IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Case No. 11-cv-00112-REB-BNB

HEIDI JEWKES,
NATASHA SWENSON,

Plaintiffs,
v.

C.O. THEODORE SHACKLETON, Correctional Officer at the Denver Women's Correctional Facility, in his individual capacity,

Defendant.

ORDER DENYING DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Blackburn, J.

The matter before me is defendant Theodore Shackleton's oral motion for judgment as a matter of law under FED. R. CIV. P. 50. I deny the motion.

This case was tried to a jury from August 6 through August 8, 2012. At the close of the plaintiffs' evidence, the defendant, Theodore Shakleton, made a motion for judgment as a matter of law under FED. R. CIV. P. 50(a). I resolved the motion on all issues raised by the defendant, except for the issue of exhaustion of administrative remedies. On that issue, I took the motion under advisement. At the close of the evidence, Mr. Shackleton renewed his prior motion for judgment as a matter of law as to the exhaustion of administrative remedies issue. I took the matter under advisement and submitted the case to the jury. On August 8, 2012, the jury returned verdicts in favor of both of the plaintiffs on their claims under the Eighth Amendment to the United States Constitution. The jury awarded 1,000 dollars in damages to each of the plaintiffs.

grievance process itself." ***Id***. at 218 (quoting ***Woodford***, 548 U.S. at 88). Under the PLRA, each jail, prison, or department of corrections is left to define the rules of its grievance process. In addition, each jail, prison, or department of corrections is left to administer its own grievance process and to enforce the rules of the grievance process it created.

When addressing Ms. Jewkes and Ms. Swenson's grievances, the CDOC failed to enforce the timeliness requirement established in CDOC regulations. Rather than enforce the timeliness requirement, the CDOC processed the plaintiffs' grievances, addressed the issues on the merits, and, ultimately, informed the plaintiffs that they had exhausted their administrative remedies. "If a prison accepts a belated filing, and considers it on the merits, that step makes the filing proper for purposes of state law and avoids exhaustion, default, and timeliness hurdles in federal court." ***Ross v. County of Bernalillo***, 365 F.3d 1181, 1186 (10th Cir. 2004), ***abrogated on otr. grounds by Jones v. Bock***, 549 U.S. 199 (2007) (citing ***Pozo v. McCaughtry***, 286 F.3d 1022, 1025 (7th Cir. 2002)). Four other circuit courts of appeal, applying the requirements of § 1997e(a), have reached the same conclusion. ***Hammett v. Cofield***, 681 F.3d 945, 947 (8th Cir. 2012); ***Hill v. Curcione***, 657 F.3d 116, 125 (2d Cir.2011); ***Reed-Bey v. Pramstaller***, 603 F.3d 322, 324 - 25 (6th Cir.2010); ***Conyers v. Abitz***, 416 F.3d 580, 584 (7th Cir.2005). Given the holding in ***Ross***, I am constrained to conclude that both Ms. Jewkes and Ms. Swenson fully exhausted their administrative remedies before filing this suit.

Mr. Shackleton argues that the court cannot conclude properly that the CDOC waived the untimeliness of the plaintiffs' grievances on behalf of Mr. Shakleton. Waiver

is the intentional relinquishment or abandonment of a known right. ***See, e.g., United States v. Olano***, 507 U.S. 725, 733 (1993). The evidence in the record does not show that the CDOC's failure to enforce the timeliness requirement as to Ms. Jewkes and Ms. Swenson was intentional. Thus, I cannot conclude that the CDOC waived the enforcement of the timeliness requirement.

Contrastingly, forfeiture is the failure to make a timely assertion of a right. ***Id***. "[W]aiver is accomplished by intent, but forfeiture comes about through neglect." ***U.S. v. Carrasco-Salazar***, 494 F.3d 1270, 1272 (10th Cir.2007) (internal quotation and brackets omitted). Forfeiture, as opposed to waiver, occurs "when there is no suggestion of a knowing, voluntary failure to raise the matter." ***U.S. v. Goode***, 483 F.3d 676, 681 (10th Cir.2007). In this case, the CDOC failed to mention or enforce the timeliness limitations of its grievance process, through all three steps of that process. Based on that failure, I conclude that the CDOC forfeited its right to enforce the timeliness requirement as to Ms. Jewkes and Ms. Swenson's grievances. Given the undisputed facts in the record, I conclude that CDOC forfeited its right to enforce the timeliness requirement. Given the holding in ***Ross***, I conclude that both Ms. Jewkes and Ms. Swenson fully exhausted their administrative remedies before filing this suit.

