

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

HAROLD BRYAN WILSON,

Plaintiff,

v.

JASON GEERDES, SCOTT FRAKES,  
TAGGART BOYD, and MICHELE  
CAPPS, all in their official capacities,

Defendants.

**8:16CV524**

**MEMORANDUM  
AND ORDER**

Plaintiff Harold Bryan Wilson (“Wilson”) is an inmate in the custody of the Nebraska Department of Correctional Services (“NDCS”). Defendants Jason Geerdes, Scott Frakes (“Frakes”), Taggart Boyd, and Michele Capps (collectively, “officials”) are all NDCS officials sued in their official capacities for allegedly violating Wilson’s constitutional right to marry and retaliating against him for even trying. Now pending before the Court is the officials’ Motion for Summary Judgment (Filing No. 155) for failure to exhaust administrative remedies as required by the Prison Litigation Reform Act of 1995 (“PLRA”), 42 U.S.C. § 1997e(a).<sup>1</sup> For the reasons stated below, the motion is granted, and the case is dismissed without prejudice.

**I. BACKGROUND**

On November 25, 2016, Wilson submitted Grievance No. 2016-10998 to NDCS in which he requested permission to marry fellow Lincoln Correctional Center (“LCC”) inmate Riley Nicole Shadle (“Shadle”). He later submitted Grievance No. 2016-11220 related to his request to marry. Inmate marriages are governed by the NDCS Inmate

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<sup>1</sup>The officials alternatively seek summary judgment on the merits, arguing legitimate penological interests justified their actions. The Court expresses no opinion on the merits of Wilson’s claims.

Marriage Policy, Administrative Regulation 205.04 (“marriage regulation”), which was made effective June 30, 2016 and was most recently revised on August 31, 2019.

On November 30, 2016, Wilson and Shadle filed a pro se complaint (Filing No. 1) in this Court. After they filed suit, Wilson was transferred to the Nebraska State Penitentiary (“NSP”), what he describes as a more violent institution. Based on their “allegations and the state of the law on the right to marry, and to facilitate” joint filings from Wilson and Shadle under difficult circumstances, the Court appointed counsel to represent them.

NDCS policy requires inmates to follow a three-step grievance process prior to filing suit. To fully exhaust grievances, inmates must file an informal grievance, a step-one grievance, and a step-two grievance on the proper forms within specified timeframes. Wilson did not fully exhaust Grievance Nos. 2016-10998 and 2016-11220 until December 2016. That month, Wilson also submitted Grievance No. 2017-752 related to NDCS’s refusal to notarize Wilson’s marriage license. Wilson filed a step-two grievance, but it was returned unanswered for failure to follow proper procedure.

As Director of NDCS, Frakes was the ultimate decision maker regarding inmate marriages. NDCS Chief of Operations Diane Sabatka-Rine (“Sabatka-Rine”) denied both marriage grievances as Frakes’s designee. She explained that under the version of the marriage regulation in place at the time, inmates are not normally permitted to marry because of “potential risks to safety, security, or good order of facility,” and in this case, “an exception to this policy [was] not warranted.”

Wilson also appealed his institutional placement classification, arguing he was transferred in retaliation for exercising his right to marry. On January 17, 2017, the warden at LCC advised Wilson his appeal was denied because Wilson was “appropriately classified at Maximum custody and assigned to the [NSP].”

On October 17, 2017, Wilson and Shadle filed a Second Amended Complaint (Filing No. 64) with the assistance of court-appointed counsel. The Second Amended Complaint alleged that the officials or their predecessors (Filing Nos. 88 and 99) (1) deliberately denied Wilson's marriage application with no penological basis in violation of their "substantive due process based constitutional right to marry," (2) refused to notarize Wilson's signature on a required government affidavit to prevent or interfere with his effort to seek redress from the government, and (3) transferred Wilson from LCC to NSP in retaliation for him asking to marry Shadle and to obstruct and interfere with his efforts. Suing under 42 U.S.C § 1983, Wilson and Shadle asked the Court to grant an injunction allowing them to complete the application process and marry without interference by the NDCS officials and their successors.

On January 15, 2019, Shadle voluntarily moved (Filing No. 106) to dismiss her claims with prejudice. The Court granted (Filing No. 107) the motion, noting Wilson's claims against the officials remained pending. On March 14, 2019, the officials moved (Filing No. 115) for summary judgment with a suggestion of mootness. The officials argued that if Shadle no longer wanted to marry Wilson, then the marriage claim should be denied as moot. In response, Wilson filed a motion for summary judgment (Filing No. 117) and cross motion for summary judgment (Filing No. 118). The Court denied (Filing No. 122) all three motions, finding the case was not moot because it was possible Shadle was willing to marry Wilson if the obstacles in their way were removed. Court-appointed counsel then withdrew.

On August 26, 2019, the officials again moved for summary judgment (Filing No. 155), primarily arguing Wilson had failed to exhaust his administrative remedies. Alternatively, the officials argued they "had a legitimate penological interest in denying Wilson's request to marry Shadle due to the predatory nature of their relationship as well as the safety, security and good order of the institutions." The officials further argued they "had a legitimate penological justification to transfer Wilson to NSP, given his sexual activities with Shadle." Given the complexity of the issues raised in the officials'

motion and the short time frame for Wilson to respond, the Court again appointed counsel (Filing No. 159) to assist Wilson in preparing a response.

