No. 14-1301

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Wesley Brooks,

Appellant,

vs.

Tom Roy, et al.,

Appellees.

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

APPELLEES' BRIEF

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

ANGELA BEHRENS
Assistant Attorney General
Atty Reg. No. 0351076
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
Telephone: (651) 757-1204
Fax: (651) 297-4139
ATTORNEY FOR APPELLEES

SUMMARY OF CASE AND WAIVER OF ORAL ARGUMENT

Appellant Wesley Brooks alleged that the appellees, who are current or former employees of the Minnesota Department of Corrections, violated his constitutional and statutory religious rights by requiring him to participate in a chemical-dependency program in prison. He did not, however, allege facts that could establish that participation in the secular program substantially burdened any religious beliefs. He also failed to first use available administrative remedies to raise his concerns. The appellees therefore moved to dismiss his complaint both for failing to state claims and for failing to comply with the Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(a) (2006), which requires exhaustion of administrative remedies. The district court appropriately dismissed his complaint for failing to exhaust. The undisputed record established that the Department had available administrative procedures, that Brooks did not use those procedures, and that no one prevented him from using them. Alternatively, the Court should affirm the dismissal of Brooks's complaint because he failed to state claims for relief.

Because this case implicates only the straightforward issue of whether an inmate exhausted available administrative remedies and the law on this issue is well developed, the appellees do not believe oral argument is necessary. If the Court grants Brooks's request for oral argument, however, the appellees agree that ten minutes per side would be sufficient.

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STATE COURT CASES

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STATE STATUTES

LEGAL ISSUES

I. Did Brooks exhaust available administrative remedies before filing his complaint?

The district court held that Brooks failed to exhaust available administrative remedies and that no one prevented him from exhausting.

Most apposite authorities:

42 U.S.C. § 1997e(a) (2006)
Jones v. Bock, 549 U.S. 199 (2007)
Woodford v. Ngo, 548 U.S. 81 (2006)
Gibson v. Weber, 431 F.3d 339 (8th Cir. 2005)

II. Even if Brooks exhausted his administrative remedies, did he state sufficient claims for relief?

The district court did not reach this issue for the appealed claims, but dismissed some other claims for which no private cause of action exists.

Most apposite authorities:

Ashcroft v. Iqbal, 556 U.S. 662 (2009)
Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)
Glick v. Sargent, 696 F.2d 413 (8th Cir. 1983)

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STATEMENT OF THE CASE

Appellant Wesley Brooks is an inmate at the Minnesota Correctional Facility in Faribault who has an extensive criminal history related to driving while intoxicated (DWI), using drugs, and escaping from custody. *State v. Brooks*, 838 NW.2d 563, 566-67 (Minn. 2013) (affirming DWI convictions), *cert. denied*, 134 S. Ct. 1799 (2014); *State v. Brooks*, No. A09-1389, 2010 WL 2650457, at *1 (Minn. Ct. App. July 6, 2010) (noting cancellation of driver's license as inimical to public safety); *Brooks v. State*, No. A05-467, 2006 WL 44322, at *1 (Minn. Ct. App. Jan. 10, 2006) (noting guilty plea to controlled-substance crime); *State v. Brooks*, 604 N.W.2d 345, 346 (Minn. 2000) (discussing escape from custody); *Brooks v. State*, No. C3-97-1992, 1998 WL 236162 (Minn. Ct. App. May 12, 1998) (discussing escape from custody). He most recently entered the Minnesota Department of Corrections' custody to serve sentences for multiple DWI convictions. *See Brooks*, 838 N.W.2d at 565.

