

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

March 1, 2007

Elisabeth A. Shumaker
Clerk of Court

BENNY R. SMITH,

Plaintiff-Appellant,

v.

C. COWMAN, Cellhouse Sargent; R.
HUNT, Disciplinary Hearing Officer,

Defendants-Appellees.

No. 06-3272

District of Kansas

(D.C. No. 06-CV-3058-SAC)

ORDER AND JUDGMENT*

Before **MURPHY, SEYMOUR, and McCONNELL**, Circuit Judges.

On February 27, 2006, Mr. Smith filed a § 1983 claim concerning disciplinary actions taken against him by prison officers, actions he considered both fraudulent and retaliatory. On March 1, 2006, the United States District Court for the District of Kansas ruled that the petitioner had not provided proof of completing the grievance process or the disciplinary appeal process, and thus had

*After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). This case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

not demonstrated an exhaustion of administrative remedies, as required by 42 U.S.C. § 1997e. The court gave him sixteen days to do so. Mr. Smith filed an interlocutory appeal, which this court dismissed for lack of jurisdiction on June 8. On June 13, the district court, noting that the defendant had still not provided proof of his administrative appeal, dismissed the action without prejudice, stating that: “a prisoner must provide a comprehensible statement of his claim and also either attach copies of administrative proceedings or describe their disposition with specificity.” R., Doc. 11 at 2 (quoting *Steele v. Fed. Bureau of Prisons*, 355 F.3d 1204, 1211 (10th Cir. 2003)).

Over the next several weeks, Mr. Smith filed a motion for reconsideration, a motion for certificate of appealability, and a “motion to set the record straight.” Because this is a § 1983 action, not a habeas corpus action, the district court properly ruled that the application for a certificate of appealability was moot. It made no ruling on the “motion to set the record straight,” which was a reiteration of the defendant’s factual complaints, along with the addition of some new ones.

The court interpreted the motion for reconsideration as a motion to alter or amend the judgement under Fed. R. Civ. P. 59(e). In that motion, Mr. Smith stated that he was unable to produce a copy of administrative proceedings because prison guards had stolen the papers from his cell. He did, however, provide the district court initial copies of the grievances, and he described the appeal process as follows: “he submitted an appeal argument to the Secretary of Correction on

February 13, [20]06 in regards to his conviction of a false charge of work performance in case no. 06-01-081E. And received a decision back from the Sec. of Corrects. affirming the conviction stating "based on some evidence." R. Doc. 13, at 1. The district court found the new evidence insufficient to disturb its earlier ruling and denied Mr. Smith's motion for reconsideration on July 19.

We affirmed the district court ruling in an unpublished opinion on December 19, 2006. *Smith v. Cowman*, 2006 WL 3616720 (10th Cir. Dec. 13, 2006). Shortly thereafter, the Supreme Court set forth a new standard to govern PLRA lawsuits: "failure to exhaust is an affirmative defense under the PLRA, and . . . inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Jones v. Bock*, ___ U.S. ___, 2007 WL 135890, at *11 (Jan. 22, 2007). Accordingly, the burden now falls on the defendants to show that Mr. Smith did not exhaust his administrative remedies.

Mr. Smith filed a petition for rehearing. In its response, the government conceded that the case should be remanded in light of the Supreme Court's recent decision in *Jones v. Bock, supra*. We agree.

The petition for rehearing is **GRANTED**, the previous decision of this Court, 2006 WL 3616720 (10th Cir. Dec. 13, 2006), is **VACATED**, and the judgment of the United States District Court for the District of Kansas is **REVERSED** and **REMANDED** for reconsideration in light of *Jones v. Bock*. Appellant's motion to proceed without prepayments of costs or fees is

GRANTED. This court reminds Mr. Smith of his obligation to continue making partial payments of the appellate filing fee until paid in full.

The petition for rehearing en banc having been circulated to the full court, and no judge in active service having called for a poll, the petition for rehearing en banc is therefore **DENIED.**

Entered for the Court,

Michael W. McConnell
Circuit Judge

Westlaw.

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Briefs and Other Related Documents
 Aquilar-Avellaveda v. Terrell C.A.10
 (Kan.), 2007. Only the Westlaw citation is currently
 available.

United States Court of Appeals, Tenth Circuit.

Jose Eli AQUILAR-AVELLAVEDA,

Plaintiff-Appellant,

v.

Duke TERRELL, Warden, USP-Leavenworth,

Defendant-Appellee.

No. 06-3334.

March 5, 2007.

Background: State prisoner brought federal civil rights and Alien Tort Claims Act complaint against warden and other prison officials. The United States District Court for the District of Kansas, Sam A. Crow, J., dismissed complaint for failure to exhaust administrative remedies. Prisoner appealed.

Holding: The Court of Appeals, Ebel, Circuit Judge, held that court erred, on preliminary screening, in requiring prisoner to supplement complaint that was silent as to exhaustion of administrative remedies with information showing he had exhausted remedies.

Reversed, vacated, and remanded.

[1] Civil Rights 78 ⇌ 1395(7)

78 Civil Rights

78III Federal Remedies in General

78k1392 Pleading

78k1395 Particular Causes of Action

78k1395(7) k. Prisons and Jails;

Probation and Parole. Most Cited Cases

Where prisoner's civil rights complaint was silent as to whether he had exhausted his administrative

remedies, district court erred, in conducting preliminary screening of prisoner's civil rights complaint, when it required prisoner to supplement record to show exhaustion of administrative remedies. 28 U.S.C.A. §§ 1915, 1915A; 42 U.S.C.A. § 1983; Prison Litigation Reform Act of 1995, § 101(a), 42 U.S.C.A. § 1997e(a).

