IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:06-CT-3018-H

WILLIE BROWN, JR., N.C. DOC #0052205,
Plaintiff,

v.

THEODIS BECK, Secretary, North Carolina Department of Correction, and MARVIN POLK, Warden, Central Prison, Raleigh, North Carolina, and UNKNOWN EXECUTIONERS, Individually, and in their Official Capacities,

Defendants.

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Local Civil Rule 7.1(e)(1)

Plaintiff Willie Brown, Jr., N.C. DOC #0052205, (hereinafter "Plaintiff"), through counsel and pursuant to Local Civil Rule 7.1(e)(1), hereby submits this Response in Opposition to Defendants' Motion to Dismiss.

STATEMENT OF THE CASE

On 27 February 2006, Plaintiff filed this civil action pursuant to 42 U.S.C. § 1983, challenging the protocol and procedures Defendants intend to employ to carry out Plaintiff's execution by lethal injection. Specifically, Plaintiff alleges that Defendants are determined to use an inadequate protocol for anesthesia as a precursor to carrying out his death sentence, and as a result, Plaintiff faces an unacceptable and unnecessary risk of suffering excruciating pain during the course of his execution. Plaintiff makes no attack on his conviction or the validity of his sentence to death by lethal injection. On 28 February 2006, Plaintiff filed a Motion for

Preliminary Injunction requesting that the Court enjoin Defendants from using their inadequate protocol for inducing and maintaining anesthesia during the course of his execution.[1]

On 3 March 2006, this Court entered an Order directing the parties "to submit information to the court to show whether or not Plaintiff had exhausted available administrative remedies at the time he filed the complaint."[2] On 7 March 2006, Defendants filed a Motion to Dismiss, seeking dismissal of Plaintiff's Complaint without prejudice for failure to exhaust administrative remedies. However, on 7 March 2006, prior to or contemporaneously with the filing of Defendants' Motion to Dismiss, Plaintiff counsel received from the Inmate Grievance Resolution Board a copy of the Grievance Examiner's Findings and Disposition Order denying Plaintiff's grievance. (Proposed Am. Compl., Ex. C.) This response constitutes a final decision with respect to Plaintiff's administrative grievance.

Upon receiving the final decision of the Inmate Grievance Examiner, Plaintiff promptly filed a Motion for Leave to File Amended Complaint to assert additional facts regarding his exhaustion of administrative remedies. Defendants' Response in Opposition to Plaintiff's Motion for Leave to File Amended Complaint was filed and served on 10 March 2006. Contemporaneously with the filing of this Response, Plaintiff is filing a Reply in Support of Motion for Leave to File Amended Complaint,[3] and that Motion is now ripe for ruling.

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[1] Pursuant to N.C. Gen. Stat. § 15-194(1), Defendants may immediately schedule a date for carrying out Plaintiff's execution after receiving notice that "[t]he United States Supreme Court has filed an opinion upholding the sentence of death following completion of the initial State and federal postconviction proceedings." Plaintiff's Petition for Writ of Certiorari was denied by the United States Supreme Court on 27 February 2006, resolving his federal habeas proceeding and eliminating all legal barriers to Defendants' ability to schedule Plaintiff's execution. Plaintiff has therefore requested expedited consideration of his Motion for Preliminary Injunction.

[2] Plaintiff's Response to this Order was filed 8 March 2006 and is incorporated herein by reference pursuant to Fed. R. Civ. P. 10(c).

[3] Pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, Plaintiff incorporates by reference the arguments set forth in his Motion for Leave to File Amended Complaint and Reply in Support of Motion for Leave to File Amended Complaint.

As reflected in his Proposed Amended Complaint, with the issuance of the final decision of the Inmate Grievance Resolution Board on 7 March 2006, Plaintiff has completely exhausted his administrative remedies as required under 42 U.S.C. § 1997e(a). The administrative review process was already completed at the time Defendants brought the instant Motion to Dismiss on 7 March 2006. For the reasons set forth below, this Court should deny Defendants' Motion and allow Plaintiff to proceed with the causes of actions asserted in his Amended Complaint.

