

NONPRECEDENTIAL DISPOSITION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 July 24, 2023*
Decided July 25, 2023

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 21-2454

JAMES J. DAHER, JR.,
Plaintiff-Appellant,

v.

MARK R. SEVIER, et al.,
Defendants-Appellees.

Appeal from the United States District
Court for the Northern District of
Indiana, South Bend Division.

No. 3:13-CV-940-JD-MGG

Jon E. DeGuilio,
Judge.

ORDER

James Daher, an Indiana prisoner, appeals the summary judgment entered against him for failing to exhaust his available administrative remedies, as he must under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a). He seeks to bring claims

* 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).

that prison officials retaliated against him for filing grievances and subjected him to unsanitary conditions, thereby violating his First and Eighth Amendment rights. Because the district court's finding that Daher failed to exhaust his remedies is not clearly erroneous, we affirm.

At the relevant times, the Indiana Department of Correction required three steps for exhaustion: (1) an informal grievance; (2) a written, formal grievance; and (3) a written appeal to the Department's central office. If Daher did not receive a response to his written grievance within 15 days, the policy required that he notify a designated official and, by ten days later, if he still received no response, proceed to step 3. This grievance process was required for allegations about "[a]ctions of individual staff" and "[a]cts of reprisal for the good-faith use of, or participation in," the grievance process. A separate process applied to challenges to a prisoner's "security level" or "loss of a job."

At issue is whether Daher submitted a step 2 grievance. He says that he did so on September 12, 2011, alleging in it that prison staff at Miami Correctional Facility took actions against him in reprisal for his past grievances and lawsuits. These actions included seizing his property and placing him in segregation where he was denied some bedding, toiletries, showers, clean clothing, quiet, and warmth. (He also alleges that officials retaliated by reclassifying his security level and ending his prison job. He used the separate process to restore those statuses; the issue here is whether he properly exhausted a claim that the changes were retaliatory.) Daher states that the prison sent him a form on November 7 explaining that it refused to accept his grievance. He also states that he resubmitted his grievance on November 9, but never received a response to this submission and never went to step 3. The defendants counter that Daher did not submit a grievance on either September 12 or November 9, and on November 7 officials sent him a form stating that the prison had rejected an unrelated grievance.

To resolve whether Daher exhausted his available administrative remedies in the place, at the time, and in the manner that the prison requires, *see Woodford v. Ngo*, 548 U.S. 81, 87 (2006), the district court held a hearing, *see Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008). In an earlier appeal from Daher, we ruled that a procedural flaw at this hearing required a remand. *Daher v. Sevier*, 724 F. App'x. 461, 465 (7th Cir. 2018). At the second hearing, Daher conceded that the November 7 form he received related to a different grievance. He also admitted that he did not contact the designated official to complain about a lack of a response to the grievances he assertedly submitted on September 12 and November 9. Likewise, he conceded that he did not, within 25 days of the prison's failure to respond to his submissions, appeal to the central office,

contending that he was unaware of the need to do so. The prison official who oversaw the facility's grievance process also testified. She explained that the Department does not log into its electronic database grievances that it refuses to accept; instead, it retains hard copies of those submissions. She disputed Daher's assertions—that he submitted on September 12 and November 9 grievances about claims raised here and that the prison refused to accept them—because the prison did not have a hard copy of any submitted grievances related to the matters in this suit. Daher replied that the prison's systems for retaining documents electronically and in hard-copy form were unreliable.

A magistrate judge found that Daher had not exhausted and recommended that the court enter summary judgment for the defendants. After highlighting Daher's concessions and accepting the prison official's testimony, the judge found that Daher did not submit a written grievance on September 12 or November 9, and even if he had, he did not appeal the prison's failure to respond within 25 days. The court adopted the magistrate judge's factual findings and recommendation and dismissed the case for Daher's failure to exhaust his administrative remedies.

We review the court's factual findings for clear error and legal conclusions *de novo*. *Ramirez v. Young*, 906 F.3d 530, 533 (7th Cir. 2018). Daher first argues the district court erred in believing the prison official who testified that Daher did not submit the September 12 grievance and finding Daher's testimony incredible. Generally, we will deem a district court's findings to be clearly erroneous only if the credited testimony is facially implausible or contradicted by irrefutable evidence. *See Wilborn v. Ealey*, 881 F.3d 998, 1006 (7th Cir. 2018). That did not occur here. Regarding Daher's assertions that he submitted, but the prison ignored, his grievances of September 12 and November 9, the district court reasonably explained why it rejected his assertions: The grievance-process manager detailed the reliability of the prison's system for retaining hard copies of rejected grievances and, after reviewing those records, could not find a hard copy of grievances corresponding to the complaint. In any case, as the court also reasonably concluded, Daher conceded that he never pursued the third step of the grievance process, which required him to appeal within 25 days the lack of the prison's response to any submitted grievances.

Daher offers three replies, but none persuades us. First, he contends that the Department's online grievance system is unreliable and that the prison regularly loses hard copies of the grievances it rejects. But it is undisputed that the prison does not log into its online system the grievances that it rejects; thus the reliability of that system is irrelevant to Daher's claim, which concerns grievances that he says the prison rejected.

Further, the court did not have to accept Daher's assertion, which the prison official credibly disputed, that the prison regularly loses hard copies of grievances it rejects.

Second, Daher argues that he could not appeal his rejected grievances because the prison never responded to them. But he does not deny that the grievance policy required him to appeal within 25 days if he did not receive a response. And he does not contest that he had access to this policy. He replies only that he was unaware of this provision, but the court correctly ruled that ignorance of a provision in an accessible policy does not excuse a failure to follow it. *See Ramirez*, 906 F.3d at 538.

Finally, Daher asserts that because his grievances included requests—to restore his security classification and prison job—to which the three-step grievance process did not apply, he was not required to use that process for his claims in this suit. He waived this contention by not raising it when he could have in his first appeal. In any case, it is flawed. True, the Department's policy exempts requests to change security classification and prison work from the three-step process. *See Miles v. Anton*, 42 F.4th 777, 780 (7th Cir. 2022). But this suit seeks relief from prison staff for retaliating against him for filing past grievances and for subjecting him to unsanitary prison conditions. The prison's policy states that prisoners must follow the three-step grievance process for all such alleged "[a]cts of reprisal" and "[a]cts of individual staff." As we have already discussed, the district court reasonably found that Daher did not submit a step 2 written grievance about these matters, and even if he did and the prison ignored them, he did not appeal the non-response within the required 25 days. Thus, the court properly found that Daher did not exhaust his available administrative remedies.

AFFIRMED