IN THE COURT OF APPEALS OF IOWA

No. 0-778 / 09-0931
Filed January 20, 2011

REBECCA TRACY,
Plaintiff-Appellant,

vs.

BENJAMIN COOVER, Individually and in his Official Capacity as a Correctional Officer for the Iowa Correctional Institution for Women, NANCY COOK, Individually and in her Official Capacity as a Correctional Counselor for the Iowa Correctional Institution for Women, DIANN WILDER TOMLINSON, Individually, and in her Official Capacity as a Warden of the Iowa Correctional Institution for Women,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Rebecca Tracy appeals the dismissal of her U.S.C. § 1983 action against two prison employees and the warden. **AFFIRMED.**

Robert Montgomery and Brandon Brown of Parrish Kruidenier Dunn Boles Parrish Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Jeffrey Thompson, Mark Hunacek, and H. Loraine Wallace, Assistant Attorneys General, for appellees.

Heard by Mansfield, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

Rebecca Tracy appeals the dismissal of her 42 U.S.C. § 1983 action against two prison employees and the warden. Because this action cannot be brought "until such administrative remedies as are available are exhausted," we affirm the district court's dismissal. 42 U.S.C. § 1997e(a).

I. Background Facts and Proceedings.

Pursuant to the federal Prison Rape Elimination Act (PREA), 42 U.S.C. § 15601 et seq.,[1] the Iowa Correctional Institution for Women (ICIW) provides all

[1] 42 U.S.C. § 15602 sets forth the purposes of PREA:

> (1) establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States;
> (2) make the prevention of prison rape a top priority in each prison system;
> (3) develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape;
> (4) increase the available data and information on the incidence of prison rape, consequently improving the management and administration of correctional facilities;
> (5) standardize the definitions used for collecting data on the incidence of prison rape;
> (6) increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape;
> (7) protect the Eighth Amendment rights of Federal, State, and local prisoners;
> (8) increase the efficiency and effectiveness of Federal expenditures through grant programs such as those dealing with health care; mental health care; disease prevention; crime prevention, investigation, and prosecution; prison construction, maintenance, and operation; race relations; poverty; unemployment; and homelessness; and
> (9) reduce the costs that prison rape imposes on interstate commerce.

See generally David K. Ries, *Duty-to-Protect Claims by Inmates After the Prison Rape Elimination Act*, 13 J.L. & Pol'y 915, 990 (2005). Ries writes:

> Under the Supreme Court's decision in *Farmer v. Brennan*, [511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994)] inmates who are raped in prison by fellow inmates may have their Eighth Amendment constitutional rights vindicated when they can show that prison officials acted with "deliberate indifference" to the threat those inmates faced. Obstacles in reporting and recording injuries, the deference typically afforded to prisons supervisors, the defense of immunity that is available to corrections officers, and the limited remedies available to prisoners have all hindered inmates in holding prison officials

offenders (prisoners or inmates) with a three-page document titled "Prevention of Sexual Misconduct—An Overview for Offenders" (Overview). The document contains a section called "Reporting Sexual Misconduct,"

> Sexual misconduct by staff is prohibited, but it must be reported before action can be taken. Do not rely on anyone else to report misconduct—when it is experienced or seen, report it immediately.
>
> To make sure that sexual misconduct is reported, the Iowa Department of Corrections has several ways for offenders to report confidentially. Offenders may use the reporting method with which they are most comfortable:
>
> - Tell a staff member you are comfortable discussing the matter with. As a part of their job, staff is required to report any allegation, ensure offender safety and maintain confidentiality.
> - Send a "kite" or letter to the institution Warden/Superintendent.
> - Use the institution grievance process.
> - Send a letter to [State Ombudsman's Office]
> - Call . . . from an offender telephone and make a verbal report.

The Overview further provides that the Iowa Department of Corrections (IDOC) will investigate all allegations of sexual assault.

In August 2007, Rebecca Tracy informed a counselor at the prison, Nancy Cook, about alleged sexual misconduct by a guard, Benjamin Coover, but there is a dispute as to exactly what was reported. Tracy claims she told Cook that

---

> responsible for sexual assaults. In response to the pervasiveness of inmate-on-inmate sexual assault, Congress passed the Prison Rape Elimination Act of 2003 *to collect data on the incidence of sexual abuse in correctional facilities and to create the National Prison Rape Elimination Commission, which will recommend national standards for the prevention of prison rape*. In addition to relying on the implementation of this Act to relieve the threat of rape in prisons, inmates should be able to use the data and recommendations that are a result of the new federal law to bring stronger claims against prison officials who fail in their duty to protect prisoners against sexual assault by other prisoners.

