NO.

BEFORE THE SUPREME COURT
OF THE UNITED STATES

James E. Whitney **Petitioner**

v.

Wendy Kelly, et al. **Respondents**

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For
The Eighth Circuit
Case No. 18-1332

Appendix A
Opinions Below

James E. Whitney, Pro se
Sui Juris In Propria Persona
163817
P.O. Box 600
Grady, Arkansas 71644-0600

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1332

James E. Whitney

Appellant

v.

Wendy Kelley, Director, Arkansas Department of Correction, et al.

Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:16-cv-00353-KGB)

MANDATE

In accordance with the judgment of 05/23/2018, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

July 30, 2018

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1332

James E. Whitney

Appellant

v.

Wendy Kelley, Director, Arkansas Department of Correction, et al.

Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:16-cv-00353-KGB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 19, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1332

James E. Whitney

Plaintiff - Appellant

v.

Wendy Kelley, Director, Arkansas Department of Correction; Laquista Swopes, CO, Varner Unit, ADC (originally named as Swopes); Lisa Childress, Sergeant, Varner Unit, ADC (originally named as Childress); W Ryas, Sergeant, Varner Unit, ADC (originally named Ryan); Faron Clemmons, Lieutenant, Varner Unit, ADC (originally named as Clemmens); Perkins, Sergeant, Varner Unit, ADC (originally named as John Doe)

Defendants - Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:16-cv-00353-KGB)

JUDGMENT

Before SHEPHERD, ERICKSON and GRASZ, Circuit Judges.

It is hereby ordered by the court that the judgment of the district court is affirmed pursuant to 8th Cir. R. 47B.

May 23, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

JAMES E. WHITNEY
ADC #163817 **PLAINTIFF**

v. **Case No. 5:16-cv-00353 KGB-JTK**

WENDY KELLEY, *et al.* **DEFENDANTS**

ORDER

The Court has received Proposed Findings and Recommendations submitted by United States Magistrate Judge Jerome T. Kearney (Dkt. No. 156). Plaintiff James E. Whitney filed objections to the Proposed Findings and Recommendations (Dkt. No. 157). After a review of the Proposed Findings and Recommendations and Mr. Whitney's objections, as well as a *de novo* review of the record, the Court adopts the Proposed Findings and Recommendations in their entirety (Dkt. No. 156). The Court grants defendants' Laquista Swopes, Lisa Childress, and Faron Clemmons' motion for summary judgment (Dkt. No. 131). Mr. Whitney's claims against Ms. Swopes, Ms. Childress, and Mr. Clemmons are hereby dismissed with prejudice. The relief requested against these defendants is denied.

It is so ordered this 30th day of January, 2018.

Kristine G. Baker
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

JAMES E. WHITNEY
ADC #163817 **PLAINTIFF**

v. **Case No. 5:16-cv-00353 KGB-JTK**

WENDY KELLEY, *et al.* **DEFENDANTS**

JUDGMENT

Consistent with the Order that was entered on this day and with this Court's prior Orders (Dkt. Nos. 99, 102, 106, 146), it is considered, ordered, and adjudged that this case is dismissed. Plaintiff James E. Whitney's retaliatory disciplinary claims against defendants Laquista Swopes, Lisa Childress, and Faron Clemmons are dismissed with prejudice, as this Court grants Ms. Swopes, Ms. Childress, and Mr. Clemmons' motion for summary judgment (Dkt. No. 131). Mr. Whitney's claim based on alleged interference with his grievances is dismissed with prejudice (Dkt. No. 102). Mr. Whitney's retaliation and excessive force claims against Ms. Swopes, Ms. Childress, and Mr. Clemmons are dismissed without prejudice for failure to exhaust administrative remedies (*Id.*). Insofar as Mr. Whitney names defendant Wendy Kelley as defendant but makes no allegations specific to Ms. Kelley, Mr. Whitney's claims against Ms. Kelley are dismissed without prejudice (Dkt. No. 99). Mr. Whitney's claims against defendant W. Ryas are dismissed without prejudice for failure to exhaust (Dkt. No. 106). Mr. Whitney's claims against defendant Perkins are dismissed without prejudice for failure to exhaust (Dkt. No. 146).

