**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT
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Filed: February 13, 2019

Philip Berryman
Earnest C. Brooks Correctional Facility
2500 S. Sheridan Drive
Muskegon Heights, MI 49444

Re: Case No. 18-1526, *Philip Berryman, et al v. Randall Haas, et al*
Originating Case No.: 2:17-cv-10762

Dear Sir,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Roy G. Ford
Case Manager
Direct Dial No. 513-564-7016

cc: Mr. David J. Weaver
Mr. Adam Robert de Bear

Enclosure

Mandate to issue

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**

No. 18-1526

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



| | | |
|---|---|---|
| PHILIP BERRYMAN, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | |
| | ) | |
| and | ) | |
| | ) | |
| HARRY T. RITCHIE, | ) | |
| | ) | |
| Plaintiff, | ) | ON APPEAL FROM THE UNITED |
| | ) | STATES DISTRICT COURT FOR |
| v. | ) | THE EASTERN DISTRICT OF |
| | ) | MICHIGAN |
| RANDALL HAAS, et al., | ) | |
| | ) | |
| Defendants-Appellees, | ) | |
| | ) | |
| and | ) | |
| | ) | |
| JOHN AND JANE DOE(S), | ) | |
| | ) | |
| Defendants. | ) | |

ORDER

Before: MOORE, GILMAN, and DONALD, Circuit Judges.

Philip Berryman, a pro se Michigan prisoner, appeals the district court's grant of summary judgment to the defendants in his prisoner-civil-rights action. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2017, Berryman and a fellow prisoner, Harry T. Ritchie, sued several personnel at the Macomb Correctional Facility, known as MRF, where the plaintiffs were both confined at the

time of their suit. Ritchie's claims are not part of this appeal. Berryman is paraplegic and requires a wheelchair. According to his complaint, he arrived at MRF in 2014. That year, he filed a grievance asking to be placed in a single-person cell because of his medical issues. That grievance "was resolved between [him] and [the] then [d]eputy warden," who gave Berryman his own cell. But in 2017, prison officials moved him to a two-person cell. Berryman alleged that they did so in retaliation for his having engaged in conduct protected by the First Amendment: helping another inmate sue one of the defendants. He also alleged that the defendants retaliated against him by destroying his legal papers and fabricating misconduct charges. Finally, Berryman alleged that the prison employees violated his Eighth Amendment right to be free from cruel and unusual punishment by placing him in a two-person cell and refusing to house him in a single-person one. Berryman invoked 42 U.S.C. § 1983 and sought damages and an injunction requiring the defendants to place him in a single-person cell.

The defendants eventually moved for summary judgment on Berryman's claims, arguing that he had failed to exhaust his administrative remedies. *See* 42 U.S.C. § 1997e(a). After tending to related matters not relevant here, the district court granted the defendants' summary-judgment motion in part and dismissed Berryman's claims for failure to exhaust. The court determined that the defendants had produced evidence showing that Berryman had exhausted his administrative remedies for only one grievance having to do with his time at MRF, and it involved back pay for his prison job, not the matters alleged in this action. The court also ruled that Berryman presented no evidence showing that he did in fact exhaust his administrative remedies or that those remedies were unavailable. Later, after granting the defendants summary judgment on Ritchie's claims, the district court dismissed the action in its entirety.

On appeal, Berryman argues that the district court erred by: (1) determining that there was no genuine dispute that he failed to exhaust his administrative remedies; (2) denying his Eighth Amendment claim; and (3) denying his First Amendment retaliation claim.

We review a district court's grant of summary judgment de novo. *Huckaby v. Priest*, 636 F.3d 211, 216 (6th Cir. 2011). Summary judgment is appropriate 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 resolving a summary judgment motion, we view the evidence in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Under the Prison Litigation Reform Act of 1995, a prisoner may not sue under § 1983 unless he has first exhausted his available administrative remedies. 42 U.S.C. § 1997e(a). "This requirement is a strong one." *Napier v. Laurel County*, 636 F.3d 218, 222 (6th Cir. 2011). It demands "proper exhaustion," *Woodford v. Ngo*, 548 U.S. 81, 88 (2006), which "means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits)," *id.* (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)). In Berryman's case, to exhaust his administrative remedies, he had to file a grievance asserting his claims and litigate it through to the end of the prison's grievance process. *See Jones v. Bock*, 549 U.S. 199, 207 (2007).

