

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
MACON DIVISION

TYRECQUISS SHAEWAUN WELLS,	:	
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	<b>Case No. 5:21-cv-407-MTT-CHW</b>
	:	
<b>Warden WALTER BERRY, et al.,</b>	:	
	:	
<b>Defendants.</b>	:	
_____	:	

**REPORT AND RECOMMENDATION**

Before the Court is a motion to dismiss filed by the Defendants. (Doc. 42). Because Plaintiff Tyrecquiss Wells failed to exhaust available administrative remedies before commencing this action, it is **RECOMMENDED** that the Defendants’ motion be **GRANTED**, and that this action be **DISMISSED without prejudice**. It is further **ORDERED** that Plaintiff’s motion to consolidate or amend (Doc. 24) is **DENIED**.

**BACKGROUND AND PLAINTIFF’S MOTION**

Plaintiff, a state prisoner, alleges that while he was confined at Baldwin State Prison (BSP), he “witnessed numerous stabbings” and has “had to fight for my life on multiple occasions.” (Doc. 1, p. 5). Plaintiff further alleges that the pervasive violence at BSP is the result of a policy or practice whereby “inmates don’t get punished when caught with concealed weapons.” (*Id.*). Plaintiff additionally alleges that the “prison is infested with crystal meth and synthetic drugs,” which exacerbates the risk of violence. (*Id.*).

Plaintiff describes, in detail, only one particularized instance of alleged violence in which he was involved. According to Plaintiff, an “inmate tried to hit me which caused me to have to defend myself and more people start[ed]” attacking so that “it was (5) against (1).” (Doc. 1, p. 6).

Plaintiff claims that the correctional officers on duty are “elderly women” who “ask inmates to watch their back because they are afraid, which puts our lives in more danger.” (Doc. 1, p. 5). Regarding the particular attack that Plaintiff describes, Plaintiff alleges that he suffered “wounds on my back,” and that the BSP medical staff had to “patch[] me up.” (Doc. 1, p. 6). Based on Plaintiff’s allegations of general and particularized violence, the Court permitted Plaintiff to proceed in this action on an Eighth Amendment claim of deliberate indifference. (Doc. 18, p. 4). *See also Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (“prison officials must ... take reasonable measures to guarantee the safety of the inmates”).

In a pending motion, Plaintiff seeks to consolidate his own civil action with those of other prisoners who have complained about similar conditions within BSP. (Doc. 24). The Court has “broad discretion in determining whether to consolidate a case pending before it.” *N.A.A.C.P. v. Michot*, 480 F.2d 547, 548 (5th Cir. 1973). Because Plaintiff has not shown that consolidation would benefit the interests of justice or judicial economy, Plaintiff’s request to consolidate is denied. Plaintiff may also have sought to amend his complaint by adding as defendants several high-ranking Georgia prison officials named in the motion’s caption.<sup>1</sup> Plaintiff failed to describe any personal wrongdoing by these officials, though, and Plaintiff cannot sue the named persons under a theory of *respondeat superior* or vicarious liability. *Keith v. DeKalb Cnty., Ga.*, 749 F.3d 1034, 1047 (11th Cir. 2014) (“supervisory officials are not liable under § 1983 for the unconstitutional acts of their subordinates on the basis of *respondeat superior* or vicarious liability”). Accordingly, insofar as Plaintiff additionally sought to amend his complaint through his motion, that request is also denied.

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<sup>1</sup> Specifically, the caption of Plaintiff’s motion lists as prospective defendants the Commissioner, Assistant Commissioner, Director of Field Operations, and an Assistant Regional Director of the Georgia Department of Corrections, along with the Assistant Commissioner of the Georgia Department of Health Services and a statewide mental health director. (Doc. 24, p. 1).

## MOTION TO DISMISS

In their pending motion to dismiss, the Defendants raise four arguments. First, the Defendants correctly note that Plaintiff may not bring official capacity claims for damages under Section 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). As their second and third arguments, the Defendants contend that Plaintiff fails to state a claim and that qualified immunity bars Plaintiff's individual capacity claims for damages. Because the Court permitted Plaintiff to survive screening under 28 U.S.C. § 1915A, and because qualified immunity is "typically addressed at the summary judgment stage," *Corbitt v. Vickers*, 929 F.3d 1304, 1311 (2019), this case is subject to dismissal on the Defendants' fourth and final argument, that Plaintiff did not properly exhaust the prison grievance process.

### (a) **The Exhaustion Requirement**

The Prison Litigation Reform Act or PLRA, 42 U.S.C. § 1997e(a), mandates that prisoners exhaust available administrative remedies before bringing an action with respect to prison conditions under 42 U.S.C. § 1983 or any other federal law. Exhaustion in this context means proper exhaustion: prisoners must "complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a precondition to bringing suit in a federal court." *Woodford v. Ngo*, 548 U.S. 81, 88 (2006). The exhaustion requirement is "designed to eliminate unwarranted federal-court interference with the administration of prisons" by "seek[ing] to afford corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Turner v. Burnside*, 541 F.3d 1077, 1085 (11th Cir. 2008).

