IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VICTOR RODRIGUEZ RAMOS	:	
	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 04-CV-0249
	:	
JOSEPH V. SMITH, WARDEN, FEDERAL DETENTION CENTER, PHILADELPHIA, PENNSYLVANIA	:	

SURRICK, J. **NOVEMBER 10, 2005**

MEMORANDUM & ORDER

Presently before the Court is Defendant's Motion To Dismiss The Complaint, Or In The Alternative, For Summary Judgment (Doc. No. 10).[1] For the following reasons, Defendant's Motion will be granted.

I. BACKGROUND

A. Facts

On December 18, 2003, Plaintiff Victor Rodriguez Ramos was sentenced to life in prison followed by five years of supervised release. (Doc. No. 906, Crim. No. 98-0362-12.) He is currently incarcerated at the United States Penitentiary ("USP") at Allenwood, Pennsylvania. (Pl.'s Decl. ¶ 3.) Prior to his transfer to the USP, Plaintiff was detained at the Federal Detention Center ("FDC") in Philadelphia, Pennsylvania from June 2000 through February 2004. (Doc. No. 10 at 1.) During that time, Defendant Joseph V. Smith was the Warden at the FDC. He is currently the Warden at the USP in Lewisburg, Pennsylvania. (Doc. No. 10 at 2.)

[1] Unless otherwise noted, all document numbers refer to the Docket for 04-CV-0249.

From June 2000 through January 2002, while awaiting trial, Plaintiff was confined in the general population at the FDC. (Am. Compl., Doc. No. 25 ¶ 7.) On or about January 28, 2002, Plaintiff was transferred to the Special Housing Unit (the "SHU") at the FDC. In the SHU, Defendant was denied many of the privileges that are afforded to inmates in the general population. (*Id.* ¶ 12.) Plaintiff remained in the SHU until December 2002, when he was transferred back into the general population. (*Id.* ¶ 28.)

On March 4, 2002, Plaintiff and two of his co-defendants filed a Motion for Review of Detention Orders and for Appropriate Relief with the Honorable Louis Pollack, the presiding judge at their criminal trial. The Motion objected to the prisoners' placement in the SHU as well as certain conditions of the SHU which precluded full access to counsel in preparation for trial. (Doc. No. 26 at Ex. B.) On March 21, 2002, Judge Pollack ordered contact visits for Plaintiff and his attorneys and translators. (*Id.* at Ex. C.) In addition, Warden Smith, after appearing before Judge Pollack, addressed a number of Plaintiff's other complaints. Plaintiff was permitted to shave before appearances at his jury trial and all of Plaintiff's legal documents were returned to him. (*Id.* at Ex. D.) Judge Pollack directed that Plaintiff's remaining grievances be addressed through prison administrative remedies. (Pl. Decl. ¶ 46.)

On April 1, 2002, Plaintiff filed six Requests For Administrative Remedies concerning the conditions of his detention in the SHU. (Doc. No. 10 at 8.) Plaintiff's requests covered the following issues: (1) return to the general population; (2) access to the law library consistent with access provided to inmates in the general population; (3) contact visits with his attorneys and family members; (4) permission to shave and get a hair cut before court appearances; (5) full access to the commissary, exercise, and other privileges of the general population unit; and (6)

opportunity to listen to tapes provided by his defense attorneys. (*Id.* at 8-9; Doc. No. 26 at Ex. E.) Defendant responded to each of these requests on April 10, 2002. He denied Plaintiff's request to return to the general population because of a policy decision to place prisoners who were "being prosecuted for capital offenses" in the SHU. (Doc. No. 26 at Ex. F.) Defendant denied Plaintiff's request for general population access to the law library, explaining that Plaintiff had access to the SHU law library and could request materials from the main law library. He denied Plaintiff's request for privileges afforded to the general population inmates, explaining that the SHU is a more secure housing unit than the general population unit. Finally, Defendant noted that special arrangements had been made for Plaintiff regarding contact visits with his attorneys, opportunities to shave before court appearances, and opportunities to listen to audio material with defense counsel. (*Id.*)

Plaintiff concedes that he did not file appeals from the Defendant's decisions on any of his six administrative requests. (Pl. Decl. ¶¶ 47-53.) Plaintiff asked his attorneys about filing an appeal and was told that his criminal co-defendants' attorneys were handling the appeals for Plaintiff as well. Plaintiff ultimately learned that his co-defendants' attorneys had not filed appeals on his behalf. However, at that point, Plaintiff's attorneys informed him that it was too late to appeal and that, in any event, such appeals would be futile because his co-defendants' appeals had been denied. (*Id.*) As a result, Plaintiff took no further action through the prison grievance system.

