

NONPRECEDENTIAL DISPOSITION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 March 17, 2025*
Decided April 3, 2025

Before

FRANK H. EASTERBROOK, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 24-1156

BRANDON L. JOHNSON,
Plaintiff-Appellant,

v.

LARRY HASKELL and BRANDON
STOVALL,
Defendants-Appellees.

Appeal from the United States District
Court for the Northern District of
Indiana, South Bend Division.

No. 3:21-CV-517-DRL-MGG

Damon R. Leichty,
Judge.

ORDER

Brandon Johnson, who is incarcerated at the Indiana State Prison in Michigan City, Indiana, sued prison guards for knowingly leaving him in a cell contaminated with feces, in violation of his Eighth Amendment rights. *See* 42 U.S.C. § 1983. The

* 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).

district court entered summary judgment for the defendants because Johnson failed to exhaust his administrative remedies. On appeal, Johnson argues that remedies were unavailable and, alternatively, that the court should have deferred ruling and allowed further discovery. Because there are factual questions about whether Johnson timely appealed the grievance office's response and whether other relevant grievances exist, we vacate the judgment and remand for an evidentiary hearing. *See Pavey v. Conley*, 544 F.3d 739 (7th Cir. 2008).

We construe the record in favor of Johnson, the non-movant. *See Williams v. Rajoli*, 44 F.4th 1041, 1045 (7th Cir. 2022). On April 20, 2021, Johnson was moved into an unsanitary cell: it was covered with feces on the bars, door, food slot, ceiling, and under the bed; and he stayed in that cell until May 3. He told two prison guards, Brandon Stovall and Larry Haskell, that he needed cleaning supplies, but they did not provide any. Instead, they left him in the filthy cell for 13 days. Afterward, he was moved to a cell with its own issues—dust, fire damage, and lingering pepper spray.

Relevant for this appeal, Indiana's grievance process consists of three steps, requiring a prisoner to: (1) file a grievance after attempting to resolve the issue informally; (2) if the grievance is denied, file an appeal to the warden or the warden's designee; and (3) if the appeal is denied, file a second-level appeal to the Department's grievance manager. *See* IND. DEP'T OF CORR., ADMIN. PROC. NO. 00-02-301, § IV (effective Sept. 1, 2020). The prisoner has five business days to appeal, *id.* § XI, or longer if he can show good cause, *id.* §§ X.B, XIII.A. If the prisoner does not receive a response within 20 days, he may appeal the grievance as though it had been denied. *Id.* § X.C.

Johnson filed a grievance on April 21, 2021, the day after he moved into the unsanitary cell. He complained of dirty food trays, the range not being mopped in months, and the guards' failure to provide him with a toilet brush. In their acknowledgement of receipt, officials noted that their deadline to respond was May 17.

Johnson filed another grievance on May 5 in which he described the unsanitary conditions in greater detail—noting that the walls, toilet, door, and bars were covered in feces for five days. He explained that, in a different cell, pepper spray hung in the air and that there was significant dust and fire damage. The grievance office returned the second grievance because, the response stated, it was duplicative of the first. Johnson did not resubmit the grievance.

Johnson received the response to his April 21 grievance on July 29, but it was dated July 8, three weeks earlier. The response stated: “[S]taff should be cleaning the

ranges at least once per shift, which includes mopping. Cell cleanup also occurs on night shift. You will need to speak with your unit lieutenant about getting items like toilet brushes.” Johnson attempted to appeal the response the day he received it, but the grievance office rejected his appeal as untimely because he filed it more than five business days after the response was sent, and Johnson did not explain why his appeal was late (to show “good cause” for untimeliness). Johnson filed this lawsuit while awaiting the grievance office’s response and then amended the complaint after his appeal was rejected.

The defendants moved for summary judgment, arguing that Johnson failed to exhaust his administrative remedies. *See* 42 U.S.C. § 1997e(a). As evidence, the defendants provided Johnson’s grievance history and copies of his two grievances from April 21 and May 5, 2021. A grievance specialist attested that those were the only two grievances relevant to the lawsuit, but Johnson disagreed.

In his response, Johnson asked, by means of a declaration, to postpone summary judgment pending the completion of limited discovery. *See* FED. R. CIV. P. 56(d). In his briefing, Johnson suggested that the defendants understated the number of grievances he filed and that some may have been lost, destroyed, or forgotten. And in his declaration, Johnson attested that prison officials refused to give him access to relevant records (presumably the other grievances he says he filed) or let him access his property box (where he might have had relevant documents).

