In the

United States Court of Appeals

for the Seventh Circuit

No. 21-1702

ERIC GOOCH,

Plaintiff-Appellant,

v.

S. YOUNG and J. WILSON,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Indiana, Terre Haute Division.
No. 2:19-cv-00607-JPH-MJD — **James P. Hanlon**, *Judge*.

ARGUED DECEMBER 14, 2021 — DECIDED JANUARY 24, 2022

Before SYKES, *Chief Judge*, and HAMILTON and ST. EVE, *Circuit Judges*.

PER CURIAM. Eric Gooch, a federal prisoner, sued correctional officers who he alleges encouraged another inmate to assault him. The defendants moved for summary judgment, arguing that Gooch failed to exhaust his administrative remedies. Gooch responded that his counselor had refused his request for the required grievance form and that prison officials threatened to hurt him if he filed a grievance. The

district court entered summary judgment for the defendants. Because exhaustion is not required when the responsible prison officials refuse to give a prisoner the necessary grievance form or thwart a prisoner from filing a grievance through threats or intimidation, we vacate the summary-judgment order and remand for further proceedings.

I. Background

Gooch filed a *Bivens* action in December 2019 against two correctional officers at the United States Penitentiary in Terre Haute, Indiana, alleging that they violated his rights under the Eighth Amendment. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). (He has since been transferred to a facility in Tucson, Arizona.) Gooch alleged in his complaint that correctional officers Lieutenant S. Young and Officer J. Wilson falsely informed another inmate that Gooch had stolen from him and directed the inmate to "take action on this matter." He further alleged that the inmate then attacked Gooch with a weapon, and when Gooch began to defend himself, Officer Wilson intervened and instructed Gooch to lie on the floor, where the inmate attacked him again.

According to the evidence presented at summary judgment, which we view in the light most favorable to Gooch, *Reid v. Balota*, 962 F.3d 325, 327 (7th Cir. 2020), Gooch asked his correctional counselor for the form on which to file a grievance against the officers who incited the attack on him. Gooch asserts that his counselor refused to give him the form and instead told him: "I'm not giving you a form to file on that and you better watch out snitching on staff." Over the next two days, "multiple guards" walked by Gooch's

cell, calling him a "rat" and saying, "[G]o ahead and write staff up[;] the next time you're gonna die."

Three days after the attack, Gooch sued Young and Wilson for violating his Eighth Amendment rights by encouraging the other inmate to attack him. After answering, the officers moved for summary judgment on the affirmative defense of failure to exhaust administrative remedies as required by the Prison Litigation Reform Act ("PLRA"). *See* 42 U.S.C. § 1997e(a); 28 C.F.R. §§ 542.10 *et seq.* Gooch responded that given the officers' threats and his counselor's refusal to give him the form, he feared for his life if he filed a grievance and believed that the court would protect him.

In support of their summary-judgment motion, Wilson and Young filed a declaration from administrative-remedy clerk Renee Turner. Turner attested that an inmate can access the federal Bureau of Prisons ("BOP") policies via the institution's law library and that her search revealed no record of a grievance filed by Gooch about his attack. However, her declaration did not dispute or address Gooch's assertion that his correctional counselor refused to provide him with the necessary form to file a grievance. And the defendants adduced no other evidence and did not take discovery on exhaustion or the availability of the forms to Gooch. Nor did they ask for an evidentiary hearing on exhaustion under *Pavey v. Conley*, 544 F.3d 739 (7th Cir. 2008).

The district judge entered summary judgment for the defendants. The judge reasoned that even if Gooch's counselor refused to provide the grievance form and the prison guards' threats deterred him from filing a complaint at Terre Haute, Gooch could have "mail[ed] his request directly to

the Regional Office, as the regulations and program statement provide." Thus, the judge concluded, the prison officials had demonstrated that the administrative-remedy process was "available" to Gooch, so he had to exhaust all of its steps before filing a complaint in federal court.

II. Discussion

Now represented by recruited counsel, Gooch argues that the judge erred in entering summary judgment because he misapprehended the meaning of "available" remedies under the PLRA. He maintains that exhaustion was not required because prison officials refused to provide him with the necessary grievance form and, further, thwarted him from filing a grievance through threats and intimidation. We review de novo the district court's exhaustion determination on summary judgment. *Reid*, 962 F.3d at 329.

The PLRA applies in *Bivens* actions to prevent prisoners from bringing a case in federal court challenging prison conditions until the available administrative remedies are exhausted. *See Kaba v. Stepp*, 458 F.3d 678, 683–84 (7th Cir. 2006); § 1997e(a). Administrative remedies are "available" if they are "'capable of use' to obtain 'some relief for the action complained of.'" *Ross v. Blake*, 578 U.S. 632, 642 (2016) (quoting *Booth v. Churner*, 532 U.S. 731, 738 (2001)). If an administrative remedy is unavailable, a prisoner need not exhaust it. *Id.* at 635. Failure to exhaust is an affirmative defense, so the defendants bear the burden of proof and cannot shift it to require Gooch to show that administrative remedies were unavailable. *See Kaba*, 458 F.3d at 686.