Department staff ordered Brooks to complete a chemical-dependency treatment program and directed him to participate in the New Dimensions program at the Faribault prison. (J.A. 5 ¶ 18.) Brooks began the program in November 2011. (*Id.* at 62 ¶ 4.) In February 2012, Brooks started this lawsuit against Appellees Commissioner of Corrections Tom Roy, former Deputy Commissioner of Facility Services David Crist, current Deputy Commissioner of

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Facility Services Terry Carlson, Director of Health Services Nanette Larson, Faribault prison warden Bruce Reiser, former Faribault Director of Psychological Services Douglas Panser, and former Director of New Dimensions at the Faribault prison James Schaffer.[1] (J.A. 1.) Brooks alleged that he is a Native American and that New Dimensions is a "twelve-step" program that "conflicts" with his religious beliefs, although he did not identify any specific belief or any conflict between the program and any belief. (*Id.* at 2, 4-7.) He alleged that participation in the program violated his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1 (2006); the First Amendment free-exercise clause; the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (2006); and the Minnesota Constitution. (*Id.* at 2.) He sued the appellees in their official and individual capacities, but sought only equitable relief. (*Id.* at 9-10; *see also* Pl.'s Mem. 6, 14 (clarifying that he did not seek damages), ECF 28.)

The appellees moved to dismiss the complaint in its entirety because Brooks failed to state any claims for relief, noting primarily that no cause of action existed for some of Brooks's claims and that, for his remaining claims, he failed to allege a

[1] After this case began, Crist retired and Carlson replaced him. Panser is no longer a Department employee, and Schaffer now works at a different correctional facility. Although Brooks named John and Jane Does in his complaint, he did not include any substantive allegations about them, did not amend his complaint to identify them, and did not establish that they were ever served with the complaint.

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substantial burden on a religious belief. (Defs.' Mot., ECF 9; Defs.' Mem., ECF 11.[2]) Alternatively, the appellees requested summary judgment because Brooks failed to exhaust available administrative remedies before starting his lawsuit. (Defs.' Mot.)

If an inmate has concerns about conditions of his confinement, the Department has specific appeal procedures that govern some situations and a

[2] Brooks misrepresents the record and procedural history of the case. (Appellant's Br. 1, 5.) For the appellees' motion, the record consisted only of the complaint, the affidavit of Steven Allen, the first and third affidavits of Kobie Hudson, Brooks's second affidavit, the declaration of F. Clayton Tyler, and the exhibits to these statements. (J.A. 12-23, 61-78, 154-88; Tyler Decl., ECF. 30.) The appellees submitted Jennifer Nemecska's affidavit and the second Hudson affidavit in response to Brooks's separate motion for a preliminary injunction. (J.A. 24-60; Second Hudson Aff., ECF 24.) In support of that motion, Brooks filed his first affidavit with twenty-five pages of exhibits. (First Brooks Aff., ECF 19.) When objecting to the report and recommendation to deny that motion, Brooks then attempted to supplement the record by filing seventy-five pages of documents consisting of his third affidavit and new exhibits. (J.A. 79-153.) The appellees did not also supplement the record; they opposed the additions, and the district court noted that the new documents were improper. *Brooks v. Roy*, 881 F. Supp. 2d 1034, 1040 n.4 (D. Minn. 2012); Defs.' Mem. Opp'n Obj. 2-3, ECF 37; *see also Ridenour v. Boehringer Ingelheim Pharm. Inc.*, 379 F.3d 1062, 1067 (8th Cir. 2012) (recognizing need to present all arguments to magistrate judge). Although the magistrate judge and district court referred to some of the preliminary-injunction documents in addressing the appellees' motion, the documents do not appear to have been the basis for their decisions. Nor did Brooks base his opposition to the appellees' motion on the documents. (Pl.'s Mem.) Even if this Court considers the documents, they do not affect the case because none establish that Brooks exhausted his administrative remedies or that he alleged a substantial burden on a religious belief. *See Brooks*, 881 F. Supp. 2d at 1039-40 (noting failure to identify any substantial burden on religious belief, even after multiple affidavits).

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general grievance procedure that applies to all other situations. The Department policy addressing chemical-dependency treatment programs—contained in Division Directive 500.308—provides appeal procedures for challenging a diagnosis or programming recommendation that results from a chemical-dependency assessment and for challenging terminations from treatment programs. (J.A. 14-16.) To appeal a determination that he needs treatment, the inmate must appeal first to the director of psychological services at his prison, and then to the Department's director of behavioral health. (*Id.* at 15-16.)

