



**FARNAN, District Judge.**

Presently before the Court is Defendants' Motion to Dismiss (D.I. 63), filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons stated below, the Court will grant the motion.

**BACKGROUND**

According to his Complaint, on April 10, 1996, Plaintiff John Vernon Chapman, Jr., who was an inmate at the Delaware Multi-Purpose Criminal Justice Facility ("MPCJF") in Wilmington, was admitted to the MPCJF infirmary with an open wound on his left leg. While in the infirmary, Plaintiff was placed in the same room as an HIV-positive inmate who was "constantly bleeding and throwing the bloody clothing and towels, washclothes all over the room." On April 26, 1996, Plaintiff was examined by Dr. Glavi Georgieff, who told Plaintiff that the dressing on his leg should be changed every two days. On April 29, 1996, not having been changed since April 26, the dressing on Plaintiff's wound fell off and the wound was left uncovered until the dressing was replaced on May 4, 1996. On May 29, 1996, another HIV-positive inmate who was "bleeding on a daily basis" moved into Plaintiff's cell. Moreover, Plaintiff was not examined by Dr. Georgieff until June 13, 1996. In constant pain, fearing infection of the HIV virus, and with concern that he might lose his leg because of improper care, Plaintiff filed "several grievances" with the prison authorities but "didn't receive any response."

On May 28, 1997, Plaintiff filed the instant Complaint against Sherese Brewington-Carr, Rafael Williams, Dr. Georgieff, Nina Crile, and Correctional Medical Services ("CMS"), alleging violations of 42 U.S.C. § 1983. (D.I. 4). All of the named defendants were employees of the

MPCJF during the relevant time period.<sup>1</sup> (D.I. 4). In his Complaint, Plaintiff seeks compensatory and punitive damages for pain and suffering, mental anguish, stress, deliberate indifference, negligence, wanton disregard, cruel and unusual punishment, and violations of the Eighth and Fourteenth Amendments. On March 24, 1998, the Court dismissed without prejudice Nina Crile and CMS as defendants in the case. (D.I. 26). On April 6, 1999, the Court granted Dr. Georgieff's motion to dismiss. (D.I. 55; D.I. 56). Also on April 6, 1999, the Court granted the motion to dismiss filed by Sherese Brewington-Carr and Rafael Williams ("Defendants") insofar as Plaintiff sued Defendants in their personal capacities. (D.I. 55; D.I. 56). With the only remaining claims being those asserted against Defendants in their official capacities, Defendants filed the instant motion to dismiss on November 13, 2000. (D.I. 63). Plaintiff failed to file an answer brief by the date required by Court Order, (D.I. 62), so the Court will resolve the motion on the papers received as of the date of this Memorandum Opinion.

### **STANDARD OF REVIEW**

When a court analyzes a motion to dismiss brought under Rule 12(b)(6), the "factual allegations of the complaint must be accepted as true." Dow Chem. Co. v. Exxon Corp., 30 F. Supp. 2d 673, 693 (D. Del. 1998). The Court must draw all reasonable inferences in favor of the nonmoving party. Id. at 694. In sum, the only way a court can grant a Rule 12(b)(6) motion to dismiss is "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" contained in the complaint. Id.

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<sup>1</sup> In particular, Sherese Brewington-Carr was warden of the MPCJF, Rafael Williams was deputy warden, Dr. Glavi Georgieff and Nina Crile were employed as medical personnel, and CMS was the "medical care provider" for inmates at the MPCJF. (D.I. 4).

## DISCUSSION

### A. Exhaustion of Administrative Remedies

Defendants contend that Plaintiff failed to adequately allege exhaustion of his administrative remedies, and that, accordingly, Plaintiff's Complaint should be dismissed. The Court concludes that Defendants' contention lacks merit.

