

July 29, 2004

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III  
Clerk

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No. 04-40201  
Summary Calendar

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THOMAS H. CLAY,

Plaintiff-Appellant,

versus

UNIVERSITY OF TEXAS MEDICAL BRANCH, at John Sealy;  
UNIVERSITY OF TEXAS MEDICAL BRANCH CORRECTIONAL  
HEALTHCARE MANAGEMENT; JOHN SEALY EMPLOYEES;  
JANE DOE, #; ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 9:03-CV-268  
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Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:\*

Thomas H. Clay, Texas prisoner # 1124123, appeals the district court's dismissal without prejudice of his civil rights complaint pursuant to 42 U.S.C. § 1997e for failure to exhaust administrative remedies. Clay argues that the district court erred in dismissing his complaint, because he specifically pleaded exhaustion. Clay additionally argues, for the first time on appeal, that failure to exhaust is an affirmative defense that

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

must be raised by the defendants, that the district court erroneously held him to a heightened pleading standard, and that the court had no authority to dismiss sua sponte his complaint.

"[A] dismissal under § 1997e is made upon the pleadings without proof." Days v. Johnson, 322 F.3d 863, 868 (5th Cir. 2003). Thus, "[a]s long as the plaintiff has alleged exhaustion with sufficient specificity, lack of admissible evidence in the record does not form the basis for dismissal." Id. at 866 (quoting Underwood v. Wilson, 151 F.3d 292, 296 (5th Cir. 1998)). The district court determined, however, that Clay was not entitled to rely on his pleadings in asserting exhaustion "because the time frame [made] clear that exhaustion was impossible." As Clay contends, it was not impossible for him to exhaust his administrative remedies before filing suit. See Wendell v. Asher, 162 F.3d 887, 891 (5th Cir. 1998) (illustrating that the filing of, and response to, prisoner grievance can take significantly less time than that allowed). Therefore, Clay was entitled to rely on his pleadings in asserting exhaustion. Days, 322 F.3d at 866, 868.

Based on the foregoing, the district court's judgment is VACATED, and the case is REMANDED for further proceedings. The district court, however, is not precluded from revisiting the exhaustion issue "based upon a response by the defendants." Id. at 868.

VACATED AND REMANDED.