

Case No. 14-1301

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IN THE  
United States Court Of Appeals  
FOR THE EIGHTH CIRCUIT

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WESLEY BROOKS, *Appellant*

v.

TOM ROY ET AL., *Appellees*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

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BRIEF OF APPELLANT

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April 21, 2014

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## **SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT**

Wesley Brooks is required by Minnesota law to complete chemical dependency treatment while in prison, yet the only treatment available to him conflicts with his Native American religious beliefs. Brooks' beliefs made it impossible for him to participate fully in treatment, leading him to file a civil rights action under 42 U.S.C. § 1983 alleging violations of the First Amendment, federal religious freedom statutes, and the Minnesota Constitution. Facing termination from treatment, Brooks unsuccessfully sought a preliminary injunction.

Shortly after the complaint was filed, Appellees moved to dismiss certain claims for failure to state a claim and for summary judgment on others on the grounds that Brooks had not exhausted his administrative remedies. The Magistrate Judge recommended dismissal of all claims; the District Court affirmed.

Brooks respectfully submits that the District Court erred in dismissing his federal claims for failure to exhaust administrative remedies. Brooks' evidence establishes a question of fact as to whether Appellees prevented him from exhausting remedies. Brooks' request to enter off-site treatment at Mash-ka-wisen was properly exhausted at the time suit was filed. Brooks' claims arising out of his termination from treatment could not have been properly exhausted before suit, but were properly exhausted later, and should have been dismissed without prejudice.

Brooks respectfully requests 10 minutes' oral argument.

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## **JURISDICTIONAL STATEMENT**

This appeal is from the District Court's order entered January 14, 2014, adopting the Report and Recommendation of the Magistrate Judge and granting summary judgment to Appellees, and from the final judgment on the order. (Add. 31, 43.<sup>1</sup>) Brooks timely filed a notice of appeal on February 6, 2014. (J. App. 232.) This Court has appellate jurisdiction under 28 U.S.C. § 1291.

Brooks alleged both federal and state law claims. The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1367.

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<sup>1</sup> "Add. \_" Refers to the Addendum to this Brief. "J. App. \_" refers to the Joint Appendix, filed concurrently.

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether the District Court erred in granting summary judgment for appellees on the ground that Brooks failed to exhaust administrative remedies.

- *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986)
- *Miller v. Norris*, 247 F.3d 736 (8th Cir. 2001)
- *Giano v. Goord*, 380 F.3d 670, 678-79 (2d Cir. 2004)

2. Whether the District Court erred in dismissing with prejudice Brooks' federal claims arising out of his termination from treatment which occurred after this action was filed.

- *Johnson v. Jones*, 340 F.3d 624 (8th Cir. 2003)
- *Hammett v. Cofield*, 681 F.3d 945 (8th Cir. 2012)
- *Berry v. Kerik*, 366 F.3d 85 (2d Cir. 2003)

## **STATEMENT OF THE CASE**

On February 7, 2012, Wesley Brooks filed a civil rights case claiming that the New Dimensions chemical dependency treatment program at the Minnesota Correctional Facility in Faribault, Minnesota (MCF-Faribault), violated his right to religious liberty. (J. App. 1.) In his Complaint, Brooks brought claims under the First Amendment, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (RLUIPA), the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (AIRFA), and Article I, section 16 of the Minnesota Constitution. (J. App. 1.)

On March 1, 2012, Appellees moved to dismiss Brooks' claims for failure to state a claim, or in the alternative for summary judgment on the ground that Brooks failed to exhaust his administrative remedies prior to filing suit. In support of their motion, Appellees submitted the affidavits of Minnesota Department of Corrections Director of Behavioral Health Steven Allen, Department of Corrections Associate General Counsel Kobie Hudson, and Jennifer Nemescka, Brooks' primary therapist in the New Dimensions program. (J. App. 12, 17, 24.)

In response, Brooks submitted his own affidavit, detailing his extensive interactions with New Dimensions staff at MCF-Faribault before filing suit in an effort to see if there was a way he could participate in treatment without having to sacrifice his beliefs. (J. App. 61.) Brooks raised his concerns related to the New



Dimensions program by submitting kites to Nemecska and her superiors in the facility behavioral health system—Program Director Houff, his successor Program Director Schaffer, and Director of Behavioral Health Panser—following the chain of command. (J. App. 86-90.) Brooks acknowledges he did not pursue a grievance under the formal grievance system set forth under Minnesota Department of Corrections Rule 303.100 to address his concerns regarding chemical dependency treatment, because Nemecska and Schaffer told him treatment decisions were not appealable. (J. App. 16.)