The Department's general grievance procedure—contained in Policy 303.100—applies to anything without an otherwise specified appeal procedure. (*Id.* at 17-23.) To comply with this policy, inmates must first attempt to informally resolve matters by sending "kites" through the relevant chain of command. (*Id.* at 20.) A kite is an intraprison form used to communicate with staff. (*Id.*) If these informal attempts to resolve a dispute are unsuccessful, the inmate must then file a formal grievance with his prison's grievance coordinator. (*Id.* at 21.) The prison's warden or designee decides the grievance. (*Id.*) If the inmate is dissatisfied with the response, he may then file a grievance appeal with the Department's Central Office and an assistant or deputy commissioner will decide the appeal. (*Id.* at 22.) The Department prohibits reprisal against an inmate for filing a grievance, but if the inmate fears retaliation or harm for filing a

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grievance, he may file his initial grievance with the Department's Central Office rather than at his prison. (*Id.* at 20, 22.) Sending kites and other correspondence to Department staff does not satisfy the grievance procedure. (*Id.* at 18, 21.)

In Brooks's case, he did not appeal the diagnosis or programming recommendation that resulted from his chemical-dependency assessment to Steven Allen, the Department's Director of Behavioral Health at the time. (J.A. 13.) And he did not file any formal grievances or grievance appeals under Policy 303.100 related to the allegations in his complaint. (*Id.* at 19.) In his complaint, Brooks identified Mash-ka-wisen as a possible alternative treatment program, but he did not allege that the denial of placement there was the basis for any legal claim. (*Id.* at 6.) Mash-ka-wisen is unaffiliated with the Department and is apparently a private treatment program approximately 200 miles from Faribault. (*Id.*) In response to the appellee's motion, Brooks submitted kites reflecting that he asked treatment staff to grant him a conditional medical release to the program. (*Id.* at 71, 73.) State law authorizes the Department to provide conditional medical release only if "the offender suffers from a grave illness or medical condition and the release poses no threat to the public." Minn. Stat. § 244.05, subd. 8 (2012). The Department further has a conditional-medical-release policy requiring inmates who seek this type of release to obtain a series of recommendations and approvals from specific people, none of whom involve an inmate's chemical-dependency

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treatment staff. (Supp. App. 1-3.[3]) Brooks has never claimed that he has a "grave medical illness" or that he followed any aspect of the Department's conditional-medical-release policy. The policy also does not have a specific appeal procedure, meaning that it is subject to the Department's general grievance policy. (*Id.* at 1-5; J.A. 20.)

In response to the appellees' motion, Brooks conceded that New Dimensions is not a twelve-step program. (Pl.'s Mem. 3 n. 2.) The district court further observed in this case that Mash-ka-wisen advertises its program as rooted in the twelve-step model that Brooks claimed was antithetical to his beliefs. *Brooks*, 881 F. Supp. 2d at 1039, 1056. On the issue of exhaustion, Brooks conceded that he had not used or tried to use the Department's established procedures. He asserted generally that he exhausted his administrative remedies for all claims because he sent kites to various staff, which he believed should have been sufficient notwithstanding the Department's policies. (Pl.'s Mem. 15-16.) He argued that, if his kites were insufficient, then staff prevented him from exhausting because they allegedly told him that "treatment decisions" were not appealable.

[3] In their reply memo, the appellees pointed to the Department's publicly available conditional-medical-release policy, but also submitted a courtesy copy to the Court. (J.A. 155.) It appears that the courtesy copy was inadvertently incomplete. (*Id.* at 186-87.) The complete policy is in the parties' supplemental appendix. (Supp. App. 1-5.) The Department's policy remains publicly available at http://www.doc.state.mn.us/DocPolicy2/html/DPW_Display_TOC.asp?Opt=203.200.htm.

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(*Id.*; J.A. 66.) He further asserted that he decided not to formally grieve anything because he feared retaliation by his treatment therapist. (J.A. 66.) Brooks did not provide any explanation of, or contextual details for, the alleged statements that "treatment decisions" were not appealable, such as what decisions were the subject of the statement and when this discussion occurred. (*Id.*) Brooks's affidavit included the assertion following a discussion of events that occurred several weeks after he filed his lawsuit in February 2012.[4] (*Id.*) Documents that Brooks submitted in opposing the motion specifically referred inmates to the general grievance policy, which applies when no separate appeal process exists. (*Id.* at 77.) Further, when he entered the Department's custody, Brooks received an offender handbook that explained the grievance policy, and Department policies are available to inmates at all state prisons. (*Id.* at 154, 171-72, 184.)

