

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Dec 06, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CLINTON HECK,
Plaintiff,

v.

MICHAEL KLEMKE,
Defendant.

No. 2:19-cv-00140-SAB

**ORDER DENYING PLAINTIFF’S
MOTION FOR SUMMARY
JUDGMENT; GRANTING
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT**

Before the Court are Plaintiff’s Motions for Summary Judgment, ECF No. 25, and Defendant’s Cross-Motion for Summary Judgment, ECF No. 27. The motions were heard without oral argument. Plaintiff is proceeding *pro se*. Defendant is represented by Assistant Attorney General Katherine J. Faber.

Plaintiff Clinton Heck, a prisoner in the custody of the Washington State Department of Corrections, is bringing a claim under 42 U.S.C. § 1983, alleging that Defendant Michael Klemke intentionally withheld his decision reversing Plaintiff’s disciplinary appeal so that Plaintiff would be transferred to a harsher living condition at the Washington State Penitentiary. Plaintiff alleges that this was done to chill his efforts to pursue his grievances.

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**ORDER DENYING PLAINTIFF’S MOTION FOR SUMMARY
JUDGMENT; GRANTING DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT ~ 1**

1 **Motion Standard**

2 Summary judgment is appropriate “if the movant shows that there is no
3 genuine dispute as to any material fact and the movant is entitled to judgment as a
4 matter of law.” Fed. R. Civ. P. 56(a). The moving party has the initial burden of
5 showing the absence of a genuine issue of fact for trial. *Celotex Corp. v. Catrett*,
6 477 U.S. 317, 325 (1986). An issue of material fact is genuine if there is sufficient
7 evidence of a reasonable jury to return a verdict for the non-moving party. *Thomas*
8 *v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010). The non-moving party cannot rely
9 on conclusory allegations alone to create an issue of material fact. *Hansen v.*
10 *United States*, 7 F.3d 137, 138 (9th Cir. 1993). If the moving party meets its initial
11 burden, the non-moving party must then go beyond the pleadings and “set forth
12 specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty*
13 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). The parties must support assertions by
14 citing to particular parts of the record or show that the materials cited do not
15 establish the absence or presence of a genuine dispute of material fact. Fed. R. Civ.
16 P. 56(c). However, a court may neither weigh the evidence nor assess credibility;
17 instead, “the evidence of the non-movant is to be believed, and all justifiable
18 inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255; *see also*
19 *Cortez v. Skol*, 776 F.3d 1046, 1050 (9th Cir. 2015).

20 In addition to showing there are no questions of material fact, the moving
21 party must also show it is entitled to judgment as a matter of law. *Smith v. Univ. of*
22 *Wash. Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is entitled
23 to judgment as a matter of law when the non-moving party fails to make a
24 sufficient showing on an essential element of a claim on which the non-moving
25 party has the burden of proof. *Celotex*, 477 U.S. at 323.

26 When considering a motion for summary judgment, a court may neither
27 weigh the evidence nor assess credibility; instead, “the evidence of the non-movant
28 is to be believed, and all justifiable inferences are to be drawn in his favor.”

1 *Anderson*, 477 U.S. at 255. When parties file simultaneous cross-motions for
2 summary judgment, the court reviews each motion and the appropriate evidentiary
3 material identified in support of the motion separately, giving the nonmoving party
4 for each motion the benefit of all reasonable inferences. *Brunozzi v. Cable*
5 *Commc 'ns, Inc.*, 851 F.3d 990, 995 (9th Cir. 2017).

6 **Plaintiff's Claim**

7 Prisoners have a First Amendment right to file prison grievances and to
8 pursue civil rights litigation to the courts. *Rhodes v. Robinson*, 408 F.3d 559, 567
9 (9th Cir. 2005). Within the prison context, in order to successfully bring a claim of
10 First Amendment retaliation, a prisoner must establish five elements: (1) a state
11 actor took some adverse action against an inmate (2) because of (3) that prisoner's
12 protected conduct, and that such action (4) chilled the inmate's exercise of his First
13 Amendment rights, and (5) the action did not reasonably advance a legitimate
14 correctional goal. *Id.*

15 **Facts**

16 Plaintiff was previously housed at Airway Heights Corrections Center
17 (AHCC), a DOC facility in Airway Heights, Washington. Defendant is a
18 Correctional Program Manager at AHCC.

19 On December 12, 2018, Plaintiff was told that he would be moving to a
20 different wing. He refused the cell assignment. As a result, he was placed in
21 administrative segregation and he received a serious infraction. At the disciplinary
22 hearing held on December 18, 2018, he was found guilty of the infraction.

23 Plaintiff appealed the guilty finding on the same day. He stated there was a
24 verified keep separate order between him and someone on the B-side of the T-Unit,
25 which is where he was to move. A separation was entered in the OMNI (Offender
26 Management Network Information) on December 27, 2018, although the
27 separation should have been entered prior to when Plaintiff was infractioned for
28 refusing the move.