(Emphasis added.)

Coover exposed himself to her on one occasion and that he sexually assaulted her on another. Cook claims Tracy only told her Coover exposed himself. Although Cook knew she was required to report the allegations to authorities at the ICIW, she failed to follow protocol because she had just returned from leave after the death of her husband, "was going through a lot of issues," and simply forgot.

However, months after the conversation between Tracy and Cook, a PREA investigation occurred, though how it was initiated is unclear from the record. In February 2008, Tracy was interviewed by Andrea Wright, a department of corrections investigator. Wright testified that Tracy told her Coover exposed himself to her in August 2007, but Tracy did not report she had been raped. Tracy received no information about the investigation or the final determination, but there is no evidence she ever sought any specific relief until she filed the instant suit.

On May 16, 2008, Tracy filed this 42 U.S.C. § 1983 action against Coover, Cook, and the ICIW warden, Diann Tomlinson. Tracy alleged Coover first sexually harassed and later sexually assaulted her in early August 2007. On June 17, 2008, a two-day hearing was held on Tracy's request for preliminary injunction in which she sought to ensure Coover had no supervisory authority over her.

On July 22, 2008, after written correspondence from Tracy's counsel, the defendants filed an answer, which included an affirmative defense of failure to exhaust administrative remedies.

On July 27, 2008, the district court denied preliminary injunctive relief upon its findings that Tracy lacked credibility, of little likelihood of success on the merits, and the strong public interest mitigating against interfering with the operations of the correctional institution.

On January 6, 2009, the defendants moved for summary judgment on grounds Tracy lacked credibility. The district court denied the motion on February 9, concluding whether Tracy was sexually assaulted by Coover remained a material issue of fact in dispute. The court stated it would "not invade what legally should be the jury's province in this case."

On February 27, 2009, the defendants filed a "motion in limine and motion to dismiss," asserting plaintiff's failure to exhaust administrative remedies precluded trial. Attached to the motion was an affidavit of Diana Billhorn; a document of "Offender Grievance Procedures"; affidavits of investigators David Siler, Randy Hansenn, and Andrea Wright; and selected transcript pages from the preliminary injunction hearing. Billhorn, an Iowa Department of Corrections (IDOC) secretary, averred there was no record Tracy had filed a grievance appeal. Billhorn further averred:

> The grievance system is available for inmates to grieve a problem with their conditions of confinement unless there is a separate appeal procedure, e.g. discipline, classification, etc. There is no separate appeal procedure for complaints of a sexual nature, retaliation or failure to protect. Generally, an inmate must seek informal resolution as to her grievance issue prior to filing a grievance. Then, any grievance filed will be investigated and answered by the grievance officer or any other applicable prison official. An inmate may then appeal that response to the Warden, or his designee, at the institution where the inmate is incarcerated. If dissatisfied with the grievance appeal response, the inmate may then take a second appeal to the Central Office of the IDOC. A

> response by the Central Office of the IDOC represents an exhaustion of the administrative process.

Tracy resisted the motion, arguing the motion was an untimely summary judgment motion; ICIW provides a protocol for initiating an investigation into allegation of sexual abuse, which Tracy followed; and the defendants' conduct of failing to follow their own processes, in essence, thwarted Tracy's efforts and relieved her having to pursue additional administrative procedures.

Trial was postponed, and on March 13 and 23, 2009, a hearing was held on the defendants' motion to dismiss. The defendants informed the court they had no additional evidence to present on their motion, relying upon the affidavits and exhibits attached to the motion.

Tracy offered the testimony of Cook, who acknowledged that all inmates received a copy of the Overview at orientation; that Tracy told her Coover had exposed himself to her; and that Cook failed to report Tracy's disclosure to anyone. Cook also testified that she told Tracy she had to report this alleged incident, although Tracy asked Cook *not* to report it.

Warden Tomlinson was also called to testify by Tracy. Tomlinson also acknowledged that all inmates received a copy of the Overview at orientation. She testified that if an inmate has been sexually assaulted by a staff person, the inmate is to report the assault and has an option to give notice in one of five ways. No matter what notification is given, the report will be investigated, and the results of the investigation (unfounded, unsubstantiated, or founded) will be passed on to the warden. Tomlinson testified, however, no matter what type of notice is given, the inmate will not be informed of the result "because it's

confidential to the employee." When asked if an inmate should file a grievance "in addition to when the policies are followed as provided to inmates through the Overview," Tomilinson testified:

> A grievance should be filed if she's dissatisfied with something that has occurred in the institution, if she's dissatisfied with her condition of confinement, if she's dissatisfied with an employee member. A grievance should be filed for things that there is no other appeal process.