[2] Convicts 98 ⇌ 6

98 Convicts

98k6 k. Actions. Most Cited Cases

Failure to exhaust administrative remedies is only an affirmative defense under PLRA rather than a pleading requirement. 28 U.S.C.A. §§ 1915, 1915A; Prison Litigation Reform Act of 1995, § 101(a), 42 U.S.C.A. § 1997e(a), (c)(1).

[3] Convicts 98 ⇌ 6

98 Convicts

98k6 k. Actions. Most Cited Cases

District courts can dismiss prisoner complaints for failure to state a claim if it is clear from the face of the complaint that the prisoner has not exhausted his administrative remedies. 28 U.S.C.A. §§ 1915, 1915A; Prison Litigation Reform Act of 1995, § 101(a), 42 U.S.C.A. § 1997e(a), (c)(1).

[4] Convicts 98 ⇌ 6

98 Convicts

98k6 k. Actions. Most Cited Cases

Before dismissing a prisoner complaint under PLRA, courts are obligated to ensure that any defects in exhaustion of administrative remedies by prisoners were not the result of the action or inaction of prison officials. Prison Litigation Reform Act of 1995, § 101(a), 42 U.S.C.A. § 1997e(a), (c)(1).

[5] Convicts 98 ⇌ 6

98 Convicts

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98k6 k. Actions. Most Cited Cases

When a district court is given the opportunity to address the exhaustion question under PLRA due to affirmative but not conclusive statements in the prisoner's complaint, district court cannot dismiss the complaint without first giving the inmate an opportunity to address the issue. 28 U.S.C.A. §§ 1915, 1915A; Prison Litigation Reform Act of 1995, § 101(a), 42 U.S.C.A. § 1997e(a), (c)(1).

Jose Eli Aquilar-Avellaveda, appearing pro se.

Before HARTZ, EBEL, and TYMKOVICH, Circuit Judges.

EBEL, Circuit Judge.

*1 Jose Eli Aquilar-Avellaveda,^{FN1} a federal prisoner proceeding *pro se* on a *Bivens* complaint,^{FN2} seeks discovery, injunctive relief, and damages related to allegations that federal prison staff violated his civil rights under the First, Fifth and Eighth Amendments to the Constitution. He claims that the warden, Duke Terrell, and other prison officials intercepted and destroyed legal materials he needed to prepare for his direct appeal, and alleges that they continue to segregate him without cause and impose lighting conditions that disrupt his sleep. The district court dismissed Mr. Aquilar-Avellaveda's complaint for failure to exhaust administrative remedies, but in light of a recent ruling from the United States Supreme Court, we vacate and remand for further consideration.

Mr. Aquilar-Avellaveda filed a complaint in the United States District Court for the District of Kansas on July 18, 2006, alleging that prison officials violated his civil rights under 42 U.S.C. § 1983 and 28 U.S.C. § 1350.^{FN3} The court noted that under federal law, Mr. Aquilar-Avellaveda must exhaust his administrative remedies before bringing his action. *See* 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."). The district court relied on our precedent in *Steele v. Federal Bureau of Prisons* holding that a prisoner, to avoid dismissal of his

complaint under the Prison Litigation Reform Act (PLRA), must plead exhaustion with specificity. 355 F.3d 1204, 1210 (10th Cir.2003).

[1] Because Mr. Aquilar-Avellaveda had not included in his pleadings any information suggesting that he had pursued administrative remedies, the court ordered that Mr. Aquilar-Avellaveda be granted twenty days to supplement the record. Mr. Aquilar-Avellaveda timely responded with some information documenting his attempts at complying with the Bureau of Prison's administrative remedy program, and also alleged that prison officials prevented him from completing the administrative process.^{FN4} The district court found the documentation insufficient. Specifically, the court observed that some notices were not dated, and found that Mr. Aquilar-Avellaveda had not demonstrated that he had sought further administrative review of the warden's alleged failure to respond to the prisoner's grievance. The court dismissed the complaint without prejudice, concluding that Mr. Aquilar-Avellaveda failed to comply with the PLRA's exhaustion requirement at 42 U.S.C. § 1997e(a).

In *Steele*, we adopted the view that Section 1997e(a) required a prisoner to plead and demonstrate that he had exhausted his administrative remedies prior to bringing his complaint about prison conditions in court. 355 F.3d at 1210. We stated that a prisoner must either "attach a copy of the applicable administrative dispositions to the complaint, or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome." *Id.* (quotation, citations and alteration omitted). The district court properly relied on this holding in reviewing Mr. Aquilar-Avellaveda's complaint and requesting additional information about whether he had exhausted his administrative remedies.

*2 [2] However, the United States Supreme Court has recently rejected that rule, holding that failure to exhaust is only an affirmative defense rather than a pleading requirement. *Jones v. Bock*, --- U.S. ---, 127 S.Ct. 910, 921, --- L.Ed.2d ---- (2007) ("We conclude that failure to exhaust is an affirmative

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defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints.”). Accordingly, our pleading requirement from *Steele* is no longer good law. Because Mr. Aquilar-Avellaveda's complaint was silent as to whether he had exhausted his administrative remedies—which is acceptable under *Jones*—the district court erred in requesting Mr. Aquilar-Avellaveda to supplement the record on that issue.