ARGUMENT

I. THE REQUESTED AMENDMENT MOOTS DEFENDANTS' MOTION TO DISMISS.

Should this Court grant Plaintiff's Motion for Leave to File Amended Complaint, Defendants' Motion to Dismiss would be rendered moot and should be denied on that basis. In seeking dismissal of Plaintiff's Complaint without prejudice, Defendants rely on the allegations set forth paragraph 6 of Plaintiff's Complaint. (Defs.' Mem. Supp. Mot. Dismiss at 2.) These are the very allegations Plaintiff has sought to amend in his Motion for Leave to File Amended Complaint. As amended, Plaintiff's Complaint reflects that Plaintiff had completed each stage of the administrative review process and had received a final decision with respect to his grievance at the time he filed the Amended Complaint. (Proposed Am. Compl. ¶ 6, Ex. A, Ex. B, Ex. C.) Thus, Plaintiff's Proposed Amended Complaint is not subject to dismissal on the grounds set forth in Defendants' Motion.

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely given when justice so requires." The requested amendment to Plaintiff's Complaint presents additional facts regarding exhaustion and eliminates any deficiencies with respect to Plaintiff's exhaustion of administrative remedies. If this Court grants Plaintiff's Motion for Leave to File Amended Complaint, it should deny Defendants' Motion to Dismiss as moot.

II. DEFENDANTS' MOTION SHOULD BE DENIED BECAUSE DEFENDANTS CANNOT PROVE FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rule of Civil Procedure should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 655 (4th Cir. 2004). Defendants' Motion to Dismiss should be denied because Defendants cannot prove that Plaintiff has failed to state a claim upon which relief may be granted.

As Defendants acknowledge, in *Anderson v. XYZ Corr. Health Servs.*, 407 F.3d 674 (4th Cir. 2005), the Fourth Circuit considered whether the Prison Litigation Reform Act of 1995 amendment to 42 U.S.C. § 1997e(a) ("PLRA") allows a defendant to raise non-exhaustion as an affirmative defense or requires a plaintiff to plead his exhaustion of remedies. Adopting the position of the majority of federal circuit courts, the Fourth Circuit concluded that "the PLRA's exhaustion-of-remedies requirement does not impose a heightened pleading obligation on an inmate. Instead, an inmate's failure to exhaust administrative remedies is an affirmative defense to be pleaded and *proven* by the defendant." *Id.* at 683 (emphasis added). Although in rare cases a district court may dismiss a complaint where the failure to exhaust is apparent from the face of the complaint, in general the Fourth Circuit "reject[ed] the contention that an inmate's failure to allege exhaustion of remedies amounts to a failure to state a claim upon which relief can be granted." *Id.* at 681, 683.

The Second Circuit recently concluded that failure to exhaust under the PLRA is an affirmative defense that can be waived by the defendant if not timely asserted. *Handberry v. Thompson*, 436 F.3d 52, 59-60 (2d Cir. 2006). *See also Lira v. Herrera*, 427 F.3d 1164, 1171 (9th Cir. 2005) (recognizing that the § 1997e(a) exhaustion requirement is not jurisdictional and

may be waived if the defendant does not raise it); *Smith v. Mensinger*, 293 F.3d 641, 647 n.3 (3d Cir. 2002) ("[E]xhaustion is an affirmative defense which can be waived if not properly preserved by a defendant.").

The allegations set forth in Plaintiff's Proposed Amended Complaint conclusively establish that Plaintiff has exhausted all available administrative remedies. It is also clear that Defendants' Motion to Dismiss for failure to exhaust was made contemporaneously with or after issuance of the Inmate Grievance Examiner's Findings and Disposition Order denying Plaintiff's grievance on 7 March 2006. (Proposed Am. Compl., Ex. C.) In fact, Plaintiff's counsel was served with Defendants' Motion to Dismiss several hours *after* receiving the final decision of the Inmate Grievance Review Board. Thus, at the time Defendants filed their Motion to Dismiss for failure to exhaust, Plaintiff had already exhausted his administrative remedies. Defendants cannot prove otherwise, as is their burden under the Fourth Circuit's decision in *Anderson*.