B. Procedural History

Plaintiff filed a pro se Complaint on March 10, 2004, seeking monetary damages and injunctive relief. (Doc. No. 6.) On February 2, 2005, Defendant filed the instant Motion to

Dismiss the Complaint or in the Alternative for Summary Judgment. (Doc. No. 10.) On June 28, 2005, we appointed counsel for Plaintiff. (Doc. No. 19.) On September 27, 2005, newly-appointed counsel filed a First Amended Complaint. (Doc. No. 25.) Since that time, both parties have filed numerous briefs in support of and in opposition to the instant Motion. (Docs. No. 24, 26, 28, 29.)

Plaintiff's First Amended Complaint alleges that his confinement in the SHU prior to his conviction constitutes unlawful punishment in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution. It further alleges that Plaintiff was confined in the SHU without proper procedural safeguards that are required under 28 C.F.R. § 541.22, in violation of his Fifth Amendment procedural due process rights. (Doc. No. 25 ¶¶ 32, 46.) The instant Motion raises the following grounds for dismissal of Plaintiff's Complaint or the entry of summary judgment: (1) Defendant was not properly served; (2) Plaintiff failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act of 1995 ("PLRA"), amended at 42 U.S.C. § 1997e; (3) the Complaint is time barred; (4) Plaintiff's Complaint is barred by the doctrine of sovereign immunity to the extent that Defendant is sued in his official capacity; (5) Plaintiff's suit is barred because of Defendant's qualified immunity; and (6) Plaintiff's due process rights were not violated.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for failure to state a claim. The purpose of a Rule 12(b)(6) motion to dismiss is to test the sufficiency of a complaint, not to resolve disputed facts or to decide the merits of the case. *NWJ Prop. Mgmt., LLC v. BACC Builders, Inc.*, Civ. A. No. 04-1943, 2004 WL 2095446, at *1 (E.D. Pa. Sept. 17,

2004); *Tracinda Corp. v. DaimlerChrysler AG*, 197 F. Supp. 2d 42, 53 (D. Del. 2002). A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of the complaint. *Johnsrud v. Carter*, 620 F.2d 29, 33 (3d Cir. 1980) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

In evaluating a motion to dismiss, all allegations in the complaint and all reasonable inferences that can be drawn therefrom must be accepted as true and viewed in the light most favorable to the nonmoving party. *Rocks v. City of Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989) (citing *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 273 (3d Cir. 1985)). The court may dismiss a complaint, "'only if it is certain that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Swin Res. Sys., Inc. v. Lycoming County*, 883 F.2d 245, 247 (3d Cir. 1989) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

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)). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The party moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the nonmoving party's legal position. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). Once the moving party carries this initial burden, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e);

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (explaining that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts"). "The nonmoving party . . . 'cannot rely merely upon bare assertions, conclusory allegations or suspicions' to support its claim." *Townes v. City of Philadelphia*, Civ. A. No. 00-CV-138, 2001 U.S. Dist. LEXIS 6056, at *4 (E.D. Pa. May 11, 2001) (quoting *Fireman's Ins. Co. v. DeFresne*, 676 F.2d 965, 969 (3d Cir. 1982)). Rather, the party opposing summary judgment must go beyond the pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. When deciding a motion for summary judgment, the court must view facts and inferences in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1127 (3d Cir. 1995). We do not resolve factual disputes or make credibility determinations. *Siegel Transfer, Inc.*, 54 F.3d at 1127.