The Eleventh Circuit's *Turner* opinion establishes a two-step process for courts to review motions to dismiss based on a prisoner's failure to exhaust. A reviewing court first:

[L]ooks to the factual allegations in the defendant's motion to dismiss and those in the plaintiff's response, and if they conflict, takes the plaintiff's version of the facts

as true. If, in that light, the defendant is entitled to have the complaint dismissed for failure to exhaust administrative remedies, it must be dismissed.

*Turner*, 541 F.3d at 1082–83.

Second, if the complaint is not dismissed under step one, the court:

[P]roceeds to make specific findings in order to resolve the disputed factual issues related to exhaustion .... Once the court makes findings on the disputed issues of fact, it then decides whether under those findings the prisoner has exhausted his available administrative remedies.

*Id.*

**(b) Grievance Procedure**

The grievance procedure applicable in this case was set by Georgia Department of Corrections Standard Operating Procedure No. 227.02, effective as of May 10, 2019. Under that procedure, prisoners were required to follow a two-step process by first filing an “original grievance” within ten days of any grievable issue. (Doc. 42-3, p. 9). Once filed, an original grievance is screened by prison staff and then either rejected or accepted and investigated. The grievance procedure further provides that a response of some kind is due within 40 days of the date of an original grievance’s submission, with the possibility of a further 10-day extension on written notice. (Doc. 42-3, p. 12).

The grievance procedure then contemplates that upon either the expiration of the original grievance response period or upon the prisoner’s receipt of a response, the prisoner should then proceed to step two by filing a “central office appeal” within seven days. (Doc. 42-3, p. 15). Thereafter, the grievance procedure contemplates a 120-day period in which the warden is to provide a response to the central office appeal. (Doc. 42-3, p. 16).

(c) **Exhaustion Analysis**

Plaintiff's claims are subject to a dismissal for failure to exhaust at both of *Turner's* steps of review. This conclusion flows from the PLRA's requirement that prisoners complete the exhaustion process before commencing an action under Section 1983. *Smith v. Terry*, 491 F. App'x 81, 83 (11th Cir. 2012) (citing *Harris v. Garner*, 216 F.3d 970, 974 (11th Cir. 2000)). As discussed below, Plaintiff's premature commencement of this action mandates a dismissal.

Regarding *Turner's* first step of review, although Plaintiff failed to respond to the Defendants' motion to dismiss, Plaintiff alleged in his complaint that he completed both the original grievance step and central office appeal step of the applicable grievance procedure. (Doc. 1, pp. 3–4). The Court must accept Plaintiff's allegations as true at *Turner's* first step, but Plaintiff's allegations do not conflict with the Defendants' allegations that Plaintiff filed only one grievance while incarcerated at Baldwin State Prison or BSP, and that the exhaustion process regarding this grievance did not conclude until after Plaintiff had already brought or commenced this Section 1983 action. *See Smith v. Terry*, 491 F. App'x at 83 (“We have interpreted the term ‘brought’—as used in section 1997e(a)—to mean ‘the filing or commencement of a lawsuit’”). Because the parties' allegations do not conflict, and because the Defendants' version of the facts shows that Plaintiff failed properly to exhaust, the Defendants are entitled to a dismissal at *Turner's* step one.

The Defendants are also entitled to a dismissal at *Turner's* second step of review based upon the available evidence. Plaintiff's prison grievance history (Doc. 42-4, p. 2) confirms that he filed only one grievance at Baldwin State Prison, and indeed only one grievance relating to conditions of confinement. Records relating to that grievance show that Plaintiff filed a central office appeal on October 13, 2021, (Doc. 42-5, p. 3), and that Plaintiff received a warden's

response on November 18, 2021. (Doc. 42-5, p. 2). At the latest, Plaintiff commenced this action prior to that date, on November 12, 2021,<sup>2</sup> before he completed the exhaustion requirement by waiting to receive the warden's response to his central office appeal. Accordingly, because Plaintiff commenced this action prematurely, and because the Court lacks discretion to waive the exhaustion requirement, *Alexander v. Hawk*, 159 F.3d 1321, 1325 (11th Cir. 1998), it is recommended that the Defendants' motion to dismiss be granted.

### CONCLUSION

For the reasons discussed herein, it is **RECOMMENDED** that the Defendants' motion to dismiss (Doc. 42) be **GRANTED**. It is further **ORDERED** that Plaintiff's motion to consolidate or amend (Doc. 24) is **DENIED**. Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, WITHIN FOURTEEN (14) DAYS after being served with a copy thereof. Objections are limited to twenty pages in length. Local Rule 7.4 The District Judge will make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are further notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for

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<sup>2</sup> Under the prison mailbox rule, Plaintiff's filing date is October 13, 2021. (Doc. 1, p. 7). Because Plaintiff failed to exhaust under either this date or the later docketing date of November 12, 2021, the Court need not resolve whether the prison mailbox rule, a rule of liberal construction, may be applied against Plaintiff's interests.

failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice.”

**SO RECOMMENDED**, this 11th day of January, 2023.

s/ Charles H. Weigle  
Charles H. Weigle  
United States Magistrate Judge