The district court determined that there was no genuine dispute that Berryman had failed to exhaust his administrative remedies. The defendants put forth evidence that the Michigan Department of Corrections keeps an electronic database of every grievance appealed to the final step of the grievance process and that the database showed that Berryman had so appealed only one grievance regarding his time at MRF, which was unrelated to his claims here. To show that a genuine dispute existed over whether he exhausted his administrative remedies, Berryman identified his 2015 grievance requesting a single-person cell. But Berryman did not litigate that grievance through the entire process. Instead, as discussed above, that grievance was resolved to his satisfaction when he was given a single-person cell. Yet Berryman argues that, because there was no reason to continue litigating that grievance regarding his request for a single-person cell, it follows that there were no available administrative remedies that he had to exhaust in 2017 when he was again denied a single-person cell.

But Berryman's 2015 grievance involved events that took place at that time, while the events that Berryman complained about in this suit were different, and not only because they happened in 2017. To file a federal action about those events, then, Berryman had to exhaust his available administrative remedies, which he could have done by filing a grievance and litigating

it through the prison's grievance process. "[E]xhaustion is required even if the prisoner subjectively believes the remedy is not available, . . . and 'even where [the prisoners] believe the procedure to be ineffectual or futile.'" *Napier*, 636 F.3d at 222 (third alteration in original) (citations omitted) (quoting *Pack v. Martin*, 174 F. App'x 256, 262 (6th Cir. 2006)). Indeed, two of the exhaustion requirement's objectives are that it "gives an agency 'an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court,'" and it promotes quicker resolution of claims, which, "[i]n some cases . . . are settled at the administrative level." *Woodford*, 548 U.S. at 89 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). That happened with Berryman's 2015 grievance, and had he filed and litigated a grievance over the matters here, it may have happened again, saving him and the defendants the burdens of federal litigation. Thus, by failing to file and litigate a grievance completely through the prison's grievance process, Berryman failed to exhaust his available administrative remedies. Even viewing the evidence in the light most favorable to Berryman, no genuine dispute exists.

Berryman's remaining appellate arguments debate the substance of his claims. But because the district court correctly dismissed his claims on exhaustion grounds, their merits are irrelevant.

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

HARRY T. RITCHIE,

*Plaintiff,*

*v.*

CASE NO.: 2:17-cv-10762

DISTRICT JUDGE LAURIE J. MICHELSON
MAGISTRATE JUDGE PATRICIA T. MORRIS

R. HAAS, HEATHER COOPER,
KRISTOPHER STEECE,
E. PARR-MIRZA, P.C. JENKINS,
L. ADRAY, RIVARD, JOHN DOES,
and JANE DOES,

*Defendants.*
_____/

**MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Doc. 71)**

## I. RECOMMENDATION

For the reasons set forth below, **IT IS RECOMMENDED** that Defendants' Motion for Summary Judgment, (Doc. 71), be **GRANTED**, and that Plaintiff's Complaint (Doc. 1), be dismissed in its entirety, i.e., be **DISMISSED WITHOUT PREJUDICE for failure to exhaust as to his retaliation claim and WITH PREJUDICE as to his Eighth Amendment deliberate indifference claim.**

## II. REPORT

### A. Introduction

Plaintiff Harry Ritchie is a state prisoner who filed a *pro se* Complaint against Defendants on March 7, 2017. (Doc. 1). Plaintiff sued each defendant in his or her

individual and official capacity. (Doc. 1 at 3). At the time of filing, Plaintiff was confined at the Macomb Correctional Facility ("MRF") under the jurisdiction of the Michigan Department of Corrections ("MDOC"). (Doc. 1 at 2).

Ritchie avers that on July 28, 2016, Jenkins placed another inmate in his single person cell ( SPC). (Doc. 1 at 26). In August of that year, the other prisoner was moved to another cell, but Jenkins then placed a different inmate in Ritchie's SPC. (*Id.*). Ritchie complained that he "was not going to have to be nude in front of another prisoner while I cleaned myself up from my bowls [sic] messing up my bed and cloth," after which he was placed "in Segregation" for forty-two days. (*Id.*). After Ritchie was released back into his SPC, yet another prisoner was moved into his living space, and eventually Ritchie "became sick to the point that I was taken to the Hospital" for a ninety-day stay because he could "not clean myself or change my clothing . . . ." (*Id.*).

When Ritchie returned to MRF, he was placed into segregation. (*Id.*). The next day, he was placed into a cell but could not fit through the door due to his wheelchair, so he was again "placed in segregation . . . for [f]ive days" until relocated to a different cell with "another prisoner" who "assaulted and . . . stole[] some of [his] store goods." (*Id.*). After being taken to a hospital for an overnight stay, he was transferred back to MRF and placed in segregation for four days before being placed in a single person cell for a day, and then moved "the following day" to "a two person cell." (*Id.*).