[3][4] If the complaint had made it clear through Mr. Aquilar-Avellaveda's affirmative statements that he had not exhausted his administrative remedies, the district court could have raised the exhaustion question *sua sponte*, consistent with 42 U.S.C. § 1997e(c)(1) and 28 U.S.C. §§ 1915 and 1915A, and sought additional information from Mr. Aquilar-Avellaveda. *Jones* suggests that district courts can dismiss prisoner complaints for failure to state a claim if it is clear from the face of the complaint that the prisoner has not exhausted his administrative remedies. *Jones*, 127 S.Ct. at 921. However, courts also are obligated to ensure that any defects in exhaustion were not procured from the action or inaction of prison officials. *See, e.g., Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir.2002) (stating that although 42 U.S.C. § 1997e requires inmates to exhaust “available” administrative remedies, the “failure [of prison officials] to respond to a grievance within the time limits contained in the grievance policy renders an administrative remedy unavailable”). The facts ordinarily pled in allegations concerning prison conditions frequently will not give a definitive answer as to whether a prisoner has completed his internal grievance process or whether he was thwarted in his attempts to do so.

[5] We believe that only in rare cases will a district court be able to conclude from the face of the complaint that a prisoner has not exhausted his administrative remedies and that he is without a valid excuse. When a district court is given the opportunity to address the exhaustion question due to affirmative but not conclusive statements in the prisoner's complaint, we follow the Fourth Circuit in holding that “a district court cannot dismiss the complaint without first giving the inmate an

opportunity to address the issue.” *See Anderson v. XYZ Corr. Health Servs.*, 407 F.3d 674, 682 (4th Cir.2005). “District courts taking this approach must exercise caution. To determine whether an inmate has exhausted his administrative remedies requires an understanding of the remedies available and thus likely would require information from the defendant as well as the inmate.” *Id.* at 683 n. 5.

*3 We **REVERSE** and **VACATE** the district court's order and judgment dismissing Mr. Aquilar-Avellaveda's complaint, and **REMAND** to the district court for further consideration in accordance with *Jones v. Bock* and this opinion.

FN1. As the district court noted, appellant's name has been referred to as “Aguilar-Avellaneda” in other records. In this appeal, the appellant uses “Aquilar-Avellaveda,” which was the name employed by the district court.

FN2. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Mr. Aquilar-Avellaveda's complaint sought relief under 42 U.S.C. § 1983; the Alien Tort Claims Act, 28 U.S.C. § 1350; and a range of federal rules permitting a court to compel production of documents, depositions and subpoenas. The district court construed the complaint as a *Bivens* action.

FN3. The district court granted Aquilar-Avellaveda's motion to proceed on appeal *in forma pauperis* under 28 U.S.C. § 1915. We remind Mr. Aquilar-Avellaveda that he must continue making payments on his appellate filing fee until the entire balance is paid.

FN4. The Bureau of Prisons was not served with the complaint at issue and did not enter an appearance in this matter. Moreover, the district court did not order the Bureau to enter an appearance.

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Briefs and Other Related Documents

Rigsby v. U.S.C.A.10 (Kan.),2004.This case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. Tenth Circuit Rule 36.3. (FIND CTA10 Rule 36.3.)

United States Court of Appeals,Tenth Circuit.

Jack RIGSBY, Sr., Plaintiff-Appellant,

v.

UNITED STATES of America,

Defendant-Appellee.

No. 03-3207.

Feb. 6, 2004.

Background: Federal inmate appearing pro se sued federal government under the Federal Tort Claims Act (FTCA), asserting claim for personal property that prison officials allegedly caused to be lost during his detention. The United States District Court for the District of Kansas dismissed the action for lack of subject matter jurisdiction, and inmate appealed.

Holdings: The Court of Appeals, Brorby, Circuit Judge, held that:

(1) prison officials were entitled to sovereign immunity from inmate's claim, under FTCA's exception to waiver of immunity, and thus, district court lacked subject matter jurisdiction over inmate's claim;

(2) district court's ruling that prison officials were entitled to sovereign immunity was not contrary to congressional intent or case precedent; and

(3) court would not consider inmate's claim that circuit precedent holding that law enforcement officials were prison officials covered by FTCA's exception to waiver of sovereign immunity was contrary to Federal Bureau of Prison policy or

federal regulations, given that claim had been previously addressed and rejected on appeal.

Affirmed.

West Headnotes

[1] United States 393 ⇐78(5.1)

393 United States

393V Liabilities

393k78 Torts

393k78(5) Nature of Act or Claim

 393k78(5.1) k. In General. Most Cited

Cases

Federal prison officials were entitled to sovereign immunity from pro se inmate's claim for personal property that officials allegedly caused to be lost during his detention, under exception to waiver of immunity under Federal Tort Claims Act (FTCA), and thus, district court lacked subject matter jurisdiction over inmate's claim; exception to waiver applied to any claim arising from the detention of any goods by any law enforcement officer, and prison employees were law enforcement officers within meaning of FTCA. 28 U.S.C.A. §§ 1346(b)(1), 2680(c).

[2] Courts 106 ⇐90(2)

106 Courts

106II Establishment, Organization, and

Procedure

106II(G) Rules of Decision

106k88 Previous Decisions as Controlling or as Precedents

106k90 Decisions of Same Court or Co-Ordinate Court

106k90(2) k. Number of Judges Concurring in Opinion, and Opinion by Divided Court. Most Cited Cases

United States 393 ⇐78(5.1)

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393 United States
 393V Liabilities
 393k78 Torts
 393k78(5) Nature of Act or Claim
 393k78(5.1) k. In General. Most Cited

Cases

District court ruling that federal prison officials were entitled to sovereign immunity from pro se inmate's claim for personal property that officials allegedly caused to be lost during his detention, under exception to waiver of immunity under Federal Tort Claims Act (FTCA), was not contrary to congressional intent or case precedent; circuit precedent had determined that law enforcement officers were prison employees covered by exception, and appellate panel in circuit was required to follow circuit precedent absent en banc reconsideration or superseding contrary Supreme Court decision. 28 U.S.C.A. §§ 1346(b)(1), 2680(c)

Jack Rigsby, Sr., pro se, Beaumont, TX, for Plaintiff-Appellant.

