

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

**For the Seventh Circuit
Chicago, Illinois 60604**

Submitted July 1, 2024*

Decided July 1, 2024

Before

DIANE S. SYKES, *Chief Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

JOSHUA P. KOLAR, *Circuit Judge*

No. 24-1023

WALTER J.D. MOFFETT,
Plaintiff-Appellant,

v.

MICHAEL A. DITTMAN, et al.,
Defendants-Appellees.

Appeal from the United States District
Court for the Western District of
Wisconsin.

No. 20-cv-21-wmc

William M. Conley,
Judge.

ORDER

Walter Moffett, a Wisconsin prisoner, appeals the summary judgment against him based on his failure to exhaust administrative remedies before bringing excessive-force and failure-to-intervene claims under the Eighth Amendment. *See* 42

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

U.S.C. § 1983. Because the undisputed facts show that a grievance process was available to Moffett, but he did not exhaust his remedies with respect to these claims, we affirm.

We construe the facts and draw all reasonable inferences in favor of Moffett, the nonmoving party. *Williams v. Ortiz*, 937 F.3d 936, 941 (7th Cir. 2019). In January 2016, Moffett, who is confined to a wheelchair, was housed in the unit for disabled and mentally ill prisoners at Columbia Correctional Institution. On January 21, Moffett was summoned to the dayroom for a visit with Dr. Maria Gambaro to discuss personal problems. According to Moffett, correctional officer Billie Pesjkar interrupted the conversation and ordered Moffett to go back into his cell. Frustrated by his slow movement, Pesjkar pushed Moffett into a nearby wheelchair lift. At this point, Moffett tried to grab the railings of the wheelchair lift to keep himself upright, but Pesjkar grabbed his arms and pressed the emergency alert button, causing other officers to arrive. The officers forced Moffett to the ground and, in the process, caused injuries to his head, shoulders, back, arms, and fingers.

Moffett filed this suit under 42 U.S.C. § 1983, alleging that some officers used excessive force while others failed to intervene, in violation of his rights under the Eighth Amendment. The defendants moved for summary judgment on the basis that Moffett failed to exhaust administrative remedies as required by the Prison Litigation Reform Act. The district judge agreed with the defendants, rejecting Moffett's argument that complaint forms were not available to him after the January 2016 incident. Moffett appeals, and we review the ruling on exhaustion de novo. *Williams*, 937 F.3d at 941.

Moffett argues that the judge erred by not excusing his failure to file a grievance about the use of force on January 21, 2016, because administrative remedies were not available. The Prison Litigation Reform Act provides that "[n]o action shall be brought with respect to prison conditions ... until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). This provision requires "proper" exhaustion, *Woodford v. Ngo*, 548 U.S. 81, 93 (2006), which means that prisoners must follow the procedures that state law requires, *Jones v. Bock*, 549 U.S. 199, 218 (2007). Exhaustion is not required, though, if a grievance process is not "available." *Gooch v. Young*, 24 F.4th 624, 627 (7th Cir. 2022). This includes situations where "prison officials responsible for providing grievance forms refuse to give a prisoner the forms necessary to file an administrative grievance." *Id.* (citation omitted). Because failure to exhaust is an affirmative defense, the defendants must show that administrative remedies were available to Moffett. *Id.*

We agree with the district judge that the defendants met their burden. It is undisputed that Moffett did not file a grievance about excessive force or failure to intervene following the incident on January 21, 2016. And the defendants submitted evidence that Moffett managed to file a grievance in February 2016 about a different incident. Moffett responds that he could access only one complaint form, which he used to address other issues. But the record belies his contention: According to a declaration supplied by the defendants, complaint forms were available in Moffett's housing unit and, in fact, a total of 17 complaints were submitted by inmates in his unit in January and February 2016. Moffett denies this but offers nothing more. Simply put, unsworn statements in his brief—which the record does not support—are insufficient to avoid summary judgment. *See Daugherty v. Page*, 906 F.3d 606, 611 (7th Cir. 2018).

AFFIRMED