In a one-on-one with Steece, Ritchie "was told that [his SPC accommodation notice] did not matter because it had been discontinued . . . ." (*Id.*). On September 28, 2016, Ritchie was in segregation when both Haas and Steece visited his cell and "asked [him] to explain

why [he] was on a Hunger Strike and what [they] could do to get [him] started back eating," to which he replied that "P.A. Mc[K]issick had taken [his] [SPC] claiming that it was at the request of . . . Jenkins and both of them, who had talked with . . . Cooper in person and Parr-Mirza, Rivard and they had agreed that [McKissick] should cancel the [SPC] Detail." (Doc. 1 at 26-27).[1] Further, Ritchie alleges that he spoke with Adray, who told him "that she had knowledge of the problem and . . . [had] been contacted by . . . Steece regarding the detail and [she] told him [she] had spoke[n] with . . . Jenkins and agreed" that Ritchie's SPC detail be canceled. (Doc. 1 at 27). According to Ritchie, both Haas and Steece confirmed that they participated in this decision and agreed with it. (*Id.*).

The next day, Steece and Haas again visited Ritchie to tell him that his wheelchair would not be returned "because . . . Mc[K]issick . . . canceled the detail," and two days later, without a wheelchair, Ritchie "was ordered to leave the Segregation Unit." (*Id.*). Although Lieutenant Weiburg "and Captain ordered MRF staff to give [him] a Wheelchair and to take [him] to Three Unit," the individuals who escorted him there "took the Wheelchair with them as they left," leaving him only a walker, which he "could not use." (*Id.*).

On October 4, 2016, Ritchie was written up for "Disobeying a Direct Order [and] crawling on the floor and pulling the Walker to get to the bathroom" at the behest of Haas and Steece. (Doc. 1 at 28). Several days later, on October 8, 2016, Ritchie "was transferred

[1] Ritchie includes at this point the allegation that he "[f]iled third step on December 30, 2016." (Doc. 1 at 27). Although the context for this allegation remains uncertain, it appears to relate to engagement with the grievance process relating to the denial of his SPC and wheelchair accommodations, detailed further below.

to DLWH hospital where he stayed" until December 5, 2016. (*Id.*). Doctors there "ordered [his] wheelchair reinstated" upon his return to MRF, but when he returned to MRF he was instead "placed in Segregation once again, . . ." *Id.* As before, Ritchie was transferred between segregation and other under-equipped cells, including "another two man cell" where he was "assault[ed] by the other prisoner who had been taking [Ritchie's] property and forcing himself upon [Ritchie], . . ." (*Id.*). Amidst these transfers, Ritchie remained "unable to clean himself, without having to give up eating on days that he needs to clean himself, in that he has to wait until the other prisoner goes to eat [before he] tries to complete [his] cleaning." (*Id.*). While in segregation, Adray and McKissick visited his cell, whereupon Adray "stated that she had taken part in the removal of the wheelchair and single person cell and that [he] would never get them back" before walking away. (*Id.*). Later, Jenkins "walked by and in a low voice said 'how do you like your single man room?'" (*Id.*).

Although not labeled as such, Plaintiff's claims fall into two categories: (1) retaliation and (2) deliberate indifference to Plaintiff's serious medical needs.

Defendants field the instant motion for summary judgment on January 3, 2018. (Doc. 71.) Although ordered to respond, Plaintiff did not file any response. Defendants also filed a supplemental brief on February 2, 2018. (Doc. 75.)

**B. Summary Judgment Standard**

When a movant shows that "no genuine dispute as to any material fact" exists, the court will grant her motion for summary judgment. Fed. R. Civ. P. 56(a). In reviewing such motion, the court must view all facts and inferences in the light most favorable to the non-

moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The moving party bears "the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-movant's case." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting *Celotex Corp. v. Cartrett*, 477 U.S. 317, 323 (1986)) (internal quotation marks omitted). In making its determination, a court may consider the plausibility of the movant's evidence. *Matsushita*, 475 U.S. at 587-88. Summary judgment is also proper where the moving party shows that the non-moving party cannot meet its burden of proof. *Celotex*, 477 U.S. at 325.