Tomlinson also testified:

> The grievance procedure is a process that we also tell the offenders about in orientation, that if they have a complaint or if they have a complaint about their condition of confinement or an employee or something that's not covered by a different process that has an appeal mechanism, they then can file a grievance.

Tomlinson explained the grievance procedure as follows: An inmate is required to first try to resolve their complaint informally. If the inmate is not satisfied, she can file a formal written grievance, which is sent to a grievance officer. The grievance officer will give the inmate notice the grievance has been received, an investigation will follow, and a decision given to the inmate. Once the grievance request for specific remedy is either granted or denied, then an appeal can be taken to the warden, who could either grant or deny the inmate's remedy request. If still unsatisfied, the inmate can appeal to the central office. Once the central office renders its decision, the administrative remedies are complete.

The district court dismissed the action without prejudice. The court noted "an important distinction" between the grievance policy and the Overview. The district court explained:

> The grievance policy at issue provides a mechanism through which a prison inmate may attempt to resolve a claim arising from institutional matters. It provides a formal procedure through which an inmate may grieve a given complaint, request a specific remedy, receive a response and recommendation of action form the institution regarding a complaint, and appeal a decision made upon the complaint. [The Overview], on the other hand does not provide a procedure for grievances. It is a document providing an overview of the institution's policy pertaining to the prevention of sexual misconduct. The document is provided to inmate pursuant to the Iowa Department of Correction's policy for compliance with the Federal Prison Rape Elimination Act, and informs an inmate as to how they may go about reporting an act of sexual assault or misconduct. The reporting of sexual misconduct is a duty imposed upon all inmates under the PREA policy. . . . As such, an inmate is required by institutional rules to report acts of sexual assault or misconduct regardless of their desire, or lack thereof, to actually grieve the matter and seek specific resolution.

The district court noted also there was no dispute that the grievance process was made known to and was available to Tracy at all relevant times in the dispute.[2] It characterized Tracy's report of sexual misconduct to Cook as an attempt to resolve a grievance informally, which even if rendered futile by Cook's failure to follow through with a report, did not relieve Tracy of the requirement that she file a formal grievance complaint.

Tracy appeals, arguing the district court erred in (1) concluding she failed to exhaust her administrative remedies when she utilized the prison's alternative process for reporting a sexual assault; (2) concluding the prison's internal procedures for reporting sexual assault were not an internal remedy, procedure, or process but were merely a reporting mechanism; (3) shifting the burden of proof to the plaintiff by finding she was presumably required to file a written

[2] While Tracy objected to this finding in a motion for reconsideration, the district court did not modify this finding, noting "the availability of the grievance process was never disputed by Plaintiff prior to the filing of her" post-hearing motion.

grievance if she was dissatisfied with the results of any informal resolution; and (4) allowing the defendants to file an untimely motion to dismiss shortly before trial when the defendants had effectively waived any reliance upon the affirmative defense of exhaustion of administrative remedies.

II. Scope and Standard of Review.

Though called a motion to dismiss, the nature of the defendants' motion is unique. *See Osborn v. United States*, 918 F.2d 724, 729–30 (8th Cir. 1990) (noting the "unique nature" of a factual challenge to the court's power to hear a case). In *Bryant v. Rich*, 530 F.3d 1368, 1374–75 (11th Cir. 2008), the Eleventh Circuit court wrote:

> Even though a failure-to-exhaust defense is non-jurisdictional, it is like a defense for lack of jurisdiction in one important sense: Exhaustion of administrative remedies is a "matter[] in abatement, and ordinarily [does] not deal with the merits." That exhaustion is nothing more than a precondition to an adjudication on the merits is confirmed by the language of the PLRA itself . . . .
>
> Because exhaustion of administrative remedies is a matter in abatement and not generally an adjudication on the merits, an exhaustion defense . . . is not ordinarily the proper subject for a summary judgment; instead, it "should be raised in a motion to dismiss, or be treated as such if raised in a motion for summary judgment."

(Internal citations and footnotes omitted.) The motion may be supported with affidavits or other documents, and the district court can hold a hearing at which witnesses may testify. *See Osborn*, 918 F.2d at 730 (finding that where statute of limitations was a jurisdictional prerequisite to suit under federal tort claims act, the court was required to determine whether it had power to hear the case); *see also Wyatt v. Terhune*, 315 F.3d 1108, 1119–20 (9th Cir. 2003) (holding that judge must decide exhaustion even if it must make findings of fact); *cf. Pavey v.*

Conley, 544 F.3d 739, 741 (7th Cir. 2008) (holding there is no jury trial right on debatable factual issues relating to the defense of failure to exhaust administrative remedies in § 1983 suit).

