IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JACK E. ALDERMAN	*	
	*	
Plaintiff,	*	CIVIL ACTION
	*	FILE NO. 1:07-CV-896-BBM
v.	*	
	*	
JAMES E. DONALD, in his capacity as Commissioner of the Georgia Department of Corrections; HILTON HALL, in his capacity as Warden, Georgia Diagnostic and Classification Prison; DOES 1-50, UNKNOWN EXECUTIONERS, in their capacities as employees and/or agents of the Georgia Department of Corrections	*	
	*	
Defendants.	*	

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO THE PRE-ANSWER MOTION TO DISMISS

COME NOW James E. Donald, Commissioner, Georgia Department of Corrections, and Hilton Hall, Warden, Georgia Diagnostic and Classification Prison,[1] by counsel, the Attorney General for the State of Georgia, and without

[1] Plaintiff has also specified numerous unknown, unnamed party Defendants in this lawsuit. (R1-1, ¶ 4). To the extent that any such individuals have been properly named and served, it is the intent of counsel to represent the individuals. To the extent that there has not been proper service, a "special appearance" is being made for the purpose of advocating the pre-answer motion on their behalf.

waiving such defenses as the applicability of the statute of limitations, pursuant to *Local Rule 7.1C*, reply to Plaintiff's response to the pre-answer Motion to Dismiss.

Plaintiff filed the instant action challenging "the manner in which Defendants will execute him". (R1-1). On May 21, Defendants filed a pre-answer motion to dismiss. (R1-13). In the motion, Defendants established that Plaintiff failed to exhaust administrative remedies, indisputably, a requirement for pursuing this action. Essentially, Defendants demonstrated, and Plaintiff concedes in the complaint, that at the time the complaint was filed, April 20, 2007, Plaintiff had just begun the grievance process. (R1-1, ¶ 11). In support of the motion, Defendants attached an affidavit, describing the Georgia grievance process, and containing copies of the actual grievance documents.

In the response to the motion to dismiss, (1) Plaintiff contends that the motion and attachments are improper; (2) Plaintiff contends that the issue presented in the instant lawsuit is not grievable so that exhaustion is not required; and (3) Plaintiff contends that district court decisions from other states control how the motion to dismiss should be resolved.

Defendants hereby incorporate the statement of the case, and statement of facts submitted with the original motion.

I.

As an initial matter, Defendants note that Plaintiff does not dispute that as an inmate in custody of the Department of Corrections he is subject to the Department's grievance procedures. Nor does Plaintiff allege ignorance, or obstruction with regard to pursuing a grievance. Plaintiff does not dispute that the grievance process starts with an informal grievance, advances to a formal grievance followed by an appeal to the warden, then an appeal to the Commissioner. (R1-13-2, Attachment 1). Finally, Plaintiff does not dispute that the grievance process is not complete until a response to an appeal is issued by the Commissioner's Office. (See R1-13-2, ¶ 12).

In light of the above, and the concession in the complaint that Plaintiff had just started the grievance procedure at the time this action was filed, it is obvious that Plaintiff failed to exhaust. (R1-1, ¶ 11).

II.

To avoid the ramifications of an unexhausted claim, Plaintiff contends that exhaustion is an affirmative defense that can only be raised in a motion for summary judgment after the completion of discovery, and that Defendants' motion is improper because it contains information outside of the record. (R1-16).

As previously argued, the federal statute applicable in this case is clear, "no action shall be brought . . . until such administrative remedies as are available are

exhausted". 42 U.S.C. § 1997e(a). Exhaustion is a pre-condition to bringing a lawsuit challenging conditions of confinement, and can not be waived. Porter v. Nussle, 534 U.S. 516 (2002); Dillard v. Jones, 89 F. Supp. 2d 1362, 1365 (N.D. GA 2000).

Plaintiff contends, without support, that exhaustion can only be advanced in a motion for summary judgment, and that in accordance with *Local Rule 56.1D*, such a motion can only be filed after discovery is completed. (R1-16, p. 3). In Jones v. Bock, 127 S.Ct. 910 (2007), the Supreme Court clarified procedural issues regarding exhaustion. The Court held that the PLRA does not authorize heightened pleading requirements regarding exhaustion; therefore, exhaustion is an affirmative defense. The Court noted that a complaint is subject to dismissal when an affirmative defense appears on the face of the complaint. Jones v. Bock, 127 S.Ct. at 921; Anderson v. XYZ Correctional Health Services, Inc., et al, 407 F.3d 674, 682 (4th Cir. 2005).