Laurie Kathleen Kahrs, Office of the United States Attorney, Wichita, KS, for Defendant-Appellee.

Before TACHA, Chief Circuit Judge, and PORFILIO and BRORBY, Senior Circuit Judges.

ORDER AND JUDGMENT^{FN*}

FN* This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.BRORBY, Circuit Judge.

**1 After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Jack Rigsby, Sr., a federal inmate appearing *pro se*, appeals the district court's dismissal of his complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 2680(c). Mr. Rigsby's complaint asserts a cause of action for lost property under 28 U.S.C. § 1346(b)(1) of the Federal Tort Claims Act. We affirm the district court's dismissal for lack of subject matter jurisdiction.

In his complaint, Mr. Rigsby alleged federal prison officials caused the loss of *105 his personal property when they packed, inventoried or placed it in a locker while he was in detention. After reviewing the federal government's motion to dismiss and Mr. Rigsby's reply thereto, the district court issued an order granting the government's motion to dismiss. In so doing, the district court concluded it lacked subject matter jurisdiction under 28 U.S.C. § 2680(c), which provides an exception to the waiver of sovereign immunity under the Federal Tort Claims Act. Specifically, the district court determined the exception applied because Mr. Rigsby's claim: 1) arose from the detention of goods by prison employees, 2) who are law enforcement officers within the meaning of the exception.

Mr. Rigsby appeals the dismissal, claiming: 1) the district court's ruling is contrary to the congressional intent behind the Federal Tort Claims Act and Supreme Court decisions; 2) the district court incorrectly ruled prison employees meet the definition of "law enforcement officers" within the meaning of the exception outlined in 28 U.S.C. § 2680(c); and 3) the law of this circuit and others is contrary to Federal Bureau of Prison policy and the Code of Federal Regulations.

A court may only exercise jurisdiction when specifically authorized to do so. See *Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir.1994). We review *de novo* both a dismissal for lack of subject matter jurisdiction, see *U.S. West Inc. v. Tristani*, 182 F.3d 1202, 1206 (10th Cir.1999), *cert. denied*, 528 U.S. 1106, 120 S.Ct. 845, 145 L.Ed.2d 713 (2000), and rulings on sovereign immunity and the applicability of an exception to the Federal Tort Claims Act, see *Steele v. Federal Bureau of Prisons*,

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355 F.3d 1204, 1213-14, (10th Cir.2003). The Federal Tort Claims Act, under 28 U.S.C. § 1346(b)(1), waives the federal government's immunity from certain tort claims. See *Elder v. United States*, 312 F.3d 1172, 1176 (10th Cir.2002). An exception to this waiver of sovereign immunity exists under 28 U.S.C. § 2680(c) for any claim arising from the detention of any goods or merchandise by any "law enforcement officer." See *Hatten v. White*, 275 F.3d 1208, 1210 (10th Cir.2002). This court has clearly determined prison employees are "law enforcement officers" within the meaning of 28 U.S.C. § 2680(c). See *Steele*, 355 F.3d at 1213-14; *Hatten*, 275 F.3d at 1210. This determination comports with the broad interpretation given by other circuit courts to the term "law enforcement officer" within the meaning of § 2680. See *United States v. Bein*, 214 F.3d 408, 415 (3d Cir.2000) (and cases cited therein), cert. denied, 534 U.S. 943, 122 S.Ct. 322, 151 L.Ed.2d 240 (2001).

**2 [1] With these standards in mind, we have reviewed the pleadings, Mr. Rigsby's brief on appeal, and the district court's decision, considering them in light of the applicable law. The district court issued a comprehensive and well-reasoned decision, which 1) clearly comports with the law in this circuit that prison employees meet the definition of law enforcement officers within the meaning of § 2680, and 2) correctly concludes it lacked subject matter jurisdiction under that statute, because no sovereign immunity was waived. See *Steele*, 355 F.3d at 1213-14; *Hatten*, 275 F.3d at 1210.

[2] Despite Mr. Rigsby's contentions otherwise, he fails to provide a persuasive argument the district court's ruling is somehow contrary to the congressional intent behind the Federal Tort Claims Act or a Supreme Court decision. Moreover, even if his argument was persuasive, this panel is required to follow circuit precedent, absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court. See *106 *United States v. Hernandez-Rodriguez*, 352 F.3d 1325, 1333 (10th Cir.2003). Neither condition for disregarding circuit precedent is presented here.

Finally, we reject Mr. Rigsby's assertion the law of this circuit is contrary to Federal Bureau of Prison policy and the Code of Federal Regulations. In support, he points out that the Federal Bureau of Prisons told him to file a lawsuit in the district court if he was dissatisfied with the agency's decision denying his property claim, which he now asserts establishes his right to file a suit in federal district court. Because we have previously addressed and rejected the same argument on appeal, we decline to address it here. See *Steele*, 355 F.3d at 1213-14.

For substantially the same reasons contained in the district court's May 22, 2003 Order, and for the reasons stated herein, we **AFFIRM** the district court's dismissal of Mr. Rigsby's complaint for lack of subject matter jurisdiction. The mandate should issue forthwith.

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Briefs and Other Related Documents (Back to top)

- 2005 WL 2481649 (Appellate Brief) Appellee's Jurisdictional Brief (Jul. 22, 2005) Original Image of this Document (PDF)
- 2003 WL 23539748 (Appellate Brief) Appellant/Petitioner's Opening Brief (Nov. 10, 2003) Original Image of this Document (PDF)
- 03-3207 (Docket) (Jul. 24, 2003)

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Briefs and Other Related Documents

Wilson v. U.S.C.A.10 (Kan.),2002.This case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. Tenth Circuit Rule 36.3. (FIND CTA10 Rule 36.3.)