So adjudged this 30h day of January, 2018.

Kristine G. Baker
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

JAMES E. WHITNEY,
ADC #163817 PLAINTIFF

5:16CV00353-KGB-JTK

WENDY KELLY, et al. DEFENDANTS

PROPOSED FINDINGS AND RECOMMENDATIONS

INSTRUCTIONS

The following recommended disposition has been sent to United States District Judge Kristine G. Baker. Any party may serve and file written objections to this recommendation. Objections should be specific and should include the factual or legal basis for the objection. If the objection is to a factual finding, specifically identify that finding and the evidence that supports your objection. An original and one copy of your objections must be received in the office of the United States District Court Clerk no later than fourteen (14) days from the date of the findings and recommendations. The copy will be furnished to the opposing party. Failure to file timely objections may result in waiver of the right to appeal questions of fact.

If you are objecting to the recommendation and also desire to submit new, different, or additional evidence, and to have a hearing for this purpose before the District Judge, you must, at the same time that you file your written objections, include the following:

1. Why the record made before the Magistrate Judge is inadequate.

2. Why the evidence proffered at the hearing before the District Judge (if such a hearing is granted) was not offered at the hearing before the Magistrate Judge.

3. The detail of any testimony desired to be introduced at the hearing before the

District Judge in the form of an offer of proof, and a copy, or the original, of any documentary or other non-testimonial evidence desired to be introduced at the hearing before the District Judge.

From this submission, the District Judge will determine the necessity for an additional evidentiary hearing, either before the Magistrate Judge or before the District Judge.

Mail your objections and "Statement of Necessity" to:

Clerk, United States District Court
Eastern District of Arkansas
600 West Capitol Avenue, Suite A149
Little Rock, AR 72201-3325

I. Introduction

Plaintiff James Whitney is a state inmate incarcerated at the Varner Unit of the Arkansas Department of Correction (ADC). He filed this action pursuant to 42 U.S.C. § 1983, alleging retaliation, excessive force, and retaliatory disciplinary claims against Defendants Swopes, Childress, Clemmons, and Ryas (originally identified as Ryan) (Doc. No. 27).[1] Defendants Kelley, Perkins and Ryas previously were dismissed (Doc. Nos. 100, 101, 146). The retaliation and excessive force claims against Defendants Swopes, Childress and Clemmons, and the grievance claim against Childress, also were dismissed (Doc. No. 102).

This matter is before the Court on the Motion for Summary Judgment filed by remaining Defendants Swopes, Childress, and Clemmons (Doc. No. 131). Plaintiff filed a Response in opposition to the Motion (Doc. No. 153),

II. Amended Complaint

Plaintiff claimed Defendant Swopes filed disciplinary charges against him in retaliation for

[1]This Court granted in part Plaintiff's Motion to Amend his Complaint, as to his claims against these four originally-named Defendants, by Order dated January 19, 2017 (Doc. No. 24).

grievances he filed on November 6, 2016. (Doc. No. 27) This followed an incident which occurred that same day while Plaintiff worked in the kitchen. Plaintiff claimed Defendant Swopes did not file the disciplinary charges against him until after he submitted his grievances to Defendant Childress, who should have known that Swopes' actions were unlawfully retaliatory. As the senior staff member on duty that day, Defendant Clemmons also should have known that Swopes tended to retaliate against inmates who exercised their first amendment rights.