1 Defendant Klemke reviewed Plaintiff's appeal on December 31, 2018. After
2 reviewing the separation in OMNI, Defendant concluded that Plaintiff's infraction
3 should be reversed. In his decision, Defendant wrote, "[i]n reviewing OMNI I see
4 there is a separation entered by IIU Greene for a unit separation from another
5 individual housed in T-Unit. I contacted IIU Greene and verified that this should
6 have been in place prior to the incident for which you were infracted. Therefore the
7 infraction is being dismissed." ECF NO. 30, at 7. Once he completed the appeal, he
8 used interoffice mail to return his appeal decision to the Hearings Department at
9 AHCC. The Hearings Department is responsible for entering appeal decisions into
10 the computer system.

11 Plaintiff filed an Offender's Kite on December 27, 2018. He asked:

12 Why is my appeal taking so long? Policy says 10 business days and a
13 prompt response. I feel like you are intentionally delaying so I get
14 transferred. This feels like you are retaliating against me for filing all
15 those grievances. Please hurry. I'm about to be sent to WSP – IMU
23 hour lock down.

16 ECF No. 25-5.

17 Plaintiff filed another Kite on December 31, 2018. He asked that DOC take
18 another look at his infraction. A response to the Kite, dated January 8, 2019, states:
19 "It appears this is currently under appeal. Please wait for the process to complete."

20 On the same day as his disciplinary hearing, a new Custody Facility Plan
21 was initiated for Plaintiff by Michael Kerr with the recommendation that Plaintiff
22 demote to close/maximum custody and transfer to another prison facility. He was
23 referred for a classification change based on his infraction history of AHCC,
24 including an April 6, 2018 infraction for unauthorized drugs/paraphernalia, a June
25 1, 2018 serious infraction for possessing, or receiving a positive test for use of
26 drugs or alcohol, as well as the December 2018 infraction.

27 A classification hearing was held on December 18, 2018 to discuss the
28 recommendation to demote Plaintiff to close/maximum custody. Plaintiff

1 participated in the hearing. Plaintiff's Custody Facility Plan was reviewed by four
2 DOC employees on various dates—December 20, 2018, December 21, 2018, and
3 December 28, 2018. Plaintiff's Custody Facility Plan recommending his custody
4 demotion and transfer continued to be reviewed by DOC staff. Ultimately, it was
5 determined that Plaintiff was to be assigned to maximum custody and transfer him
6 to the Washington State Penitentiary, Intensive Management Unit. He was
7 transferred on January 15, 2019.

8 Plaintiff followed up with the classification staff at the WSP and asked about
9 the fact that his latest infraction was overturned. A new custody facility plan was
10 initiated for Plaintiff on February 13, 2019. On February 21, 2019, Plaintiff was
11 promoted to medium custody and assigned to transfer back to AHCC.

12 **DOC Grievance Program**

13 While in DOC custody, offenders may file grievances challenging: 1) DOC
14 institution policies, rules, and procedures; 2) the application of such policies, rules,
15 and procedures; 3) the lack of policies, rules, or procedures that directly affect the
16 living conditions of the offender; 4) the actions of staff and volunteers; 5) the
17 actions of other offenders; 6) retaliation by staff for filing grievances; and 7)
18 physical plant conditions. ECF No. 28. Offenders may also file Employee Conduct
19 grievances. *Id.* An Employee Conduct grievance is defined as, “[a] grievance
20 against a specific, identified employee, contract staff, or volunteer under
21 jurisdiction of the local facility or community corrections office, for alleged
22 inappropriate demeanor, language or actions. Grievances alleging retaliation for
23 participation in the Offender Grievance Program are also considered Employee
24 Conduct grievances.” *Id.* Grievance Coordinators will not investigate Employee
25 Conduct grievances. *Id.* Instead, grievances accepted as Employee Conduct
26 grievances are sent directly to the Superintendent/designee for review and
27 investigation as Level II grievances. *Id.*

28 Since March 1, 2005, offenders have 20 working days from the date of an

1 incident to file a grievance. *Id.* An exception to this filing timeframe is allowed if
2 there is a valid reason for the delay. *Id.* This timeframe does not apply to
3 complaints against a specific written policy. *Id.* The Grievance Coordinators are
4 authorized to wave the normal 20 day filing timeframe in which to submit a
5 complaint if the offender presents documentation of their attempts to resolve a
6 conflict through a contractor's review process and allows the coordinator to
7 photocopy the documentation for the grievance record. *Id.*

8 An offender may also file only one complaint about the same issue or
9 incident. *Id.* Grievance staff will return a complaint to an offender if multiple
10 complaints about the same issue or incident have been filed, along with
11 instructions to rewrite the complaints into one simple, clear, and concise
12 complaint. *Id.* Subsequent complaints regarding the same issue or incident will be
13 assigned the same Log ID Number as the original complaint, and only one Level 0
14 complaint will be accepted to the next level. *Id.*

15 In May 2019, Plaintiff submitted a grievance alleging that Frank Rivera
16 retaliated against him by waiting until after he was transferred to find him not
17 guilty of an infraction. *Id.* Although Plaintiff did not date the grievance, it was
18 received by the grievance office on May 10, 2019. *Id.* The grievance coordinator
19 did not accept Plaintiff's grievance because the grievance was concerning an
20 infraction Plaintiff received in December 2018. *Id.* Under the Offender Grievance
21 Program, Plaintiff had 20 working days from the date of the incident to submit his
22 grievance. *Id.* By submitting the grievance in May of 2019, Plaintiff was beyond
23 time frame.