On December 16, 2019, Wilson filed his response (Filing No. 169). Wilson contends he exhausted his administrative remedies, and that if he did not, the officials waived that defense by not raising it until their motion for summary judgment. Wilson further argues summary judgment is improper because the officials “have failed to articulate a legitimate penological interest in denying Wilson’s marriage to Shadle and there is evidence contradicting the [officials’] stated justifications for their decision.” With the officials’ reply (Filing No. 172), this matter is now fully briefed and ready for decision.

## **II. DISCUSSION**

### **A. Standard of Review**

Summary judgment is required when the “movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In deciding the officials’ motion for summary judgment, the Court views the facts in the light most favorable to Wilson and gives him the benefit of all reasonable inferences. *See Crawford v. Van Buren County*, 678 F.3d 666, 669 (8th Cir. 2012).

### **B. Exhaustion**

Section 1997e(a) of the PLRA requires prisoners to exhaust all available administrative remedies before filing suit. The exhaustion requirement is an attempt to “eliminate unwarranted federal-court interference with the administration of prisons.” *Woodford v. Ngo*, 548 U.S. 81, 93 (2006). The provision is also intended to reduce the number of suits, improve their quality, and promote efficiency in the court system. *See Porter v. Nussle*, 534 U.S. 516, 524-25 (2002).

The officials argue that Wilson’s claims must be dismissed because he did not exhaust his administrative remedies before filing suit on November 30, 2016. Wilson

seems to suggest that he has met the PLRA exhaustion requirement because by the time he filed his Second Amended Complaint on October 17, 2017, he had exhausted his administrative remedies with respect to his marriage and retaliation claims. To the extent he makes such an argument, Wilson is mistaken.

Exhaustion is a prerequisite to filing suit. *See* 42 U.S.C. § 1997e(a) (“No action shall be brought with respect to prison conditions under section 1983 . . . until such administrative remedies as are available are exhausted.”). A prisoner cannot exhaust as he moves through the subsequent stages of the judicial process. *See Johnson v. Jones*, 340 F.3d 624 (8th Cir. 2003) (explaining courts must look to the time of filing to determine exhaustion). Therefore, dismissal is required under 1997e(a), unless the officials waived their exhaustion defense. *See, e.g., Foulk v. Charrier*, 262 F.3d 687, 697 (8th Cir. 2001) (recognizing the affirmative defense of exhaustion “can be waived”). Wilson says the officials did just that.

Federal Rule of Civil Procedure 8(b) requires a party responding to a pleading to “state in short and plain terms its defenses to each claim asserted against it.” Rule 8(c) further requires them to “affirmatively state any avoidance or affirmative defense” like exhaustion. In the officials’ answer (Filing No. 65), they did not specifically plead the exhaustion defense. Instead, they reserved “the right to assert, as an affirmative defense, that [Wilson has] failed to exhaust [his] available administrative remedies.” The officials then raised the failure to exhaust as an affirmative defense in the motion for summary judgment, which was after the second amended complaint.

Wilson argues the officials’ reservation of “the right to assert said defense in a later pleading” followed by a motion for summary judgment is inadequate to preserve their exhaustion defense. Wilson may be right, but the Court need not answer that question in this case.

Rule 8(c)’s “pleading requirement is intended to give the opposing party both notice of the affirmative defense and an opportunity to rebut it.” *First Union Nat’l Bank*

*v. Pictet Overseas Tr. Corp.*, 477 F.3d 616, 622 (8th Cir. 2007). The Eighth Circuit has held that a “technical failure to comply with Rule 8(c) is not fatal” as long as the “affirmative defense is raised in the trial court in a manner that does not result in unfair surprise.” *Id.* (quoting *Fin. Timing Publ’ns, Inc. v. Compugraphic Corp.*, 893 F.2d 936, 944 n.9 (8th Cir. 1990)); *see also Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 714-15 (8th Cir. 2008) (deciding “Rule 8(c) [wa]s not an absolute bar to a party’s belated attempt to plead an affirmative [preemption] defense”). Although Wilson argues that the officials failed to properly preserve their affirmative defense, this resulted in no “unfair surprise” to Wilson because he was on notice and had the opportunity to rebut the defense. *See First Union*, 477 F.3d at 622 (eschewing “a literal interpretation of the Rule that places form over substance”).

Since Wilson did not exhaust all three claims before filing suit and suffered no unfair surprise from the manner in which the officials raised the exhaustion defense, the Court finds this case should be dismissed without prejudice for failure to exhaust administrative remedies.

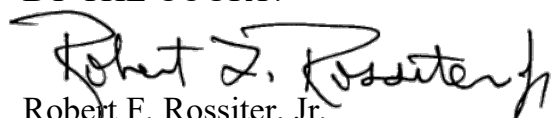
Accordingly,

IT IS ORDERED:

1. Defendants Jason Geerdes, Scott Frakes, Taggart Boyd, and Michele Capps’s Motion for Summary Judgment (Filing No. 155) is granted as it relates to the issue of exhaustion.
2. This case is dismissed without prejudice for failure to exhaust administrative remedies.
3. A separate judgment will issue.

Dated this 10th day of April 2020.

BY THE COURT:



Robert F. Rossiter, Jr.  
United States District Judge