2007 WL 4326747
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Lucy AMADOR, Stacie Calloway, Tonie Coggins, Stephanie Dawson, Latasha Dockery, Tanya Jones, Bobbie Kidd, Bette Jean McDonald, Kristina Muehleisen, Jeanette Perez, Laura Pullen, Corilynn Rock, Denise Saffioti, Shantelle Smith, Shenyell Smith, Hope Susoh a/k/a Hope Susoh Brevard, and Nakia Thompson, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
SUPERINTENDENTS OF the DEPARTMENT of CORRECTIONAL SERVICES ("DOCS") Anginell Andrews, Roberta Coward, Dennis Crowley, Alexandreena Dixon, Elaine Lord, Ronald Moscicki and Melvin Williams; DOCS Deputy Superintendent Donald Wolff; DOCS Director of Personnel Terry Baxter; DOCS Inspector General Richard Roy; DOCS Director of the Sex Crimes Unit of the Inspector General's Office Barbara D. Leon; DOCS Director of the Bureau of Labor Relations Peter Brown; DOCS Commissioner Glenn S. Goord; Office of Mental Health Commissioner James Stone; DOCS Correction Officers Frederick Brenyah, Charles Davis, Michael Evans, Sergeant Michael Galbreath, Officers John E. Gilbert III, Hudson, Rick Larue, Rico Meyers, Mario Pique, Jeffrey Shawver, Robert Smith, Sergeant Smith, Officers Sterling, Delroy Thorpe, and Pete Zawislak, Defendants.

No. 03 Civ. 0650(KTD)(GWG). | Dec. 4, 2007.

Opinion

OPINION & ORDER

KEVIN THOMAS DUFFY, District Judge.

I. ***Background***

***1** Plaintiffs in this case are seventeen current and former female inmates of the New York State Department of Correctional Services ("DOCS"). On October 14, 2003, Plaintiffs filed their First Amended Complaint against several line officers employed at seven New York state prisons ("Line Officer Defendants") and various supervisors of certain New York state prisons and other DOCS officials ("Supervisory Defendants").[1] Plaintiffs alleged that they were sexually abused and harassed by the Line Officer Defendants and that the Supervisory Defendants contributed to this abuse and harassment through the maintenance of inadequate policies and practices. Pursuant to 42 U.S.C. § 1983, Plaintiffs seek monetary damages as well as declaratory and injunctive relief. Both groups of defendants have filed various motions to dismiss and Plaintiffs have filed a motion for class certification.

On September 13, 2005, I issued an Order addressing the parties' motions. I dismissed, for lack of standing, the claims for injunctive relief and declaratory judgment of Plaintiffs who had been released from DOCS custody prior to the filing of the Amended Complaint.[2] I also dismissed one plaintiff who had already filed a separate action elsewhere.[3] After denying the Supervisory Defendants' motion to dismiss for improper venue, I reserved ruling on the Supervisory Defendants' motion to transfer venue pending my consideration of the joinder and related issues. I also converted the Supervisory Defendants' motion to dismiss Plaintiffs' injunctive claims for failure to exhaust administrative remedies into a motion for summary judgment, and invited the parties to supplement the record on this narrow issue. Because they may have become moot after my resolution of the exhaustion issue, I further reserved ruling on the Supervisory Defendants' motions to dismiss for failure to state a claim. Finally, I reserved ruling on Plaintiffs' motion for class certification until I determined whether any of the Plaintiffs have exhausted any, or all, of their claims for injunctive relief. Thereafter, Plaintiffs filed a motion for reconsideration of the September 13, 2005 Order, which I denied by Order on November 10, 2005.

In the September 13, 2005 Order, I requested the parties submit supplemental briefs on the issues of: (1) mootness of the claims of the Plaintiffs who were released from prison after the Amended Complaint was filed; (2) exhaustion of administrative remedies; (3) joinder and severance of each Plaintiff's individual claim for damages against the specific Line Officer Defendants with the purported class claims against the Supervisory Defendants for injunctive relief; and (4) joinder and severance of each Plaintiff's individual claim for damages against the specific Line Officer Defendants with the other Plaintiffs' individual claims. As the parties have had ample time to supplement the record, I now rule on the mootness of two Plaintiff's claims and on the issue of exhaustion of the remaining Plaintiffs' claims.