In the instant case, it is clear from the face of the complaint that Plaintiff has not exhausted administrative remedies. Plaintiff specifically pleads that at the time of the filing of the complaint he had just begun the grievance process, and that he had not yet received a response, much less completed the process. (R1-1, ¶ 11).

As Plaintiff concedes failing to exhaust in the complaint, there is no need to wait for the issue to be raised in an answer to the complaint or until discovery is

completed. In accordance, with Jones v. Bock, the case is subject to dismissal based upon what appears on the face of the complaint.

In addition, regarding Defendants' use of a motion to dismiss to challenge exhaustion, Defendants submit that in Sterling v. Warden Hugh Smith, 2007 U.S. Dist. LEXIS 38077, p. 5-7 (S.D. Ga. May 23, 2007), the district court considered the propriety of utilizing summary judgment to resolve exhaustion issues. The court decided that *Rule 56* was not the proper vehicle for challenging exhaustion, especially as the movant in such a challenge is not seeking a judgment on the merits, but instead resolution of a condition precedent to suit. *Id*. See Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2003).

In addition, part of the basis behind requiring exhaustion is the resolution of disputes without judicial intervention. Alexander v. Hawk, 159 F.3d 1321, 1327 (11th Cir. 1998). Plaintiff's suggestion that exhaustion can only be raised after the completion of discovery would countermine this key reason behind the federal statute requiring exhaustion, and needlessly waste time and resources.

Plaintiff also contends that because information outside the pleading was presented, the motion to dismiss should be converted to a motion for summary judgment.

First, as stated above, a Rule 56 motion for summary judgment is not the proper way to challenge exhaustion. Sterling v. Warden Hugh Smith.

Second, considering information outside of the pleading does not necessarily require converting a motion to dismiss to a motion for summary judgment. See Colonial Pipeline Co. v. Collins, 921 F.2d 1237, 1243 (11th Cir. 1991). In addition the court may look beyond the pleadings to decide this issue. See Sterling v. Warden Hugh Smith, p. 7; Waters v. Arpaio, 2007 U.S. Dist. LEXIS 10234, p. 4 (D. Ariz. Feb. 12, 2007); Chelette v. Harris, 229 F.3d 684, 688 (8th Cir. 2000). In Sterling v. Warden Hugh Smith, the court noted that "because a motion contesting a prisoner's exhaustion of administrative remedies does not reach the merits of his underlying claim, the court may look beyond the pleadings and decide disputed issues of fact. Id. p. 7. In Waters v. Arpaio, in resolving the issue of exhaustion at the motion to dismiss stage, the court considered an affidavit, and a copy of the grievance procedure at issue. Waters v. Arpaio, p. 2.

Third, Defendants note that in his response to the motion to dismiss, Plaintiff included a copy of the formal grievance document. (R1-16-2, Exhibit A).[2] By including the grievance document in his pleading Plaintiff has voluntarily placed into the record a document upon which the court can make a decision regarding exhaustion. The document presented by Plaintiff clearly shows that at the time the complaint in the case was filed, the grievance process was not complete. In fact,

[2] Plaintiff failed to authenticate the document; however, Defendants do not contest authenticity.

Plaintiff filed the formal grievance on April 26, 2007, six days after filing the complaint in this case. (R1-1; R1-16-2, Exhibit A).

In conclusion, on the face of the complaint it is apparent that Plaintiff failed to exhaust. Further, Defendants affirmatively raised the issue of exhaustion at the earliest opportunity in a pre-answer motion to dismiss. (R1-13). Plaintiff has had an opportunity to respond to the motion. (R1-16). Therefore, the issue of exhaustion is ripe for consideration by the court.

III.

In an attempt to circumvent the exhaustion requirement, Plaintiff contends that the issue presented in the instant lawsuit is not grievable. (R1-16, p. 10).[3] Plaintiff contends that as the issue is not grievable, there is no need to pursue administrative remedies. Defendants note that although Plaintiff is asserting that the issue is not grievable, Plaintiff has filed an informal grievance, and a formal grievance. (R1-1, ¶ 11, Appendix A; R1-16-2, Exhibit A).

Defendants submit that a review of the actual grievance procedure which sets forth what is and is not grievable is helpful. (R1-13-2, Attachment 1, p. 3)(Department Grievance Procedure). While matters outside the control of the Department, such as an inmate's conviction or sentence are clearly listed as non

[3] Contrary to the plain language on the face of the grievance document submitted by Plaintiff, Plaintiff erroneously contends that the Defendants have determined the issues in this case to be non grievable. (R1-1, p. 10; R1-16-2, Exhibit A).

grievable, conditions of confinement within the control of the Department are grievable. Id. No where in the grievance procedure or in any response by the Department has it been stated that the protocol governing the method of execution is not grievable.