III. Summary Judgment

Pursuant to FED.R.CIV.P. 56(a), summary judgment is appropriate if the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Dulany v. Carnahan, 132 F.3d 1234, 1237 (8th Cir. 1997). "The moving party bears the initial burden of identifying 'those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.'" Webb v. Lawrence County, 144 F.3d 1131, 1134 (8th Cir. 1998) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (other citations omitted)). "Once the moving party has met this burden, the non-moving party cannot simply rest on mere denials or allegations in the pleadings; rather, the non-movant 'must set forth specific facts showing that there is a genuine issue for trial.'" Id. at 1135. Although the facts are viewed in a light most favorable to the non-moving party, "in order to defeat a motion for summary judgment, the non-movant cannot simply create a factual dispute; rather, there must be a genuine dispute over those facts that could actually affect the outcome of the lawsuit." Id.

Defendants ask the Court to dismiss Plaintiff's remaining retaliatory disciplinary claim against them, stating that they are protected by qualified immunity, because the evidence shows that the disciplinary charges filed against Plaintiff were supported by "some evidence."

According to Defendant Swopes' affidavit, on November 6, 2016, while working in the kitchen under Swopes' supervision, Whitney threw metal pots and pans across the room, creating unnecessary noise and denting the pans he threw (Doc. No. 133-2). Swopes confronted Whitney about his conduct, ordered him to return to his barracks, and charged him with violating three rules. (Id., p. 2; Doc. No. 133-4; pp. 3-4). Later, Swopes located Plaintiff in the Varner Super Max Unit (not his barracks) and charged him with another disciplinary violation for disobeying her order to return to his barracks. (Doc. No. 133-2, p. 2; Doc. No. 133-4, pp. 9-10). Following disciplinary hearings, Plaintiff was found guilty of creating excessive noise as a result of the first charges filed against him, and out of place of assignment, assault, and failure to obey order of staff as a result of the second set of charges filed against him. (Doc. Nos. 133-4, pp. 12-14, No. 133-5) Based on this evidence, Defendants state that Plaintiff cannot support his retaliation claim against them.

In response, Plaintiff claims summary judgment is not appropriate because of several disputed issues of material fact, and that Defendants failed to provide him with adequate responses to his discovery requests.[2] He claims the disciplinary hearing officer denied him due process during his hearings because he was not allowed to call witnesses, and that the reasons given for the disciplinary charges against him were a pretext for the Defendants' retaliation.[3] He also claims Defendant Swopes filed the disciplinary charges against him only after he filed grievances against her.

Qualified immunity protects officials who act in an objectively reasonable manner. It may shield a government official from liability when his or her conduct does not violate "clearly

[2] This issue was resolved in prior Court orders (Doc. Nos. 105, 155).
[3] Plaintiff's due process allegation is not an issue in this case.

established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity is a question of law, not a question of fact. McClendon v. Story County Sheriff's Office, 403 F.3d 510, 515 (8th Cir. 2005). Thus, issues concerning qualified immunity are appropriately resolved on summary judgment. See Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (the privilege is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.").

To determine whether defendants are entitled to qualified immunity, the courts generally consider two questions: (1) whether the facts alleged or shown, construed in the light most favorable to the plaintiff, establish a violation of a constitutional or statutory right; and (2) whether that right was so clearly established that a reasonable official would have known that his or her actions were unlawful. Pearson v. Callahan, 555 U.S. 223, 232 (2009).[4] Defendants are entitled to qualified immunity only if no reasonable fact finder could answer both questions in the affirmative. Nelson v. Correctional Medical Services, 583 F.3d 522, 528 (8th Cir. 2009).

To support a claim of retaliation against Defendants, Plaintiff must show that he exercised a constitutionally protected right, that Defendants disciplined him, and that the exercise of the constitutional right motivated the discipline. Meuir v. Greene County Jail Employees, 487 F.3d 1115, 1119 (8th Cir. 2007). However, a retaliatory discplinary claim fails if the prisoner violated prison rules, and Defendants only need to show "some evidence " of a rules violation to prevail.

