

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-2746

Mark Anthony Harris,

Appellant,

v.

Mike Kemna; Amy Gertz; Jean Ann
Johnson; Heather Townsend; Mark
Parkhurst; Travis Plowman; Ruby
Wright; Judy Huff,

Appellees.

*
*
*
* Appeal from the United States
* District Court for the
* Western District of Missouri.
*
*
*
* [UNPUBLISHED]
*
*

Submitted: November 16, 2005

Filed: November 29, 2005

Before BYE, MAGILL, and COLLOTON, Circuit Judges.

PER CURIAM.

Missouri state prisoner Mark Harris appeals the district court's¹ dismissal of his 42 U.S.C. § 1983 claim against numerous prison officials. Harris alleged that prison officials failed to follow prison disciplinary regulations in violation of his due process

¹The Honorable Fernando J. Gaitan, Jr., United States District Judge for the Western District of Missouri.

rights and that his sentence in disciplinary segregation violated his Eighth Amendment right to be free from cruel and unusual punishment.

Having carefully reviewed the record, we note that defendants properly raised a 42 U.S.C. § 1997e(a) lack-of-exhaustion affirmative defense, see Nerness v. Johnson, 401 F.3d 874, 876 (8th Cir. 2005) (per curiam) (Prison Litigation Reform Act's exhaustion requirement is affirmative defense that defendant has burden to plead and prove), and the record contains no indication that Harris exhausted prison remedies as to his Eighth Amendment claim. See Kozohorsky v. Harmon, 332 F.3d 1141, 1143 (8th Cir. 2003) (when multiple prison-condition claims have been joined, § 1997e(a) requires that all available prison grievance remedies be exhausted as to all claims).

Accordingly, we affirm on the ground that Harris had failed to exhaust his Eighth Amendment claim at the time of filing. See Johnson v. Jones, 340 F.3d 624, 627 (8th Cir. 2003) (if exhaustion is not completed at time of filing, dismissal is mandatory). We also modify the dismissal to be without prejudice. See Calico Trailer Mfg. Co. v. Ins. Co. of N. Am., 155 F.3d 976, 978 (1998) (affirming dismissal for failure to exhaust administrative remedies, but modifying to be without prejudice).