A protocol setting forth the method of execution may be challenged by an inmate in a 42 U.S.C. § 1983 complaint about conditions of confinement Hill v. McDonough, ___ U.S. ___, 126 S. Ct. 2096 (2006). In Hill v. McDonough, the Court clearly set forth that challenges to the fact of confinement are the province of habeas corpus; however, challenges to conditions of confinement, such as a challenge to the method of execution, may be pursued in a civil rights action. Hill v. McDonough, 126 S. Ct at 2101. Simply stated, if a Plaintiff is challenging the fact that he will be executed, it is a habeas case; if he is challenging the procedure, it is a civil rights case.

In the instant case, Plaintiff states that he is "challenging not his sentence of death, but rather the manner in which Defendants will execute him". (R1-1, p. 1). Accordingly, Plaintiff is challenging a condition of confinement which can be grieved, and can be the subject of a civil rights lawsuit.

Defendants recognize that there may be some confusion regarding what issues can and can not be grieved based upon how Plaintiff worded his grievance. In Plaintiff's grievance, he asks for two forms of relief: (1) not to be executed; or

(2) that the method of execution be constitutional. (R1-16-2, Exhibit A).[4] With regard to the method of execution, Plaintiff contends that it will cause undue pain. Because two types of relief were requested by the Plaintiff, the Warden's response to the grievance addressed both requests. With regard to the request not to be executed, Plaintiff was informed that "Your sentence of execution is not subject to the grievance procedure." This response is in accord with the Department grievance procedure which states that sentences are not grievable. (R1-13-2, Attachment 1, p. 3).

Defendants note that to the extent that Plaintiff may be challenging his sentence, such a challenge should be brought in a habeas case, and not in a civil rights action. See Preiser v. Rodriguez, 411 U.S. 475 (1973); Nelson v. Campbell, 541 U.S. 637 (2004); Hill v. Hopper, 112 F.3d 1088 (11th Cir. 1997).

With regard to Plaintiff's second form of relief, that the method of execution be constitutional, Plaintiff was told that "There is a protocol established for carrying out court ordered executions that has been deemed constitutional that will be followed in the event of your execution". (R1-16-2, Exhibit A). As it was deemed that the method of execution was appropriate, the grievance was denied. Accordingly, Plaintiff's contention that his request not to be executed is non

[4] Plaintiff filed the grievance on April 26, 2007, six days after filing the complaint in this case. (R1-1; R1-16-2, Exhibit A).

grievable is accurate; his contention that the challenge to the method of execution was deemed not to be grievable, is inaccurate.

IV.

Finally, in support of his position that the case should not be dismissed for failure to exhaust, Plaintiff relies on Nooner v. Davis, and Timberlake v. Buss. (R1-16-3; R1-16-4). Nooner v. Davis involves resolution of a request for preliminary injunction on the merits, which is not the issue before the court on Defendants motion to dismiss. In Timberlake v. Buss, the court was considering the issue of exhaustion. However, the court based its decision on the fact that the plaintiff was not, and could not have been aware of the protocols at issue in that case. Unlike Timberlake, the Plaintiff in this case obviously had access to the protocol, as it was attached to the complaint in the case. (R1-1, p. 8, Appendix C).

While Plaintiff's cases do not support his position regarding exhaustion in this case, Defendants submit that Bowling v. Haas, 2007 U.S. Dist. LEXIS 7556 (E.D. Ky. Jan. 31, 2007), supports Defendants' position. In the instant case, just as in Bowling v. Haas, Plaintiff contends that the exhaustion required by federal law should be ignored. The court refused to ignore exhaustion in that case. Similarly, Defendants submit that as Plaintiff is challenging a condition of confinement, and as he has not exhausted his administrative remedies, this action should be dismissed.

IV. CONCLUSION

Based upon the foregoing, Defendants respectfully request that their Motion to Dismiss be granted.

Respectfully submitted this 8th day of June, 2007.

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CERTIFICATION AS TO FONT

Pursuant to N.D. Ga. Local Rule 7.1 D, I hereby certify that this document is submitted in Times New Roman 14 point type as required by N.D. Ga. Local Rule 5.1(b).

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed this **DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS** for Defendants with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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