> Where exhaustion—like jurisdiction, venue, and service of process—is treated as a matter in abatement and not an adjudication on the merits, it is proper for a judge to consider facts outside of the pleadings and to resolve factual disputes so long as the factual disputes do not decide the merits and the parties have sufficient opportunity to develop a record.

Bryant, 530 F.3d at 1376 (internal footnotes omitted). "[O]nce the defendants filed their motion to dismiss, the court was obligated to proceed to determine whether in fact [the plaintiff] had exhausted his administrative remedies." *Chelette v. Harris,* 229 F.3d 684, 688 (8th Cir. 2000).

To the extent the district court had to make findings of fact to decide the issue, we believe those findings are binding upon us if supported by substantial evidence. *See* Iowa R. App. P. 6.904(3)(*a*).

III. Analysis—Exhaustion Requirement.

A. Exhaustion requirement. Section 1997e(a) of the Prison Litigation and Reform Act (PLRA) requires a prisoner must first exhaust her administrative remedies before she can bring a 42 U.S.C. § 1983 action related to prison conditions. *See* 42 U.S.C. § 1997e(a).[3] "[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general

[3] No 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).

circumstances or particular episodes,"[4] *Porter v. Nussle,* 534 U.S. 516, 524, 532, 122 S. Ct. 983, 988, 992, 152 L. Ed. 2d 12, 21, 26 (2002), and regardless of the nature of the claim or the relief the prisoner is seeking. *See Booth v. Churner,* 532 U.S. 731, 741, 121 S. Ct. 1819, 1825, 149 L. Ed. 2d 958, 966 (2001).[5] Exhaustion under the PLRA requires "proper exhaustion," which "'means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits).'" *Woodford v. Ngo*, 548 U.S. 81, 90, 126 S. Ct. 2378, 2385, 165 L. Ed. 2d 368, 378 (2006) (citation omitted). "Available grievance procedures must be exhausted even if the relief the inmate seeks under § 1983 was not available through those procedures." *King v. Iowa Dep't of Corr.*, 598 F.3d 1051, 1052 (8th Cir. 2010), *cert. denied,* 10-5755, 2010 WL 3957405 (U.S. Oct. 12, 2010).

The *Porter* court noted that the PLRA's mandatory exhaustion requirement was intended to "reduce the quantity and improve the quality of prisoner suits." 534 U.S. at 524, 122 S. Ct. at 988, 152 L. Ed. 2d at 21. The Eighth Circuit has similarly explained the purpose of the exhaustion requirement:

---

[4] We are constrained by the statute as written. However, we are mindful of the effect of our ruling, and we acknowledge at least one commentator concludes that in cases of sexual abuse the PLRA exhaustion requirement should be amended. *See* Katherine Robb, *What We Don't Know Might Hurt Us: Subjective Knowledge and the Eighth Amendment's Deliberate Indifference Standard for Sexual Abuse in Prisons*, 65 N.Y.U. Ann. Surv. Am. L. 705, 752–53 (2010) ("To ensure prison rape victims have a clear path to resolve their abuse, the PLRA should be amended to either eliminate the exhaustion requirement for prison sexual abuse victims or set a separate, more direct exhaustion path that takes into account victims' needs.").

[5] As noted in footnote six of *Booth*, exhaustion under the PLRA is at odds with traditional doctrines of administrative exhaustion under which a litigant need not apply to an agency that has no power to decree the relief requested or need not exhaust where doing so would be futile. 532 U.S. at 741 n.6, 121 S. Ct. at 1825 n.6, 149 L. Ed. 2d at 966 n.6.

> Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case. In some instances, corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation. In other instances, the internal review might filter out some frivolous claims. And for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy.

Johnson v. Jones, 340 F.3d 624, 626–27 (8th Cir. 2003); *see also King v. Iowa Dep't of Corrections*, 598 F.3d 1051, 1052 (8th Cir. 2010).

However, under the PLRA, failure to exhaust the available administrative remedies is an affirmative defense, with the burden of proof falling on defendant, and not a matter of subject matter jurisdiction. *Lenz v. Wade,* 490 F.3d 991, 993 n.2 (8th Cir. 2007) (citing *Jones v. Bock,* 549 U.S. 199, 212–17, 127 S. Ct. 910, 919–22, 166 L. Ed. 2d 798, 810–14 (2007)).

