FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AARON DALE EATON,

Plaintiff-Appellant,

v.

T. BLEWETT, Two Rivers Correctional Institution Superintendant, Sued in his individual and Official Capacity as Appropriate; VANDERWALKER, First name unknown; Two Rivers Correctional Institution Correctional Officer, Sued in his individual and Official Capacity as Appropriate; RIDLEY, First name unknown; Two Rivers Correctional Institution Asst. Superintendant of General Services, Sued in her individual and Official Capacity as Appropriate; ROSSI, First name unknown; Two Rivers Correctional Institution Grievance Coordinator, Sued in his individual and Official Capacity as Appropriate; EYNON, First name unknown; Two Rivers Correctional Institution Grievance Coordinator, Sued in his individual and Official Capacity as Appropriate; TWO RIVERS CORRECTIONAL INSTITUTION,

Defendants-Appellees.

No. 21-35728

D.C. No. 2:20-cv-01641-SI

OPINION

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted July 6, 2022
Seattle, Washington

Before: Michael Daly Hawkins and Patrick J. Bumatay, Circuit Judges, and Richard Seeborg,* District Judge.

Opinion by Judge Hawkins

* The Honorable Richard Seeborg, Chief United States District Judge for the Northern District of California, sitting by designation.

SUMMARY[**]

Prisoner Civil Rights

The panel vacated the district court's order on summary judgment dismissing a pro se prisoner's action for failure to exhaust available administrative remedies, as required by the Prison Litigation Reform Act.

The Oregon facility where plaintiff Aaron Eaton is housed has regulations that include these limitations: inmates are limited to having no more than four grievances pending at the same time, each of which must be limited to a specific event (i.e., repeated events involving the same subject matter must be separately grieved). Due to safety concerns, prison officials also placed a ban on inmate receipt of postage-prepaid mail inserts. With these rules in place, prison officials confiscated an envelope with prepaid postage that Eaton received from a law firm. Prison officials later concluded that the enclosure was perfectly appropriate legal mail which Eaton should have received. When Eaton attempted to complain, he was told that he was at the four-grievance limit. The only way to pursue the mail-related grievance would have been to dismiss one of his earlier grievances, which would likely forfeit any relief for the claim underlying the dismissed grievance.

The panel held that Eaton had pointed to specific circumstances in the case that made administrative remedies practically unavailable. When the evidence was viewed in the light most favorable to Eaton, it was apparent that Eaton was left with the choice to pursue his mail-related grievance at the expense of another viable claim or forfeit his mail-related grievance—a conundrum resulting, in part, from Two Rivers Correctional Institution's failure to process an earlier grievance within the usual timeframe prescribed by regulation. On the current record, defendants were not entitled to summary judgment and accordingly, the panel vacated and remanded.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Rosalind E. Dillon (argued), Roderick & Solange MacArthur Justice Center, Chicago, Illinois; Devi M. Rao and Katherine Cion, Roderick & Solange MacArthur Justice Center, Washington, D.C.; Easha Anand, Roderick & Solange MacArthur Justice Center, San Francisco, California; for Plaintiff-Appellant.

Peenesh H. Shah (argued), Assistant Attorney General; Denise J. Fjordbeck, Staff Attorney; Benjamin Gutman, Solicitor General; Ellen F. Rosenblum, Attorney General; Office of the Attorney General of Oregon, Salem, Oregon; for Defendants-Appellees.

Kelly Simon, ACLU Foundation of Oregon, Portland, Oregon; Jennifer Wedekind, ACLU-American Civil Liberties Union, Washington, D.C.; for Amici Curiae American Civil Liberties Union, American Civil Liberties Union of Oregon, Prison Law Offices, and Rights Behind Bars.

HAWKINS, Circuit Judge:

Under the umbrella of the Prison Litigation Reform Act (PLRA), correctional authorities can establish and enforce reasonable regulations that balance safety and security concerns with prisoner access to mail and the ability of inmates to grieve concerns. What happens when such regulations, reasonable on their face, operate to actually deny access to the grievance process? The record here shows how well-intended regulations can operate in just that way.