The non-moving party cannot rest merely on the pleadings in response to a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Instead, the non-moving party has an obligation to present "significant probative evidence" to show that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos.*, 8 F.3d 335, 339-40 (6th Cir. 1993). The non-movant cannot withhold evidence until trial or rely on speculative possibilities that material issues of fact will appear later. 10B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2739 (3d ed. 1998). "[T]o withstand a properly supported motion for summary judgment, the non-moving party must identify specific facts and affirmative evidence that contradict those offered by the moving party." *Cosmas v. Am. Express Centurion Bank*, 757 F. Supp. 2d 489, 492 (D. N.J. 2010). In doing so, the non-moving party cannot simply assert that the other side's evidence lacks credibility. *Id.* at 493. And while a pro se party's arguments are entitled to liberal construction, "this liberal standard does not, however, 'relieve [the party] of his duty to meet the requirements necessary to defeat a motion for summary

judgment.'" *Veloz v. New York*, 339 F. Supp. 2d 505, 513 (S.D. N.Y. 2004) (quoting *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 50 (2d Cir. 2003)). "[A] pro se party's 'bald assertion,' completely unsupported by evidence, is not sufficient to overcome a motion for summary judgment." *Lee v. Coughlin*, 902 F. Supp. 424, 429 (S.D. N.Y. 1995) (quoting *Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir. 1991)).

When the non-moving party fails to adequately respond to a summary judgment motion, a district court is not required to search the record to determine whether genuine issues of material fact exist. *Street*, 886 F.2d at 1479-80. The court will rely on the "facts presented and designated by the moving party." *Guarino v. Brookfield Twp. Trs.*, 980 F.2d 399, 404 (6th Cir. 1992). After examining the evidence designated by the parties, the court then determines "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so onesided that one party must prevail as a matter of law.'" *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1310 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 251-52). Summary judgment will not be granted "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248.

C. **Exhaustion – retaliation claim**

**1. PLRA**

Congress passed the Prison Litigation Reform Act of 1995 ("PLRA") in response to a "sharp rise in prisoner litigation in the federal courts." *Woodford v. Ngo*, 548 U.S. 81, 83 (2006). By passing the PLRA, Congress attempted to ensure that "the flood of nonmeritorious [prisoner civil rights] claims [did] not submerge and effectively preclude

consideration of the allegations with merit." *Jones v. Bock*, 549 U.S. 199, 202 (2007). Congress equipped the PLRA with several mechanisms designed to reduce the quantity and increase the quality of the claims that came to federal court. *Id.* A "centerpiece" of the PLRA was the "invigorated" exhaustion requirement: "No action shall be brought with respect to prison conditions under [§ 1983] . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (2000); *see also Woodford*, 548 U.S. at 84 ("A centerpiece of the PLRA's effort 'to reduce the quantity . . . of prisoner suits' is an 'invigorated' exhaustion provision.") (quoting *Porter v. Nussle*, 534 U.S. 516, 524 (2002)). Courts consider the PLRA's suits "brought with respect to prison conditions" to include "all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter*, 534 U.S. at 532.

The *Woodford* Court held that the PLRA's exhaustion of administrative remedies requires (1) that no remedies currently remain available, and (2) that the remedies that had been available to the prisoner were "properly" exhausted. 548 U.S. at 93. Prior to *Woodford* there were conflicting interpretations of the PLRA's exhaustion requirement. Some circuits interpreted the exhaustion requirement to mean that plaintiffs must have no more administrative remedies available before bringing their cases to federal court. *Id.* Others interpreted it to mean that plaintiffs must have "properly" exhausted their available remedies by following the agency's procedural requirements such as "deadlines and other critical procedural rules." *Id.*

In finding that exhaustion of remedies required "proper" exhaustion, the Court was persuaded by the "striking" similarities between the language of the PLRA and the doctrine of exhaustion in administrative law. *Id.* at 102. It also considered the purposes behind the exhaustion requirement, reasoning that an interpretation that did not require proper exhaustion would render the PLRA "toothless"–enabling a prisoner to bypass prison remedies by simply disregarding or ignoring deadlines. *Id.* at 95. "Proper exhaustion" means that the plaintiff complied with the administrative "agency's deadlines and other critical procedural rules." *Id.* at 90. Complaints and appeals must be filed "in the place, and at the time, the prison's administrative rules require." *Id.* at 87 (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002)).

In *Jones*, the Court instructs us to look to the prison's policy itself when determining "whether a prisoner has properly exhausted administrative remedies--specifically, the level of detail required in a grievance to put the prison and individual officials on notice of the claim." 549 U.S. at 205; *id.* at 218 ("The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the *prison's requirements*, and not the PLRA, that define the boundaries of proper exhaustion." (emphasis added)). Specifically, the *Jones* Court was determining whether a plaintiff needed to identify the defendant by name during the initial grievance process. Since the MDOC's policy at the time did not require that level of specificity the Court did not find that the PLRA required it. *Id.* at 218. However, the current MDOC policy requires this level of specificity. MDOC Policy Directive ("PD") 03.02.130 (eff. July 9, 2007).

