

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**SHAWN W. MCDIFFETT,**

**Plaintiff,**

**v.**

**CHARLES NANCE, et al.,**

**Defendants.**

**Case No. 17-3037-JAR-JPO**

**MEMORANDUM AND ORDER**

This matter is before the Court on Plaintiff Shawn McDiffett's Response to Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment (Doc. 87). Five defendants in this lawsuit<sup>1</sup> filed a Motion to Dismiss, or in the Alternative, for Summary Judgment (Doc. 58) and accompanying memorandum in support thereof (Doc. 59) on February 27, 2019. That same day, Defendants sent Plaintiff a "Notice to Pro Se Litigant Who Opposes a Motion for Summary Judgment," explaining Plaintiff's burden under Federal Rule of Civil Procedure 56 and Local Rule 56.1.<sup>2</sup> Despite receiving this notice, the Court received no response from Plaintiff.

This Court then ordered Plaintiff to "show good cause, in writing, on or before August 9, 2019, why Defendants' motion should not be granted as unopposed" and to "file any response to Defendants' motion by August 9, 2019."<sup>3</sup> Plaintiff requested additional time to respond to Defendants' motion,<sup>4</sup> and the Court allowed Plaintiff until September 23, 2019 to file his

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<sup>1</sup> Those five defendants are Charles Nance, Nicolaus Ball, Gay Savino, Irene Silva, and Lindsay Wildermuth. The only remaining defendant, Beverly Jackson, has filed a separate Motion for Summary Judgment, which will be adjudicated separately. This Memorandum and Order does not resolve or dispose of any claims against Defendant Jackson.

<sup>2</sup> Doc. 61.

<sup>3</sup> Doc. 67 at 2.

<sup>4</sup> Doc. 77. The Court notes that, in this motion, Plaintiff also requested other relief which was denied.

response.<sup>5</sup> On September 27, 2019, having received no response from Plaintiff, the Court issued a Memorandum and Order granting Defendants' motion.<sup>6</sup> Then, on October 8, 2019, the Court received Plaintiff's response to Defendants' motion.<sup>7</sup> For the reasons set forth below, after consideration of Plaintiff's response, the Court does not disturb its findings and conclusions set out in its September 27 Memorandum and Order.

## **I. Background**

Plaintiff brings this pro se civil rights action pursuant to 42 U.S.C. § 1983 based on events that occurred while he was incarcerated at the Lansing Correctional Facility in Lansing, Kansas ("LCF"). Prior to the Court's September 27 Memorandum and Order granting Defendants' motion for summary judgment, six defendants remained in this lawsuit: Charles Nance, Lindsay Wildermuth, Nicolaus Ball, Irene Silva, Gay Savino, and Beverly Jackson.

As discussed more fully in prior orders of the Court,<sup>8</sup> Plaintiff's claims against Defendants Nance, Wildermuth, Ball, Silva, and Savino were: (1) claims against Defendant Savino related to medical care, including care Plaintiff received before and after hernia surgery; (2) claims against Defendant Savino regarding whether she properly communicated Plaintiff's medical needs and restrictions to other staff members; (3) claims against Defendants Nance, Silva, Wildermuth, and Ball for placing Plaintiff in cells that did not comply with his medical restrictions; (4) claims against Defendants Wildermuth and Ball for placing Plaintiff in a "more restricted area" cell; (5) claims against Defendants Wildermuth and Ball for failing to forward request forms to other staff members; and (6) claims against Defendants Nance, Silva,

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<sup>5</sup> Doc. 79.

<sup>6</sup> Doc. 82.

<sup>7</sup> Doc. 87.

<sup>8</sup> Docs. 13, 82.

Wildermuth and Ball for violation of Plaintiff's equal protection rights. The factual bases for Plaintiff's allegations are set out in both his Amended Complaint and the Court-ordered *Martinez* Report.<sup>9</sup>

This Court granted summary judgment for Defendants upon determination that Plaintiff "failed to exhaust his administrative remedies as required by the" Prison Litigation Reform Act (the "PLRA").<sup>10</sup> Alternatively, the Court determined that Defendants were entitled to qualified immunity. Because Plaintiff has not met his burden to demonstrate he timely filed his response, and, alternatively, because Plaintiff's response does not impact the Court's prior findings of nonexhaustion and qualified immunity, the prior Memorandum and Order of this Court remains undisturbed.

## **II. Timeliness**

Following Plaintiff's request for additional time,<sup>11</sup> the Court permitted Plaintiff until September 23, 2019 to file a response to Defendants' motion.<sup>12</sup> The Court received Plaintiff's response on October 8, 2019, rendering the response untimely unless Plaintiff can demonstrate he is entitled to take advantage of the prison mailbox rule. That rule "holds that a pro se prisoner's [filing] will be considered timely if given to prison officials for mailing prior to the filing deadline, regardless of when the court itself receives the documents."<sup>13</sup> Under this rule, an inmate may establish timeliness of an otherwise out-of-time filing in two ways:

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<sup>9</sup> The facts recited in this section are taken from Plaintiff's Amended Complaint (Doc. 12) and the "Report in 'Martinez v. Aaron' Investigation Civil Rights Complaint" (the "*Martinez* Report") (Doc. 41), filed by interested party KDOC. *Martinez* Reports are a tool enabling the creation of a factually sufficient record in pro se prisoner cases. See *Martinez v. Aaron*, 570 F.2d 317, 319 (10th Cir. 1978).