The chemical dependency appeal procedures expressly provide that certain treatment decisions are not appealable or grievable. (J. App. 14-16.) For example, the policy sets forth a procedure to appeal a chemical dependency assessment, but specifies that “[o]nly the diagnosis and recommended programming may be appealed—not the location of a program placement.” (J. App. 15.) The chemical dependency appeal procedures also allow a “decision to terminate an offender from a chemical dependency program” to be appealed to the program director, but then provide that the “Program Director’s appeal decision is final and may not be grieved.” (J. App. 16.)

One of the claims brought in this action is the denial of Brooks’ request to undergo chemical dependency treatment at his own expense at a different location, the Native American program known as Mash-ka-wisen in Sawyer, Minnesota. (J.

App. 6.) On December 30, 2011, Brooks asked Nemecska if he could obtain a conditional medical release to participate in chemical dependency treatment at the Mash-ka-wisen program. (J. App. 88.) Brooks believed that obtaining treatment at Mash-ka-wisen would allow him to freely practice his religion because it incorporated Native American spiritual beliefs into the treatment program, and offered the assistance of Native American spiritual advisors. (J. App. 89.) Nemecska denied his request. (J. App. 88.)

Brooks followed up this request with two kites following the chain of command, asking then-Program Director Houff on January 3, 2012, and making the same request to the facility Director of Behavioral Health, Appellee Panser, on February 2, 2012. Brooks asked Houff what the procedure would be to enter treatment at a Native American treatment program; Houff responded that he did “not know of any Native American specific treatment program within the MN DOC” but that Brooks could have “N.A. specific curriculum to incorporate into your treatment experience here[,]” or could contact Appellee Panser. (J. App. 89.) In a follow-up conversation, Brooks specifically asked for, and Houff denied, the opportunity to enter chemical dependency treatment off-site at Mash-ka-wisen. (J. App. 89.) Brooks submitted a kite to Panser asking the same question, and Panser offered essentially the same response. (J. App. 90.)

After filing this action, Brooks continued to struggle with meeting Nemecska's expectations. He submitted treatment journals asking Nemecska to clarify why she thought he was resisting treatment expectations, and expressing concern about being required to disclose information about his family and reservation. (J. App. 65-66, 90-96.)

Nemecska continued to view Brooks' expression of his beliefs as resisting treatment, and began taking steps to terminate Brooks from treatment. On March 5, 2012, Nemecska placed Brooks on a behavior contract—the first step toward termination from treatment—claiming he lacked motivation and was resisting treatment. (J. App. 94.) Brooks continued to struggle with Nemecska's expectations, and when Nemecska told him he would have to “put aside” his beliefs while in treatment, Brooks told her in a journal entry that he was offended. (J. App. 95.) Nemecska responded by accusing Brooks of undermining the group. (J. App. 95.) In the middle of April, Nemecska put Brooks on a probation contract, a step closer to termination from treatment. (J. App. 96.) Brooks believed that he was placed on both the behavior contract in March and the probation contract in April as punishment for speaking about his beliefs, asking questions, and pursuing his civil rights action. (J. App. 94, 96.) On April 19, Brooks was notified he would be terminated from treatment. (J. App. 96.) As provided in Rule 500.308, Brooks immediately filed a written administrative appeal with Program Director

Schaffer, which was denied. (J. App. 97, 153.) Brooks was terminated from treatment on April 23, 2012. (J. App. 97, 153.)

The United States Magistrate Judge recommended denial of Brooks' motion for a preliminary injunction, and Brooks objected. In support of his objection, Brooks submitted an additional affidavit and exhibits. (J. App. 79.) Appellees responded to Brooks' objection and submitted an additional supporting affidavit from Hudson. (J. App. 154.) The District Court denied the motion.

Appellees' motion to dismiss or for summary judgment was taken under advisement. On December 7, 2012, the United States Magistrate Judge issued a Report and Recommendation which recommended that Brooks' federal claims be dismissed with prejudice, and Brooks' state law claims be dismissed without prejudice. (Add. 30.) The Report and Recommendation considered Brooks' individual-capacity RLUIPA claims and AIRFA claims on the merits, and recommended dismissal. (Add. 14-21.) Brooks did not object to these portions of the Report and Recommendation.