A plaintiff does not need to show proper exhaustion as a part of their complaint. *Jones*, 549 U.S. at 216. Rather, failure to properly exhaust remedies is an affirmative defense. *Id.*

**2. MDOC Policy**

The MDOC provides prisoners with a grievance procedure for bringing forward their concerns and complaints. *See* MDOC PD 03.02.130 (eff. 7/9/2007). The MDOC's grievance procedure consists of steps that a prisoner must follow prior to filing a complaint in court, and each step is accompanied by a time limit. First, the grievant must attempt to resolve the issue with the person involved "within two business days after becoming aware of a grievable issue, unless prevented by circumstances beyond his/her control." MDOC PD 03.02.130(P).

If the initial attempt to resolve the issue with the person involved is impossible or unsuccessful, the inmate must then submit a Step I grievance form within five days. MDOC PD 03.02.130(V). If the grievance is accepted, the prison staff is required to respond in writing to a Step I grievance within fifteen days, unless an extension is granted. MDOC PD 03.02.130(X). The policy provides the following instructions regarding the information that needs to be included in a grievance:

> The issues should be stated briefly but concisely. Information provided is to be limited to the facts involving the issue being grieved (i.e., who, what, when, where, why, how). Dates, times, places and names of all those involved in the issue being grieved are to be included.

MDOC PD 03.02.130(R). If the inmate is not satisfied with the response, or does not receive a response within fifteen days, he must file a Step II appeal within ten business

days. MDOC PD 03.02.130(BB). Once again, if the inmate is dissatisfied with the response at Step II or does not receive a Step II response within fifteen days, he has ten business days to submit a Step III appeal to the Prisoner Affairs Section. MDOC PD 03.02.130(FF). "To file a Step III grievance, the grievant must send a completed Step III grievance, using the Prisoner/Parolee Grievance Appeal form . . . ." *Id.* The Step III response concludes the administrative grievance process. According to MDOC policy, a grievance is not complete until the MDOC has responded to the Step III grievance. MDOC PD 03.02.130(B), (FF), (GG). *Woodford* and *Jones* require inmates to file grievances that conform to MDOC procedures in order to properly exhaust available remedies. 548 U.S. at 93; 549 U.S. at 218.

**3. Analysis**

Defendants posit exhaustion of administrative remedies as a defense to the retaliation claim. Specifically, they argue that the grievances which were exhausted through step III were not the same as the allegations made in the grievances and that the grievances failed to name defendants Haas, Cooper, Steece, Parr-Mirza, Adray and Rivard-Babisch. Defendants have presented evidence that Plaintiff properly exhausted, through Step III, only two grievances, MRF-16-08-1519-17z and MRF-16-08-1520-12z. In these grievances, Plaintiff complained that a prison counselor, Jenkins, was wrongfully refusing to honor his medical detail for a single cell and that Jenkins had inappropriately asked Cooper to cancel his medical detail. (Doc, 47-3 and 47-4.)

Defendants contend that neither of these grievances addressed Plaintiff's current complaint that he was denied a single cell as a form of retaliation, citing *Ward v. Luckey*,

No. 12-CV-14875, 2013 WL 5595350, at *2 (E.D. Mich. Oct. 11, 2013)("[i]t is not enough for Ward to show only that an underlying grievance was filed, he must show that he exhausted his administrative remedies with respect to the retaliation claim"); *Jordan-El v. Harrington*, No. 2:06-CV-10431, 2016 WL 1791261, at *5 (E.D. Mich. May 25, 2006)("[s]ince retaliation is a separate form of misconduct or mistreatment, the plaintiff was required to give prison officials fair notice of a First Amendment retaliation claim").

In grievance 1519 and 1520, Plaintiff complained Jenkins told him his medical detail for a single cell had ended and that she had told Defendant Cooper to cancel the single cell detail. (Doc. 47-3, 47-4.) Plaintiff does not claim these acts by Jenkins were taken in retaliation for any of Plaintiff's past protected conduct. Rather, Plaintiff states, "resolution is that my detail for single person room be honor and no retaliation by transfer or by her or other staffs writing misconduct and taking my property" and "resolution is for my single person cell or room be honor, and for her not to retaliation by deny any medical treatment." (Doc. 47-3 and 47-4, respectively.) Plaintiff is asking not to be retaliated against in the future, he is not complaining about any retaliation that had actually happened. Accordingly, Plaintiff's grievances do not complain about being retaliated against and thus, did not exhaust any retaliation claim.