[4]Courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." Nelson, 583 F.3d at 528 (quoting Pearson v. Callahan, 555 U.S. at 236).

Hartsfield v. Nichols, 511 F.3d 826, 829 (8th Cir. 2008).

In this case, Defendants rely on the fact that some evidence supported Plaintiff's disciplinary convictions, based on the statements from the charging officer. (Doc. Nos. 133-4, p. 14; 133-5, p. 3). And a witnessing officer's violation report is considered to be "some evidence." Superintendent v. Hill, 472 U.S. 445, 456 (1985). Therefore, even if the disciplinary charges were filed against Plaintiff after he submitted the grievances about the incidents (which is in dispute), sufficient evidence existed to support his convictions and to preclude his retaliation claim.

In further support of their Motion, Defendants offer as evidence a video of the kitchen incident (Doc. No. 133-3). The soundless video shows Plaintiff standing at a sink in the kitchen, tossing numerous pots and pans somewhere off to the left of the screen. It also shows Defendant Swopes approaching Plaintiff and speaking with him. As the Eighth Circuit Court of Appeals recently held, "'When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.'" White v. Jackson, 865 F.3d 1064, 1077 (2017) (quoting Scott v. Harris, 550 U.S. 372 (2007)). Therefore, to the extent Plaintiff disputes Defendants' version of the facts, the video of the kitchen incident tells a different story. In light of all the evidence presented, the Court finds that Defendants acted reasonably under the circumstances. No reasonable fact finder could find that the facts alleged or shown, construed in the light most favorable to Plaintiff, establish a violation of a constitutional or statutory right.

IV. Conclusion

IT IS, THEREFORE, RECOMMENDED that the Motion for Summary Judgment filed by remaining Defendants Childress, Clemmons, and Swopes (Doc. No. 131) be GRANTED, and

Plaintiff's complaint against Defendants be DISMISSED.

IT IS SO RECOMMENDED this 4th day of October, 2017.

JEROME T. KEARNEY
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

JAMES E. WHITNEY,
ADC #163817 PLAINTIFF

v. 5:16CV00353-KGB-JTK

WENDY KELLEY, et al. DEFENDANTS

ORDER

This matter is before the Court on Plaintiff's Motion to Stay ruling on the Defendants' Summary Judgment Motion, pending resolution of his appeals (Doc. No. 152). Defendants filed a Response in opposition to the Motion (Doc. No. 154).

Currently pending before the United States Court of Appeals for the Eighth Circuit are Plaintiff's appeals (Doc. Nos. 111, 121) from: 1) June 27, 2017 Order dismissing Defendant Kelley (Doc. No. 99); 2) June 27, 2017 Order denying Plaintiff's Motion for preliminary injunction (Doc. No. 101); 3) June 27, 2017 Order dismissing Plaintiff's retaliation and excessive force claims against Defendants Swopes, Childress, and Clemmons for failure to exhaust administrative remedies; dismissing Plaintiff's grievance claims for failure to state a claim; and denying Plaintiff's Motion to disqualify me (Doc. No. 102); 4) July 5, 2017 Order denying Plaintiff's Motions to Compel, to Stay, to Appoint Counsel, and for my Recusal (Doc. No. 105); and 5) July 11, 2017 Order denying Plaintiff's Motion to Change Venue and Stay Proceedings (Doc. No. 117). Plaintiff states in his present Motion that this Court's ruling on Defendants' Summary Judgment Motion should be stayed, pending resolution of these appeals, because the decisions will have a substantial and significant effect on the outcome of the court proceedings.

In Response, Defendants object to the stay request, stating Plaintiff's appeals are without merit. They also ask the Court to construe Plaintiff's Motion as a Response to their Summary

Judgment Motion, since he includes substantive legal arguments in response to their arguments for dismissal.