United States Court of Appeals,Tenth Circuit.

Eugene X. WILSON, Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 01-3224.

Jan. 4, 2002.

Federal prisoner brought civil rights action against prison correctional officers seeking damages for loss of 45 books confiscated by officers. The United States District Court for the District of Kansas dismissed action. Prisoner appealed. The Court of Appeals, Murphy, Circuit Judge, held that: (1) United States was proper defendant, (2) prisoner could not assert Fifth Amendment due process claim arising out of intentional deprivation of property; and (3) officers' confiscation of prisoner's books fell within exception to waiver of sovereign immunity under Federal Tort Claims Act (FTCA).

Affirmed.

West Headnotes

[1] Federal Courts 170B ⇨611

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review

170BVIII(D)1 Issues and Questions in Lower Court

170Bk611 k. Necessity of Presentation in General. Most Cited Cases

Court of Appeals would not address federal prisoner's claims against prison officials which were raised for the first time on appeal. U.S.C.A.

Const.Amend. 1.

[2] United States 393 ⇨50.10(3)

393 United States

393I Government in General

393k50 Liabilities of Officers or Agents for Negligence or Misconduct

393k50.10 Particular Acts or Claims

393k50.10(3) k. Criminal Law Enforcement and Investigation; Prisoners' Claims. Most Cited Cases

After Attorney General certified that the correctional officers were acting within the scope of their employment, United States was proper defendant to federal prisoner's claims against correctional officials arising out of their loss of 45 of his books. 28 U.S.C.A. § 2679(d)(1).

[3] Constitutional Law 92 ⇨272(2)

92 Constitutional Law

92XII Due Process of Law

92k256 Criminal Prosecutions

92k272 Execution of Sentence

92k272(2) k. Imprisonment and Incidents Thereof. Most Cited Cases

Convicts 98 ⇨3

98 Convicts

98k3 k. Property and Conveyances. Most Cited Cases

Prisons 310 ⇨4(7)

310 Prisons

310k4 Regulation and Supervision

310k4(7) k. Personal Grooming and Effects; Contraband and Searches. Most Cited Cases

Federal prison provided prisoner with meaningful post-deprivation administrative remedies for loss of his books that were confiscated from his cell, and, thus, prisoner could not assert Fifth Amendment

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due process claim arising out of intentional deprivation of property. U.S.C.A. Const.Amend. 5.

[4] United States 393 78(5.1)

393 United States

393V Liabilities

393k78 Torts

393k78(5) Nature of Act or Claim

393k78(5.1) k. In General. Most Cited

Cases

Federal correctional officers' confiscation of prisoner's books was detention of goods by law enforcement officers, and, thus, fell within exception to waiver of sovereign immunity under Federal Tort Claims Act (FTCA). 28 U.S.C.A. § 2680(c).

Before HENRY, BRISCOE, and MURPHY, Circuit Judges.

496 ORDER AND JUDGMENT ^{FN}

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.MURPHY, Circuit Judge.

**1 After examining the briefs and the appellate record, this court has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Proceeding *pro se*, Eugene X. Wilson appeals the district court's dismissal of the civil action he brought against four correctional officers employed at the United States Penitentiary in Leavenworth, Kansas. In his complaint, Wilson alleged that the officers lost or misplaced forty-five books that were confiscated from his prison cell. Wilson sought \$750.00 in compensatory damages, the alleged

value of the lost books. After the Attorney General certified that the four officers were acting within the scope of their employment, the officers moved to substitute the United States as defendant pursuant to 28 U.S.C. § 2679(d)(1). The district court granted the motion. The United States then moved to dismiss Wilson's complaint. The district court concluded that the United States had not waived its sovereign immunity from the suit brought by Wilson and, thus, granted the motion to dismiss. Wilson brought this appeal.

[1] In his appellate brief, Wilson raises both First Amendment and Religious Freedom Restoration Act claims. Because these claims have been raised for the first time on appeal, this court declines to address them. See *Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 814 n. 22 (10th Cir.1995) (noting that in the absence of extraordinary circumstances this court will not consider issues raised for the first time on appeal).

[2][3] Wilson also argues that the district court erred when it construed his claims as arising under the Federal Tort Claims Act ("FTCA") and substituted the United States as defendant. The district court concluded that it was required to substitute the United States when the Attorney General certified that the correctional officers were acting within the scope of their employment. The court relied upon 28 U.S.C. § 2679(d)(1) which states,

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in the United States district court shall be deemed an action against the United States ... and the United States *shall* be substituted as the party defendant.

(emphasis added). Wilson argues that his claims do not arise under the FTCA and, therefore, 28 U.S.C. § 2679(d)(1) is inapplicable. Wilson contends that his complaint states a viable Fifth Amendment due process claim. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Wilson's argument is

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foreclosed by Supreme Court precedent. See *Daniels v. Williams*, 474 U.S. 327, 328, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) (“[T]he Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property.” (emphasis in original)). Even if Wilson's complaint could be construed as raising a claim that the correctional*497 officers *intentionally* deprived him of his property, he cannot state a constitutional violation. The prison provided Wilson with an administrative remedy after the loss of his books. Thus, he was afforded a meaningful post-deprivation remedy for the alleged loss and cannot assert a constitutional claim. See *Hudson v. Palmer*, 468 U.S. 517, 533, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). Consequently, we conclude that the district court properly construed Wilson's claims as arising under the FTCA and properly substituted the United States as the defendant in this action.