III. LEGAL ANALYSIS

A. Bivens Actions and the Prison Litigation Reform Act

Plaintiff asserts that Defendant, formerly the Warden of the FDC in Philadelphia, Pennsylvania, violated his Fifth Amendment Due Process and Procedural Due Process rights by placing him in solitary confinement for an extended period and by failing to conduct the proper procedural reviews and assessments as required under 28 C.F.R. § 541.22. Plaintiff seeks monetary relief from Defendant pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* permits the awarding of monetary damages against federal officials for violations of an individual's constitutional rights.

Because Plaintiff is currently an inmate at the USP in Allenwood and brought this *Bivens* action with respect to conditions he experienced while detained at the FDC in Philadelphia, his suit is subject to the PLRA and its exhaustion requirement. The PLRA provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title 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). As the Third Circuit has made clear in *Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000), "§ 1997e(a) applies equally to § 1983 actions and to *Bivens* actions." *Id.* at 68. We must determine whether Plaintiff adequately exhausted his administrative remedies through the prison grievance system and if not, whether his failure to do should be excused in this case.

B. Exhaustion Requirement Under the PLRA

The Court of Appeals for the Third Circuit has determined that § 1997e(a) is not a jurisdictional requirement. Therefore, failure to exhaust administrative remedies does not deprive the federal court of subject matter jurisdiction. *Id.* at 69 n.4. However, "[f]ailure to exhaust administrative remedies is an affirmative defense that must be pled and proven by the defendant. In appropriate cases, failure to exhaust may be raised as the basis for a motion to dismiss." *Brown v. Croak*, 312 F.3d 109, 111 (3d Cir. 2002) (internal citations omitted). Defendant has properly raised this affirmative defense as a basis of his 12(b)(6) Motion to Dismiss.

The Code of Federal Regulations ("CFR") provides a detailed system by which inmates in federal prisons must file administrative grievances. *See* 28 C.F.R. §§ 542.14, 542.15.

Prisoners have twenty days following the date of the event that is the basis for the request to file a formal written Administrative Remedy Request. 28 C.F.R. § 542.14. If a prisoner is not satisfied with the Warden's response to his request, he may file an appeal to the Regional Director within twenty days of the date on the response. 28 C.F.R. § 542.15. Prisoners may again appeal to the General Counsel within thirty days of the response from the Regional Director. *Id.* The CFR provides that "[w]hen the inmate demonstrates a valid reason for delay, these time limits may be extended." *Id.*

Defendant contends and Plaintiff concedes that he did not file any appeal from the six administrative decisions regarding his detention in the SHU and the conditions of that detention. Plaintiff's administrative requests directly address the claims which Plaintiff has raised in this *Bivens* action. Because of his failure to appeal from those administrative decisions, it is clear that Plaintiff did not exhaust his administrative remedies under § 1997e(a). The question remaining is whether Plaintiff's failure to exhaust his administrative remedies may be excused.

As a preliminary matter, it is important to note that Congress, by passing the PLRA in 1996, amended § 1997e(a) to provide that the exhaustion requirement applies to all actions, including but not limited to § 1983 suits, and that the exhaustion requirement was no longer discretionary. Prior to 1996, § 1997e(a) provided:

> [I]n any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, *if the court believes that such a requirement would be appropriate and in the interests of justice,*continue such case . . . to require exhaustion of such plain, speedy, and effective remedies as are available.

42 U.S.C. § 1997e(a) (1994) (amended 1996) (*quoted in Nyhuis*, 204 F.3d at 70, n.5) (emphasis altered). The current version of § 1997e(a), provides as follows:

> "*[N]o action shall be brought with respect to prison conditions under § 1983 of this Title,* 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 supplied). Thus, as the Supreme Court has recently noted, "[t]he current exhaustion provision in § 1997e(a) differs markedly from its predecessor. Once within the district court's discretion, exhaustion in § 1997e(a) cases is now mandatory." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). As *Porter* and *Booth v. Churner*, 532 U.S. 731 (2001), made clear, the exhaustion requirement is not waived even in cases where the administrative remedies appear to be futile or where the relief sought in the federal action cannot be provided by the administrative process in the prison. *Porter*, 534 U.S. at 524; *Booth*, 532 U.S. at 741. In fact, the Court in *Booth* specifically stated, "we stress the point that we will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Booth*, 532 U.S. at 741 n.6.

