

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 17-10093

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D.C. Docket No. 5:14-cv-00147-MTT-CHW

DEBORAH HINES,

Plaintiff-Appellant,

versus

DR. NAZAIRE, Pulaski State Prison,  
DR. BILLY NICHOLS, et al.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Middle District of Georgia

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(March 27, 2019)

Before TJOFLAT, JORDAN, and ANDERSON, Circuit Judges.

PER CURIAM:

We have had the benefit of oral argument in this case, in which there was a full exploration of the dispositive issue in this appeal—whether the district court was clearly erroneous in its factual finding that Hines never filed the necessary formal grievance. All parties acknowledge on appeal that the filing of a formal grievance was necessary in order for Hines to exhaust administrative remedies under the Prison Litigation Reform Act. For the reasons fully explored at oral argument, we conclude that the district court’s finding of fact—i.e., that Hines never filed the necessary formal grievance with respect to her claims against either Dr. Nazaire or GCHC and Dr. Nichols—is not clearly erroneous.

For two reasons, we also reject Hines’s argument that administrative remedies were not available to her. First, this argument is raised for the first time on appeal and is therefore waived.<sup>1</sup> Second, Hines’s admissions in the district court make it clear that she was not actually deterred from utilization of the grievance process with which she was very familiar. Cf. Turner v. Burnside, 541 F.3d 1077, 1085 (11th Cir. 2008). Thus, the district court properly concluded that Hines failed to exhaust her administrative remedies.

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<sup>1</sup> Our careful review of the record leaves us confident that enforcing the waiver against this pro se litigant does not result in a miscarriage of justice because, as discussed in the opinion text, the record does not support her legal argument. Ramirez v. Sec’y, U.S. Dep’t of Transp., 686 F.3d 1239, 1249–50 (11th Cir. 2012).

Finally, we address an additional claim by Hines applicable only to the motion to dismiss filed by GCHC and Dr. Nichols. For the reasons discussed below, we reject Hines's argument, also raised for the first time on appeal, that the district court should not have entertained the motion to dismiss filed by GCHC and Dr. Nichols because it was docketed after their answer (albeit on the same day). We do so for three reasons. First, the cases cited by Hines on this point involved a delay of several weeks or more between the filing of an answer and a subsequent motion to dismiss. Second, both the answer and the motion to dismiss filed by GCHC and Dr. Nichols set forth similar affirmative defenses, including a defense asserting that Hines failed to exhaust administrative remedies. Third, courts have entertained affirmative defenses included in a motion to dismiss when the defense was previously included in the answer, sometimes doing so on the basis that the motion to dismiss becomes a preliminary hearing under Rule 12(i) of the Federal Rules of Civil Procedure.

Accordingly, the judgment of the district court is

**AFFIRMED.**<sup>2</sup>

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<sup>2</sup> In light of our disposition of this appeal, we need not address the other matters briefed by the parties.