[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-10840

Non-Argument Calendar

JOHN ROBERT MCDOWELL,

Plaintiff-Appellant,

versus

FNU BOWMAN,
in their individual as well as official capacities,
C. BERENTINE,
Corporal, in their individual as well as official capacities,
C. BOWENS, Major,
in their individual as well as official capacities,
BILLY WOODS,
Marion County Sheriff,

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Defendants-Appellees,

MARION COUNTY JAIL,
in their official capacity,
MARION COUNTY, FLORIDA,
in their official capacity,
DEPARTMENT OF LAW ENFORCEMENT,
State of Florida, in their official capacity,
STATE OF FLORIDA,
in their official capacity,

Defendants.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 5:18-cv-00337-RBD-PRL

Before LUCK, LAGOA, and MARCUS, Circuit Judges.

PER CURIAM:

John McDowell, a Florida state prisoner proceeding *pro se*, appeals following the dismissal of his *pro se* civil rights suit for failure to exhaust his administrative institutional remedies. On appeal, McDowell argues that he is not subject to the Prison

Litigation Reform Act ("PLRA") or its exhaustion requirement, but even if he was, he properly exhausted his administrative remedies before filing suit. After thorough review, we affirm.

The relevant background is this. In July 2018, McDowell, a state pretrial detainee at the time, filed the present *pro se* suit against several defendants, including three officials in Marion County, Florida -- Officer Bowman, Corporal C. Berentine, Major C. Bowens -- in their individual capacities. In an amended complaint, he added, as a defendant, Marion County Sheriff Billy Woods in his individual and official capacities.[1]

Three of those defendants -- Berentine, Bowens, and Woods -- responded by moving to dismiss McDowell's amended complaint under Fed. R. Civ. P 12(b)(1) and 12(b)(6) for failure to exhaust his remedies under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e.[2] McDowell opposed the motion to

[1] McDowell also named, in his initial complaint, the Marion County Jail, the State of Florida Department of Law Enforcement ("FDLE"), and the State of Florida as defendants, and he also raised claims against individual defendants in their official capacities. The district court later dismissed those claims on various grounds. In his amended complaint, he omitted another defendant, Marion County, he originally sued. Because he does not raise these issues on appeal, he has abandoned them. *See United States v. Cannon*, 987 F.3d 924, 939 (11th Cir. 2021) (explaining that an appellant abandons a claim when he fails to plainly and prominently raise it on appeal).

[2] Berentine, Bowens, and Woods, and later Bowman, styled their motions as ones to dismiss a "second amended complaint," but according to the district

dismiss, arguing that he had substantially exhausted available administrative remedies because the grievance procedure "was effectively thwarted by uncooperative jail personnel." He added that he was not in jail at the time he filed the motion, so he was not subject to the PLRA, even though he was in jail when he filed the initial suit. The fourth defendant, Bowman, then moved to dismiss McDowell's amended complaint, adopting the motion to dismiss by Berentine, Bowens, and Woods and making the same exhaustion arguments. The district court granted the motions to dismiss, finding that McDowell was confined at the Marion County Jail when he filed the suit, so he was subject to the PLRA, and he had not exhausted his administrative remedies.

We review the grant of a motion to dismiss *de novo*. *Boyd v. Warden*, 856 F.3d 853, 863–64 (11th Cir. 2017). We also review the district court's interpretation and application of the PLRA's exhaustion requirements *de novo*. *Higginbottom v. Carter*, 223 F.3d 1259, 1260 (11th Cir. 2000). However, we review any findings of fact the district court makes concerning PLRA exhaustion for clear error. *Bryant v. Rich*, 530 F.3d 1368, 1377 (11th Cir. 2008). Under our prior panel precedent rule, a prior panel's holding is binding unless it has been overruled or abrogated by the Supreme Court or us sitting *en banc*. *See United States v. Steele*, 147 F.3d 1316, 1317–

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court docket, this is the only amended complaint and the parties all cite to the same amended complaint.

18 (11th Cir. 1998). Unpublished opinions are not considered binding precedent. 11th Cir. R. 36-2.

First, we are unpersuaded by McDowell's argument that the PLRA does not apply to him. When the PLRA applies, "[n]o 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." 42 U.S.C. § 1997e(a).