The Oregon facility where Aaron Eaton is housed has regulations that include these limitations: inmates are limited to having no more than four grievances pending at the same time, each of which must be limited to a specific event (i.e., repeated events involving the same subject matter must be separately grieved). Due to safety concerns, prison officials also placed a ban on inmate receipt of postage-prepaid mail inserts. With these rules in place, prison officials confiscated an envelope with prepaid postage that Eaton received from a law firm along with a form that, according to Eaton, would have allowed him to submit a claim in an ongoing bankruptcy proceeding involving the Boy Scouts of America. Prison officials later concluded that the enclosure was perfectly appropriate legal mail which Eaton should have received. Unfortunately, this was done only after expiration of the opportunity for Eaton to submit a claim in the bankruptcy proceeding and ultimately participate in a settlement for sexual abuse survivors. When Eaton attempted to

complain, he was told that he was at the four-grievance limit. The only way to pursue the mail-related grievance would have been to dismiss one of his earlier grievances, which would likely forfeit any relief for the claim underlying the dismissed grievance.

This presented Eaton with a real world "Catch 22," a dilemma from which there is no escape, one in which the only solution is denied by a circumstance inherent in the problem.[1] Because prison officials here presented just such a dilemma to Eaton, their otherwise reasonable regulations operated to deny him access to the grievance process to resolve an apparently valid dispute. Accordingly, we vacate and remand.

[1] "Catch 22" has become a known phrase originally coined by novelist Joseph Heller in his 1961 novel of the same name, in which Captain Yossarian seeks relief from combat duty on the grounds he is crazy and is told that if he is afraid of combat, he cannot be crazy.

I.

Eaton is an adult in custody (AIC) at the Two Rivers Correctional Institution (TRCI) in Oregon. In July 2020, TRCI Superintendent of General Services, Tonia Ridley, sent an email to TRCI staff explaining that envelopes with prepaid postage are considered contraband to be confiscated. A few days after Ridley's email, legal mail arrived at TRCI for Eaton. The mail pertained to a legal proceeding involving the Boy Scouts of America and included a questionnaire along with a pre-addressed and stamped return envelope, which was intended to facilitate the return of the questionnaire and ultimately Eaton's submission of a claim in that proceeding. TRCI Officer John Vanderwalker processed the incoming legal mail. Relying on Ridley's earlier email, Officer Vanderwalker confiscated the return envelope and issued a slip indicating that he had confiscated the envelope as an unauthorized article.

Eaton immediately filed a grievance regarding the confiscation of the envelope. Under the applicable regulations, Eaton needed to follow a grievance process consisting of three levels—the initial grievance, the initial appeal, and the final appeal—each of which are subject to specific deadlines. An initial grievance must be filed "within 14 calendar days from the date of the incident or issue being grieved." Or. Admin. R. 291-109-0205. TRCI will issue a grievance response within 35 calendar days from the date the grievance was accepted unless further review is

necessary. *Id.* In that case, "the AIC will be notified that the department will respond within an additional 14 calendar days." *Id.* The AIC then has 14 calendar days to file an initial appeal, *id.*, or to refile a returned grievance, Or. Admin. R. 291-109-0225(2). TRCI's response timeline and the deadlines for filing a final appeal follow the same timeline as the initial grievance and initial appeal (i.e., 35 days to respond, 14 days to appeal, and 35 days to respond). Or. Admin. R. 291-109-0205.

Eaton filed his mail-related grievance on July 27, 2020—the same day he received notice of the confiscation and well within the 14-day deadline for grieving the action. As defendants' counsel conceded at oral argument, the content and timing of the grievance were procedurally proper. But there was a problem. Eaton already had four grievances pending—the maximum allowed by regulation. *See* Or. Admin. R. 291-109-0215. So TRCI returned Eaton's grievance with a note: "An AIC may not have more than four active complaints (grievances, discrimination complaints, or appeals of either) at any time." Eaton attempted to appeal the return of his grievance, but TRCI returned Eaton's appeal explaining that a returned grievance may not be appealed. Eaton also submitted a communications form to the TRCI grievance office inquiring about the number of grievances he had pending and explaining that he wanted to "get [his] grievances in compliance." TRCI responded by telling Eaton that he should refer to previous receipts to determine which grievances were still active; providing the definition of "active grievance"; and

instructing, "If you have a question on the status of a specific grievance, send me the number and your question." Eaton made a final attempt to appeal the return of his grievance but again received notice that the returned grievance was not appealable.

In the meantime, TRCI returned the confiscated envelope to Eaton. Ridley also sent a follow-up email to clarify that AICs may receive "an envelope that is addressed to an attorney with a metered stamp and return address of the AIC's name" as those "envelopes are intended to provide a quick turnaround for legal work only." However, according to Eaton, by the time TRCI took these corrective measures, his opportunity to submit a claim in the Boy Scouts of America proceeding had expired, and he lost the chance to see if he qualified for participation in the settlement negotiations that followed.