Defendants have cited no decisions by any federal courts of appeal or published decisions of this Court that would support the granting of a motion to dismiss filed after exhaustion has occurred. In their Objection to Motion for Leave to File Amended Complaint, Defendants cite to *Hargett v. Beck*, 5:04-CT-132-FL (E.D.N.C. 2005), in which the Court granted a motion to dismiss without prejudice where the plaintiff completed the administrative review process several days after filing his complaint. However, the order in *Hargett* was issued prior to the Fourth Circuit's decision in *Anderson*, clarifying that exhaustion is not a pleading requirement but rather an affirmative defense. Moreover, the order in *Hargett* does not reflect any amendment of the complaint following the completion of administrative review.

This Court has addressed the issue presented by Defendants' Motion to Dismiss on at least two other occasions and concluded that dismissal was not warranted where the defendants

could not prove, at the time of filing of the motion to dismiss, that the plaintiff had failed to exhaust administrative remedies. In *Page v. Beck*, No. 5:04-CT-04-BO (E.D.N.C. Nov. 30, 2005) (attached hereto as Exhibit A), the Court denied a motion to dismiss filed by the defendants after the plaintiffs had fully exhausted their administrative remedies. Additionally, in *Boyd v. Beck*, 404 F. Supp. 2d 879, 882-83 (E.D.N.C. 2006), the Court held that failure to exhaust must be pled and proved by the defendants, and because the defendants did not attach affidavits or provide other evidence regarding the status of administrative remedies, the record before the Court did not support the dismissal of plaintiff's complaint.

In light of Plaintiff's exhaustion of all available administrative remedies, dismissal of his Complaint without prejudice will not serve the purposes underlying the exhaustion requirement of the PLRA. Rather, dismissal will result in a waste of judicial resources, with nothing to be gained by forcing Plaintiff to simply refile his action following dismissal, alleging the very facts already before the Court in Plaintiff's Proposed Amended Complaint. The Supreme Court has recognized that:

> Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case. In some instances, corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation. In other instances, internal review might 'filter out some frivolous claims.' And for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy.

Porter v. Nussle, 534 U.S. 516, 524-25 (2002) (quoting *Booth v. Churner*, 532 U.S. 731, 737 (2001) and citing *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992)).

Dismissal of Plaintiff' action at this point will do nothing to further these purposes. First, Defendants denied Plaintiff's grievance without taking corrective action that would have obviated the need for litigation with respect to Plaintiff's claims. Second, as demonstrated by the affidavits and other evidence submitted in support of Plaintiff's Motion for Preliminary Injunction, Plaintiff's claim cannot be regarded as "frivolous" and is deserving of consideration on the merits.[4] Third, to the extent adjudication of Plaintiff's claims may be facilitated by the administrative record, that record is before the Court, attached to the Plaintiff's Proposed Amended Complaint.

There is no dispute that Plaintiff has fully exhausted his administrative remedies nor that the requested dismissal would be without prejudice such that Plaintiff could immediately refile an action identical to the Proposed Amended Complaint already before this Court. Because affirmative allegations regarding exhaustion have been presented to the Court and the interests underlying the PLRA's exhaustion requirement have been satisfied, dismissal would only serve to needlessly delay the Court's consideration of the merits of Plaintiff's claims. Interests of justice and efficiency are therefore served by allowing Plaintiff to proceed with the causes of actions asserted in his Amended Complaint.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' Motion to Dismiss.

[4] Indeed, this Court specifically concluded that a similar challenge to Defendants' protocol for inducing and maintaining anesthesia prior to execution by lethal injection was "neither frivolous nor malicious." *Rowsey v. Beck*, No. 5:04-CT-04-BO (E.D.N.C. Jan. 20, 2004) (attached hereto as Exhibit B).

Respectfully submitted this the 13th day of March 2006.

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CERTIFICATE OF SERVICE

This is to certify that on this date, I electronically filed the foregoing **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Thomas J. Pitman, Special Deputy Attorney General (tpitman@ncdoj.com)
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This the 13th day of March, 2006.

/s/ Laura M. Loyek
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Attorney for Plaintiff