As to Brooks' First Amendment and official-capacity RLUIPA claims, the Report and Recommendation did not address the merits, but considered both sides' affidavits and exhibits on the issue of exhaustion of remedies, and concluded that Appellees were entitled to judgment as a matter of law. (Add. 28.) Brooks objected to these conclusions.

On January 14, 2014, the District Court overruled Brooks’ objections and adopted the Report and Recommendation. (Add. 31). The District Court accepted Nemecska’s description of the New Dimensions program, and labeled Brooks’ perception of religious aspects within New Dimensions to be “unfounded.” (Add. 33). Nonetheless, like the United States Magistrate Judge, the District Court did not reach the merits of Brooks’ First Amendment and official-capacity RLUIPA claims, but addressed only the question of exhaustion of remedies.

The District Court considered the affidavits and exhibits submitted by both sides and concluded that the motion was properly treated as a motion for summary judgment. (Add. 37-38.) The District Court proceeded to disregard Brooks’ sworn statements that Nemecska and Schaffer had told him treatment decisions were not appealable, and, finding no question of fact, granted summary judgment to Appellees on Brooks’ First Amendment and official-capacity RLUIPA claims on the grounds that Brooks did not exhaust the administrative remedies set forth in Minnesota Department of Corrections Rules 303.100 and 500.308 (Add. 41-42.)

Brooks acknowledges he did not exhaust the procedure set forth in Rule 303.100, but maintains Appellees prevented him from doing so, and maintains that his sworn statements presented an issue of fact. Brooks also challenges the District Court’s conclusion that he failed to exhaust his remedies under the separate and distinct chemical dependency appeal standards and procedures, set forth in Rule

500.308. Because Brooks was prevented from exhausting his remedies under Rule 303.100, and because he exhausted remedies under 500.308, Brooks respectfully submits the District Court's grant of summary judgment was error.

## **SUMMARY OF THE ARGUMENT**

The District Court's decision addressed only whether Brooks properly exhausted his administrative remedies before filing suit. To avoid summary judgment on this issue Brooks was required to come forward with evidence presenting a genuine issue of material fact as to whether he exhausted all available administrative remedies as of February 7, 2012.

Brooks came forward with evidence that Appellees prevented him from using the grievance procedure set forth in 303.100 by telling him treatment decisions were not appealable. Moreover, Brooks' request to treat at the Mash-kawisen program in Sawyer, Minnesota, was directed to the location of treatment; such disputes are not appealable under Rule 500.308, and when his request was denied, no further exhaustion of remedies should have been required. Finally, Brooks could not have exhausted claims related to his termination from treatment, which did not occur until April 23. The District Court erred in dismissing this claim with prejudice, because Brooks had no opportunity to exhaust his remedies before filing suit.

Brooks respectfully asks the Court to reverse the grant of summary judgment on these claims, and to remand them to the District Court for further proceedings or dismissal without prejudice.

## **ARGUMENT**

### **I. THE DISTRICT COURT ERRED IN FINDING NO QUESTION OF FACT AS TO WHETHER BROOKS EXHAUSTED HIS ADMINISTRATIVE REMEDIES.**

#### **A. Standard of Review.**

On a motion for summary judgment, a district court may not resolve disputed questions of material fact, but must reach a decision based on the record as viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986). A district court's grant of summary judgment is reviewed *de novo*, with the appellate court also viewing the facts and drawing inferences in the light most favorable to the nonmoving party. *Barnhart v. UNUM Life Ins. Co.*, 179 F.3d 583, 587 (8th Cir. 1999); *Enterprise Bank v. Magna Bank of Missouri*, 92 F.3d 743, 747 (8th Cir. 1996).

The moving party—here, Appellees—had the burden of demonstrating to the District Court that there was no genuine issue of material fact and that they were entitled to judgment as a matter of law. *Enterprise Bank*, 92 F.3d at 747. And, because exhaustion of administrative remedies is an affirmative defense, the ultimate burden of proof lay with Appellees, not with Brooks. *Foulk v. Charrier*, 262 F.3d 687, 697 (8th Cir. 2001). Brooks respectfully submits Appellees met neither burden and were not entitled to judgment as a matter of law.



B. Brooks' Evidence Established, Or Alternatively Presented a Question of Fact As To Whether, Administrative Remedies Were Exhausted.