**2 [4] Wilson also challenges the district court's conclusion that it lacked subject matter jurisdiction to hear his claims because they are barred by sovereign immunity. The court noted that the FTCA's broad waiver of sovereign immunity was limited in this case by an exception. That exception, found at 28 U.S.C. § 2680(c), provides that the waiver of sovereign immunity does not apply to any claim, “arising in respect of the ... detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer.” The district court concluded that (1) the confiscation of Wilson's books was a detention of goods and (2) the correctional officers were law enforcement officers under § 2680(c). Having reviewed the arguments of the parties, we can find no reversible error in the district court's analysis and conclusion. Consequently, we affirm the dismissal of Wilson's complaint for substantially those reasons stated by the district court.

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Hoover v. WestC.A.10 (Okla.),2004.This case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. Tenth Circuit Rule 36.3. (FIND CTA10 Rule 36.3.)

United States Court of Appeals,Tenth Circuit.

Stephen Joe HOOVER, Plaintiff-Appellant,

v.

Kelly WEST; Earl Markland; Royce Melton; J.D.

Davis; Gary Gibson; Randall Workman; Frank

Keating, Defendants-Appellees.

No. 03-7106.

Feb. 19, 2004.

Background: Former state inmate filed § 1983 action alleging cruel and unusual punishment and denial of due process. The United States District Court for the District of Oklahoma dismissed complaint, and inmate appealed.

Holdings: The Court of Appeals, Ebel, Circuit Judge, held that:

- (1) grievance process provided sufficient remedy to require exhaustion;
- (2) warden's failure to respond to inmate's grievance did not excuse inmate from exhausting his administrative remedies; and
- (3) officials' failure to respond to inmate's grievance did not equitably estop them from moving to dismiss his suit.

Affirmed.

West Headnotes

[1] Civil Rights 78 ⇨1319

78 Civil Rights

78III Federal Remedies in General

78k1314 Adequacy, Availability, and Exhaustion of State or Local Remedies

78k1319 k. Criminal Law Enforcement; Prisons. Most Cited Cases

State inmate was required to exhaust his administrative remedies before filing § 1983 suit alleging that he was beaten by prison guards, even if grievance process could not be used to discipline guards or to assert tort claims against guards, where transfers and hearings were available through grievance process. Civil Rights of Institutionalized Persons Act, § 2(a), 42 U.S.C.A. § 1997e(a); 42 U.S.C.A. § 1983.

[2] Civil Rights 78 ⇨1319

78 Civil Rights

78III Federal Remedies in General

78k1314 Adequacy, Availability, and Exhaustion of State or Local Remedies

78k1319 k. Criminal Law Enforcement; Prisons. Most Cited Cases

Warden's failure to respond to state inmate's grievance did not excuse inmate from exhausting his administrative remedies before filing § 1983 suit, even if inmate properly appealed matter and review board refused to respond in part because warden had not responded, where board gave inmate ten days to cure deficiency, but inmate made no effort to do so. Civil Rights of Institutionalized Persons Act, § 2(a), 42 U.S.C.A. § 1997e(a); 42 U.S.C.A. § 1983.

[3] Estoppel 156 ⇨62.2(2)

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k62 Estoppel Against Public, Government, or Public Officers

156k62.2 States and United States

156k62.2(2) k. Particular State

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Officers, Agencies or Proceedings. Most Cited Cases

State prison officials' failure to respond to inmate's grievance did not equitably estop them from moving to dismiss inmate's § 1983 suit for failure to exhaust administrative remedies, absent showing of detrimental reliance by inmate. Civil Rights of Institutionalized Persons Act, § 2(a), 42 U.S.C.A. § 1997e(a); 42 U.S.C.A. § 1983.

Stephen Joe Hoover, pro se, Tulsa, OK, Plaintiff-Appellant.

Linda K. Soper, Asst. Atty. General, W.A. Drew Edmondson, Atty. General, Office of the Attorney General, Oklahoma City, OK, for Defendants-Appellees.

Before EBEL, MURPHY, and McCONNELL, Circuit Judges.

ORDER AND JUDGMENT^{FN*}

FN* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R.App. P. 34(f) and 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

This Order and Judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.EBEL, Circuit Judge.

**1 Stephen J. Hoover ("Plaintiff"), a former Oklahoma prisoner appearing *pro se* and *in forma pauperis*,^{FN1} filed this action pursuant to 42 U.S.C. § 1983 while he was incarcerated. The district court granted Defendants' motion to dismiss for failure to exhaust administrative remedies under 42 U.S.C. § 1997e(a), and Plaintiff now appeals. For the following reasons, we AFFIRM the district court's order.

FN1. Plaintiff was released from custody prior to filing his notice of appeal, and thus the filing fee provisions of the Prison Litigation Reform Act do not apply to this appeal. See 28 U.S.C. § 1915(a), (b), (h); *Whitney v. New Mexico*, 113 F.3d 1170, 1171 n. 1 (10th Cir.1997). Based on our review of Plaintiff's financial declarations, we grant his motion to proceed *in forma pauperis* on appeal. See 28 U.S.C. § 1915(a)(1).

BACKGROUND

Plaintiff alleged that on August 1, 2000, Sergeant Kelly West, supervised and assisted by other prison officials, assaulted and battered Plaintiff while he was wearing full restraints during his cellmate's cell abstraction. The next day, Plaintiff submitted a "Request to Staff" to Randall Workman, a Deputy Warden, who denied it on August 16, 2000. Plaintiff then filed a grievance to the Warden on that same day. On August 21, 2000, the Warden's *179 office returned the grievance to Plaintiff unanswered on the ground that Plaintiff had previously filed a grievance regarding the same issue. Defendants have since conceded that the Warden's office made a mistake regarding this rationale, as no other previous grievance was filed regarding this incident.