I therefore suggest that Plaintiff has not exhausted his retaliation claim against any defendants.

In addition, Defendants note that since complete exhaustion occurs only as to those persons named or alleged to have committed any wrongful act in the grievance, Plaintiff's failure to name Defendants Haas, Cooper, Steece, Parr-Mirza, Adray or Rivard-Babisch is

fatal. *Reed-Bey v. Pramstaller*, 603 F.3d 322, 324-25 (6th Cir. 2010)("Requiring inmates to exhaust...by, say, identifying all relevant defendants – [will] not only further to [PLRA's] objectives, but it also prevents inmates from undermining these goals by intentionally defaulting their claims at each step of the grievance process, prompting unnecessary and wasteful federal litigation in the process.") I note that this is not the type of situation presented in cases such as *Brim v. Welton*, 704 F. App'x 585 (Nov. 29, 2017). In *Brim*, the Plaintiff identified an unnamed prison guard in his step one grievance and then named the guard in his step two appeal. Here, Plaintiff did not reference unnamed defendants who he later identified as any of the defendants in this case. Instead, he simply did not allege any misconduct on the part of these defendants.

**D. Eighth Amendment deliberate indifference claim**

In *Estelle v. Gamble*, the Supreme Court held "that deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment's Cruel and Unusual Punishment Clause because it constitutes the "unnecessary and wanton infliction of pain'" and is "repugnant to the conscience of mankind" by offending our "evolving standards of decency." 429 U.S. 97, 104 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 97, 104 (1976)). To establish a cognizable claim, Plaintiff's allegations must show Defendant's 'sufficiently harmful' acts or omissions. *Id.* at 106. "[I]nadvertent failure to provide adequate medical care . . . will not violate the Constitution." *Id.*

The 'deliberate indifference' inquiry incorporates objective and subjective elements. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). The objective inquiry asks whether the deprivation was "sufficiently

serious," which a claimant satisfies where it "has been diagnosed by a physician as mandating treatment or . . . is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Blackmore v. Kalamazoo Cty.*, 390 F.3d 890, 897 (6th Cir. 2004) (quoting *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 208 (1st Cir. 1990)) (internal quotation marks omitted). The subjective inquiry considers whether official's state of mind was sufficiently culpable; it requires a showing that an official "knows of and disregards an excessive risk to inmate health or safety." *Harrison v. Ash*, 539 F.3d 510, 518 (6th Cir. 2008) (quoting *Farmer*, 511 U.S. at 837) (internal quotation marks omitted). "[T]he official must both be aware of the facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference." *Id.*

The facts of this case are succinctly stated in Judge Michelson's opinion and order denying Plaintiff's motion for a preliminary injunction. (Doc. 58.)

Plaintiff Ritchie certified in his complaint and affidavit that his medical conditions require SPC accommodations to relieve pain and ensure habitable sanitary conditions. *See generally* Doc. 1 at 26 (describing how Ritchie was confined to a wheelchair and could not "clean [him]self or change [his] clothing and became sick to the point the [he] was taken to the Hospital" for ninety days when deprived of his SPC accommodation); Doc. 9 at ID 88 ("The above described Single Person Cell is necessary for [Ritchie's] Medical conditions. . . . [and] helps to reli[e]ve Pain.").

Defendants indicate that upon arriving at MRF on June 15, 2016, Plaintiff began a hunger strike. (Doc. 71 at ID 573.) On July 12, 2016, Plaintiff met with health care to

request incontinence garments because since he had been on a hunger strike, he had difficulty sensing when he had to defecate and had soiled himself. (Doc. 71 at ID 574; Doc. 23-5 at ID 191-92). The next day, Plaintiff was given incontinence undergarments. (Id.; Doc. 23-5 at ID 193-95.) On July 26, 2016, Plaintiff met with R.N. Nelson Duncan who granted Plaintiff's request for a single-person cell for one week. (Id.; Doc. 23-5 at ID 197.) On July 28, 2016, Dr. Hussain evaluated Plaintiff and determined that he did not meet the criteria for a single-person cell. (Id.; Doc. 23-5 at ID 198.) Plaintiff's other medical accommodations, i.e., wheelchair accessible housing, bottom bunk, cane, incontinence supplies, wheelchair, and attendant to assist with movement inside the facility, remained in place. (Id.; Doc. 23-5 at ID 199.) In August 2016, after another prisoner was placed in Plaintiff's cell, Plaintiff complained about being "nude in front of another prisoner while I cleaned myself up[.]" (Doc. 1 at ID 29.) In September 2016, Plaintiff began another hunger strike in protect of his being denied a single-person cell but consistently told Physician Assistant McKissick that he felt fine. (Doc. 23 at ID 200-02.) P.A. McKissick also discontinued Plaintiff's incontinence undergarments because he was not eating and thus, not defecating. (Doc. 23 at ID 204.) After reviewing Plaintiff's chart, P.A. McKissick also found no diagnostic evidence to support Plaintiff's claim of an inability to ambulate and thus, discontinued Plaintiff's wheelchair accommodation. (Doc. 23 at ID 203.)