Our *en banc* decision in *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000) (*en banc*), has addressed when and whether the PLRA applies to a plaintiff. In *Harris*, inmates brought a civil rights suit against state correctional employees, alleging violations of their constitutional rights during a prison "shakedown." 216 F.3d at 972. All eleven of the inmates were confined in prison when the lawsuit was filed, but by the time the district court dismissed their claims -- fifteen-and-a-half months later -- six of them had been released from confinement. *Id.* On appeal, our *en banc* Court affirmed, holding, in part, that the applicability of the personal injury requirement of the PLRA depended on an inmate's confinement status *at the time the action was filed*. *Id.* at 974 (establishing that "brought" as used in the PLRA refers to the filing or commencement of a lawsuit). In other words, the confinement status of a prisoner after the suit is brought is irrelevant for PLRA purposes. *Id.* at 981, 982. The status that matters is whether a plaintiff was a prisoner confined in

a jail, prison or other correctional facility at the time the federal civil action was brought. *Id.*

We again explored the applicability of the PLRA in a recent unpublished decision. *See Q.F. v. Daniel*, 768 F. App'x 935 (11th Cir. 2019) (unpublished). There, a plaintiff had filed a complaint while imprisoned, then voluntarily withdrew the complaint, and later filed an almost identical complaint after he was released from custody pursuant to a Georgia renewal statute. *Id.* at 938. We noted that the Georgia Court of Appeals had held that the renewed suit constituted a *de novo* action under Georgia law, meaning that a plaintiff who filed a renewed suit like the one at issue was not subject to the PLRA because he was not confined at the time of the renewed suit. *Id.* at 939. We noted that the Georgia Court of Appeals had agreed with that conclusion. *Id.* Regardless, our Court in *Q.F.* ultimately held that we did not need to resolve whether an inmate's confinement status on the filing date of a renewed action controlled, since the *Q.F.* plaintiff had also exhausted his available administrative remedies before filing his original action. *Id.*

Here, McDowell was subject to the PLRA. As we've noted, he was confined at the Marion County Jail in Florida at the time he filed his initial suit. Whether a plaintiff is confined or not is determined *at the time that the plaintiff files the suit*. *Harris*, 216 F.3d at 981–82. Because he was confined when he filed his suit, the PLRA applied to him.

As for McDowell's argument that *Harris* is no longer valid caselaw, we disagree. *Harris* constitutes binding prior precedent,

decided by our Court sitting *en banc*, and neither the Supreme Court nor our *en banc* Court has overturned or abrogated it, so we are bound to apply it. *Steele*, 147 F.3d at 1317–18. *Q.F.*, the case on which McDowell relies, is an unpublished case and not binding precedent. 11th Cir. R. 36-2. Further, it is distinguishable -- the plaintiff in *Q.F.*, unlike McDowell, filed a totally new, though nearly identical, lawsuit under a Georgia renewal statute that the state court had previously ruled constituted a new suit for PLRA purposes. *Q.F.*, 768 F. App'x at 938–39. McDowell, by contrast, filed an amended complaint, in the same case, with no apparent state statutory regime causing his amended complaint to be considered a new suit for PLRA purposes.

Therefore, the district court properly concluded that the PLRA applied to McDowell's case, and, as a result, he was required to satisfy its exhaustion requirement.

Moreover, we are unconvinced by McDowell's argument that he satisfied the PLRA's exhaustion requirement. The exhaustion requirement in the PLRA requires a prisoner to exhaust all prescribed remedies available to him before filing a lawsuit to seek judicial redress. *Woodford v. Ngo*, 548 U.S. 81, 93–94 (2006); *see Jones v. Bock*, 549 U.S. 199, 211 (2007). Exhaustion is mandatory, and courts cannot excuse a failure to exhaust available administrative remedies because "special circumstances" exist or because the available procedures are "futile." *Ross v. Blake*, 578 U.S. 632, 638–39 (2016); *see Higginbottom*, 223 F.3d at 1261.

The defense that an inmate has failed to exhaust his administrative remedies, which is separate from the merits of a suit, is generally raised in a motion to dismiss. *Bryant*, 530 F.3d at 1374–75. Nevertheless, a district court can consider facts outside of the pleadings and resolve factual disputes, so long as the factual disputes do not decide the merits of a litigant's underlying claims, and parties have had sufficient opportunity to develop a record. *Id.* at 1376. Because the failure to exhaust is an affirmative defense, the defendant bears the burden to prove that the plaintiff failed to exhaust his administrative remedies. *Turner v. Burnside*, 541 F.3d 1077, 1082 (11th Cir. 2008).

Deciding whether a plaintiff failed to exhaust his administrative remedies is a two-step process. *Id.* First, the district court looks to the factual allegations in the defendant's motion to dismiss and those in the plaintiff's response. *Id.* If they conflict, the district court takes the plaintiff's version of the facts as true. *Id.* If, in that light, the defendant is entitled to have the complaint dismissed for failure to exhaust administrative remedies, it must be dismissed. *Id.* However, if a complaint is not subject to dismissal at the first step, then the district court proceeds to the second step, where it makes specific findings in order to resolve the disputed factual issues concerning exhaustion. *Id.* Once the district court makes findings on the disputed issues of fact, it decides whether, based on those findings, the prisoner has exhausted his remedies. *Id.* at 1083.