If it is established that exhaustion of administrative remedies did not occur prior to filing of the suit, dismissal is mandatory. *Jones,* 549 U.S. at 211, 127 S. Ct. at 918–19, 166 L. Ed. 2d at 810 ("There is no question that exhaustion [of administrative remedies] is mandatory under the PLRA and that unexhausted claims cannot be brought in court"); *Woodford,* 548 U.S. at 85, 126 S. Ct. at 2382, 165 L. Ed. 2d at 375 ("Exhaustion is no longer left to the discretion of the district court, but is mandatory."); *Johnson,* 340 F.3d at 627–28 (finding that if a prisoner does not exhaust his administrative remedies *before* filing a complaint in federal court, "dismissal is mandatory," and even if a prisoner subsequently satisfies the exhaustion requirement while his action is still pending, the case still must be dismissed).

In *Jones*, 549 U.S. at 217–18, 127 S. Ct. at 922–23, 166 L. Ed. 2d at 815, the Supreme Court stated:

> [W]e [have] held that to properly exhaust administrative remedies prisoners must "complete the administrative review process in accordance with the applicable procedural rules"—rules that are defined not by the PLRA, but by the prison grievance process itself. Compliance with prison grievance procedures, therefore, is all that is required by the PLRA to "properly exhaust." The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion.

The record before us establishes the formal grievance procedure adopted by the IDOC, which prescribes a set of administrative remedies that are available to Iowa state prison inmates (denominated as "offenders"). *See King*, 598 F.3d at 1052 (describing four-step grievance procedure adopted by the IDOC). Upon arrival, "all offenders are informed about how to access health services and the grievance system. This information is communicated orally and in writing" and is "posted and accessible to offenders." Pursuant to the policy, an offender "must attempt to resolve the grievance informally prior to filing written grievance." If dissatisfied with the informal attempt, then the inmate must use an "Offender Grievance Complaint" form to describe the problem, and specify the action requested. On this complaint form, the inmate must note whether and what "informal resolution procedures [have] been exhausted and what steps" have been taken. Receipt of the formal grievance is acknowledged by a grievance officer within seven days. The grievance officer investigates the complaint and prepares a response, which explains the inmate's appeal rights, notes a "Grievant Appeal form must be used," and explains where such forms may be

obtained. Appeal is to the warden in the first instance. The warden is to respond in writing within fifteen days of receipt of the appeal. The inmate may appeal the warden's response, again using the appeal form, and sending it to the grievance appeal coordinator. The coordinator "ensure[s] response to appeals [on Form F-5] from the appropriate source within 30 days of receipt." The grievance procedure provides, "Expiration of a time limit at any step entitles the grievant to move to the next step unless a written extension has been given." As noted in Billhorn's affidavit, "A response by the Central Office of the IDOC represents an exhaustion of the administrative process."

In summary, the administrative remedies provided by IDOC are fully exhausted for purposes of § 1997e(a) only when an inmate completes all of the prescribed steps of the IDOC grievance procedure, and receives a final decision from the central office. It is undisputed Tracy did not utilize the institution's formal grievance procedure with respect to any of her complaints in the petition.

B. Alternative process. Tracy argues she exercised an "alternative available process." But Tracy's contention that the Overview is an alternative method for inmates to seek a remedy for sexual assault is misplaced. We acknowledge an inmate's duty to report sexual misconduct pursuant to the Overview. We further note that the report, as stated in the Overview, will lead to an investigation and may lead to corrective action.[6] However, a report is not tantamount to initiating a grievance. The report form does not provide for a

[6] Under the heading "Possible Outcomes of An Investigation," the Overview provides, "a number of corrective actions may occur if it is determined to be in the best interest of the offender, the staff and the institution," including that staff could be placed on restricted duty, barred from entering the institution, or suspended, or the inmate could be relocated for their safety.

request for action or remedy; there are no provisions for notice to the inmate of outcomes of the investigation; and nowhere is there mention of an appeal. All of those characteristics are included in the grievance procedure. Further, the Overview is not an "alternative" administrative process for inmate grievances and we believe the district court accurately described the important distinction between the two.

> The grievance policy at issue provides a mechanism through which a prison inmate may attempt to resolve a claim arising from institutional matters. It provides a formal procedure through which an inmate may grieve a given complaint, request a specific remedy, receive a response and recommendation of action from the institution regarding a complaint, and appeal a decision made upon the complaint. [The Overview], on the other hand does not provide a procedure for grievances. It is a document providing an overview of the institution's policy pertaining to the prevention of sexual misconduct. . . . As such, an inmate is required by institutional rules to report acts of sexual assault or misconduct regardless of their desire, or lack thereof, to actually grieve the matter and seek specific resolution.[7]

C. Exhaustion excused. The Eighth Circuit has excused inmates from complying with an institution's grievance proceedings in two circumstances: when prison officials have prevented prisoners from utilizing the procedures or when officials themselves have failed to comply with the grievance procedures.[8]

---

[7] Our dissenting colleague notes that the Overview lists several ways in which the reporting obligation can be fulfilled, one of which is by using "the institution grievance process." In our view, this highlights the distinction between the two procedures. A grievance is one way of making a report, but a report is not necessarily a grievance.