II. ***Mootness of Released Plaintiffs' Claims***

***2** Before addressing the sufficiency of Plaintiffs' exhaustion, I address the mootness of the claims of Plaintiffs Stephanie Dawson and Shantelle Smith. Dawson and Smith have been released from their respective correctional facilities. In my prior Order, I declined to dismiss their claims as moot because they had merely been transferred to other facilities which they alleged employed the same policies and practices as where their abuse occurred. However, as they have both since been released, their claims for injunctive and declaratory relief have become moot and are hereby dismissed.[4]

III. ***Legal Standard for Summary Judgment***

In deciding this motion for summary judgment, I must construe the evidence in the light most favorable to the Plaintiffs, as the non-moving parties, and draw all reasonable inferences in their favor. *Wray v. City of New York,* 490 F.3d 189 (2d Cir.2007). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed.R.Civ.P. 56(c); Hellstrom v. Pep't. of Veterans Affairs,* 201 F.3d 94, 97 (2d Cir.2000). For the reasons below, I must grant the Supervisory Defendants' motion for summary judgment as to the issue of exhaustion.

IV. ***New York's Inmate Grievance Program***

Formal exhaustion in New York generally requires compliance with the DOCS's three-step grievance and appeal procedure outlined in the Inmate Grievance Program. *See* N.Y. Com.Codes R. & Regs. tit. 7 ("7 N.Y.C.R.R."), § 701.5. The first step requires an inmate to file a complaint with the Inmate Grievance Resolution Committee ("IGRC") within twenty-one calendar days of the alleged occurrence for an attempt at informal resolution. 7 N.Y.C.R.R. § 701.5(a) and (b). The IGRC is comprised of inmates and DOCS employees. Next, after receiving a response from the IGRC, the inmate may appeal to the superintendent of the facility by completing and signing the appeal section of the IGRC response form and submitting it within seven days of receipt. *Id.* at § 701.5(c). Finally, after receiving a response from the Superintendent, the inmate may seek further review from the Central Office Review Committee ("CORC") by appealing the superintendent's decision within seven days of receipt. *Id.* at § 701.5(d). Generally, "a prisoner has not exhausted his administrative remedies until he goes through all three levels of the grievance procedure." *Lunney v. Brureton,* No. 04-CV-2438, 2007 U.S. Dist. LEXIS 38660 at *20 (S.D.N.Y. May 25, 2007) (internal citation omitted). Moreover, if the inmate does not receive a timely response, she may still appeal to the next level, and a failure to do so constitutes a failure to exhaust her administrative remedies. *Tackman v. Goord,* 2005 WL 2347111 at *17 (W.D.N.Y. Sept. 26, 2005).

***3** The DOCS also provides for an expedited procedure for the review of grievances alleging harassment[5] by DOCS employees as follows:

> (a) An inmate who wishes to file a grievance complaint that alleges employee harassment shall follow the procedures set forth in section 701.5(a) of this Part.
>
> *Note:* An inmate who feels that he/she has been the victim of harassment should report such occurrences to the immediate supervisor of that employee. However, this is not a prerequisite for filing a grievance with the IGP.
>
> (b) A grievance alleging harassment shall be given a grievance calendar number and recorded in sequence with all other grievances on the grievance clerk's log (form # 2136). All documents submitted with the allegation must be forwarded to the superintendent by close of business that day.
>
> (c) The superintendent or his/her designee shall promptly determine whether the grievance, if true, would represent a bona fide case of harassment as defined in section 701.2 of this Part. If not, then it shall be returned to the IGRC for normal processing.
>
> (d) If it is determined that the grievance is a bona fide harassment issue, the superintendent shall:
>
> (1) initiate an in-house investigation by higher ranking supervisory personnel into the allegations contained in the grievance;
>
> (2) request an investigation by the inspector general's office; or
>
> (3) if the superintendent determines that criminal activity may be involved, request an investigation by the New York State Police, Bureau of Criminal Investigation.
>
> (e) Once a grievance has been referred to the superintendent and determined to be an allegation of harassment, that grievance cannot be withdrawn. The superintendent must address the grievant's allegations.
>
> (f) Within 25 calendar days of receipt of the grievance, the superintendent will render a decision on the grievance and transmit said decision, with reasons stated to the grievant, the grievance clerk,