Without addressing the request for discovery, the district court entered summary judgment for the defendants. The court determined that Johnson had provided no evidence of missing grievances, and the fact that Johnson was moved out of the unsanitary cell—and therefore received a remedy—did not excuse his failure to appeal the response to the April 21 grievance. Further, the court concluded, appealing that decision on the day that he received it did not excuse his failure to explain why the attempted appeal was not filed within five days of the office sending the response.

On appeal, Johnson challenges the summary judgment decision, which we review *de novo*. *See Williams*, 44 F.4th at 1045. According to Johnson, his appeal of the grievance from April 21, 2021, must have been timely because he submitted it the same day he received the grievance office’s response. The PLRA requires “strict adherence” to the relevant grievance procedures, *Jackson v. Esser*, 105 F.4th 948, 956 (7th Cir. 2024), and the procedures state that a prisoner must appeal “within five (5) business days after the date of the grievance response.” ADMIN. PROC. NO. 00-02-301, § XI. The defendants proceed as though the five-day window starts when the grievance office sends the

response, but the grievance specialist at the prison attested otherwise, stating that Johnson needed to appeal “within five (5) days of receiving the grievance response.” (Affidavit of Joshua Wallen, Doc. 43-1 ¶ 36.) Because it is unclear whether Johnson timely appealed, a *Pavey* hearing is necessary to determine whether he exhausted the grievance of April 21, 2021. *See Pavey*, 544 F.3d at 742.

At the *Pavey* hearing, the district court must also determine whether Johnson properly attempted to appeal despite failing to submit the necessary forms. The grievance procedures require a prisoner to submit State Form 45473 to appeal properly, and Johnson did not do so. But Johnson returned the grievance office’s response and indicated that he disagreed with the decision. It is possible that the grievance office, therefore, should have provided Johnson with the correct forms, but it did not. *See Sapp v. Hyatte*, No. 3:21-CV-768 RLM-MGG, 2023 WL 5223580, at *4 (N.D. Ind. Aug. 15, 2023) (“If a prisoner wants State Form 45473, he marks ‘disagree’ on the Offender Grievance Response Report and sends it to the grievance specialist” who then “sends a copy of State Form 45473 to the prisoner.”).

A *Pavey* hearing can also clarify whether all relevant grievances are in the record. Johnson argues that summary judgment was premature because he submitted a declaration requesting further discovery before a summary judgment ruling. On appeal, he frames this argument under Federal Rule of Civil Procedure 56(d), which allows the district court to postpone summary judgment to allow further discovery when a party “cannot present facts essential to opposing a motion for summary judgment.” *Smith v. OSF HealthCare Sys.*, 933 F.3d 859, 866 (7th Cir. 2019). The defendants concede that Johnson’s declaration in the district court appears to have been a Rule 56(d) motion—which requires a supporting affidavit—and, under liberal construction, we agree. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

In his response to the summary judgment motion, Johnson argued that the defendants had “lost, stolen, or forgotten” about other relevant grievances he had filed. And in his declaration, Johnson swore that prison officials would not give him access to relevant records. Further, Johnson requested through filings (instead of discovery requests served on the defendants) grievance logs and copies of grievances that had been resolved or rejected. Because Johnson raised the issue of needing further discovery and why, and he tried to issue requests for the items he sought, he acted in a “diligent, sensible, and sequenced manner.” *See Smith*, 933 F.3d at 861. He also did not miss a discovery deadline; none had been set. *See id.* at 865.

Further, Johnson's motion was not obviously futile. *See id.* at 866. Although the defendants asserted that he had filed only two relevant grievances in this case (the two discussed above), they provided a log of grievances Johnson filed before his amended complaint, including five about the "Safety, Sanitation, Environmental Conditions" of the institution. Yet the defendants did not supply or discuss the potential relevance of these grievances. On appeal Johnson provides a copy of one of the logged grievances that the defendants did not mention. It complains of unsanitary cell conditions like those Johnson complained of in his grievance from April 21, 2021. Johnson did not present this additional grievance to the district court—he attested that he could not gain access to his papers—so we refrain from analyzing it here. *See Tuduj v. Newbold*, 958 F.3d 576, 580 (7th Cir. 2020). But given the existence of at least one potentially relevant grievance that was on the log the defendants submitted and that was never addressed, further probing is warranted. It is the defendants' burden to establish a prisoner's failure to exhaust. *Gooch v. Young*, 24 F.4th 624, 627 (7th Cir. 2022).

We therefore VACATE the judgment of the district court and REMAND the case for an evidentiary hearing to determine (1) whether Johnson's appeal was timely for his grievance from April 21, 2021; and (2) whether any of Johnson's other grievances were relevant to the unsanitary conditions of his cell and, if so, whether he exhausted the available remedies. We encourage the district court to consider recruiting counsel for Johnson to assist at the *Pavey* hearing.