24 Plaintiff then submitted a grievance on May 15, 2019, claiming that
25 Defendant Michael Klemke retaliated against him for filing grievances by
26 intentionally withholding a decision on his disciplinary appeal until after he had
27 transferred. *Id.* This grievance was included with the Rivera grievance since the
28 subject matter was the same as that grievance. *Id.* The grievance coordinator did

1 not accept the grievance because only one complaint about the same issue or
2 incident may be filed. *Id.*

3 **Exhaustion of Administrative Remedies**

4 42 U.S.C. § 1997(e) provides:

5 (a) Applicability of administrative remedies

6 No action shall be brought with respect to prison conditions under
7 section 1983 of this title, or any other Federal law, by a prisoner
8 confined in any jail, prison, or other correctional facility until such
9 administrative remedies as are available are exhausted.

10 Exhaustion is necessary even if the prisoner is seeking relief that the
11 administrative process does not provide. *Booth v. Churner*, 532 U.S. 731, 741
12 (2001) (holding administrative exhaustion is required even where grievance
13 process does not permit award of money damages and prisoner seeks only money
14 damages, as long as grievance tribunal has authority to take some responsive
15 action). That said, an inmate is required to exhaust only *available* remedies. *Albino*
16 *v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (emphasis in original, citation
17 omitted). To be available, a remedy must be available “as a practical matter”; it
18 must be “capable of use; at hand.” *Id.* (citation omitted).

19 Failure to exhaust under the PLRA is “an affirmative defense the defendant
20 must plead and prove.” *Jones v. Bock*, 549 U.S. 199, 204 (2007). Once the
21 defendant has carried that burden, the prisoner has the burden of production in
22 which the prisoner must put forward evidence showing there is something in his or
23 her particular case that made the existing and generally available administrative
24 remedies effectively unavailable to him. *Albino*, 747 F.3d at 1172. That said, the
25 ultimate burden of proof remains with the defendant. *Id.*

26 **Analysis**

27 Defendant has met his burden of showing that a grievance procedure was
28 available to Plaintiff and that Plaintiff failed to exhaust his administrative

1 remedies. Consequently, the burden shifts to Plaintiff to show that there was
2 something in his particular case that made these administrative remedies
3 effectively unavailable to him. He has failed to do so.

4 Plaintiff argues that he did not file a grievance against Defendant Klemke
5 because he believed the infractions have their own appeal procedure and are not
6 grievable through the Offender Grievance Program. However, this case is not
7 about Plaintiff's infraction. Rather, he is suing Defendant Klemke for retaliation
8 due to the delay in processing his appeal. Defendant has shown that alleged
9 retaliation on the part of a DOC employee is grievable. Notably, Plaintiff filed a
10 grievance related to Defendant Klemke's retaliation and the grievance was rejected
11 not because the issue was not grievable but because the grievance was submitted
12 past the 20-day timeline. As such, Plaintiff's § 1983 claim for retaliation due to the
13 delay in processing his appeal is dismissed for failure to exhaust.

14 Moreover, a reasonable jury, after reviewing the evidence that has been
15 presented in the record, would not find that Defendant Klemke retaliated against
16 Plaintiff because Plaintiff filed grievances.¹ The record demonstrates that
17 Defendant Klemke processed his appeal and placed it in interoffice mail. While the
18 record demonstrates that as of January 8, 2019, the appeal had not been processed
19 by the Hearing Department, there is nothing in the record to indicate that
20 Defendant Klemke caused or had any responsibility for any delay.

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28 ¹ Defendant reported that Plaintiff filed four grievances during December, 2018.

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment, ECF No. 25, is **DENIED.**

3 2. Defendant's Motion for Summary Judgment, ECF No. 27, is
4 **GRANTED.**

5 3. The District Court Executive is directed to enter judgment in favor of
6 Defendant and against Plaintiff.

7 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
8 Order, forward a copy to Plaintiff and counsel and close the file. The Court finds
9 that an appeal of this Order would not be taken in good faith.

10 **DATED** this 6th day of December 2019.



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A handwritten signature in blue ink that reads "Stanley A. Bastian". The signature is written in a cursive style and is positioned above a horizontal line.

16 Stanley A. Bastian
17 United States District Judge
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