The district court granted the appellees' motion. (Add. 31-42.) As to the appellees' motion to dismiss, the court dismissed Brooks's AIRFA claims and his individual-capacity claims under RLUIPA, holding that no causes of action existed. (*Id.* at 20-22, 31-32.) The court did not address whether Brooks stated claims for his remaining claims. Instead, the court concluded that regardless of how Brooks's claims were characterized, he had not exhausted administrative

[4] His later affidavit included the statement between two paragraphs discussing events in March 2012. (J.A. 95.)

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remedies. (*Id.* at 38-41.) As to Brooks's claims that Department staff prevented him from grieving because he feared retaliation, the court held that Brooks's arguments lacked factual support. *Id.* Because Brooks had failed to use the Department's administrative remedies when they were available, and the time for using them had since expired, the Court dismissed Brooks's federal claims with prejudice and declined supplemental jurisdiction over his state-law claims. (*Id.* at 28 & n.17, 41.)

On appeal, Brooks challenges only the dismissal of his claims for failing to exhaust administrative remedies. He no longer claims that he was prevented from exhausting because he feared reprisal. *See* Fed. R. App. P. 28(a)(9)(A) (requiring principal brief to include all arguments supporting position); *Rotskoff v. Cooley*, 438 F.3d 852, 854 (8th Cir. 2006) (holding that undeveloped issue is waived); *see also Harding Cnty., S.D. v. Firthiof*, 575 F.3d 767, 773 n.3 (8th Cir. 2009) (recognizing that reply brief cannot revive waived issues). He asserts only that he exhausted as to placement at Mash-ka-wisen and that staff prevented him from grieving by allegedly telling him that treatment decisions were not appealable. Although Brooks's complaint did not involve any claims about his termination from the treatment program, he asserts that the district court erroneously dismissed these claims with prejudice.

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SUMMARY OF ARGUMENT

The Court should affirm the district court. The caselaw concerning exhaustion is well established and requires strict compliance with a prison's administrative processes. It is undisputed that Brooks did not use the Department's established grievance procedure, and Brooks submitted no evidence that he ever attempted to, or that Department staff prevented him from trying to, use the grievance procedure. Because Brooks's dismissed claims did not include any claim challenging his termination from treatment, Brooks's assertions that those claims were dismissed with prejudice have no factual basis.

Even if Brooks exhausted his administrative remedies, the Court should affirm on the alternative ground that Brooks failed to state claims for relief. Brooks's complaint was devoid of any facts that alleged a substantial burden on a sincerely held religious belief, and his allegations additionally failed to support any claims against the appellees in their individual capacities.

ARGUMENT

I. BROOKS FAILED TO EXHAUST AVAILABLE ADMINISTRATIVE REMEDIES BEFORE STARTING THIS LAWSUIT.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Chivers v. Wal-Mart Stores, Inc.*, 641 F.3d 927, 932 (8th Cir. 2011). A fact dispute is immaterial if it does not affect the outcome of the case, and the non-moving party

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cannot defeat summary judgment by presenting merely colorable evidence or evidence that is not significantly probative in light of the record as a whole. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Gannon Int'l Ltd. v. Blocker*, 684 F.3d 785, 792 (8th Cir. 2012). A plaintiff further cannot avoid summary judgment by presenting statements from the record out of context or relying on speculation and conjecture. *Anderson*, 477 U.S. at 256; *Nyrop v. Indep. Sch. Dist. No. 11*, 616 F.3d 728, 737 (8th Cir. 2010); *Bloom v. Metro Heart Grp. of St. Louis, Inc.*, 440 F.3d 1025, 1028-29 (8th Cir. 2006).