> and any direct party of interest. Time limit extensions may be requested, but such extensions may be granted only with the consent of the grievant.
>
> (g) If the superintendent fails to respond within the required 25 calendar day time limit the grievant may appeal his/her grievance to CORC. This is done by filing a notice of decision to appeal (form # 2133) with the inmate grievance clerk.
>
> (h) If the grievant wishes to appeal the superintendent's response to CORC, he/she must file a notice of decision to appeal (form # 2133) with the inmate grievance clerk within seven calendar days of receipt of that response.
>
> (i) Unless otherwise stipulated in this section, all procedures, rights, and duties pertaining to the processing of any other grievance as set forth in section 701.5 of this Part shall be followed.

7 N.Y.C.R.R. § 701.8.

V. *Exhaustion Requirement of the Prison Litigation Reform Act*

As amended by the Prison Litigation Reform Act ("PLRA") of 1995, 42 U.S.C. § 1997e(a) provides that a prisoner must exhaust all administrative remedies before pursuing a federal claim in federal court:

> ***4** "[n]o action shall be brought with respect to prison conditions under section 1983 ... or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility *until such administrative remedies as are available are exhausted."*

42 U.S.C. § 1997e(a) (emphasis added). Since the filing of the Amended Complaint in this case, several developments in the area of administrative exhaustion have been made by the Supreme Court and the Second Circuit. Therefore, it is necessary to review the present exhaustion requirement under the PLRA.

The PLRA was enacted "to reduce the quantity and improve the quality of prisoner suits" by "afford[ing] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle,* 534 U.S. 516, 524-25 (2002). Thus, exhaustion serves two major purposes. First, it protects administrative agency authority by giving an agency "an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court, and it discourages disregard of the agency's procedures." *Woodford v. Ngo,* 126 S.Ct. 2378, 2385 (2006). Second, exhaustion promotes efficiency as claims are generally settled faster and more economically in proceedings before an agency than in federal court. *Id.* Through exhaustion of administrative procedures, federal courts are provided a "useful record" for cases that proceed beyond the administrative level. *Id.*

The PLRA's exhaustion requirement is an affirmative defense for which the defendants bear the burden of proof. *Rivera v. Goord,* 253 F.Supp.2d 735, 745 (S.D.N.Y.2003). Exhaustion "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter,* 534 U.S. at 532. Exhaustion is required even when a prisoner seeks a remedy that cannot be awarded through administrative avenues. *Booth v. Turner,* 532 U.S. 731, 741 (2001).

Exhaustion must be complete and in proper accordance with the prison's administrative procedures, *Woodford,* 126 S.Ct. at 2382, and cannot be achieved during the pendency of the federal case, *Baez v. Kahanowicz,* 469 F.Supp.2d 171, 179 (S.D.N.Y.2007). Complete exhaustion requires pursuing administrative remedies through the highest level for each claim. *Veloz v. New York,* 330 F.Supp.2d 505, 514 (S.D.N.Y.2004), *affirmed,* 178 Fed. Appx. 39 (2d Cir.2004). Proper exhaustion demands compliance with all of the agency's deadlines and other critical procedural rules. *Woodford,* 126 S.Ct. at 2386. Additionally, there is no "total exhaustion,"-that is, failing to exhaust one claim does not necessarily affect any other claim that has been completely and properly exhausted. *Jones v. Bock,* 127 S.Ct. 910, 924 (2007). Moreover, the Second Circuit has held that exhaustion requires the prisoner's grievance to be sufficient on its face to alert the prison of his complaint. *Brownell v. Krom,* 446 F.3d 305, 310-11 (2d Cir.2006).