According to the Prison Litigation Reform Act of 1996, "[n]o action shall be brought with respect to prison conditions under section 1983 . . . 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). The State of Delaware Bureau of Prisons has established a comprehensive Inmate Grievance Procedure ("Grievance Procedure").<sup>2</sup> (D.I. 64, Exh. A). Defendants contend that, because Plaintiff failed to adhere to the Grievance Procedure, he has failed to exhaust his administrative remedies, and therefore, Defendants' motion to dismiss should be granted.

In his Complaint, Plaintiff alleges that he attempted to use the Grievance Procedure and only filed his Complaint because he did not receive a response from prison authorities. (D.I. 4). The Court of Appeals for the Third Circuit has concluded that there is no "futility" exception to Section 1997e(a). Nyhuis v. Reno, 204 F.3d 65, 71 (3d Cir. 2000). In Nyhuis, the plaintiff argued that pursuing administrative remedies would have been futile because they would not have provided him with the monetary relief he sought, and therefore, the exhaustion requirement of Section 1997e(a) should not apply. Id. at 66. The Third Circuit rejected the plaintiff's contention

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<sup>2</sup> When resolving a motion to dismiss pursuant to Rule 12(b)(6), courts should generally "not consider matters extraneous to the pleadings." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997). However, "a court may consider an undisputably authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." Id. (citations omitted). In the instant case, Plaintiff's Complaint avers that the Grievance Procedure existed and that he filed several grievances in accordance with the Grievance Procedure. Therefore, the Court concludes that it can appropriately rely upon the Grievance Procedure, which is attached to Defendants' brief, in resolving the instant motion.

and held that, under Section 1997e(a), exhaustion of administrative remedies is mandatory even if the remedies a plaintiff is seeking cannot be obtained through the administrative process. Id. at 66-67. The Third Circuit reasoned that Section 1997e(a) was amended in 1996 so that the words “plain, speedy, and effective remedies as are available,” were replaced with “such administrative remedies as are available.” Id. at 70 (citations omitted). Therefore, the Third Circuit concluded that no futility exception to Section 1997e(a) exists under any circumstances. Id. at 71.

In the instant case, under the Grievance Procedure, Level I of the administrative process is initiated when an inmate files a written grievance with the Inmate Grievance Chair (“IGC”). (D.I. 64, Exh. A at 5-6). Within 24 hours, the IGC must forward the grievance to the supervisor of the housing unit or department that is implicated in the grievance. (D.I. 64, Exh. A at 6). The supervisor is then required to conduct an investigation of the allegations and to provide a written report of this investigation to the IGC within 24 hours. (D.I. 64, Exh. A at 6). The IGC then has one day to deliver a copy of the supervisor’s written report to the inmate who filed the grievance. (D.I. 64, Exh. A at 6). If, at the completion of Level I, an informal resolution is not reached, an inmate can pursue the grievance to Level II, which affords a hearing in front of the Resident Grievance Committee (“RGC”). (D.I. 64, Exh. A at 6). If not satisfied after Level II, an inmate can proceed to Level III, which provides for mediation with the Bureau Grievance Officer and a hearing before an “Outside Reviewer,” who is not associated or employed by the Delaware Department of Corrections. (D.I. 64, Exh. A at 7). The Outside Reviewer then submits a written recommendation to the Chief of the Bureau of Prisons. (D.I. 64 at 7).

In the instant case, Plaintiff alleges that he received no response when he filed grievances with the prison authorities. The Court concludes that, despite Defendants’ arguments to the contrary, Nyhuis is not necessarily applicable where, as here, prison authorities completely ignore inmate grievances. For the Court to apply Nyhuis in every case where an inmate grievance has been ignored would be to encourage prison officials to ignore such grievances in order to prohibit

inmates from properly exhausting administrative remedies.

The Court, however, does find the case of Rhodes v. Alameda County, 1997 WL 135901, at \*1 n.1 (N.D. Cal. March 17, 1997) instructive on the instant issue. In Rhodes, the plaintiff alleged that prison authorities ignored his written grievance. Id. at \*1 n.1. The court dismissed the complaint without prejudice because the complaint did not “adequately allege exhaustion as there is no indication that the proscribed time limits have passed without a response being received, or that plaintiff has appealed to the final level of review.” Id. at \*1 n.1.