[8] *See Gibson v. Weber,* 431 F.3d 339, 341 (8th Cir. 2005); *Lyon v. Vande Krol,* 305 F.3d 806, 808 (8th Cir. 2002) ("[I]nmates cannot be held to the exhaustion requirement of the PLRA when prison officials have prevented them from exhausting their administrative remedies."); *Miller v. Norris,* 247 F.3d 736, 740 (8th Cir. 2001) (noting "a remedy that prison officials prevent a prisoner from 'utiliz[ing]' is not an 'available' remedy under § 1997e(a)"). *But see Lewis v. Mollette*, 2010 WL 4780850, ___ F. Supp. 2d ___, ___ (N.D. N.Y Nov. 24, 2010) (rejecting defendants' failure-to-exhaust defense where fifteen-year-old incarcerated in mental health unit of detention

Tracy contends this case is like *Foulk v. Charrier*, 262 F.3d 687, 698 (8th Cir. 2001), where an inmate was allowed to proceed with a § 1983 action because the prison officials failed to follow their own administrative process. In *Foulk* the inmate had submitted an "Informal Resolution Request" (IRR) with respect to his excessive force claim, to which the institution did not respond and which in turn—according to the record presented there—precluded him from filing a grievance. *Foulk*, 262 F.3d at 698. Tracy argues that because Cook failed to file a PREA report following Tracy's complaint about Coover's conduct, she was relieved of seeking further administrative action. But as we have already concluded, the Overview is not a grievance procedure and, consequently, Cook's failure to file a report, although contrary to the reporting requirements of PREA, did not prevent Tracy from filing a grievance. Even if Tracy was attempting to informally grieve her complaint rather than simply report it, her report to Cook satisfied the "attempt to informally resolve her grievance" requirement, permitting her to file a formal grievance.

Nor does Tracy contend prison officials prevented her from filing a grievance. *See Gibson*, 431 F.3d at 341 (upholding determination of failure to exhaust where plaintiffs presented no evidence that any prison official thwarted an attempt to initiate the procedures or that any official made it impossible for them to file grievances); *Sergent v. Norris,* 330 F.3d 1084, 1085–86 (8th Cir. 2003) (finding no evidence in record that inmate was prevented from effectively

---

facility followed one of informal options available in Resident Manual to express concerns regarding treatment at facility).

utilizing grievance procedures). We think this case is more like *Chelette,* 229 F.3d at 688, wherein the court noted:

> If it is 'likely' that Chelette could have filed a grievance over the alleged lack of medical care, it can hardly be said that he exhausted such administrative remedies as were available to him. Section 1997e(a) says nothing about a prisoner's subjective beliefs, logical or otherwise, about the administrative remedies that might be available to him. The statute's requirements are clear: If administrative remedies are available, the prisoner must exhaust them.

Our dissenting colleague maintains the prison rendered its grievance procedure "effectively unavailable" by distributing an overview of its PREA reporting process that could have confused and misled an inmate into believing that making an oral report to a counselor would be a valid substitute for a formal grievance. We disagree for this argument for several reasons. First, this argument was not made below. Had Tracy argued below that she did not follow the formal grievance procedure because she was confused by the Overview, a record could have been developed specifically on this issue. Second, from the record before us, we are not persuaded that an inmate would be confused. As we note above, according to the Overview itself, reporting is an obligation on the prisoner and is not a way for a prisoner to request relief. To seek relief, by contrast, the inmate must follow the straightforward step of filing a one-page grievance form, which according to the record was readily available. Additionally, this is not a case like *Barkey v. Reinke*, 2010 WL 3893897 (D. Idaho Sept. 30, 2010), cited by our colleague. In that case, the court found the prison's PREA reporting mechanism actually was "an alternative administrative remedy." *Barkey*, 2010 WL 3893897 at *6. The inmate there met with an investigator the

day of her verbal report, was made aware of the outcome of the investigation, and was then "directed outside of the grievance system." *Id*. at *7. Here, nobody steered Tracy away from using the grievance system. At most, she alleges that she told her counselor once about the incident, and then heard nothing further.

D. Timeliness of motion to dismiss. Tracy also argues the district court erred in considering "an extremely late and untimely motion to dismiss." She argues the defendants waived their right to assert their exhaustion defense.