***5** Although the Second Circuit has recognized that exhaustion is mandatory, it has also stated that "certain caveats apply." *Giano v. Goord,* 380 F.3d 670, 677 (2d Cir.2004). More specifically, the Second Circuit has recognized that "in some circumstances, the behavior of the defendants may render administrative remedies unavailable." *Hemphill v. New York,* 380 F.3d 680, 686 (2d Cir.2004). Therefore, the Second Circuit has constructed a three-part inquiry in cases where a prisoner plaintiff seeks to counter a defendant's contention that the prisoner has failed to exhaust all available administrative remedies pursuant to 42 U.S.C. § 1997e(a).[6] *See id.* First, the court must determine whether the administrative remedies were in fact "available" to the prisoners.[7] *Id.* "To the extent that the plaintiff lacked 'available' remedies, the PLRA's exhaustion requirement is inapplicable." *Id.* Second, the court must determine which defendants, if any, are estopped from raising the affirmative defense of non-exhaustion because of their own actions inhibiting the prisoners' complete and proper exhaustion. *Id.* Finally, if administrative remedies were "available" to the

prisoners and the defendants are not estopped, but Plaintiffs nevertheless did not exhaust available remedies, the court must consider whether "special circumstances" have been plausibly alleged to justify the prisoners' failure to comply with administrative procedural requirements. *Id.*

Regarding the issue of whether remedies were available, the Second Circuit has recognized that a defendant's threats of retaliation may cause a remedy to be "effectively unavailable" for exhaustion purposes. *Id.* at 687-88; *Ortiz v. McBride,* 380 F .3d 649, 654 (2d Cir.2004). The test for deciding whether the ordinary grievance procedures were available is an objective one: whether a "similarly situated individual of ordinary firmness" would have deemed them available. *Hemphill,* 380 F.3d at 688. If the remedies were "unavailable" because of defendants' threats, the PLRA requirements would be considered automatically satisfied as to all defendants. *Id.* at 690 n. 8. However, in the context of estoppel, a prisoner may be excused from exhaustion only as to those defendants who made such threats, depending on the facts pertaining to each defendant. *Id.* at 689.

Finally, the Second Circuit has stated that there are "special circumstances" in which prisoners' failure to exhaust is justified despite the existence of available remedies and the nonexistence of estoppel. Justification is determined by "looking at the circumstances which might understandably lead usually uncounselled prisoners to fail to grieve in the normally required way." *Giano,* 380 F.3d at 678. For example, a prisoner's reasonable interpretation of ambiguous DOCS regulations may justify his failure to exhaust if, based on his interpretation, he reasonably believed the remedies were unavailable to him. *Id.*

***6** After the Supreme Court's decision in *Woodford,* the viability of *Hemphill* 's three-part inquiry has been called into question. *See Ruggiero v. County of Orange,* 467 F.3d 170, 176 (2d Cir.2006) ("[w]e need not determine what effect *Woodford* has on our case law"); *Collins v. Goord,* 438 F. Supp 2d 399, 411 n. 13 (S.D .N.Y.2006) ("it is open to doubt whether *Woodford* is compatible with the results reached in some of the cases in this Circuit applying *Hemphill,* and part of the *Hemphill* inquiry may be in tension with *Woodford"*).[8]