The Court finds persuasive the suggestion in Rhodes that, if prison officials completely fail to comply with procedural deadlines for responding to inmate grievances, then administrative remedies have been exhausted and an inmate can pursue a Section 1983 claim in federal court. It is apparent from the face of the Complaint that the time for responding to Plaintiff’s grievance has expired.<sup>3</sup> However, the Grievance Procedure explicitly states that if “no response has been received by the expiration of a time limit at any step [in the Grievance Procedure], the [inmate] shall be entitled to move to the next step of the process.” (D.I. 64, Exh. A at 3). Since Plaintiff was entitled to take his grievance to Level II when he received no response within three days, it is arguable under Rhodes that Plaintiff’s failure to proceed to Level II means that he failed to exhaust his administrative remedies. See also Ahmed v. Sromovski, 103 F. Supp. 2d 838, 844 (E.D. Pa. 2000)(holding that a prisoner failed to exhaust his administrative remedies because he did not pursue his grievance to the second and third levels of administrative review).

However, the Court concludes that the instant circumstances are such that Plaintiff should not be barred from litigating the instant action. While the Grievance Procedure allows an inmate to proceed to the next level if the inmate does not receive a response within the time required, it is

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<sup>3</sup> As discussed above regarding Level I of the Grievance Procedure, an inmate is supposed to receive a written response to a grievance approximately three days after the date the inmate filed the grievance.

not clear how an inmate can do this if he or she is ignored at Level I. The Grievance Procedure states that an inmate can proceed from Level I to Level II if the grievance is not resolved informally, at which point “the IGC will notify the [inmate] . . . that a RGC meeting will be held.” The Grievance Procedure does not suggest how an inmate can initiate the beginning of Level II review without the assistance of the IGC. Therefore, the Court concludes that Plaintiff’s failure to take his grievance to Level II when his grievance was ignored at the Level I stage does not require dismissal of Plaintiff’s Complaint for failing to exhaust administrative remedies.

**B. Eleventh Amendment Immunity**

Defendants contend that Plaintiff’s Complaint must be dismissed because Defendants are immune from monetary liability in their official capacities under the Eleventh Amendment. For the reasons stated below, the Court agrees with Defendants’ contention.

The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” Furthermore, the United States Supreme Court has stated that:

Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity, or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity.

Will v. Michigan Dep’t of State Police, 491 U.S. 58, 66 (1989)(citations omitted). In that regard, the Supreme Court has held that Congress did not intend to override a State’s Eleventh Amendment immunity when it enacted Section 1983. Quern v. Jordan, 440 U.S. 332 (1979). In addition, Section 1983 only allows claims against “person[s],” which does not include claims seeking monetary relief from state officials who are sued in their official capacities. Will, 491 U.S. at 71. Therefore, State officials sued in their official capacities for money damages can

assert Eleventh Amendment immunity. Id. at 71 n.10.

Applying the above standards, Plaintiff's claim for money damages against Defendants in their official capacities is barred under the Eleventh Amendment. Since these are the only claims asserted by Plaintiff that still remain in the instant action, the Court will enter judgment in favor of Defendants and against Plaintiff on all counts.

### **CONCLUSION**

For the reasons discussed above, the Court will grant Defendants' Motion to Dismiss (D.I. 63).

An appropriate Order will be entered.



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

JOHN V. CHAPMAN, JR.,

Plaintiff,

v.

SHERESE BREWINGTON-CARR, and  
RAFAEL WILLIAMS,

Defendants.

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C.A. No. 97-271-JJF

**FINAL ORDER**

At Wilmington this 1 day of May, 2001, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (D.I. 63) is **GRANTED**, and therefore, judgment is entered in favor of Defendants and against Plaintiff on all counts.

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UNITED STATES DISTRICT JUDGE