In October 2016, Plaintiff was transferred to Dwayne Waters Health Center, a hospital, for a lengthy stay, i.e., over 50 days. (Doc. 1 at ID 31; Doc. 23 at ID 205, 209.) The intake physician noted that the patient had not been eating and felt weak in his lower extremities but "[b]ecause there are many inconsistencies in his ability to ambulate, Dr.

Borgerding has suggested close monitoring prior to providing and reissuing a wheelchair." (Doc. 23 at ID 206.) On December 5, 2016, Plaintiff was discharged from Dwayne Waters and returned to prison. The discharge summary stated that an EMG of Plaintiff's lower extremities was normal and that there was no evidence of any spinal disc herniation. (Doc. 23 at ID 209.) The next day, P.A. McKissick evaluated Plaintiff, referred to his recent hospital records, and determined he did not need to be provided with a single-person cell. (Doc. 23 at ID 211.) Plaintiff claimed that he had incidents with cellmates becoming angry or otherwise harassing or assaulting him because of his condition.

As indicated above, Plaintiff received a substantial portion of medical care for his medical issues which undermines his claim that they acted deliberately indifferent to his serious medical needs. The actions taken or not taken by Defendants were supported by medical record evidence. Under these circumstances, and with no contrary evidence having been brought forward at all by Plaintiff in response to the motion for summary judgment, I find that Plaintiff has not presented evidence that creates a genuine issue of material fact as to this claim under the Eighth Amendment. *See*, *Stansell v. Grafton Corr. Inst.*, No. 17-CV-01892, 2018 WL 971838, at *3 (N.D. Ohio Feb. 20, 2018)(dismissing Eighth Amendment claim based on plaintiff having been denied a single cell despite his allegation that his cellmate does not understand his medical condition and becomes irate with him for using the toilet too frequently); *Bolton v. Good*, 992 F. Supp. 604, 627 (S.D. N.Y. 1998)(using the toilet in front of cellmates, "while undoubtedly embarrassing and uncomfortable, does not approach the standard of inhumane conditions that violate the

Eighth Amendment.") Accordingly, Plaintiff's Eighth Amendment claim should be dismissed.

**E. Conclusion**

For the reasons discussed above, **IT IS RECOMMENDED** that Defendants' Motion for Summary Judgment, (Doc. 71), be **GRANTED**, and that Plaintiff's Complaint (Doc. 1), be dismissed in its entirety, i.e. be **DISMISSED WITHOUT PREJUDICE for failure to exhaust as to his retaliation claim and be DISMISSED WITH PREJUDICE as to his Eighth Amendment deliberate indifference claim.**

## IV. REVIEW

Pursuant to Rule 72(b)(2) of the Federal Rules of Civil Procedure, "[w]ithin 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy." Fed. R. Civ. P. 72(b)(2); *see also* 28 U.S.C. § 636(b)(1). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). The parties are advised that making some objections, but failing to raise others, will not preserve all the objections a party may have to this Report and Recommendation. *Willis v. Sec'y of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Dakroub v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this magistrate judge.

Any objections must be labeled as "Objection No. 1," "Objection No. 2," etc. Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the objections in length and complexity. Fed. R. Civ. P. 72(b)(2); E.D. Mich. LR 72.1(d). The response must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," etc. If the Court determines that any objections are without merit, it may rule without awaiting the response.

Date: March 13, 2018

S/ PATRICIA T. MORRIS
Patricia T. Morris
United States Magistrate Judge

**CERTIFICATION**

I hereby certify that the foregoing document was electronically filed this date through the Court's CM/ECF system which delivers a copy to all counsel of record. A copy was also sent via First Class Mail to Harry T. Ritchie #166460 at Alger Maximum Correctional Facility, N6141 Industrial Park Drive, Munising, MI 49862.

Date: March 13, 2018

By s/Kristen Castaneda
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PHILIP BERRYMAN, and
HARRY T. RITCHIE,

Plaintiffs,

v.