Eaton then turned to federal court. He filed the underlying 42 U.S.C. § 1983 action pro se and alleged, among other things, that defendants' confiscation of the envelope from his legal mail violated his First Amendment rights. The district court determined that Eaton stated a cognizable First Amendment claim but granted defendants' motion for summary judgment on the basis that Eaton had not exhausted the available administrative remedies as required under the PLRA.

II.

We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's grant of summary judgment on exhaustion grounds, *Albino v. Baca*, 747 F.3d

1162, 1168 (9th Cir. 2014) (en banc), as well as the district court's interpretation of the PLRA, *Nunez v. Duncan*, 591 F.3d 1217, 1222 (9th Cir. 2010).

III.

The PLRA requires prisoners to exhaust "such administrative remedies as are available" before filing suit in federal court. 42 U.S.C. § 1997e(a). Exhaustion must be proper—in "compliance with deadlines and other critical procedural rules, with no exceptions for special circumstances." *Ramirez v. Collier*, 142 S. Ct. 1264, 1275 (2022) (internal quotation marks and citations omitted). As we have "previously emphasized," however, the PLRA's exhaustion requirement extends only to *available* administrative remedies, and "a failure to exhaust a remedy that is effectively unavailable does not bar a claim from being heard in federal court." *McBride v. Lopez*, 807 F.3d 982, 986 (9th Cir. 2015). The critical question, here, is whether "there is something in [Eaton's] particular case that made the existing and generally available administrative remedies effectively unavailable to [him]." *Albino*, 747 F.3d at 1172.

"[T]he ordinary meaning of the word 'available' is 'capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.'" *Ross v. Blake*, 578 U.S. 632, 642 (2016) (quoting *Booth v. Churner*, 532 U.S. 731, 737–38 (2001)). The assessment of availability is a "pragmatic analysis," *Munoz v. United States*, 28 F.4th 973, 975 (9th Cir. 2022), in which the court "must apply [the

availability standard] to the real-world workings of prison grievance systems," *Ross*, 578 U.S. at 643.

The Supreme Court has identified three examples of circumstances in which administrative remedies are effectively unavailable: (1) when the grievance system "operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) when the system is "so opaque that it becomes, practically speaking, incapable of use"; and (3) "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 643–44.

We also have found administrative remedies effectively unavailable in several circumstances. *See Anders v. Marshall*, 867 F.3d 1076, 1078 (9th Cir. 2017) (describing *Ross* examples as "non-exhaustive"). In *Fordley v. Lizarraga*, we held that a prison's failure to respond to an emergency grievance over the course of several months, and in contravention of its own deadlines, rendered administrative remedies unavailable. 18 F.4th 344, 358 (9th Cir. 2021). In *Sapp v. Kimbrall*, we similarly held that a prison's improper screening of a grievance would render administrative remedies effectively unavailable. 623 F.3d 813, 823 (9th Cir. 2010). In *Nunez v. Duncan*, we held that an inmate was excused from the exhaustion requirement where the inmate was unable to access a policy necessary to bring a timely administrative appeal. 591 F.3d at 1226. We reached the same conclusion

in cases where inmates were unable to access information about the administrative grievance process, *Albino*, 747 F.3d at 1177, or the form necessary to submit a grievance, *Marella v. Terhune*, 568 F.3d 1024, 1026 (9th Cir. 2009).

Because failure to exhaust is an affirmative defense, defendants had the burden to show that there was an available administrative remedy that Eaton did not exhaust. *Albino*, 747 F.3d at 1172. Although defendants established that TRCI has a grievance process and that Eaton's grievance was never resolved on the merits, *see Woodford v. Ngo*, 548 U.S. 81, 84 (2006), Eaton pointed to several pieces of evidence indicating that unique circumstances rendered TRCI's grievance process effectively unavailable to him for his mail-related grievance, *see Fordley*, 18 F.4th at 351. For example, the record indicates that Eaton had four grievances pending at the time he attempted to grieve the mail confiscation, in part, because TRCI had not processed one of his earlier grievances in accordance with the applicable deadlines. A typical grievance moves through the initial determination and two levels of appeal in approximately 133 days. *See* Or. Admin. R. 291-109-0205. TRCI received one of Eaton's pending grievances on March 23, 2020. By September 10, 2020—approximately 171 days after its receipt—the grievance was only in the initial appeal stage. Delays in processing and failures to respond to pending grievances are circumstances signaling the practical unavailability of administrative remedies. *See Fordley*, 18 F.4th at 355; *Andres*, 867 F.3d at 1078–79; *Brown v. Valoff*, 422 F.3d

926, 943 n.18 (9th Cir. 2005). Although the delay apparent in the record did not directly involve the mail-related grievance, it contributed to the dismissal of that grievance and "thwarted" Eaton's effort to formally grieve the confiscation of his legal envelope. *See Fordley*, 18 F.4th at 356.

