

NONPRECEDENTIAL DISPOSITION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 August 18, 2026*

Decided August 24, 2026

Before

FRANK H. EASTERBROOK, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

JOSHUA P. KOLAR, *Circuit Judge*

No. 25-3119

BRANDON L. PORTER,
Plaintiff-Appellant,

v.

CHRISTOPHER HOCH,
Defendant-Appellee.

Appeal from the United States District
Court for the Eastern District of
Wisconsin

No. 25-CV-52

Lynn Adelman,
Judge.

ORDER

Brandon Porter, a Wisconsin prisoner, sued Sergeant Christopher Hoch and unnamed officers for using excessive force and failing to intervene in violation of his rights under the Eighth Amendment. *See* 42 U.S.C. § 1983. The district court entered

* 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).

summary judgment for the defendants because Porter failed to exhaust his administrative remedies, *see* 42 U.S.C. § 1997e(a), and failed to identify the unnamed officers by the court's deadline. We affirm, though we modify the judgment to reflect that the dismissal against all defendants is without prejudice.

We construe the facts and draw all reasonable inferences in favor of Porter, the nonmovant. *See Balle v. Kennedy*, 73 F.4th 545, 553 (7th Cir. 2023). Porter alleges that in July 2024, Hoch used excessive force when he deployed pepper spray at Porter after Porter had stopped fighting with another prisoner and surrendered. He also alleged that other unidentified officers failed to intervene to prevent Hoch from excessively spraying Porter. Porter says that Hoch then falsified a conduct report that charged him with aggravated assault and disobeying orders. The prison held a disciplinary hearing at which Porter called Lieutenant Kelsey Stone as a witness because she reviewed the video footage of the incident. Stone testified that Hoch did not spray Porter unnecessarily, but Porter insisted she was lying. Porter was found guilty of the offenses and was punished with 60 days in disciplinary segregation.

In August 2024, Porter filed two grievances about the incident and disciplinary hearing. The first complaint alleged that an unknown officer deployed pepper spray excessively after Porter had stopped fighting with another prisoner and surrendered. The complaint examiner dismissed the complaint because the video footage and Hoch's conduct report showed that he did not use excessive force. Porter timely appealed the dismissal of his complaint, but his appeal was rejected because it exceeded 500 words. *See* WIS. ADMIN. CODE DOC § 310.09(2)(e). A few weeks later, Porter filed a second complaint alleging that Hoch falsified the conduct report. The complaint was dismissed because it sought to challenge the sufficiency of the charges against Porter, which could not be raised in an institutional complaint. Porter appealed, but his appeal was dismissed.

Porter sued Hoch, Stone, and the unnamed officers for violating his rights under the Eighth Amendment. The district court screened his complaint under 28 U.S.C. § 1915A(a) and allowed Porter to proceed with a claim against Hoch for using excessive force and a claim against the unnamed officers for failing to intervene. The district court told Porter that he must identify the unnamed officers through discovery and later entered a scheduling order directing Porter to do so by July 28, 2025. The court did not allow Porter to proceed on a claim against Stone for failing to intervene because Porter did not allege that Stone was present during the altercation. The court also did not

allow Porter to proceed on a claim against Hoch and Stone for falsifying information in the conduct report and during the disciplinary hearing.

Porter then served the defendants with discovery seeking to identify the unnamed officers. But the defendants moved for summary judgment, arguing that Porter had not exhausted his remedies as to his first complaint because his appeal was rejected for exceeding 500 words. *See* WIS. ADMIN. CODE DOC § 310.09(2)(e). The second complaint, the defendants argued, concerned only Porter's claim that Hoch falsified the conduct report, and because he was not permitted to proceed on that claim, the complaint was irrelevant to whether Porter exhausted his claims for excessive force and failure to intervene. The defendants also filed a motion to stay discovery pending the resolution of their motion for summary judgment. The district court stayed discovery because the exhaustion defense concerned Hoch and the unnamed officers.