The issue before the District Court was whether Brooks exhausted his administrative remedies as required under the Prison Litigation Reform Act of 1995 (PLRA). The relevant part of that statute provides, “[n]o action shall be brought with respect to prison conditions . . . 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) (2006). The exhaustion requirement offers the prison the “opportunity to correct its own mistakes” before suit, and “promotes efficiency” where claims “can be resolved much more quickly and economically” in administrative proceedings. *Woodford v. Ngo*, 548 U.S. 81, 89 (2006).

To properly exhaust administrative remedies, a prisoner is required to comply with a prison’s administrative deadlines and procedures. *Id.* at 90. The purpose of this requirement is to allow the prison the opportunity to address claims administratively. Where some claims are properly exhausted and others are not, the plaintiff should be permitted to proceed with those claims that are properly exhausted. *Hammett v. Cofield*, 681 F.3d 945, 948 (8th Cir. 2012).

Only “available” administrative remedies must be exhausted. *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001). A remedy that prison officials prevent a prisoner from “utilizing” is not “available” within the meaning of the PLRA, and

need not be exhausted. *Id.*; see also *Chelette v. Harris*, 229 F.3d 684, 688 (8th Cir. 2000) (“[i]f administrative remedies are available, the prisoner must exhaust them.”) An administrative remedy may be unavailable if prison regulations expressly state that certain types of claims are not eligible for the administrative process, or do not differentiate clearly between the types of claims which are and are not eligible. See *Giano v. Goord*, 380 F.3d 670, 678-79 (2d Cir. 2004) (prison regulation providing that disciplinary proceedings were “not grievable” justified prisoner’s failure to use grievance process); see also *Hanks v. Prachar*, Civ. No. 02-4045, 2009 WL 702177, \*8-10 (D. Minn. March 13, 2009) (prisoner’s testimony that official told him he could not grieve the subject of restraints created a question of fact on whether he was prevented from exhausting remedies).

Brooks respectfully submits that the District Court erred in adopting the Magistrate’s Report and Recommendation and granting summary judgment for Appellees. To survive Appellee’s motion for summary judgment, Brooks was only required to present “evidence from which a jury might find in his favor.”

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). The District Court should have denied summary judgment because Brooks came forward with evidence establishing Appellees prevented him from exhausting his remedies, and that despite Appellees’ statements, Brooks properly exhausted administrative

remedies concerning his request to complete chemical dependency treatment at Mash-ka-wisen at his own expense.

Viewed in the light most favorable to Brooks, the record reflects that Nemecska and Schaffer told Brooks there was no appeal from treatment decisions. Brooks stated as much under oath in two affidavits. (J. App. 66, 95.) Both the United States Magistrate Judge and the District Court erred by discrediting Brooks' statements under oath and declining to consider them evidence. (Add. 27, 41.) Rather than take the statements as evidence of a fact—that Nemecska and Schaffer told Brooks he could not appeal—both the United States Magistrate Judge and the District Court considered Brooks' statements evidence of Brooks' mere “subjective beliefs.” (Add. 28, 41.) The District Court stated that “*other than Plaintiff's own statements*, there is no evidence that New Dimensions staff denied him of his right to file a grievance.” (Add. 41 (emphasis added)).

Brooks' statements under oath in his affidavits are sufficient, especially at an early stage of the case where no discovery has occurred, to create an issue of fact as to what prison officials said to him. This is not a case where Brooks stated only that he was under the impression there was no point in appealing, or that a prison official predicted an appeal would fail. *Cf. Gibson v. Weber*, 431 F.3d 339, 341 (8th Cir. 2005); *Lyon v. Vande Krol*, 305 F.3d 806, 809 (8th Cir. 2002).

On a motion for summary judgment, the court's role is not to weigh the evidence or make credibility determinations, but to view the evidence in the light most favorable to the nonmoving party, and to assess whether there was an issue of fact. Here, Brooks' sworn statements created an issue of fact as to whether he was prevented from exhausting his administrative remedies. The District Court erred by disregarding Brooks' evidence and granting summary judgment for Appellees.

Even ignoring Brooks' account of what Nemecska and Schaffer told him, the record shows Brooks exhausted his remedies concerning his request to transfer to Mash-ka-wisen. The proper procedure to appeal chemical dependency treatment decisions was the chemical dependency appeal process established by Rule 500.308. That process provides that "[o]nly the diagnosis and recommended programming may be appealed—not the location of a program placement."