The Prison Litigation Reform Act of 1995 (PLRA) requires inmates to exhaust administrative remedies before filing any lawsuit challenging prison conditions. 42 U.S.C. §1997e(a) (2006). Exhaustion is mandatory, even if the administrative process cannot grant the relief sought. *Porter v. Nussle*, 534 U.S. 516, 524 (2002); *Booth v. Churner*, 532 U.S. 731, 739 (2001). Exhaustion requires proper exhaustion, meaning that an inmate must fully comply with an agency's established procedures. *Woodford v. Ngo*, 548 U.S. 81, 90-91, 94 (2006); *see also Jones v. Bock*, 549 U.S. 199, 218 (2007) ("[I]t is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion.")

A remedy is "available" when it is "capable of use for the accomplishment of a purpose." *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) (quotation omitted). Although a limited exception to exhaustion exists when prison staff

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prevented an inmate from exhausting, an inmate's subjective beliefs about the availability or futility of administrative remedies are irrelevant. *Hammett v. Cofield*, 681 F.3d 945, 948 (8th Cir. 2012); *Gibson v. Weber*, 431 F.3d 339, 341 (8th Cir. 2005); *Lyon v. Vande Krol*, 305 F.3d 806, 809 (8th Cir. 2002). This Court has generally excused exhaustion only if staff actively prevented an inmate from grieving by, for example, refusing to provide necessary forms or refusing to process grievances. *See Conner v. Doe*, 285 F. App'x 304 (8th Cir. 2008); *Foulk v. Charrier*, 262 F.3d 687, 698 (8th Cir. 2001); *Miller*, 247 F.3d at 738; *Hanks v. Prachar*, No. 02-4045, 2009 WL 702177, at *10 (D. Minn. Mar. 13, 2009). When a prison has an available administrative procedure, an inmate cannot rely on staff statements to claim that he did not need to follow the procedure. *Gibson*, 431 F.3d at 341; *Chelette v. Harris*, 229 F.3d 684, 688 (8th Cir. 2000).

The district court correctly held that Brooks failed to exhaust available administrative remedies. The undisputed record establishes that Brooks received information about, and had access, to the Departments' general grievance policy, which plainly applies to conditions of confinement except those subject to a separate appeal process. To the extent that Brooks generally believed that he did not need treatment or New Dimensions was not an appropriate program assignment for him, he needed to follow Directive 500.308 and appeal his chemical-dependency diagnosis or the recommended treatment program first to the

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prison's director of psychological services and then to the Department's director of behavioral health. He did not. More significantly, Brooks's claims all relate to his central proposition that his religious beliefs were substantially burdened while in New Dimensions. To properly exhaust these claims, he needed to file a formal grievance and then a grievance appeal. He concedes that he did not. And, before the district court, he implied that he consciously chose not to because of his alleged fear of retaliation. Because exhaustion is mandatory and administrative remedies were available, the district court properly dismissed his claims.

On appeal, Brooks makes three central arguments: (1) he exhausted his remedies as to his request to go to Mash-ka-wisen because the Department's treatment policy does not allow inmates to appeal the location of their treatment; (2) staff told him treatment decisions were not appealable and the district court failed to properly credit his sworn statement to this effect; and (3) the district court erroneously dismissed with prejudice claims related to his termination from the treatment program. None of these arguments has a factual or legal basis.

A. Brooks Did Not Exhaust Administrative Remedies Related to Placement at Mash-ka-wisen.

Directive 500.308 provides that the location of treatment is not appealable. This provision has no bearing on Brooks's claims for multiple reasons. First, his claims do not arise from the denial of placement at Mash-ka-wisen; they relate to

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his claim that the Department has improperly burdened his religious beliefs. It is this issue that requires exhaustion for Brooks to proceed with a lawsuit.

Second, the policy statement about the location of treatment is in the context of challenges to whether treatment is appropriate and the type of treatment recommended within the *Department* (i.e., the prison at which the inmate will participate in treatment). At the point the policy applies, a sentencing court has already sentenced an inmate to prison. If the court believed treatment in the community was appropriate, the court presumably would have sentenced the offender to probation to allow participation in a community-based treatment program. The policy therefore does not address requests to participate in non-prison programs.