Recently, the Second Circuit decided *Macias v. Zenk,* No. 04-6131, 2007 WL 2127722 (2d Cir. July 26, 2007), which addresses some of *Woodford* 's effects on the law in this Circuit. In *Macias,* the prisoner-plaintiff, Macias, filed two administrative tort claims and made informal complaints to prison officials before filing his complaint in federal court. *Macias,* 2007 WL 2127722 at *5. Macias argued that under *Johnson v. Testman,* 380 F.3d 691 (2d Cir.2004), these tort claims and informal requests for medical attention excused his failure to exhaust because, although he did not use the formal administrative remedy system, his actions "provided enough information about the conduct of which he complained to allow prison officials to take appropriate responsive measures." *Macias,* 2007 WL 2127722 at *5 (quoting *Johnson,* 380 F.3d at 697). *Johnson* 's holding, however, was that that a prisoner satisfied the PLRA's requirement if he both (1) *substantively* exhausted his remedies by providing correction officials an opportunity to address complaints internally; *and* (2) *procedurally* exhausted his remedies because the prison's remedial system was so confusing that he reasonably believed he had exhausted all available remedies. *Id.* Macias only alleged that he should be excused from exhaustion because his informal complaints put the prison on notice of his grievance. *Id.* Therefore, the Second Circuit held that Macias failed to procedurally exhaust his administrative remedies. Because Macias did not allege that the remedial system was so confusing that he reasonably believed he had exhausted all available remedies, the Second Circuit did not decide what effect *Woodford* has on *Hemphill* 's holding that a reasonable misinterpretation of the internal remedial scheme is a "special circumstance" justifying an inmate's failure to follow procedural rules to the letter. *Id.* at *6 n. 1.[9]

Macias also alleged that the defendant threatened him, and argued that these threats rendered his administrative remedies unavailable, or alternatively, estopped the defendant from raising non-exhaustion as an affirmative defense. *Id.* at *7. The court remanded to the district court to determine whether Macias's remedies were rendered unavailable by the defendant's allegedly threatening behavior, using the "ordinary firmness" test from *Hemphill,* and, "depending on the facts pertaining to each defendant," whether defendant should be estopped from raising non-exhaustion because of the alleged threats. *Id.* at *8 (quoting *Hemphill,* 380 F.3d at 688).

***7** The first two parts of the *Hemphill* analysis-regarding effectively unavailable remedies and estoppel-appear to remain viable after *Woodford.* Therefore, these concepts will be applied here.

VI. ***Analysis of Plaintiffs' Exhaustion Attempts***

The Supervisory Defendants moved to dismiss the entire Amended Complaint on the basis of nonexhaustion. I previously converted their motion to dismiss to a motion for summary judgment and now rule in favor of the Supervisory Defendants as to Plaintiffs' injunctive and declaratory claims.[10]

Plaintiffs argue that they exhausted their administrative remedies by complying with one or more of the "alternative avenues" for grieving described in the prison orientation documents, thereby providing sufficient notice of their claims. Each Plaintiff alleges that she complained to the Inspector General about her sexual abuse. Several

Plaintiffs also complained to the immediate supervisor of the alleged abuser.[11] A few other Plaintiffs also complained to a DOCS official that they felt comfortable approaching.[12] Three Plaintiffs utilized the formal procedure by filing grievances and appealing them to the CORC.[13] Plaintiffs also argue that the Supervisory Defendants are estopped from raising nonexhaustion and that "special circumstances" justify their nonuse of the formal grievance procedure because the DOCS caused Plaintiffs to believe it was sufficient to report the abuses to the Inspector General or any staff member, and because the DOCS provided misleading instructions concerning the mechanism for complaining. Finally, Plaintiffs alternatively argue that administrative remedies were made "unavailable" by virtue of threats towards them. Plaintiffs' arguments are unavailing.

Generally, failure to pursue *all* of an inmate's available remedies precludes that inmate's lawsuit. *See Porter,* 534 U.S. at 524; *Braswell v. Johnson,* 2002 U.S. Dist. LEXIS 25294 at *14 (S.D.N.Y. Mar. 5, 2002); *see also Boddie v. Bradley,* 2007 U.S.App. LEXIS 3759 at *4-5 (2d Cir. Feb 16, 2007) (holding that simply sending informal letters directly to DOCS officials instead of submitting a complaint on an inmate grievance form, as required by DOCS regulations, does not satisfy the exhaustion requirement). Moreover, as *Macias* states, inmates must follow the formal grievance procedures to achieve proper *procedural* exhaustion, as mere notice is not sufficient. 2007 WL 2127722 at *6. Pursuant to *Macias,* plaintiffs do not procedurally exhaust all of their remedies where they fail to argue that because of a confusing or misleading administrative remedial system, they justifiably believed that informal complaints were their *"only* available remedies." 2007 WL 2127722 at *6 (emphasis added). Thus, unless Plaintiffs allege that the DOCS remedial system was so confusing that it made them think their informal complaints and letters were the *only* available means of grieving, their estoppel argument must fail.