As noted previously, under the PLRA, failure to exhaust the available administrative remedies is an affirmative defense, which may be waived. *Foulk*, 262 F.3d at 697. For example, in *Murray v. Goord*, 668 F. Supp. 2d 344, 344–56 (N.D.N.Y. 2009), the court concluded "[b]y not raising failure to exhaust as a defense in their answer, defendants have waived their right to now seek dismissal of plaintiff's complaint on that basis." *See also Handberry v. Thompson,* 446 F.3d 335, 342 (2d Cir. 2006) (holding defendants waived the non-exhaustion defense by opposing plaintiff's summary judgment motion on grounds there were no relevant available administrative proceedings); *Presti v. Dellacamera*, 2010 WL 466006 (D. Conn. Feb. 4, 2010) ("Because the defendants did not raise failure to exhaust administrative remedies in their answer, the defense is waived.").

However, where the defense has been asserted in the defendants' answer, we find no case where the defense is deemed waived for delay in raising it. *See Foulk*, 262 F.3d at 697 (finding no waiver of defense where defendant included a general affirmative defense for failure to exhaust administrative remedies in his answer to fifth amended complaint, raised the issue by oral

motion during trial, and reasserted it in a post-trial motion for judgment as a matter of law); *Bush v. Smith*, 2007 WL 1521596 (S.D. Ga. May 23, 2007) ("Here, however, the defendants *did* raise the defense—in their Answer. And they were not legally compelled to litigate that defense by way of a summary disposition motion (*e.g.,* to dismiss, or for summary judgment). Instead, like any other defendant, they were entitled to wait for a Rule-50(a)(1) ruling at trial.") The fact that most litigants seek to spare themselves litigation expense by *not* waiting until trial does not alter that fact. Waiting may seem irrational, given the expense of a trial and the litigation risks arising from it. However, Tracy has cited no case where waiver has been found under these circumstances.

IV. Conclusion.

Because "[n]o action shall be brought with respect to prison conditions under section 1983 . . . until such administrative remedies as are available are exhausted," 42 U.S.C. § 1997e(a), and Tracy failed to exhaust the administrative remedies available to her under the grievance procedures of ICIW, we affirm the dismissal of her § 1983 petition.

AFFIRMED.

Mansfield, P.J., concurs; Tabor, J., dissents.

TABOR, J. (dissenting)

I respectfully dissent. I disagree with the majority's decision to dismiss Rebecca Tracy's civil rights suit against Benjamin Coover based on a failure to exhaust her administrative remedies under 42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act (PLRA). "There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court." *Jones v. Bock*, 549 U.S. 199, 211, 127 S. Ct. 910, 918–19, 166 L. Ed. 2d 798, 810 (2007). The exhaustion requirement is intended to give "prison officials an opportunity to resolve disputes concerning the exercise of their responsibilities before being haled into court." *Id.* at 204, 127 S. Ct. at 914, 166 L. Ed. 2d at 806.

But section 1997e(a) does not require exhaustion of all remedies. Rather, by its plain terms, the PLRA requires prisoners to exhaust only those avenues of relief that are "available" to them. 42 U.S.C. § 1997e(a); *see Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001). When prison officials effectively prevent a prisoner from using the correct channels to route a complaint, a remedy may be rendered unavailable as a practical matter, and the failure to adhere to technical exhaustion requirements may be excused. *See, e.g.*, *Brown v. Croak*, 312 F.3d 109, 111-12 (3d Cir. 2002) (excusing exhaustion when guards erroneously informed an inmate that he had to wait until an investigation was completed before filing a grievance); *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006) (allowing suit when prison officials failed to respond to a properly filed grievance); *Foulk v. Charrier*, 262 F.3d 687, 698 (8th Cir. 2001) (rejecting claim of failure to exhaust when prison officials failed to respond to an informal resolution request filed by an inmate which was the first step in the grievance process); *Nunez v.*

Duncan, 591 F.3d 1217, 1224 (9th Cir. 2010) (holding inmate's failure to exhaust was excused because he took reasonable and appropriate steps to address claim and was precluded from doing so by warden's mistake). Confusing or contradictory information given to a prisoner is pertinent to the exhaustion analysis "because it informs our determination of whether relief was, as a practical matter, 'available.'" *See Brown v. Valoff*, 422 F.3d 926, 937 (9th Cir. 2005).

IDOC officials inform prisoners about the general offender grievance procedures at orientation. These procedures require prisoners, who have a complaint about any institutional matter, to "attempt to resolve the grievance informally prior to filing a written grievance." ICIW Warden Diann Wilder Tomlinson testified that if an inmate is not satisfied with the informal resolution of her complaint, she may file a formal grievance. The IDOC procedures require a formal grievance to be filed within thirty days of the alleged incident. The majority finds that because Tracy did not utilize the formal grievance procedure she did not exhaust her administrative remedies. For complaints about anything other than sexual misconduct, I would agree.