Plaintiff then appealed the issue to the Administrative Review Authority (ARA), which returned his grievance unanswered on August 31, 2000 because he had improperly attached additional pages to the grievance and because he had not received a response from the facility head (the Warden). The Administrative Review Authority gave Plaintiff ten additional days to correct the deficiencies and properly submit the grievance. Instead of attempting to cure during this time period, ^{FN2} Plaintiff filed a lawsuit in the Eastern District of Oklahoma pursuant to 42 U.S.C. § 1983, alleging cruel and unusual punishment in violation of the Eighth Amendment and denial of due process in violation of the Fourteenth Amendment.

FN2. Plaintiff did attempt to refile his

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grievance to the Administrative Review Authority (ARA) on June 21, 2002. However, the ARA returned it for untimeliness because it was filed almost two years after he had been given ten days to correct the above deficiencies.

Defendants moved to dismiss under Rule 12(b)(6) on the ground that Plaintiff had failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). The district court granted the motion and Plaintiff now appeals.

DISCUSSION

We exercise jurisdiction over this appeal from the district court's final order pursuant to 28 U.S.C. § 1291. We review *de novo* the district court's dismissal for failure to exhaust administrative remedies under 42 U.S.C. § 1997e(a). *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir.2002).

A. The Exhaustion Requirement of the Prison Litigation Reform Act (PLRA)

The general rule is that plaintiffs need not exhaust administrative remedies before filing a § 1983 suit. *Porter v. Nussle*, 534 U.S. 516, 523, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002). However, as part of the 1996 Prison Litigation Reform Act (PLRA), Congress added an exhaustion requirement for prisoners' suits regarding prison conditions. 42 U.S.C. § 1997e(a). The provision, entitled "Suits by Prisoners," provides:

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

**2 42 U.S.C. § 1997e(a). The Supreme Court has held that this exhaustion requirement for suits regarding "prison conditions" applies to "all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."

FN3 *Porter*, 534 U.S. at 531, 122 S.Ct. 983.

FN3. The government asserts, without citation to the record or reference to dates, that Plaintiff was still incarcerated at the date of filing his complaint. Plaintiff does not seem to contest this. Therefore, it appears that the PLRA exhaustion requirement applies.

"Although section 1997e(a) mandates the exhaustion of administrative remedies, a plaintiff's failure to fulfill a statutory requirement does not necessarily deprive the federal courts of subject matter jurisdiction." *180 *Chelette v. Harris*, 229 F.3d 684, 687 (8th Cir.2000). The Supreme Court has held that the language of the exhaustion requirement must contain " 'sweeping and direct' language indicating that there is no federal jurisdiction prior to exhaustion, or else the exhaustion requirement is treated as an element of the underlying claim." *Id.* (quoting *Weinberger v. Salfi*, 422 U.S. 749, 757, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975)). Because § 1997e(a) does not contain this sort of "sweeping and direct" language, every circuit court that has considered the issue has found that the PLRA exhaustion requirement is not jurisdictional. *Id.* (collecting cases); see also *Ali v. District of Columbia*, 278 F.3d 1, 5-6 (D.C.Cir.2002) (same). We recently joined our sister circuits in finding that the PLRA exhaustion requirement, although mandatory, is not a prerequisite to our jurisdiction.^{FN4} *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1206 (10th Cir.2003).

FN4. Therefore, Plaintiff is correct when he argues that § 1997e(a) is not jurisdictional. However, this argument does not get him far as the district court would still have been required to dismiss his complaint had he failed to exhaust. Section 1997e(a) is mandatory and requires dismissal of any case in which an available administrative remedy has not been exhausted.

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An inmate must not only begin the administrative grievance process in order to meet the exhaustion requirement, but must also complete it in compliance with administrative rules. *Jernigan*, 304 F.3d at 1032. Even if the administrative process does not provide the particular relief sought by the plaintiff, he or she is still required to exhaust all administrative procedures that are available. *Booth v. Churner*, 532 U.S. 731, 741, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001). Similarly, the plaintiff is required to exhaust all available procedures offered by the prison even if doing so appears "futile." *Jernigan*, 304 F.3d at 1032; see also *Giano v. Goord*, 250 F.3d 146, 150-51 (2d Cir.2001) ("[T]he alleged ineffectiveness of the administrative remedies that are available does not absolve a prisoner of his obligation to exhaust such remedies[.]"); *Perez v. Wisconsin Dept of Corrections*, 182 F.3d 532, 536-37 (7th Cir.1999) (finding that the PLRA exhaustion requirement has no "futility exception," and stating that "[n]o one can know whether administrative requests will be futile; the only way to find out is to try") (emphasis in original).

B. Defendants' administrative procedure provided a remedy that triggered the exhaustion requirement of § 1997e(a).

Plaintiff first argues that the Oklahoma Department of Corrections ("DOC") provides no remedy for his allegations. According to Plaintiff, this is because the grievance process cannot be used to discipline staff and because the Oklahoma Governmental Tort Claims Act does not provide a cause of action for "individual non-official acts." (Aplt. Br. at 10-11.)

**3 [1] However, the Supreme Court has held that as long as the administrative procedures have "authority to take some action in response to a complaint," that is enough of a remedy to trigger the exhaustion requirement. *Booth*, 532 U.S. at 736, 121 S.Ct. 1819 (emphasis added). For example, although the procedures may not provide monetary relief, they might provide for transfer to another facility or at least a hearing on grievances. See *Larkin v. Galloway*, 266 F.3d 718, 723 (7th Cir.2001). Plaintiff does not argue that transfers or

hearings were not available through this process, and it is not sufficient for him to simply point to the lack of either a tort cause of action or an inmate-*181 initiated disciplinary action against staff. The administrative procedures provided some remedy and Plaintiff is obligated to exhaust those procedures even if the available remedy is not one of his choosing. See *Booth*, 532 U.S. at 741, 121 S.Ct. 1819.

C. Plaintiff did not exhaust all "available" administrative procedures, and Defendants' actions did not render these procedures "unavailable."