***8** As Plaintiffs argue that the DOCS three-step grievance procedure is just one of the many perceived available avenues for grieving a complaint, they fail to demonstrate that they believed their informal complaints and letters were the *"only* available remedies." Also, even if Plaintiffs misconstrued the grievance instructions, it would have been unreasonable to conclude that the three-step grievance procedure was foreclosed to them. *See Giano,* 380 F.3d at 678; *Tackman,* 2005 WL 2347111 at *28. Therefore, Plaintiffs' estoppel and special circumstances arguments must fail.

Plaintiffs further argue that administrative remedies were rendered "unavailable" by virtue of threats made against them. In support, Plaintiffs assert the blanket proposition that the three-step grievance procedure is not available to victims of sexual abuse simply because it requires inmates to self-initiate the process, which sexual abuse victims have a difficult time doing. This argument is unavailing for several reasons. First, the fact that three of the Plaintiffs filed formal grievances directly cuts against Plaintiffs' argument that the process is unavailable to victims of sexual abuse. Moreover, every Plaintiff complained in some way or another about the abuse they allegedly received as inmates, whether by complaining to the Inspector General, supervisors, or other DOCS officials. *See Hemphill,* 380 F.3d at 687 (stating it is unlikely that a plaintiff would claim administrative remedies were "unavailable" because of threats where that plaintiff did in fact write a grievance letter to the Superintendent). The evidence does not demonstrate that Plaintiffs' efforts at grieving properly were thwarted, but rather shows that they merely selected to pursue informal avenues instead of the formal grievance procedure. As such, Plaintiffs' argument that administrative remedies were "unavailable" fails.

One cannot exhaust *all* administrative remedies by merely pursuing an informal avenue over the formal grievance procedure. Thus, because Plaintiffs Stacie Calloway, Tonie Coggins, Latasha Dockery, Tanya Jones, Kristina Muehleisen, Denise Saffioti, Hope Susoh, and Nakia Thompson did not complete the three-step grievance procedure, they have not properly exhausted all of their administrative remedies.[14] *See Porter,* 534 U.S. at 524. Therefore, I grant the Supervisory Defendants summary judgment as to the issue of exhaustion and these Plaintiffs' claims for injunctive and declaratory relief are hereby dismissed without prejudice.[15]

Plaintiff Shenyell Smith is the only remaining Plaintiff who utilized the formal three-step procedure for grieving. Her grievance, however, raises a separate concern with regard to exhaustion. "[T]he mere fact that plaintiff filed *some* grievance, and fully appealed all the decisions on that grievance, does not automatically mean that [s]he can now sue anyone who was in any way connected with the events giving rise to that grievance." *Collins,* 438 F.Supp.2d at 412-13 (emphasis in original) (citing *Turner v. Goord,* 376 F.Supp.2d 321, 325 (W.D.N.Y.2005)). If a grievance alleges nothing more than maltreatment at the hands of a particular defendant, that grievance is not sufficient to exhaust all administrative remedies as against other defendants later claimed to have been aware of the systematic problems and who failed to correct them. *Id.; See also Strong v. Edwards,* 2005 U.S. Dist. LEXIS 23187 at *6-10 (S.D.N.Y. Oct. 7, 2005) (holding that plaintiff failed to exhaust administrative remedies as to a Superintendent where the original grievances did not name the Superintendent nor explain how he was connected to the alleged incidents of maltreatment).