RANDALL HAAS,
HEATHER COOPER,
KRISTOPHER STEECE,
ERIN PARR-MIRZA,
AMIE JENKINS,
LISA ADRAY,
CAROLINE RIVARD-BABISCH,
JOHN DOES, and
JANE DOES,

Defendants.

Case No. 17-cv-10762
Honorable Laurie J. Michelson
Magistrate Judge Patricia T. Morris

**ORDER REGARDING REPORT AND RECOMMENDATION [76] AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [71]**

Before the Court is Magistrate Judge Patricia T. Morris' Report and Recommendation. (R. 76.) At the conclusion of her March 13, 2018 Report and Recommendation, Magistrate Judge Morris notified the parties that they were required to file any objections within 14 days of service, as provided in Federal Rule of Civil Procedure 72(b)(2) and Eastern District of Michigan Local Rule 72.1(d), and that "[f]ailure to file specific objections constitutes a waiver of any further right of appeal." (R. 76, PID 620.) It is now April 12, 2018. As such, the time to file objections has expired. And no objections have been filed.

The Court finds that the parties' failure to object is a procedural default, waiving review of the Magistrate Judge's findings by this Court. In *United States v. Walters*, 638 F.2d 947, 949–50 (6th Cir. 1981), the Sixth Circuit established a rule of procedural default, holding that "a party

shall file objections with the district court or else waive right to appeal." And in *Thomas v. Arn*, 474 U.S. 140, 144 (1985), the Supreme Court explained that the Sixth Circuit's waiver-of-appellate-review rule rested on the assumption "that the failure to object may constitute a procedural default waiving review even at the district court level." 474 U.S. at 149; *see also Garrison v. Equifax Info. Servs., LLC,* No. 10-13990, 2012 WL 1278044, at *8 (E.D. Mich. Apr. 16, 2012) ("The Court is not obligated to review the portions of the report to which no objection was made." (citing *Thomas*, 474 U.S. at 149–52)). The Court further held that this rule violates neither the Federal Magistrates Act nor the Federal Constitution.

The Court therefore finds that the parties have waived further review of the Magistrate Judge's Report and accepts her recommended disposition. It follows that this Court GRANTS Defendants' motion for summary judgment (R. 71) and that Ritchie's retaliation claim is DISMISSED WITHOUT PREJUDICE and his deliberate-indifference claim is DISMISSED WITH PREJUDICE.

SO ORDERED.

s/Laurie J. Michelson
LAURIE J. MICHELSON
U.S. DISTRICT JUDGE

Dated: April 12, 2018

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on April 12, 2018.

s/Keisha Jackson
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

| | |
|---|---|
| PHILIP BERRYMAN, and<br>HARRY T. RITCHIE,<br><br>Plaintiffs,<br><br>v.<br><br>RANDALL HAAS,<br>HEATHER COOPER,<br>KRISTOPHER STEECE,<br>ERIN PARR-MIRZA,<br>AMIE JENKINS,<br>LISA ADRAY,<br>CAROLINE RIVARD-BABISCH,<br>JOHN DOES, and<br>JANE DOES,<br><br>Defendants. | Case No. 17-cv-10762<br>Honorable Laurie J. Michelson<br>Magistrate Judge Patricia T. Morris |

**JUDGMENT**

In accordance with the opinion and order entered on July 31, 2017 (R. 56) and the order entered on April 12, 2018 (R. 77) it is hereby ORDERED and ADJUDGED that Plaintiffs' complaint is DISMISSED.

s/Laurie J. Michelson
LAURIE J. MICHELSON
U.S. DISTRICT JUDGE

Dated: April 12, 2018

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on April 12, 2018.

s/Keisha Jackson
Case Manager

No. 18-1526

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**FILED**
Apr 25, 2019
DEBORAH S. HUNT, Clerk

PHILIP BERRYMAN,

Plaintiff-Appellant,

HARRY T. RITCHIE

Plaintiff,

v.

RANDALL HAAS, ET AL.,

Defendants-Appellees,

JOHN AND JANE DOE(S),

Defendants.

ORDER

**BEFORE:** MOORE, GILMAN, and DONALD, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

**Deborah S. Hunt, Clerk**

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
Deborah S. Hunt
Clerk
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988
Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: April 25, 2019

Philip Berryman
Macomb Correctional Facility
34625 26 Mile Road
New Haven, MI 48048-3000

Re: Case No. 18-1526, *Philip Berryman, et al v. Randall Haas, et al*
Originating Case No.: 2:17-cv-10762

Dear Mr. Berryman,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Adam Robert de Bear

Enclosure