Nevertheless, several courts have found rare circumstances that will excuse this otherwise mandatory exhaustion requirement or that will permit a finding that the administrative remedies were not really *available* as is required by § 1997e(a).[2] For example, the Third Circuit has

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[2] Plaintiff has suggested that in considering whether to excuse this requirement, we look for guidance to the body of habeas corpus case law addressing exhaustion. Defendant has similarly analyzed the situation, albeit opposing excuse, under that same body of case law. However, the cases cited by both parties that provide standards for excusing the exhaustion requirement in habeas cases are inapposite in the PLRA context. The Second Circuit has specifically recognized that it is inappropriate to analogize the PLRA's exhaustion requirement to the habeas context:

concluded that dismissal or summary judgment for failure to exhaust under § 1997e(a) is inappropriate when prison officials have misled or otherwise precluded the inmate from filing or exhausting prison grievance procedures. *See, e.g., Mitchell v. Horn,* 318 F.3d 523, 529 (3d Cir. 2003) (holding that district court incorrectly dismissed claim because it did not consider prisoner's allegations that he had been denied grievance forms by prison officials); *Brown*, 312 F.3d at 112 (finding that prisoner's claim that he was misled by prison officials precluded dismissal based on exhaustion requirement); *Camp v. Brennan*, 219 F.3d 279, 280-81 (3d Cir. 2000) (noting that prisoner who was misled by prison officials regarding grievance procedure faced a Catch-22 situation which could preclude finding of non-exhaustion); *see also Oliver v. Moore*, No. 04-1540, 2005 WL 1988996, at *3-4 (3d Cir. Aug. 18, 2005) (holding that while administrative remedy may be deemed unavailable where prison officials prevented pursuit of prison grievance process, where no evidence of such interference is found, exhaustion is not excused).

Other circuits have likewise found that the misconduct of prison officials with regard to an inmate's grievances preclude defendant from raising failure to exhaust as an affirmative defense. In *Ziemba v. Wezner*, 366 F.3d 161 (2d Cir. 2004), the Second Circuit concluded that the affirmative defense of exhaustion is subject to estoppel if prison officials preclude the inmate

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> [T]he differences between habeas cases and prison litigation under § 1983 are legion. Accordingly, there is no underlying reason why what constitutes "cause and prejudice" sufficient to permit avoidance of procedural bars in habeas cases should govern PLRA exhaustion situations. Nor does the language or legislative history of the PLRA suggest that Congress intended the PLRA's exhaustion provisions to be the equivalent of, or stricter than, habeas procedural default rules.

Giano v. Goord, 380 F.3d 670, 679 (2d Cir. 2004).

from exhausting administrative remedies. *Id.* at 163. Similarly, the Sixth Circuit held that when an inmate did not receive a response to his prison grievances, defendant's motion to dismiss based on failure to exhaust administrative remedies must be denied. *See Boyd v. Corr. Corp. of Am.*, 380 F.3d 989, 996-97 (6th Cir. 2004). Finally, the Fifth Circuit has found administrative remedies to be unavailable when prison authorities refuse or fail to give an inmate the appropriate grievance forms despite his requests. *See Aceves v. Swanson,* 75 F. App'x. 295, 296 (5th Cir. 2003).

Interestingly, the Second Circuit has also found reason to excuse the exhaustion requirement under § 1997e(a) based on the notion that some "special circumstances" justify a failure to exhaust. The Second Circuit employs a three-part inquiry when defendant contends that a prisoner has failed to exhaust available administrative remedies. The court must ask: (1) whether administrative remedies were actually available, (2) whether the defendants forfeited their right to raise the affirmative defense or by their own actions precluded the plaintiff from using administrative grievance procedures, and (3) whether "'special circumstances' have been plausibly alleged that justify 'the prisoner's failure to comply with administrative procedural requirements.'" *Hemphill v. New York*, 380 F.3d 680, 680 (2d Cir. 2004) (quoting *Giano,* 380 F.3d at 676). Under this rationale, the Second Circuit has identified such "special circumstances" in cases in which the prisoner reasonably misinterpreted the regulations that established the administrative grievance procedures. *Giano*, 380 F.3d at 676-78 (finding "special circumstances" where prisoner reasonably interpreted prison regulations to mean that he could not file administrative requests); *Hemphill,* 380 F.3d at 690 (finding "special circumstances" where prison regulations were manifestly unclear); *Rodriguez v. Westchester County Jail Corr.*

Dep't, 372 F.3d 485, 487 (2d Cir. 2004) (finding "special circumstances" where prisoner's incorrect belief was reasonable and was based on since overturned Second Circuit precedent).