Mr. Shackleton argues that it is not proper to conclude that the CDOC waived, on Mr. Shackleton's behalf, the exhaustion of administrative remedies requirement. Generally, the cases cited by Mr. Shackleton in his notice of supplemental authority [#82] concern invalid and unauthorized waivers by agents and others in similar positions. In essence, Mr. Shackleton argues that the CDOC did not have the authority to waive enforcement of the CDOC grievance rules to the extent enforcement of those

rules might benefit Mr. Shackleton. Presumably, Mr. Shakleton contends also that the CDOC cannot forfeit enforcement of the grievance rules on his behalf. I disagree.

As interpreted by the United States Supreme Court, the exhaustion requirement of § 1997e(a) is designed to serve certain specific purposes:

> We have identified the benefits of exhaustion to include allowing a prison to address complaints about the program it administers before being subjected to suit, reducing litigation to the extent complaints are satisfactorily resolved, and improving litigation that does occur by leading to the preparation of a useful record.

Jones v. Bock, 549 U.S. 199, 219 (2007) (***citing Woodford v. Ngo***, 548 U.S. 81, 88 - 91 (2006) and ***Porter v. Nussle***, 534 U.S. 516 (2002)). Stated simply, the key purpose of the exhaustion requirement is to ensure that "the prison grievance system is given a fair opportunity to consider the grievance." ***Woodford***, 548 U.S. at 94. Personal notice to individuals who might later be sued based on an incident addressed in a grievance generally is not a primary purpose of the exhaustion requirement mandated in § 1997e(a). ***Jones***, 549 U.S. at 219 (citing ***Johnson v. Johnson***, 385 F.3d 503, 522 (5th Cir. 2004)).

Under § 1997e(a) and the applicable CDOC regulations, Mr. Shakleton does not have the ability or the right to control the processing of a grievance, even if the grievance is related to actions taken by Mr. Shakleton. The CDOC devised its own grievance process and, as designed, that process does not include any regulations or procedures which serve the purpose of notifying a potential individual defendant or the purpose of permitting such a defendant to participate in or control the resolution of the grievance. In short, under the applicable law and regulations, the CDOC has exclusive control of the enforcement of its grievance rules. Mr. Shakleton may not insist on

enforcement of the CDOC grievance rules when the CDOC has not insisted on enforcement of its grievance rules. Rather, if the CDOC forfeits enforcement of certain of its grievance procedures, and processes a grievance despite a deviation from the rules, Mr. Shakleton is bound by that forfeiture.

IV. CONCLUSION & ORDERS

I have reviewed all of the evidence presented at trial to the extent that evidence is relevant to the unresolved issue raised in the defendant's Rule 50 motion. The facts relevant to the motion are undisputed. Therefore, the defendant's motion presents a question of law. Given the undisputed facts in the record concerning the CDOC's processing of the grievances of Ms. Jewkes and Ms. Shakleton, I find and conclude that both Ms. Jewkes and Ms. Swenson fully exhausted their administrative remedies before filing this suit. The CDOC's failure to enforce fully the timeliness requirement of its grievance procedure does not bar Ms. Jewkes and Ms. Swenson from asserting in this case their claims against Mr. Shakleton.

THEREFORE, IT IS ORDERED as follows:

1. That defendant Theodore Shackleton's motion for judgment as a matter of law under FED. R. CIV. P. 50, which was asserted in open court at the close of the evidence during the trial of this case, is **DENIED**;

2. That **JUDGMENT SHALL ENTER** in favor of the plaintiffs, Heidi Jewkes and Natasha Swenson, and against the defendant, Theodore Shackleton, as to the plaintiff's claims for damages under the Eighth Amendment, as found by the jury in this case, whose verdicts were read into the record in open court on August 8, 2012 (***see*** **Courtroom Minutes** [#80-7 & #80-8] filed August 8, 2012;

3. That the plaintiffs are **AWARDED** their costs, to be taxed by the clerk of the court pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1;

4. That any post-trial motions, including any motion for an award of attorney fees, **SHALL BE FILED** on or before November 12, 2012; and

5. Responses and replies to any post-trial motions shall be marshaled under D.C.COLO.LCivR 7.1C.

Dated October 29, 2012, at Denver, Colorado.

BY THE COURT:

Robert E. Blackburn
United States District Judge