The district court next entered summary judgment for the defendants because Porter failed to exhaust his administrative remedies. The court focused only on the first complaint because the second concerned claims that the court dismissed at screening. The court disagreed with Porter's argument that the complaint examiner was required to return, rather than reject, his appeal for failing to comply with DOC § 310.09(2)(e). *Compare* WIS. ADMIN CODE DOC § 310.12(4)(e) (appeal shall be returned for failure to comply with DOC § 310.10), *with id.* § 310.12(5) (appeal may be rejected for failure to comply with DOC § 310.09). The court pointed out that under DOC § 310.12(5), a complaint examiner may recommend rejecting an appeal if it exceeds 500 words, and the provisions do not require the examiner to give a prisoner an opportunity to correct a defect in his appeal. The court also determined that DOC § 310.10(5)—which allows a complaint examiner to return a complaint if it does not comply with DOC § 310.07—concerns only complaints and that Porter did not explain why this provision should apply to his appeal. The court then dismissed the unnamed officers with prejudice because Porter failed to identify them by the deadline set by the court in its scheduling order. *See* CIVIL L. R. 41(c) (allowing dismissal with prejudice for failing to prosecute action diligently).

Porter appeals, arguing that DOC § 310.12(4)(e) required the complaint examiner to return Porter's appeal to give him an opportunity to fix a procedural defect. But the court did not err when it determined that Porter failed to exhaust his administrative remedies because his appeal was properly rejected based on a procedural defect. *See Woodford v. Ngo*, 548 U.S. 81, 90–91, 95 (2006) (prisoner must comply with grievance system's critical procedural rules). Porter does not dispute that his appeal failed to

comply with the word limit in DOC § 310.09(2)(e), and the complaint examiner recommended rejecting it on this basis as permitted by DOC § 310.12(5). Porter's appeal was not rejected for failing to comply with DOC § 310.10, so the provision requiring the complaint examiner to return an appeal, DOC § 310.12(4)(e), does not apply. Further, Porter does not identify any provision requiring complaint examiners to give prisoners an opportunity to cure procedural defects in their appeals.

Porter also argues that administrative remedies were unavailable because, after his appeal was rejected, he asked the Office of the Secretary how to proceed but received no instructions. Administrative remedies may be unavailable where the scheme is "so opaque that it becomes, practically speaking, incapable of use." *Ross v. Blake*, 578 U.S. 632, 643–44 (2016). But Porter does not dispute that he understood the requirement that his appeal not exceed 500 words and that it could be rejected on that basis. Moreover, the Office of the Secretary responded to his question, explaining that the decision to reject the appeal was final, and that he could take no further action.

Next, Porter argues that the district court improperly dismissed with prejudice the unnamed officers, and we agree. The court dismissed the unnamed officers with prejudice because Porter failed to identify them before the court-imposed deadline. But the court had stayed that discovery deadline after the defendants moved for summary judgment on exhaustion grounds. Porter's discovery request seeking the identities of the unnamed officers remained pending. Porter diligently sought the identities of the officers, and he cannot be faulted for failing to comply with a deadline that had been stayed.

Nevertheless, the unnamed defendants are properly dismissed without prejudice because Porter failed to exhaust his administrative remedies on his claims against them. The unnamed officers, like Hoch, moved for summary judgment on exhaustion grounds and submitted all grievances related to the incident. The only grievance relevant to the unnamed officers' alleged failure to intervene is the one that was not properly exhausted. Because all dismissals under § 1997e(a) should be without prejudice, *see Fluker v. Cnty. of Kankakee*, 741 F.3d 787, 791 (7th Cir. 2013), we modify the judgment to reflect that the unnamed officers are dismissed without prejudice.

We close with two final points. First, in his reply brief, Porter suggests that the district court erred when it did not allow him to proceed on a claim about the falsification of the conduct report. But he waived this argument by raising it for the first time in his reply brief. *Minocqua Brewing Co. LLC v. Hess*, 160 F.4th 849, 856–57 (7th Cir.

2025). Second, Porter argues that the district court should have reached the merits of his claims. But the defendants did not move for summary judgment on the merits of Porter's claims. Rather, they invoked the protections of 42 U.S.C. § 1997e(a), so the district court properly did not consider the merits after it concluded Porter failed to exhaust his administrative remedies. *See Perez v. Wis. Dept. of Corr.*, 182 F.3d 532, 536 (7th Cir. 1999).

AFFIRMED AS MODIFIED