Defendants rely on the Fourth Circuit's decision in *Moore v. Bennette*, 517 F.3d 717 (4th Cir. 2008), to argue that this case involves simply an example of an AIC failing to comply with a critical procedural rule. In *Moore*, the Fourth Circuit analyzed exhaustion under an administrative scheme that prohibited inmates from filing new, non-emergent grievances while another grievance was pending. *See id.* at 729. The grievance there, filed May 27, 2003, regarded treatment for the plaintiff's gout. *Id.* at 723. The plaintiff had filed another grievance relating to Hepatitis C just 12 days earlier. *Id.* The Fourth Circuit held that the gout-related grievance was properly returned because the Hepatitis C-related grievance was still pending, and as a result, the grievance did not serve to exhaust administrative remedies. *Id.* at 729. In rendering its holding, the Fourth Circuit explained that "[b]ecause Moore had no excuse for not resubmitting the [gout-related] grievance on or after June 5, 2003, when Step 2 of his Hepatitis C grievance was complete, the district court properly concluded that Moore failed to exhaust his available remedies regarding his gout claim." *Id.* at 730.

Unlike the record in *Moore*, the record here is devoid of definitive evidence that Eaton could have timely refiled his mail-related grievance. The record instead indicates that Eaton's four active grievances were still pending 14 days after the return of his mail-related grievance, at which point his mail-related grievance would become time-barred. *See* Or. Admin. R. 291-109-0225(2).

Rather than disputing this point, defendants argue that Eaton could have withdrawn one of his active grievances to make room for his mail-related grievance. Eaton has demonstrated that questions of fact persist as to whether he could have withdrawn an active grievance (1) in time to refile his mail-related grievance or (2) without forfeiting the claim underlying the withdrawn grievance. Indeed, Eaton demonstrated that there were routine delays between TRCI's processing of a grievance and sending notice of its decision to an AIC. And when he requested information about his active grievances, Eaton did not receive information about the status of those grievances or options to substitute his mail-related grievance for one of the pending grievances. The governing regulations also place the decision to reopen a withdrawn grievance in the discretion of the grievance coordinator, Or. Admin. R. 291-109-0225(4), suggesting that exercising the option to withdraw a grievance may have forced Eaton to choose between two potentially viable constitutional claims. *Cf. Hebbe v. Pliler*, 627 F.3d 338, 343 (9th Cir. 2010) ("[A]n inmate cannot be forced to sacrifice one constitutionally protected right solely

because another is respected."). The district court presumed that Eaton would not be prejudiced by withdrawing one of his pending grievances because two of those grievances referenced mold. However, as the non-moving party, Eaton was entitled to have all reasonable inferences drawn in his favor, *see Albino*, 747 F.3d at 1168, including the inference that his pending grievances related to distinct incidents, *see* Or. Admin. R. 291-109-0210 (requiring separate grievance for each incident).

We have explained that to withstand summary judgment a plaintiff must point to specific circumstances in the case that made administrative remedies practically unavailable. *Albino*, 747 F.3d at 1172–73. Eaton did so here.[2]

IV.

When the evidence is viewed in the light most favorable to Eaton, it is apparent that Eaton was left with the choice to pursue his mail-related grievance at the expense of another viable claim or forfeit his mail-related grievance—a conundrum resulting, in part, from TRCI's failure to process an earlier grievance within the usual timeframe prescribed by regulation. On the current record, defendants were not entitled to summary judgment.

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[2] Defendants argue for the first time on appeal that, even if Eaton's grievance was procedurally proper when filed, the tort claim notice he filed in accordance with Oregon Revised Statutes §§ 30.265, 30.275, would have required closure of the grievance, thus preventing Eaton from exhausting his administrative remedies. We decline to consider this alternative argument in the first instance. *See Hillis v. Heineman*, 626 F.3d 1014, 1019 (9th Cir. 2010).

Appellees will bear the costs on appeal.

VACATED AND REMANDED.