

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Durwin Abbott v. Percy Babin, Tyrone Kilbourne, and Steve Radar

587 F. App'x 116 (5th Cir. 2014) (per curiam) · No. No. 14-30141 · Decided September 29, 2014

SUMMARY

The Fifth Circuit affirmed the dismissal without prejudice of Durwin Abbott's 42 U.S.C. § 1983 excessive-force claim because he failed to properly exhaust available administrative remedies under the Prison Litigation Reform Act. Abbott's grievance was rejected for presenting multiple incidents, and his resubmission did not cure that procedural defect. The court explained that he could pursue exhaustion again by filing a procedurally proper grievance concerning the November 11, 2011 incident.

CASE DETAILS

COURT	United States Court of Appeals for the Fifth Circuit
WRITING FOR THE COURT	Reavley; Dennis; Southwick
JURISDICTION	Federal
DECIDED	September 29, 2014
DOCKET	No. 14-30141
DISPOSITION	affirmed
PROCEDURAL POSTURE	Prisoner brought a 42 U.S.C. § 1983 excessive-force and retaliation action. The district court granted defendants summary judgment and dismissed the action without prejudice for failure to exhaust administrative remedies under the Prison Litigation Reform Act. Abbott appealed.
STANDARD OF REVIEW	De novo review of both the grant of summary judgment and dismissal of a prisoner's § 1983 action for failure to exhaust administrative remedies.
PRECEDENTIAL VALUE	unpublished_nonprecedential
PARTIES	Durwin Abbott v. Captain Percy Babin, Master Sergeant Tyrone Kilbourne, Warden Steve Radar

TOPICS

[section 1983](#)[prisoners rights](#)[summary judgment](#)[standard of review](#)[appellate procedure](#)

PRACTICE AREAS

civil rights

prisoner litigation

appellate procedure

civil procedure

QUESTIONS PRESENTED

1. Whether Abbott properly exhausted available administrative remedies before filing his § 1983 action.
2. Whether the district court properly granted summary judgment and dismissed the action without prejudice for failure to exhaust.
3. Whether use of a second-step administrative-response form excused Abbott's failure to submit a procedurally proper grievance.

HOLDINGS

1. Abbott failed to properly exhaust his administrative remedies because his grievance was rejected at screening for presenting multiple incidents, and he resubmitted the same procedurally defective complaint without curing the defect.
2. The Secretary's use of a second-step response form did not excuse Abbott's failure to submit a procedurally proper administrative grievance.
3. The district court properly granted summary judgment to defendants and dismissed Abbott's § 1983 action without prejudice.

KEY QUOTATIONS

“A genuine dispute of material fact exists only if “a reasonable jury could return a verdict for the nonmoving party.”” (at 3)

“A properly exhausted claim is one which has “complete[d] the administrative review process in accordance with the applicable procedural rules.”” (at 4)

FACTUAL BACKGROUND

Abbott alleged that on November 11, 2011, prison officials removed him from his cell, took him to a separate unit, and used excessive force, including punching him and placing him in a chokehold while he was or had been handcuffed. He claimed the incident caused shoulder and wrist injuries and was retaliation for prior administrative complaints. His administrative grievance combined allegations concerning the November 11 incident with references to other incidents and complaints, leading prison officials to reject it as a multiple-complaint grievance.

PROCEDURAL HISTORY

Abbott filed an administrative grievance concerning an alleged November 11, 2011 prison beating, but the Louisiana Department of Public Safety and Corrections rejected it because it presented multiple issues. Abbott resubmitted the same complaint and later received a second-step response stating that the grievance had properly been rejected at screening. The district court held that Abbott failed to cure the procedural defect, granted summary judgment to defendants, and dismissed the action without prejudice. The Fifth Circuit affirmed.

DISPOSITION

affirmed

CASES CITED

- Ballard v. Devon Energy Prod. Co., 678 F.3d 360, 365 (5th Cir. 2012)
- Richardson v. Spurlock, 260 F.3d 495, 499 (5th Cir. 2001)
- Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)
- Porter v. Nussle, 534 U.S. 516, 524 (2002)
- Woodford v. Ngo, 548 U.S. 81, 88, 93 (2006)
- Jones v. Bock, 549 U.S. 199, 216, 218 (2007)
- Wright v. Hollingsworth, 260 F.3d 357, 359 (5th Cir. 2001)