NONPRECEDENTIAL DISPOSITION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 August 4, 2021*
Decided August 4, 2021

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 20-1012

ANDREW WALDROP,
Plaintiff-Appellant,

v.

NICOLE MARSHALL,
Defendant-Appellee.

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

No. 3:18-cv-1770-NJR-GCS

Nancy J. Rosenstengel,
Chief Judge.

O R D E R

Andrew Waldrop, an Illinois prisoner, sued a member of the medical staff at Menard Correctional Center for deliberate indifference to a knee injury. But an evidentiary hearing under *Pavey v. Conley*, 544 F.3d 739 (7th Cir. 2008), convinced the district court that Waldrop failed to exhaust administrative remedies before filing suit. The court therefore dismissed the action. Because the district court was not required to credit Waldrop's account of his attempts to grieve the issue, we affirm.

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* We have agreed to decide this 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).

Waldrop says he fell from the top bunk of his cell, injuring his knees. He alleges that Nicole Marshall then refused to treat him, leading to chronic pain and reduced mobility. Those allegations, however, are not the focus of this appeal.

Rather, the question is whether Waldrop properly raised his claim through Illinois's mandatory administrative-grievance process before suing Marshall under 42 U.S.C. § 1983. See *Wilborn v. Ealey*, 881 F.3d 998, 1004 n.2 (7th Cir. 2018). When Marshall asserted an exhaustion defense, 42 U.S.C. § 1997e(a), the district court conducted a *Pavey* hearing. Because administrative exhaustion is a prerequisite to suit, factual disputes about exhaustion need not reach a jury, and a *Pavey* hearing permits trial judges to resolve credibility contests, weigh evidence, and adjudicate the exhaustion defense. See *Wilborn*, 881 F.3d at 1004.

At Waldrop's *Pavey* hearing, he testified that he gave written grievances to two officers at Menard. Several days after his injury, he explained, he gave one to an unnamed female counselor whose physical appearance he could not describe; a month later, he handed another to a counselor named Jason Vasquez.

Yet Vasquez testified that Waldrop had given him no grievances, that Waldrop's counseling logs contained no record of them, and that Vasquez would have flagged them in the logs if Waldrop had submitted them. Indeed, although the logs were admitted into evidence and showed that Waldrop spoke with counselors five times in the two months after his fall, they did not mention any grievances. And no one at the hearing identified the unnamed female counselor. Waldrop, meanwhile, admitted he had no copies of grievances, and no receipts or staff responses.

The parties agreed at the hearing that, about a month after the supposed second grievance (and sometime after his transfer from Menard to a different prison), Waldrop tried to pursue a written grievance with the statewide Administrative Review Board. But the Board rejected this grievance as untimely because, by then, more than 60 days had lapsed since the nurse's alleged misconduct. And it was not a proper administrative appeal (as distinct from an original grievance), because Waldrop attached no prior decision by Menard's grievance officers and the Board had no other record of a prior grievance.

On reviewing this evidence, the district court found that Waldrop's testimony was not credible, that no grievance was filed at Menard, and that Waldrop's submission

to the Board was indeed untimely or incomplete. Administrative remedies had been available to Waldrop, but he had not pursued them. So, the court dismissed the suit. The court designated its judgment "without prejudice," but its decision is functionally final and thus reviewable on appeal: the court signaled that it was "done with" the case, *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1020 (7th Cir. 2013); Illinois does not appear to offer Waldrop a path to grieving his medical issue anew; and the two-year statute of limitations likely would bar a future suit. See *Ray v. Maher*, 662 F.3d 770, 772 (7th Cir. 2011) (citing 735 ILCS 5/13–202).

Waldrop now argues that the district court should have credited his testimony about written grievances at Menard. We review that contention for clear error, see *Pavey v. Conley* (*Pavey II*), 663 F.3d 899, 904 (7th Cir. 2011), and reverse only if the court credited testimony that was facially implausible or contradicted by irrefutable evidence, or else discredited testimony on irrational grounds, see *Wilborn*, 881 F.3d at 1006. That did not happen here. Vasquez contradicted Waldrop's testimony and said nothing implausible; no one could identify the other officer to whom Waldrop said he had given a written grievance; and the administrative records were inconsistent with Waldrop's account. No trier of fact would be required to credit Waldrop's testimony, discredit Vasquez's, and infer that the prison records were flawed.

For completeness, we address Waldrop's argument that, before proceeding to a hearing, the district court should have exercised its discretion to recruit counsel for him under *Pruitt v. Mote*, 503 F.3d 647 (7th Cir. 2007) (en banc). Waldrop did not demonstrate a reasonable attempt to obtain counsel on his own—even after the court invited him to amend his motion for counsel to include details about his attempts—and that shortcoming was reason enough to deny his request. See id. at 655.

We have examined Waldrop's other contentions on appeal, but none has merit.

AFFIRMED