***9** In this case, Plaintiff Shenyell Smith only complained of one particular defendant, identified as "CO Thorpe," in her grievance.[16] In this grievance, she states that CO Thorpe opened her shower door while she was disrobing

and had sexually assaulted and harassed her. She did not mention any other Supervisory Defendant or state how they were connected to CO Thorpe's alleged improper conduct. As such, her claims for injunctive and declaratory relief against the Supervisory Defendants have not been adequately exhausted at the administrative level and are hereby dismissed.

VII. ***Conclusion***

All of Plaintiffs' claims for injunctive and declaratory relief against the Supervisory Defendants have now been dismissed for the reasons stated above and in the previous Order of September 13, 2005. Therefore, there is no need to grant Plaintiffs' motion for class certification, which is hereby denied. Summary judgment dismissing the complaint will be entered for all Supervisory Defendants and for all defendants with the exception of the claims of Shenyell Smith against Delroy Thorpe.

SO ORDERED.

Footnotes

1 The Supervisory Defendants are Anginell Andrews, Terry Baxter, Peter Brown, Roberta Coward, Alexandreena Dixon, Glenn S. Goord, Barbara D. Leon, Elaine Lord, Richard Roy, James Stone, Melvin Williams, and Donald Wolff. This group also included Dennis Crowley and Ronald Moscicki who were dismissed by my previous Order of September 13, 2005.

2 These plaintiffs include Lucy Amador, Bette Jean McDonald, Jeannette Perez, Laura Pullen, and Corilynn Beth Rock.

3 Bobbie Kidd was dismissed pursuant to the "first filed" rule, having been enjoined by the Western District of New York from participating in this action.

4 Contrary to Plaintiffs' contention, this court may dismiss these claims as moot. To avoid mootness of their claims, Plaintiffs Dawson and Smith would have to show that they were still in custody at the time the class was certified. *See Gerstein v. Pugh,* 420 U.S. 103, 110 n. 11 (1975). As I have yet to certify Plaintiffs as a class, such a showing is not possible. Moreover, this case does not present an exception to that rule, unlike in *Gerstein* where there was no way of ascertaining the length of pretrial custody at the outset of the case and such custody could end at any time in various ways. *Id.* In any event, the "relation back" doctrine serves to preserve the viability of class claims and not claims of individual plaintiffs. As I have my doubts as to the propriety of class certification in this case, I believe the doctrine would be inapplicable here.

5 "Harassment" includes "employee misconduct meant to ... harm an inmate." 7 N.Y.C.R.R. § 701.2(e). Such conduct includes assault. *See Larry v. Byno,* No. 9:01-CV-1574, 2006 WL 1313344 at *3 (N.D.N.Y. May 11, 2006) ("There is also an expedited grievance procedure for prisoners who, as in the present case, allege that they have been harassed or assaulted by correctional officers.").

6 In *Hemphill,* the Second Circuit "read together" the holdings of a series of five Second Circuit cases to formulate the three-part inquiry. *See Hemphill v. New York,* 380 F.3d 680 (2d Cir.2004); (citing *Giano v. Goord,* 380 F.3d 670 (2d Cir.2004), *Abney v. McGinnis,* 380 F.3d 663 (2d Cir.2004), *Johnson v. Testman,* 380 F.3d 691 (2d Cir.2004), *Ortiz v. McBride,* 380 F.3d 649 (2d Cir.2004), and *Ziemba v. Wezner,* 366 F.3d 161 (2d Cir.2004)).