Under *Jones v. Bock*, 549 U.S. 199 (2007), and *Woodford v. Ngo*, 548 U.S. 81 (2006), prison regulations define what is

(and is not) required of an inmate to "properly" exhaust. In this case, the BOP has promulgated an administrative-remedy process consisting of multiple steps. 28 C.F.R. §§ 542.10 *et seq.* An inmate must first attempt to resolve the issue informally, and if still unsatisfied, must submit a formal written request to the institution. § 542.13–14. This request must be "on the appropriate form (BP-9)," which the inmate "shall obtain" from the correctional counselor or other appropriate staff. § 542.14. If an inmate "reasonably believes the issue is sensitive" and that filing the form at his institution would threaten his safety, the inmate "may submit the Request directly to the appropriate Regional Director." § 542.14(d).

The defendants were not entitled to summary judgment because they did not demonstrate that administrative remedies were available to Gooch, and Gooch provided evidence to the contrary. The grievance process was arguably unavailable for two reasons. The first rests on Gooch's contention that the correctional counselor refused to give him the necessary form. The BOP's policy states that an inmate "shall obtain the appropriate form" to file a grievance, § 542.14(c), which demonstrates that the form is required to seek any form of administrative remedy. In *Hill v. Snyder*, 817 F.3d 1037 (7th Cir. 2016), we held that "exhaustion is not required when the prison officials responsible for providing grievance forms refuse to give a prisoner the forms necessary to file an administrative grievance." *Id.* at 1041 (citing *Dale v. Lappin*, 376 F.3d 652, 655–56 (7th Cir. 2004)). Evidence of the appropriate official's refusal to give a prisoner an available form "is sufficient to permit a finding" that the administrative remedies were not available. *Id.*

Yet Young and Wilson argue that Gooch had time remaining to file a timely grievance, and so he should have tried harder to procure the BP-9 form—for instance, by asking other staff—before "rushing to court." But *Hill* rejected this proposed rule as "unworkable," holding that "[t]he PLRA does not impose such a requirement" for "prisoners to go on scavenger hunts just to take the first step toward filing a grievance." *Id.* Like the inmate in *Hill*, Gooch asked the appropriate official for the form to submit a formal grievance and says he was refused. *See id.* at 1039. The government does not contest his testimony on that score. Therefore, Gooch's case cannot reasonably be distinguished from *Hill*. Nor is it meaningfully different from *Dale*, in which the inmate requested the appropriate grievance form from his counselor and several other prison staff who either told him they did not have the form or ignored his requests. 376 F.3d at 655–56. We rejected the defendants' assertion that inmates need not use the form to submit a grievance because the prison's policy plainly stated that the form was required, and we held that remedies were not available to the inmate. *Id.* at 656.

Further, the government's suggestion that Gooch could have filed a grievance directly with the Regional Director is hard to square with BOP regulations—although the judge stated otherwise when he agreed that Gooch could have done this "as the regulations and program statement provide." First, an inmate may submit a grievance with "sensitive" content to the Regional Director, § 542.14, but the government did not establish that Gooch's concern would be considered a "sensitive" matter. Second, the sensitive-issue workaround is not an exception to the requirement that a prisoner write out his grievance on a BP-9 form. Under the

plain language of the rules, in order to submit a grievance to the Warden or Regional Director, a prisoner must use "the appropriate form (BP-9)." § 542.14(a). The government does not engage with that argument. Because the government did not contest Gooch's testimony that he was prevented from obtaining a BP-9 grievance form, it failed to meet its burden of showing that administrative remedies were "available."

Under *Hill* and *Dale*, the prison's refusal to provide the form suffices to show that Gooch did not have administrative remedies available. But he also attested that prison officials threatened and intimidated him to prevent him from reporting the defendants' conduct. An administrative remedy that a prisoner is required to exhaust under the PLRA must be "available in fact and not merely in form." *Schultz v. Pugh*, 728 F.3d 619, 620 (7th Cir. 2013). A remedy is not considered "available" to an inmate who is prevented by threats or intimidation by prison officials from submitting a grievance according to the prescribed policies. *Id.* Gooch attested that he feared for his life if he continued with the BOP's administrative-remedy process because guards told him that he was "gonna die" if he complained about prison staff. The government did not contest this assertion, so for this additional reason, it failed to meet its burden of showing that remedies were "available" to Gooch. *See Ross*, 578 U.S. at 644; *Schultz*, 728 F.3d at 620.

We therefore VACATE the summary-judgment order and REMAND for further proceedings.