But in instances where inmates report sexual misconduct by guards, I find the exhaustion question is muddied by the written overview developed by the IDOC in 2006 to comply with federal regulations regarding the Prison Rape Elimination Act of 2003 (PREA). When Tracy entered the ICIW she—like every other inmate—received a written overview of the PREA policies for handling instances of sexual misconduct. This document advised inmates that they could report a staff member's sexual misconduct by any of five methods (which are

quoted in the majority decision) and that sexual misconduct "must be reported before action can be taken." Importantly, "the institution grievance process" is listed as one of the several alternatives an inmate is free to choose to report sexual misconduct. Tracy used one of those methods to report alleged sexual misconduct by guard Benjamin Coover: she told a staff member with whom she was comfortable discussing the matter.

After choosing one of the methods listed to report the guard's alleged sexual misconduct, Tracy could reasonably conclude she was not required, or even allowed, to simultaneously use any alternative methods, including the option: "Use the institution grievance process." The document promised that the IDOC would investigate all allegations of sexual misconduct, regardless of how they were reported[9] and suggested that reporting sexual misconduct would result in corrective action as noted in the majority's footnote six. The document also told inmates: "Keep in mind a thorough investigation takes time. The investigation must clearly support or refute any allegation with evidence, information gathered from witnesses, and documentation." Given this guidance in this PREA overview document, it would be unclear to any inmate when it was time to file a separate, formal grievance. In fact, by incorporating the option of instituting the grievance process as one of several ways of reporting sexual misconduct, it would objectively seem that an inmate who chose another reporting method was not required to institute the formal grievance process at all.

[9] At least initially, this promise was not fulfilled because the prison counselor to whom Tracy reported the guard's alleged sexual misconduct admittedly failed to contact anyone else in the IDOC concerning the allegations.

I believe that by providing prisoners with what was plainly billed as an alternative method for reporting sexual misconduct by a guard, the IDOC superimposed a confusing and misleading layer to its traditional grievance procedures, rendering them effectively unavailable to Tracy and excusing her failure to exhaust her administrative remedies. *See Barkey v. Reinke*, 2010 WL 3893897 (D. Idaho) (holding female inmate could proceed on her sexual assault claim because prison provided alternative administrative remedy, a PREA hotline, which plaintiff called to report she was fondled and groped during pat down search).

I recognize that section 1997e(a) "says nothing about a prisoner's subjective beliefs, logical or otherwise, about the administrative remedies that might be available to him." *Chellette v. Harris*, 229 F.3d 684, 688 (8th Cir. 2000). But this case involves more than an inmate's subjective misunderstanding that she had to wait for an informal process to play out before filing a formal grievance. This case involves the IDOC's distribution of a PREA overview document that advertised several alternative methods for reporting sexual misconduct by a guard, fostering an objective misunderstanding that those alternatives supplanted the traditional grievance procedure. Section 1997e(a) is not a license for prison officials to "play hide-and-seek" with administrative remedies. *See Goebert v. Lee County*, 510 F.3d 1312, 1323 (11th Cir. 2007) (deciding inmate exhausted administrative remedies by filing "grievance" despite the fact that she did not use the correct form).

In *Woodford v. Ngo*, 548 U.S. 81, 102–03, 126 S. Ct. 2378, 2393, 165 L. Ed. 2d 368, 385–86 (2007), the Court stated that it had "no occasion" to decide

how to address "the possibility that prisons might create procedural requirements for the purpose of tripping up all but the most skillful prisoners." I don't believe the IDOC purposefully promulgated the PREA reporting procedure to "trip up" unskilled inmates into foregoing the traditional grievance process. But the harshness of the exhaustion requirement is amplified for those inmates who are generally untrained in the law and often poorly educated as the prison moves away from the simplicity of a single grievance system toward a two-track process for reporting sexual misconduct; and, is further exacerbated by the vulnerability of a sexual assault victim who is reporting sexual misconduct perpetrated against her by her superior—a correction officer.

Finally, I believe the PLRA exhaustion standard has been met in this case for another reason: the IDOC has accorded Tracy all "available" relief it sees fit as a result of the investigation that was apparently triggered outside the traditional grievance process. *See Brown*, 422 F.3d at 936. The record in this case reflects that the IDOC Division of Investigative Services completed an investigation of Tracy's complaint and reached a conclusion with respect to her allegation against Coover. Prison officials thus had an opportunity to resolve this dispute before being haled into court.