7 It is unclear whether factual disputes regarding the exhaustion defense should ultimately be decided by the court or by a jury. There is case law suggesting that a jury should determine if a remedy was "available" or not. This line of cases seem to support the idea that, like a statute of limitations, exhaustion is an affirmative defense with disputed issues of fact that generally should be submitted to a jury. *Katz v. Goodyear Tire & Rubber Co.,* 737 F.2d 238, 243 n. 2 (2d Cir.1984). However, there is also case law, which in my view is more persuasive and on point, supporting the view that exhaustion should be determined by the court and not a jury. *See Lunney,* 2007 U.S. Dist. LEXIS 38660 at *35 n. 4 (citing *Wyatt v. Terhune,* 315 F.3d 1108, 1119-20 (9th Cir.2003) (court may decide disputed issues of fact in motion to dismiss for nonexhaustion); *Priester v. Rich,* 457 F.Supp.2d 1369, 1377 (S.D.Ga.2006) (same); *Dukes v. Doe,* No. 03-CV4639, 2006 WL 1628487 at *6 (S.D.N.Y. June 12, 2006) (ordering an evidentiary hearing on question of exhaustion)). I find it proper that this issue be decided by the court.

8 In *Collins v. Goord,* the district court noted that Justice Breyer, concurring in *Woodford,* cited with approval the Second Circuit's holding in *Giano v. Goord,* 380 F.3d 670, 677 (2d Cir.2004), that the exhaustion requirement is not absolute and encouraged district courts to consider whether prisoner plaintiffs' cases fall into a "traditional exception that the [PLRA] implicitly incorporates." 438 F.Supp.2d 399, 411 n. 13 (S.D.N.Y.2006) (citing *Woodford,* 126 S.Ct. at 2393 (Breyer, J., concurring)). The district court also stated that although parts of *Hemphill* may be in tension with *Woodford,* it did "not read *Woodford* to foreclose an exception to the PLRA's exhaustion requirement where prison authorities actively obstruct an inmate's ability to 'properly' file a prison grievance." *Collins,* 438 F.Supp.2d at 415.

9 The court did, however, rule that as far as its decision in *Braham v. Clancy,* 425 F.3d 177, 183 (2d Cir.2005), might provide

support for Macias's argument that he procedurally exhausted his remedies by providing sufficient notice of his grievance, *Braham* is overruled by *Woodford. Braham* expanded *Johnson* by permitting prisoners to procedurally exhaust claims by taking enough informal steps to put prison officials on notice of their concerns, regardless of whether they used the prison's formal grievance procedures. *Macias,* 2007 WL 2127722 at *6. The court held that, after *Woodford,* notice alone is insufficient as it does not satisfy *Woodford*'s requirement of "proper exhaustion." *Id.*

10 At the outset, I reject the Supervisory Defendants' argument that the entire action must be dismissed for failure to exhaust as the Supreme Court has ruled that there is no "total exhaustion" rule and only non-exhausted claims need be dismissed. *See Jones v.. Bock,* 127 S.Ct. 910, 924 (2007).

11 These Plaintiffs include Tonie Coggins, Stephanie Dawson, and Kristina Muehleisen.

12 These Plaintiffs include Stephanie Dawson, Tanya Jones, Denise Saffioti, and Shenyell Smith.

13 Stephanie Dawson filed a formal DOCS grievance on February 25, 2003. The Superintendent responded that the Inspector General's Office was undergoing an investigation. Finally, the Central Office denied her grievance and upheld the Superintendent's decision. Shantelle Smith filed a formal grievance on June 27, 2003. The Superintendent denied the grievance as the complaint was referred to the Inspector General for investigation. The Amended Complaint alleges that Ms. Smith appealed this decision to the Central Office. Finally, Shenyell Smith filed a formal grievance on January 3, 2002, which was denied by the Superintendent and the Central Office after appeal based on the referral of her complaint to the Inspector General for investigation.

14 While Plaintiff Coggins filed a formal grievance on July 17, 2003, she had not appealed it through all levels of the grievance procedure by the time of the Amended Complaint, and an inmate's attempt at exhaustion during the pendency of a federal case does not satisfy the PLRA. *See Baez,* 469 F.Supp.2d at 179.

15 *See Braswell,* 2002 U.S. Dist. LEXIS 25294 at *16 (holding that where an inmate fails to exhaust, "the appropriate disposition is ... to dismiss the complaint without prejudice to refiling once the plaintiff has pursued to exhaustion all currently available procedures under the state prison grievance program").

16 "CO Thorpe" refers to Defendant Delroy Thorpe.