An inmate must exhaust his administrative remedies, but he need not exhaust unavailable ones. *Ross*, 578 U.S. at 642. The

modifier "available" means that an administrative remedy must provide the possibility of some relief. *Id.* at 643. There are three kinds of circumstances that make an administrative remedy unavailable. *Id.* First, an administrative remedy is unavailable when the administrative procedure operates as a simple "dead end," with officers unable or consistently unwilling to provide any relief to aggrieved inmates. *Id.* For example, if a handbook required inmates to submit grievances to a particular office and the office disclaims the capacity to consider petitions or if officials have authority but decline to exercise it, then it is unavailable. *Id.* Second, a remedy is unavailable when an administrative scheme is so opaque that it is incapable of use. *Id.* The mechanism may exist to provide relief, but no ordinary prisoner can discern or navigate it. *Id.* at 643–44. Third, a remedy is unavailable when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, and intimidation. *Id.* at 644.

Here, the district court did not err when it found that McDowell had not exhausted his administrative remedies. For starters, because the claims in McDowell's amended complaint contradicted the defendants' version of events, the district court properly went to the second step of the analysis. *Turner*, 541 F.3d at 1082. For that step, McDowell only offered conclusory statements broadly asserting that prison officials did not allow him to engage in the formal process, that he had filed a formal grievance, and that prison officials thwarted him and gave him misinformation. For their part, the defendants filed various documents --

affidavits, directives, and the inmate handbook, among other things -- to detail the procedural requirements for filing a formal grievance in prison. Relevant here, the first few steps in the process are: (1) the inmate completes an "Inmate Request Form," which a "Sergeant" must review; (2) if the Sergeant cannot resolve the grievance, he or she must provide the inmate with access to an electronic grievance system; and (3) the Sergeant must complete documentation within that electronic system that will enable the grievance to be tracked. The parties agree that McDowell did not complete steps (2) or (3) of the process; instead, McDowell argues that those steps were "unavailable" because the Sergeant never reviewed an Inmate Request Form that McDowell submitted, and never provided him with access to the electronic grievance system.

But while McDowell claims that he never received a response to the Inmate Request Form underlying his present lawsuit, he did not provide the district court with evidence that he submitted that form. The district court noted that, pursuant to the prison's procedure, McDowell should have retained a copy of the Inmate Request Form, yet McDowell apparently did not do so. On appeal, McDowell "concede[s] that he was not in possession of the form at the time the defendants [sic] motion to dismiss was filed, calling into question its existence." McDowell says that he attempted to obtain the form from the prison and did not receive it in time to respond to the motion to dismiss, but, again, there is no indication of this in the district court. As the record reflects, McDowell did not seek an extension to file his response to the

motion to dismiss due to the prison's alleged delay, nor did he ask to supplement the record once he received a copy of that form.

On this record, we cannot say that the district court clearly erred in finding that McDowell had not filed a formal grievance and had offered no support for his bare claim that his administrative remedies were unavailable. This is especially true since the three other Inmate Request Forms the defendants provided in conjunction with the motion to dismiss -- which are all accompanied by responses from prison officials -- cast doubt on McDowell's allegations that he (1) actually filed the Inmate Request Form at issue and (2) never received a response to it.[3]

Accordingly, the district court did not err in dismissing McDowell's amended complaint on the ground that he did not

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[3] While McDowell appears to have attached a copy of an Inmate Request Form on appeal, we are limited to "consider[ing] only evidence that was part of the record before the district court." *Selman v. Cobb Cty. Sch. Dist.*, 449 F.3d 1320, 1332 (11th Cir. 2006); *see also* Fed. R. App. P. 10(a) (explaining that the record on appeal consists of the filings and transcripts from the district court and a certified copy of the docket entries). As we've noted, McDowell never attempted to put this document in the record in the district court. Nor did he move to reopen his case in the district court to supplement the record with it, or even move our Court to supplement the record with it on appeal. As for his construed motion to amend his appellant brief with a supplemental exhibit -- an exhibit that purportedly includes Inmate Request Forms filed by *another* inmate -- that motion is DENIED, since these items were not before the district court and since these items do not alter our analysis in the case.

exhaust his administrative remedies, and we affirm. *See Turner*, 541 F.3d at 1082.

AFFIRMED.