In this case, Plaintiff does not allege that prison officials precluded him from filing administrative requests or appeals so that Defendant is estopped from raising exhaustion as an affirmative defense. He does not claim that the procedures were unclear, creating special circumstances that justify excusing the exhaustion requirement. Rather, Plaintiff argues that his failure should be excused based upon the fact that he received misleading information from his own attorneys regarding his administrative appeals. Plaintiff contends that he filed six administrative requests with the help of his criminal co-defendants because he is illiterate and could not draft the requests on his own. He alleges that he asked his attorneys to appeal the decisions on those requests for him and was told that his co-defendants' attorneys were handling the appeals for him. Plaintiff later learned that his attorneys had provided him with incorrect information and that no one had filed appeals on his behalf. At that point, Plaintiff believed that it was too late to appeal and that such appeals would be futile given the disposition of the appeals made by his criminal co-defendants. He therefore did nothing.

The facts, as presented by Plaintiff, clearly demonstrate that he had the opportunity to rectify the failure to appeal but took no action. The regulations governing administrative requests in the federal prisons clearly state that when inmates demonstrate valid reasons for delay, the time limits on requests and appeals may be extended. 28 C.F.R. §§ 542.14, 542.15. Plaintiff does not claim that he made any attempt to appeal from the administrative decisions once he learned of his attorneys' error nor did he seek an extension of the time limit for filing such appeals. Plaintiff contends that because he was illiterate he could not draft the appeals on

his own, and because he was detained in solitary confinement, he could not seek the assistance of other inmates. However, the regulations governing administrative requests mandate that assistance be provided to inmates who cannot file requests and appeals on their own. The regulation provides:

> Wardens shall ensure that assistance is available for inmates who are illiterate, disabled, or who are not functionally literate in English. Such assistance includes provision of reasonable accommodation in order for an inmate with a disability to prepare and process a Request or an Appeal.

28 C.F.R. § 542.16. Plaintiff does not claim or offer evidence that he sought assistance from the Warden or other prison officials in filing an appeal. This is, of course, the proper procedure under the regulations. Instead, Plaintiff relied on advice of his attorneys and did not seek to correct their errors once he learned of the problem. He did not try to appeal on his own and present his attorneys' error as the reason for the untimely nature of the appeal. In addition, he failed to seek assistance from the prison officials who are required to provide assistance to illiterate inmates.

Given the facts as alleged by Plaintiff, the mandatory nature of the exhaustion requirement under the amended PLRA, and the rarity of finding circumstances that excuse exhaustion, we are satisfied that Plaintiff's failure to exhaust his administrative remedies should not be excused. Accordingly, we will grant Defendant's 12(b)(6) motion to dismiss with prejudice.[3] Because we dismiss the Complaint based on Plaintiff's failure to exhaust

[3] We dismiss Plaintiff's Complaint with prejudice because Plaintiff's failure to exhaust administrative remedies cannot, at this time, be cured. Because administrative remedies are no longer available, dismissal with prejudice is proper. *Berry v. Kerik*, 366 F.3d 85, 86 (2d Cir. 2004).

administrative remedies, we need not address the other arguments raised by Defendant in the instant Motion.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VICTOR RODRIGUEZ RAMOS	:	
	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 04-CV-0249
	:	
JOSEPH V. SMITH, WARDEN,	:	
FEDERAL DETENTION CENTER,	:	
PHILADELPHIA, PENNSYLVANIA	:	

ORDER

AND NOW, this 10th day of November, 2005, it is ORDERED that Defendant's Motion To Dismiss The Complaint, Or In The Alternative, For Summary Judgment (Doc. No. 10) is GRANTED and Plaintiff's First Amended Complaint is DISMISSED.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge