

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JAN 22 1991

ROBERT L. HOECKFF.
Clerk

OSCAR TUCKER,
Plaintiff-Appellant,
v.
OFFICER ALLPORT and
WARDEN ANTHONY BELASKI,
Defendants-Appellees.

No. 90-1176
(D.C. No. 90-C-0098)
(D. Colo.)

ORDER AND JUDGMENT*

Before LOGAN, SEYMOUR, and TACHA, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Oscar Tucker is an inmate at the Federal Correctional Institution in Littleton, Colorado. On December 6, 1989, Tucker was transferred into the Administrative Segregation Unit. The cell in which he was placed had a broken window. Tucker immediately requested a warmer cell, but was told none was available. He remained in the cell from December 6 until December 12. During this period, Tucker repeatedly requested the window be

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

repaired or he be moved to a different cell. Tucker was given an additional blanket and extra towels to cover the window. The staff also increased the heat in the unit to compensate for any heat loss due to the broken window. Tucker claims these measures were not helpful in combating the extreme cold in his cell. Tucker was moved to a different cell within the unit on December 13. This cell, although somewhat warmer, also had a broken window. He was removed from this cell on December 18.

Tucker filed this Bivens action in the United States District Court for the District of Colorado. He asserted he was entitled to an order to correct conditions, \$10,000 in damages for mental anguish and physical suffering, and \$10,000 in punitive damages for outrageous conduct and gross negligence. Tucker did not pursue the Administrative Remedy Procedure for Inmates found at 28 C.F.R. § 542.10-542.16 prior to filing this action.

Relying on this court's decision in Brice v. Day, 604 F.2d 664 (10th Cir. 1979), cert. denied, 444 U.S. 1086 (1980), the district court dismissed Tucker's complaint without prejudice for failure to exhaust administrative remedies. The court held Tucker was obligated to pursue the Administrative Remedy Procedure for Inmates prior to filing his suit in federal court. Tucker now appeals this decision. We affirm.

Tucker contends he was not required to exhaust administrative remedies before filing this action because (1) his efforts to utilize these remedies were thwarted by prison officials' failure to respond to his informal requests for relief; (2) the procedures found in 28 C.F.R. §§ 542.10-542.16 provide no remedy for an

inmate complaining about conditions to which he is no longer subject; and 3) these procedures cannot be used by an inmate to request money damages.

Tucker's first contention is without merit. Although he was not satisfied with the results of his informal requests for relief, Tucker presents no evidence indicating it would have been futile to file a more formal complaint. In fact, the prison officials demonstrated some willingness to respond by providing Tucker with extra blankets and towels, moving him to a different cell, and increasing the heat in the administrative detention unit.

Neither would Tucker's administrative remedies necessarily be barred for his failure to file a timely complaint. The Administrative Remedy Procedure for Inmates does state that a formal complaint should be made within fifteen calendar days of the date on which the basis of the complaint occurred. This provision, however, also states that an extension will be granted if there is a valid reason for delay. 28 C.F.R. § 542.13(b). Tucker is therefore not foreclosed from now pursuing these procedures.

Tucker's failure to exhaust these administrative remedies prior to filing this suit is also not excused because they do not provide the particular remedy he is seeking. This same argument was made by the plaintiffs in Brice. 604 F.2d at 665. ("They [appellants] do contend, however, that the doctrine [of exhaustion of remedies] has no application where damages are sought They contend that the Bureau of Prisons' review procedure does not

provide for an award of monetary damages.") The court in Brice specifically rejected this argument. It held these procedures should be utilized even when the prisoner is seeking relief for which they do not provide. The court noted these administrative procedures allow for investigation and factfinding that later will assist the trial court when it considers the prisoner's complaint. The court concluded the requirement that prisoners pursue these procedures before filing an action in federal court actually assist a prisoner in later stating his case to the district court.

We therefore **AFFIRM** the district court's dismissal of Oscar Tucker's complaint without prejudice. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge