding plaintiff must plausibly allege supervisor had the requisite state of mind to state claim for facilitating, approving, or condoning unlawful act); *Guitron v. Paul*, 675 F.3d 1044, 1046 (7th Cir. 2012) (recognizing force used maliciously or sadistically to cause harm states claim under Eighth Amendment).

We also agree with Gaines that he should be permitted to join his condition-of-confinement claims against Prentice and Melvin in this suit. The district court ruled that those claims must be severed into a separate suit because they are unrelated to his claim of excessive force. *See George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007) ("Unrelated claims against different defendants belong in different suits."). Gaines maintains that they were not unrelated, but "all one act." Even if we accept the court's premise that the confinement to a dirty cell was a different incident than the use of force, the court still erred in severing the claims as it did. Rule 18(a) of the Federal Rules of Civil Procedure allows a party to "join, as independent or alternative claims, as many claims as it has against an opposing party." And as we noted in *George*, this rule applies equally as well to prisoners as it does to non-prisoners and makes it so "multiple claims against a single party are fine." *Id*. Because the court allowed Gaines to proceed against Prentice for her authorization of excessive force—and should have allowed him to proceed against Melvin—his claims that they ordered his placement in a filthy cell without running water or cleaning supplies were properly joined in this suit. But we hold only that those claims were properly joined; we express no opinion on whether Gaines stated claims for relief against either or both defendants and leave that question for the district court in the first instance.

Finally, we turn to Gaines's argument that the court wrongly denied his motions for recruited counsel. Here we see no error. Civil litigants are not entitled to the assistance of court-recruited counsel. *Olson v. Morgan*, 750 F.3d 708, 711 (7th Cir. 2014) (citing *Pruitt*, 503 F.3d at 649). Before the court will recruit volunteer counsel, a plaintiff must first make reasonable efforts to obtain counsel and then the court considers whether the plaintiff is unable to litigate the case pro se. *Id.* Gaines contends that the district court erred on the second step, but it properly relied on only the first. Although Gaines attached to his final motion two responses from attorneys he contacted, he did not adequately explain why he neglected to respond to the legal clinic that asked him for more information. The court reasonably concluded that Gaines's sole explanation (that the clinic's review would take too long) did not reflect a reasonable effort to secure representation. *See Thomas v. Wardell*, 951 F.3d 854, 858, 860 (7th Cir. 2020) (upholding denial of counsel because plaintiff did not adequately inform the 14 attorneys he contacted about the nature of his case). If Gaines meets his threshold burden on remand, the district court will be permitted (though in no way obligated) to reconsider recruiting a lawyer.

We VACATE the judgment and REMAND for further proceedings consistent with this order.