Third, Brooks claims that his request to go to Mash-ka-wisen is rooted in a request for a conditional medical release. An entirely separate policy addresses conditional medical release, and a statute governs eligibility for this type of release. Brooks has never complied with that policy or statute. That he asked people who have no involvement with the conditional-medical-release procedure about obtaining conditional medical release does not establish exhaustion.

Finally, even if Brooks's request to go to Mash-ka-wisen is not appealable under Directive 500.308, the general grievance policy specifically applies to issues that have no separate appeal process. Directive 500.308 does not state that the

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location is not grievable, as it does for other topics. (*See* J.A. 16 (noting that program director's termination decision "may not [be] grieved.").) Because Brooks filed no grievances related to the allegations in his complaint, he failed to exhaust available administrative remedies.

B. No Staff Prevented Brooks from Using Available Administrative Procedures.

Brooks claims that treatment-program staff prevented him from exhausting by allegedly telling him that "there was no appeal from treatment decisions." (J.A. 66.) Even assuming that Brooks's statement is true for the purpose of summary judgment, no material fact issue existed to preclude summary judgment. First, as with his previous argument, individual treatment decisions were not the basis of his complaint. His claims relate to the overall assertion that the program burdened his religious beliefs, and he did not grieve that issue. Second, despite Brooks's meticulous recounting of every other alleged interaction with staff, Brooks's affidavit is notably vague as to when these conversations allegedly occurred, and Brooks indicated that they occurred *after* he began this lawsuit, meaning that he did not rely on the statements as a reason for not trying to exhaust *before* filing his lawsuit. Third, if the statements were made, they appear to be true in the context of the treatment policy as it does not provide an appeal procedure within the treatment program for individual treatment decisions. In that case, the general grievance policy applies and Brooks did not follow it. Brooks's

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misunderstanding of the grievance procedure does not change the fact that the procedure was available. This is not a case in which staff prevented Brooks from grieving by refusing to process his grievances.

Brooks asserts that the district court did not properly credit his affidavit. Throughout this litigation, Brooks has created a moving target in his claims and arguments. He first alleged that New Dimensions was a twelve-step program. Then he conceded it was not and changed his focus, touching on seeking conditional medical release and focusing on an alleged fear of reprisal if he grieved. Now he focuses nearly exclusively on conditional medical release and the alleged statements that he could not appeal treatment decisions. The now-challenged district court statements about Brooks's subjective beliefs were properly focused on Brooks's central contention before that court that he chose not to grieve because he feared reprisal and the grievance procedure was not available to him. The district court properly noted that the record did not contain any evidence to support these contentions, and the court relied on well-established caselaw to reject Brooks's alleged subjective beliefs. The undisputed record established that administrative remedies were available, that Brooks did not use them, and that no one prevented them from doing so. Brooks's averment that staff told him treatment decisions were not available therefore did not preclude summary judgment.

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C. The District Court Did Not Dismiss Claims Related to Brooks's Termination from Treatment Because He Failed to Make Those Claims in District Court.

Brooks disputes that he failed to exhaust administrative remedies on his claims addressed above. But, if he did not exhaust, he does not challenge their dismissal with prejudice because administrative remedies were, but are no longer, available. *See Woodford*, 548 U.S. at 92-93 (analogizing to habeas law in recognizing that PLRA requires proper exhaustion and noting that habeas law recognizes procedural default for failing to use remedies when they were available); *Johnson v. Meadows*, 418 F.3d 1152, 1155-59 (11th Cir. 2005) (holding that inmates may procedurally default claims by not properly exhausting); *Berry v. Kerik*, 366 F.3d 85, 87-88 (2d Cir. 2004) (holding that dismissal with prejudice is appropriate when previously available remedies are no longer available). Instead, Brooks asserts that the district court erroneously dismissed claims related to his termination from New Dimensions with prejudice, arguing that the dismissal should have been without prejudice or that the Court should remand the case for those claims to proceed. (Appellant's Br. 15-16.) When a party fails to raise an issue before the district court, the issue is waived on appeal. *Medtronic, Inc. v. Gibbons*, 684 F.2d 565, 569 (8th Cir. 1982). The Court should not consider this argument because Brooks failed to raise it before the district court. (Pl.'s Obj., ECF 44.)