<sup>10</sup> Doc. 82; see also 42 U.S.C. § 1997e(a).

<sup>11</sup> Doc. 77.

<sup>12</sup> See Doc. 79.

<sup>13</sup> *Price v. Philpot*, 420 F.3d 1158, 1163–64 (10th Cir. 2005) (internal citations omitted).

- (1) Alleging and proving that he or she made timely use of the prison's legal mail system if a satisfactory system is available, or
- (2) If a legal [mail] system is not available, then by timely use of the prison's regular mail system in combination with a notarized statement or a declaration under penalty of perjury of the date on which the documents were given to prison authorities and attesting that postage was prepaid.<sup>14</sup>

A prison legal mail system is one in which “prison authorities log in all legal mail at the time it is received.”<sup>15</sup>

Plaintiff has not established whether a system designed for legal mail was available for his use at the time he mailed his response. Even assuming Plaintiff did not have access to a satisfactory legal mail system, Plaintiff fails to meet the requirements to take advantage of the prison mailbox rule with respect to regular mail. Plaintiff has not submitted any notarized statement, nor has he “subscribe[d]” any declaration regarding when he provided the response to prison officials “as true under penalty of perjury.”<sup>16</sup> In fact, Plaintiff fails to make any declaration—sworn or otherwise—regarding when he provided the document to prison authorities for mailing. Though Plaintiff labeled his response as “Dated: September 22, 2019,”<sup>17</sup> he does not specify when the response was deposited to prison authorities. Because of Plaintiff's failures to comply with its requirements, the Court cannot afford him the benefit of the prison mailbox rule.<sup>18</sup>

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<sup>14</sup> *Id.* at 1166.

<sup>15</sup> *United States v. Gray*, 182 F.3d 762, 765 (10th Cir. 1999).

<sup>16</sup> *See* 28 U.S.C. § 1746; *see also United States v. Miles*, 343 F. App'x 392, 393–94 (10th Cir. 2009).

<sup>17</sup> Doc. 87 at 16.

<sup>18</sup> *Miles*, 343 F. App'x at 394.

### III. Nonexhaustion and Qualified Immunity

Even if Plaintiff's response had been timely filed, the information contained therein does not change this Court's prior determination that Plaintiff failed to exhaust his administrative remedies, nor this Court's alternative determination that Defendants are all entitled to qualified immunity as to Plaintiff's claims. Plaintiff's response largely reiterates the same arguments and factual disputes contained in his Amended Complaint. He emphasizes his lack of training in the law and related lack of legal resources, alleges that Defendants are misstating or confusing the factual narrative, and asserts that Defendants omit information related to his claims.

The Court's September 27 Memorandum and Order concluded that the record demonstrated Plaintiff failed to exhaust his administrative remedies at LCF as required by the PLRA.<sup>19</sup> In so deciding, this Court relied on the information in the *Martinez* Report, which indicated Plaintiff had only filed four administrative grievances while at LCF. Three of those grievances bore no relation to Plaintiff's instant lawsuit, and the fourth was only tenuously related. But this fourth grievance only mentioned two of the defendants by name, was improperly filed, and did not specify what actions were being grieved. The Court determined that, even if the grievance had been properly filed, it did not provide Defendants with fair notice of the specific claims presented in this case. This Court therefore concluded, based on the grievance records in the *Martinez* Report, that Defendants satisfied their burden for summary judgment of demonstrating that there was no evidence showing Plaintiff fully exhausted available administrative remedies for any claim raised in the instant suit. Nothing in Plaintiff's response raises a genuine issue of material fact on the issue of exhaustion. Summary judgment,

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<sup>19</sup> Doc. 82 at 8; *see also* 42 U.S.C. § 1997e(a).

therefore, is proper on grounds that Plaintiff failed to exhaust his administrative remedies as required by the PLRA.

The Court's prior Memorandum and Order also concluded that, even if Plaintiff were able to overcome his failure to exhaust administrative remedies, his claims would fail on qualified immunity grounds. This Court determined there was no evidence that Defendants' actions violated Plaintiff's constitutionally or federal protected rights; or that Defendants' actions were so blatantly improper that any reasonable officer would have known the action was illegal. Upon review of his response, Plaintiff does not overcome either of these barriers to relief.

#### **IV. Conclusion**

Plaintiff failed to demonstrate his response was timely filed, and he failed to meet the requirements of the prison mailbox rule. But even assuming Plaintiff's response were timely, none of the information presented disturbs this Court's prior Memorandum and Order granting Defendants' motion. Accordingly, Defendants Nance, Ball, Savino, Silva, and Wildermuth are entitled to summary judgment in accordance with the Court's Memorandum and Order filed on September 27, 2019.<sup>20</sup>

**IT IS SO ORDERED.**

Dated: February 7, 2020

S/ Julie A. Robinson  
JULIE A. ROBINSON  
CHIEF UNITED STATES DISTRICT JUDGE

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<sup>20</sup> Doc. 82.