Having reviewed the parties' submissions, and case law governing stays, the Court finds that Plaintiff's Motion should be denied, for the following reasons. "The filing of a notice of appeal is 'an event of jurisdictional significance' that confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal." Nance v. Sammis, No. 3:07CV00119-BSM, 2009 WL 510159 (E.D.Ark.) (quoting Liddell v. Bd. Of Educ., 73 F.3d 819, 823 (8th Cir. 1996). However, generally an individual may only appeal final decisions, unless certain statutory and judge-made exceptions apply. 1 SECTION 1983 LITIGATION IN STATE COURTS § 8:17, Interlocutory appeals. See also Johnson v. Jones, 515 U.S. 304, 309 (1995). Those exceptions generally apply to interlocutory orders which present "serious and unsettled questions, and ...conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and ... [are] effectively unreviewable on appeal from the final judgment." 1 SECTION 1983 LITIGATION IN STATE COURTS § 8:17 (other citations omitted). Although decisions denying motions to dismiss or for summary judgment ordinarily are not appealable, they are when they involve qualified immunity or other immunities from suit. Id.

Final decisions which do not end the litigation are defined as "decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." Swint v. Chambers County Comm'n, 514 U.S.35, 42 (1995).

Therefore, in determining whether I should stay further proceedings in this action, I reviewed the subject-matters at issue in the decisions currently pending on appeal, to determine if

they constitute decisions which would not be reviewable on appeal from a final judgment in this case. First, the decision to dismiss Defendant Kelley was not based on any argument of immunity, but rather on Plaintiff's failure to allege her specific involvement in the actions at issue. Therefore, it was not a dismissal based on an immunity from suit, as noted above, and Plaintiff may appeal that ruling after a final judgment. Next, in denying Plaintiff's Motion for Preliminary Injunction based on the improper processing of his legal mail (which is not connected to the issues pending in Defendants' Motion), the Court noted that Plaintiff never alleged an interference to legal mail relevant to this case (Doc. No. 116). This issue also may be appealed later. Similarly, the decision to dismiss some of Plaintiff's claims for failure to exhaust may be raised after a final judgment, and is not considered a conclusive decision. The Eight Circuit Court of Appeals held that a summary judgment ruling related to whether Plaintiff exhausted his legal remedies prior to filing suit is not an immediately appealable order, noting that the decision is reviewable on appeal from the final judgment. Langford v. Norris, 614 F.3d 445, 456-7 (8th Cir. 2010)

Next, Plaintiff appealed from two orders seeking my recusal or withdrawal. However, again, those are not appealable decisions. See MacNeil v. Americold Corp., 735 F.Supp. 32, 36 (D.Mass.1990). And finally, decisions on motions to compel and for counsel appear to fall into the category of decisions which can be appealed after a final judgment.

Plaintiff also asks the Court to stay ruling, based on Defendants' alleged failure to provide him with all discovery requests. The Court addressed these same arguments in the June 29, 2017 Order denying his Motions to Compel (Doc. No. 105), in which each of Plaintiff's objections were extensively reviewed. The Court concluded that Defendants properly responded to all Plaintiff's discovery requests. In addition, Defendants noted at that time (Doc. No. 92) that they provided Plaintiff an opportunity to review the video of the November 6, 2016 incident, in accordance with

the Court's May 19, 2017 Order (Doc. No. 84).

In conclusion, the Court finds no compelling need to stay ruling on Defendants' Summary Judgment Motion. In his Motion to Stay, Plaintiff asked for additional time to respond to the Motion, should it be denied. However, his Motion included arguments in opposition to the Summary Judgment Motion, and he later filed a Response in opposition to the Motion, together with extensive exhibits. Accordingly,

IT IS, THEREFORE, ORDERED that Plaintiff's Motion to Stay Ruling on the Defendants' Summary Judgment Motion (Doc. No. 152) is DENIED.

IT IS SO ORDERED this 2nd day of October, 2017.

JEROME T. KEARNEY
UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.