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Even if the Court considers the argument, the appellees do not construe the district court's order to address those claims because they were not before the court. As Brooks acknowledges, when he started this case, he had not been terminated from treatment. The complaint therefore contained no claims related to his termination from treatment. After he was terminated, he did not amend his complaint to add any claims, although the court noted in denying Brooks's motion for a preliminary injunction that any alleged retaliation claim related to the termination would be futile. *Brooks*, 881 F. Supp. 2d at 1040, 1057-58. The district court ultimately addressed and dismissed only the claims in the complaint when it granted the appellees' motion. The court therefore did not dismiss claims that were not in the complaint. And even if the case contained claims about treatment termination, a dismissal would still be mandatory rather than the remand Brooks seeks because exhaustion must occur before, not during the pendency of, litigation. *See Johnson v. Jones*, 340 F.3d 624, 627 (8th Cir. 2003).

II. EVEN IF BROOKS EXHAUSTED HIS REMEDIES, AN ALTERNATIVE GROUND FOR AFFIRMING EXISTS BECAUSE BROOKS FAILED TO STATE CLAIMS FOR RELIEF.

This Court may affirm the district court on any basis that the record supports. *Bluehaven Funding, LLC v. First Am. Title Ins. Co.*, 594 F.3d 1055, 1058 (8th Cir. 2010). The appellees identified two grounds for dismissing Brooks's complaint: he failed to state any claims for relief and he failed to exhaust

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his administrative remedies. While the district court dismissed claims for which no cause of action exists and dismissed the remaining claims based on Brooks's failure to exhaust, it did not address the remainder of the appellees' motion. If the Court concludes that the district court erred in its exhaustion analysis, the appellees request that the Court either affirm on an alternative ground or remand to the district court for a decision on the remaining grounds for dismissal.[5] *See Jones v. Norris*, 310 F.3d 610, 612 (8th Cir. 2002) (addressing inmate's appeal of dismissal for failure to exhaust, but also holding that complaint was frivolous).

Whether a complaint states a claim is a question of law. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). A district court must dismiss a complaint when the complaint fails to allege sufficient facts to state a plausible claim for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Schaller Tel. Co. v. Golden Sky Sys., Inc.*, 298 F.3d 736, 740 (8th Cir. 2002). A complaint that alleges facts that are "merely consistent with a defendant's liability . . . stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). A complaint must include factual enhancements that raise a complaint above mere assertions. *Twombly*, 550 U.S. at 557.

[5] While the appellees noted numerous flaws in Brooks's complaint before the district court, they limit their discussion here to just two of the central reasons for dismissing the complaint.

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Brooks alleged that the appellees, in their official and individual capacities, violated his rights under RLUIPA and the First Amendment's free-exercise clause. RLUIPA prohibits the government from imposing a substantial burden on an inmate's religious exercise unless the burden is the least restrictive means of furthering a compelling government interest. 42 U.S.C. § 2000cc-1(a). The First Amendment prohibits government interference with a sincerely held religious belief unless reasonably related to a legitimate penological interest. *Gladson v. Iowa Dep't of Corr.*, 551 F.3d 825, 831 (8th Cir. 2009). Although RLUIPA imposes a higher standard of review than the First Amendment, courts must still give "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005).

When a prison policy or practice implicates the First Amendment and RLUIPA, the court must first determine whether the regulation substantially burdens the inmate's ability to practice his religion. *Gladson*, 551 F.3d at 833. Establishing a substantial burden requires evidence that a prison policy or practice significantly inhibits or constrains an inmate's religious practice or meaningfully curtails his ability to express adherence to his faith. *Van Wyhe v. Reisch*, 581 F.3d. 639, 656 (8th Cir. 2009); *Gladson*, 551 F.3d at 833. Absent a substantial

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burden, a court need not consider the connection between the regulation and penological goals. *Gladson*, 551 F.3d at 833.