Plaintiff next argues that he exhausted all administrative procedures that were available to him and that any further procedures were made "unavailable" by Defendants' actions. He is frustrated by the fact that the Warden initially erred in declining to respond to his grievance based on the misconception that a previous grievance had been filed on the same issue.^{FN5} Yet, when Plaintiff attempted to appeal, the Administrative Review Authority (ARA) refused to respond in part because the Warden had not yet responded. It is true that Plaintiff seems to have been caught in a catch-22. However, the ARA gave him ten days to cure this deficiency, and instead of even attempting to obtain a response from the Warden or explain the mistake to the ARA within that time period, he filed the instant suit in district court.

FN5. Defendants now concede that the Warden erred in this initial refusal to respond to Plaintiff's grievance, as there existed no previous grievances on this August 1, 2000 incident.

Plaintiff is correct that § 1997e(a) only requires him to exhaust administrative procedures that are made "available" to him. Courts "refuse to interpret the PLRA so narrowly as to permit prison officials to exploit the exhaustion requirement through indefinite delay in responding to grievances." See *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir.2002) (quotation omitted). Instead, we

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examine the plain meaning of the term "available" in § 1997e(a) and find that a prisoner is only required to exhaust those procedures that he or she is reasonably *capable* of exhausting. See *Underwood v. Wilson*, 151 F.3d 292, 295 (5th Cir.1998). For example, "[T]he failure [of prison officials] to respond to a grievance within the time limits contained in the grievance policy renders an administrative remedy unavailable." *Jernigan*, 304 F.3d at 1032. Similarly, a prisoner lacks "available" remedies where prison officials deny him or her the necessary grievance forms. *Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir.2003). Where prison officials prevent or thwart a prisoner from utilizing an administrative remedy, they have rendered that remedy "unavailable" and a court will deem that procedure "exhausted." See *Lyon v. Vande Krol*, 305 F.3d 806, 808 (8th Cir.2002); *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir.2001).

**4 [2] However, in the instant case, Plaintiff was given ten days to cure the deficiency, yet failed to make any such attempt. This is similar to the situation we faced in *Jernigan*, 304 F.3d at 1032-33, where we held that the plaintiff had not exhausted his remedies where he failed to cure a deficiency in his appeal related to obtaining a response from the head prison official, even though it may have been the prison official's fault for misplacing his grievance. We noted that the plaintiff "was given ten days to cure the deficiency in question which no doubt would have involved informing prison officials of the lost or misfiled grievance." *Id.* at 1032. We stated that the plaintiff could not "successfully argue that he had exhausted his administrative remedies by, in essence, failing to employ them[.]" *Id.* at 1033. There, as here, the grievance policy provided*182 a time frame for prison officials' responses, after which the plaintiff could appeal with evidence of *attempts* to obtain a response. *Id.* Plaintiff has not shown us any reason why he could not have brought the mistake regarding the previous grievance to the Warden's attention (or the ARA's) within the 10-day time period. Because he did not even try to cure this deficiency, we affirm the district court's dismissal for lack of exhaustion. See *id.*

D. Defendants are not equitably estopped from moving to dismiss for failure to exhaust.

[3] Finally, Plaintiff argues that because it was Defendants' mistake that caused him to fall short of fully exhausting the administrative procedures, they should be equitably estopped from moving to dismiss based on § 1997e(a). We disagree.

"The Fifth Circuit is the only circuit to hold that equitable estoppel can apply to the PLRA exhaustion requirement." *Lewis*, 300 F.3d at 834 (citing *Wendell v. Asher*, 162 F.3d 887, 890 (5th Cir.1998)). This holding is "persuasive because non-jurisdictional prerequisites to suit in federal court are typically subject to equitable estoppel." *Id.* (citing *Zipes v. Trans World Airlines, Inc.* 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982)). However, the Seventh and Tenth Circuits have so far declined to decide whether equitable estoppel applies because their cases have fallen short of meeting the elements of equitable estoppel. See *id.*; *Jernigan*, 304 F.3d at 1033.

To establish equitable estoppel, the party claiming estoppel must show: (1) a misrepresentation by the opposing party; (2) reasonable reliance on that misrepresentation; and (3) detriment. *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1417 (10th Cir.1984). It is also well-settled that the "Government may not be estopped on the same terms as any other litigant," and the burden on the party seeking estoppel against the government is heavier. *Heckler v. Cmnty. Health Servs. of Crawford County*, 467 U.S. 51, 60, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984). "When asserting equitable estoppel against the government, one must also prove affirmative misconduct." *Lewis*, 300 F.3d at 834.

**5 In the instant case, Plaintiff merely argues that the prison officials have "misrepresented" that they have a grievance procedure and that they will answer grievances. (Apt. Br. at 18.) However, he has pointed to no statement made to him regarding his grievance or the deadlines which could constitute a misrepresentation. Nor does he show that he relied on any of Defendants' statements to him. In fact, Plaintiff was the one who knew that

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Defendants' statements regarding his previous grievance were mistaken. Just like the plaintiff in *Jernigan*, Plaintiff cannot show detrimental reliance on prison officials. See *Jernigan*, 304 F.3d at 1033 (stating that plaintiff could not show detrimental reliance, "having been told that his grievance had been lost or misfiled and having been given an opportunity to cure"). Because Plaintiff fails to show either a misrepresentation or detrimental reliance, he has clearly failed to state a claim regarding equitable estoppel. Thus, we need not reach the issue of whether equitable estoppel applies to the PLRA exhaustion requirement.

CONCLUSION

For the foregoing reasons, we AFFIRM the order of the district court dismissing Plaintiff's § 1983 claim for failure to exhaust under § 1997e(a).

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