

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION

JOHNNIE C. BOUIE, JR.,

Plaintiff,

v.

CASE NO. 2:10-CV-14277-JEM

**FLORIDA DEPARTMENT OF CORRECTIONS,
REGION IV LEAD CHAPLAIN SHAWN COLLINS,
ACTING CHAPLAIN JAMES HARDAKER, and,
WARDEN POWELL SKIPPER,**

Defendants.

**SUR-REPLY TO DEFENDANTS' REPLY REGARDING
PLAINTIFF'S EXHAUSTION OF HIS RETALIATORY TRANSFER CLAIM**

Comes now the Plaintiff, Johnnie C. Bouie, through counsel, and files this Sur-Reply to Defendants' Reply Regarding Plaintiff's Exhaustion of His Retaliatory Transfer Claim. (D.E. 117).

Standard of Review

Summary judgment is appropriate only when "the movant shows that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). The burden then shifts to the nonmovant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). The court should view the evidence and any inferences that may be drawn from it in the light most favorable to the non-movant. Adickes v.

S.H. Kress & Co., 398 U.S. 144, 158-59 (1970). Although the Court need not accept as true assertions that are clearly impossible, it should not reject a plaintiff's affidavit unless the claims therein are "blatantly contradicted by the record, so that no reasonable jury could believe them." Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).

Argument

Defendants have produced evidence tending to show that Mr. Bouie did not file a grievance of reprisal on February 9, 2010, in the form of affidavits showing that no such grievance was logged in the records at Avon Park Correctional Institution ("ACPI") or in the Central Office of the Department of Corrections. (*See generally* D.E. 117, ex. 1-2). Mr. Bouie's evidence consists of an affidavit in which he avers that he filed a grievance of reprisal with the Secretary of the DOC by placing it in a locked wooden grievance box in ACPI's food service area on February 9, 2010. (D.E. 99, at 12-13).

Contrary to Defendants' argument, no legal significance attaches to the fact that Mr. Bouie's statement is "unsupported" (D.E. 117, at 5) because his assertions are based on personal knowledge. *See Ellis v. England*, 432 F.3d 1321, 1327 (11th Cir. 2005). Defendants' evidence does not suffice to render Mr. Bouie's affidavit so incredible that the Court must disregard it entirely. Indeed, the affidavits do not even directly contradict Mr. Bouie's own affidavit – they merely note an absence of certain evidence in support of Mr. Bouie's claims. And unlike the cases cited by Defendants, here no evidence of bad faith or malingering has been submitted.

Defendants also argue that Mr. Bouie's grievance would have been untimely filed even if it were submitted on February 9, 2010, because it could not have been received at the Central Office before February 10, 2010. The premise of Defendants' argument is that Mr. Bouie could not receive the benefit of the mailbox rule unless it were receipted by ACPI according to the

procedures specified in Section 8(a-d) 33-103.006(d) of the Florida Administrative Code. None of the cited regulations support the premise that the mailbox rule cannot apply unless a grievance is receipted. Moreover, the regulations provide that the relevant periods for filing grievances may be extended at the discretion of the reviewing authority. F.A.C. 33-103.011(2). Finally, the regulations also provide that an inmate may submit sensitive grievances directly to the central office in a sealed envelope when an inmate fears reprisal. F.A.C. 33-103.006(8)(e); *see also* (D.E. 99, at 28) (grievance form explaining that “When the inmate feels he may be adversely affected by the submission of the grievance at the institutional level because of the sensitive nature of the grievance, or is entitled by Chapter 33.103 to file a direct grievance . . . directly to the Secretary’s Office [, t]he grievance may be sealed in the envelope by the inmate and processed postage free through routine institutional channels. . . .”). It would be inconsistent to punish an inmate invoking the direct submission process for a sensitive grievance by shortening the amount of time to file such a grievance, especially without any advance notice to the inmate.

WHEREFORE, Plaintiff asks the Court to deny summary judgment on the issue of exhaustion

DATED: April 10, 2013

Respectfully Submitted,

/s/ Gray R. Proctor
Gray R. Proctor
Fla. Bar No. 48192
LAW OFFICE OF GRAY R. PROCTOR
1199 N. Orange Avenue
Orlando, FL 32804
321-445-1951
321-445-5484 (fax)
E-mail: gray@appealsandhabeas.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 10, 2013, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF and is also being served on all counsel of record listed via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Gray Proctor
Gray R. Proctor, Esq.

Carrie McNamara
Office of the Attorney General
PL-01 The Capital
Tallahassee, FL 32399
850-414-3300
Email: carrie.mcnamara@myfloridalegal.com

Jamie M. Braun
Office of the Attorney General
The Capitol, Suite PL-01
Tallahassee, Florida 32399-1050
(850) 414-3300 - Telephone
(850) 488-4872 - Facsimile
jamie.braun@myfloridalegal.com