After several weeks in conflict with Nemecska over the New Dimensions program, Brooks asked if he might receive chemical dependency treatment off-site at Mash-ka-wisen. In a December 30, 2011 meeting with Nemecska, Brooks asked for a conditional medical release to be treated at a different location—Mash-ka-wisen. Nemecska denied the request. (J. App. 88.) At that point, Rule 500.308 provided no further process, and so Brooks' remedies were exhausted. Nonetheless, Brooks followed up with Program Director Houff, who also denied his request. (J. App. 89.) Again, Rule 500.308 provided no further process to

appeal the location of treatment, and Brooks' remedies were exhausted. Brooks gave the behavioral health staff at MCF-Faribault ample notice of his desire to receive chemical dependency treatment at a different location and opportunity to address his request. Each time his request was denied, Rule 500.308 allowed no further appeal. (J. App. 15.) Brooks respectfully submits this evidence establishes his administrative remedies were exhausted with respect to his request to treat at Mash-ka-wisen; the decision of the District Court should be reversed and remanded to allow him to proceed with this claim.

II. THE DISTRICT COURT ERRED IN DISMISSING WITH PREJUDICE BROOKS' CLAIMS CONCERNING TERMINATION FROM TREATMENT.

A. Standard of Review.

A district court's grant of summary judgment is reviewed *de novo*, with the appellate court viewing the facts and drawing inferences in the light most favorable to the nonmoving party. *Barnhart*, 179 F.3d at 587; *Enterprise Bank*, 92 F.3d at 747.

B. Brooks' Claims Regarding Termination From Treatment Could Not Have Been Exhausted At The Time The Complaint Was Filed, But Have Since Been Exhausted, Therefore Dismissal Without Prejudice Is Appropriate.

Failure to exhaust administrative remedies is an issue wholly separate from the merits of a claim; if a prisoner has not exhausted administrative remedies, the case may be dismissed even after a trial on the merits. *Lyon*, 305 F.3d at 809. "If

exhaustion was not completed at the time of filing, dismissal is mandatory.”

*Johnson v. Jones*, 340 F.3d 624, 627 (8th Cir. 2003).

That mandatory dismissal should ordinarily be without prejudice. Because “failure to exhaust administrative remedies is often a temporary, curable procedural flaw,” dismissal without prejudice is the appropriate remedy unless there is no possibility that the claim can be properly exhausted. *Berry v. Kerik*, 366 F.3d 85, 87 (2d Cir. 2003) (quoting *Snider v. Melindez*, 199 F.3d 108, 111 (2d Cir. 1999)); see also *Hammett*, 681 F.3d at 949 (district court properly dismissed without prejudice claims based upon requests that were not properly exhausted); *Barnes v. Arkansas Dep’t of Correction*, 485 F. Appx. 151, 152 (8th Cir. 2012) (per curiam) (unpublished) (affirming dismissal without prejudice); *Barbee v. Correctional Medical Servs.*, 394 F. Appx. 337, 338 (8th Cir. 2010) (per curiam) (unpublished) (vacating summary judgment and remanding with instructions to dismiss without prejudice for failure to exhaust administrative remedies); *Davis v. Harmon*, 389 F. Appx. 587, 588 (8th Cir. 2010) (per curiam) (unpublished) (affirming dismissal and amending it to be without prejudice for failure to exhaust administrative remedies).

The District Court erroneously concluded that Brooks’ opportunity to exhaust all claims had passed at the time this action was filed, and so decided to dismiss the case relying on *Berry v. Kerik*, 366 F.3d at 87. Yet Brooks had not

(and could not have) exhausted his federal First Amendment and RLUIPA claims arising out of termination from treatment, because he was not terminated from treatment until more than two months after he filed suit. Brooks concedes his remedies with respect to these claims were not exhausted as of February 7, but they have since been properly exhausted: Brooks timely appealed his termination decision to the Program Director, the Program Director denied Brooks' request, and Rule 500.308 provides that the "Program Director's appeal decision is final and may not be grieved." (J. App. 16, 97, 153.) No further process was available from the prison at that point, and Brooks' claims arising out of his termination from treatment are now properly exhausted.

Brooks respectfully requests that these claims be remanded to the District Court with instructions either to allow him to proceed, or to dismiss them without prejudice.

## **CONCLUSION**

Based on the foregoing, Wesley Eugene Brooks respectfully requests that the Court of Appeals reverse the decision of the District Court and remand with directions to permit him to proceed with his claims, or in the alternative, to direct the District Court to dismiss those claims without prejudice so that he may pursue those in which remedies have been exhausted.

Dated: April 21, 2014

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For the Eighth Circuit

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