Brooks's complaint vaguely alleged only that he is Native American, that he was required to participate in a "twelve-step" program, that the program "conflicts with" and is "inconsistent" with his beliefs, and that he preferred to attend a "culturally appropriate" program in the community rather than be in prison. (J.A. 5-7.) He did not identify any religious beliefs, and he did not allege any facts that could establish a substantial burden on any belief. (*Id.*) Rather, he specifically noted numerous religious activities he participates in at the prison, such as going to sweat lodges, attending pipe and drum ceremonies, and smudging. (*Id.* at 5.) And he later conceded that New Dimensions is not a twelve-step program. Despite his apparent preference not to be in prison, he did not identify any reason he could not participate in a treatment program not geared specifically to Native Americans. Because Brooks failed to allege facts that could establish a substantial burden on a religious belief, the Court should dismiss his complaint for failing to state claims.

Finally, Brooks failed to state claims against the appellees in their individual capacities. Section 1983 imposes liability only on state officials who are directly and personally involved in depriving constitutional rights. *Rizzo v. Goode*, 423 U.S. 362, 376–77 (1976). Personal involvement of a named defendant is an essential element because the respondeat-superior doctrine does not apply to

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Section 1983 claims. *Monell v. New York Dep't of Soc. Servs.*, 436 U.S. 658, 691-93 (1978). General responsibility for supervising prison operations is insufficient to establish the personal involvement necessary for individual liability. *Glick v. Sargent*, 696 F.2d 413, 414 (8th Cir. 1983). Supervisory liability requires "a causal link to, and direct responsibility for, the deprivation of rights." *Clemmons v. Armontrout*, 477 F.3d 962, 967 (8th Cir. 2007). The plaintiff must therefore explain the alleged actions of each individual defendant that violated his rights. *Ashcroft*, 556 U.S. at 676-78. Further, equitable relief against individual-capacity defendants is inappropriate because claims are against the individual rather than the individual's employer. *Kentucky v. Graham*, 473 U.S. 159, 167-68 (1985); *see also Hill v. Shelander*, 924 F.2d 1370, 1374 (7th Cir. 1991) (holding that injunctive relief against government actor may only be recovered in official-capacity suit).

The Court should dismiss all individual-capacity claims because Brooks seeks only equitable relief and he failed to allege sufficient personal involvement. Brooks named current and former upper-level staff as defendants and noted only their general responsibility in supervising various aspects of prison operations. (J.A. 2-3.) He referred collectively to "Defendants" throughout his complaint, with no differentiation of what each allegedly did to violate his rights. Moreover, his undifferentiated allegations are insufficient. He alleges that the appellees ordered

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him to complete chemical-dependency treatment, that he told them that he believes the program is inconsistent with his religious beliefs, and that they denied his request to complete treatment in the community instead of in prison. (J.A. 4-6.) He did not allege that he provided them with any evidence that the program actually burdened any religious beliefs or that he requested any reasonable accommodations. Because Brooks's complaint did not adequately allege that any appellee violated his rights, the Court should dismiss the complaint for failure to state a claim. Further, in their individual capacities, the appellees have no authority to take any action with respect to Brooks. It is therefore inappropriate for Brooks to maintain individual-capacity claims against them when he seeks only equitable relief.

CONCLUSION

The Court should affirm the district court's dismissal of Brooks's complaint. The district court correctly held that Brooks failed to exhaust available administrative remedies before commencing this lawsuit. Alternatively, the Court should affirm the dismissal because Brooks failed to allege facts that stated claims for which the district court could provide relief.

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Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

s/ Angela Behrens
Angela Behrens
Assistant Attorney General
Atty. Reg. No. 0351076

445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
Telephone: (651) 757-1204
Fax: (651) 297-4139
angela.behrens@ag.state.mn.us

ATTORNEY FOR APPELLEES ROY, CRIST, CARLSON, LARSON, REISER, PANSER, AND SCHAFFER

CERTIFICATE OF COMPLIANCE
WITH 8th Cir. R. 28A(h)(2)

The undersigned, on behalf of the party filing and serving this brief, certifies that the brief has been scanned for viruses and that the brief is virus-free.

s/ Clara Atkinson

CLARA ATKINSON

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CERTIFICATE OF SERVICE

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I hereby certify that on May 20, 2014, I electronically submitted Appellees' Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case who are registered CM/ECF users will be served by the CM/ECF system.

s/ Angela Behrens