NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted October 23, 2020*
Decided October 23, 2020

Before

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 19-1829

GREGORY JONES,
Plaintiff-Appellant,

v.

ANDREW TILDEN and RILIWAN OJELADE,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois.

No. 17-cv-1248

Joe Billy McDade,
Judge.

ORDER

Based on his own deposition testimony, Gregory Jones, an Illinois prisoner at the Pontiac Correctional Center, lost at summary judgment on his claim that a physician's assistant was deliberately indifferent to his medical needs. In his complaint, Jones had accused the assistant of failing to issue him a bottom-bunk permit after he had fallen from his upper bunk. But the district court observed that his accusation could not be

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* This appeal is successive to appeal no. 18-1286 and is decided under Operating Procedure 6(b) by the same panel. We have agreed to decide this case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

true because Jones had testified that he first fell from his upper bunk after he saw the assistant. Jones now argues that his prison grievance contradicts his deposition testimony and warrants a trial on his claim. Because the grievance is unsworn and in it Jones does not state that he told the assistant about his falls, we affirm.

Jones saw Riliwan Ojelade, a physician's assistant, twice regarding pain. He first saw him in March 2016 concerning shoulder pain, a common complaint among inmates like Jones who lift weights. Ojelade's physical exam of Jones showed that he had full range of motion in his shoulder. Still, Ojelade prescribed naproxen for Jones's pain. At his second visit, in June 2016, Jones wanted another pain reliever to treat his knee and lower-back pain. (Jones had injured his back two years earlier.) Jones asserts (and Ojelade denies) that he also requested a lower-bunk permit. Ojelade examined Jones and found no abnormalities or injuries: Jones's spine was aligned, he had no atrophy or muscle weakness, he had normal range of motion, his muscles were symmetrical, and his knees had no joint deformity, redness, or swelling. Ojelade advised Jones that his back pain would likely get worse as he ages (he was 57) and prescribed Motrin for the pain. (In his reply brief on appeal, Jones asserts that Ojelade did not examine him at this visit, but he omitted the argument in his opening brief, so it is waived. *See Carroll v. Lynch*, 698 F.3d 561, 568 (7th Cir. 2012). In any event, the argument contradicts Jones's own statement of the facts where he recounts Ojelade's exam of his back and knees.)

After filing a grievance against Ojelade for not issuing him a lower-bunk permit, Jones sued Ojelade under 42 U.S.C. § 1983, and Ojelade moved for summary judgment. (Jones also sued Dr. Andrew Tilden, but he develops no argument for reviving this claim, so we do not consider it. *See Shipley v. Chicago Bd. of Election Comm'rs*, 947 F.3d 1056, 1063 (7th Cir. 2020).) Ojelade argued that at the June exam he saw no substantial risk of harm to Jones from the upper bunk. First, his exam of Jones and Jones's muscularity showed no need for a lower-bunk permit. Second, Jones never said that he had fallen from his upper bunk. As proof, Ojelade cited Jones's deposition testimony where Jones swore (consistent with his complaint) that "the first time [he] fell was September of '16," months after the exam. Without citing any evidence, Jones replied that Ojelade knew at the June exam that he had fallen from his upper bunk.

The district court entered summary judgment for Ojelade. It ruled that Jones did not support his assertion that Ojelade knew at the June exam about falls from his upper bunk, so Ojelade had no reason to issue him a lower-bunk permit. Indeed, the court stated, Jones's testimony—that he first fell from his bunk months after that exam—refuted his claim. The court noted that Jones had attached to his complaint his grievance

about Ojelade but concluded that it did not warrant a trial. In it, Jones asserted that he saw Ojelade for back pain in June, after he fell from his bunk. But the only statement in the grievance that he reports making to Ojelade at the June exam was that he sometimes sleeps on the cell floor "to accommodate cell favors."

On appeal, Jones offers two arguments for why a jury should decide whether he notified Ojelade at the June exam of his previous falls, but both are unavailing. First, in his view, the district court improperly weighed the contents of his grievance (which states that falls occurred before his June exam) against his deposition testimony that his falls occurred only after that exam. Because this case was decided at summary judgment, we view facts properly before the court in the light most favorable to Jones. *See Petties v. Carter*, 836 F.3d 722, 727 (7th Cir. 2016) (en banc). But the grievance does not create a fact dispute regarding notice to Ojelade about falls. It is neither sworn nor a declaration that "set[s] out facts" of whether or when Jones told Ojelade that he had fallen from his bunk. *See* FED. R. CIV. P. 56(c)(4); *see also Steffek v. Client Servs., Inc.*, 948 F.3d 761, 769 (7th Cir. 2020); *Castro v. DeVry Univ., Inc.*, 786 F.3d 559, 578–79 (7th Cir. 2015). True, in it Jones asserts that he saw Ojelade after he had fallen from his bunk. But he does not assert in the grievance that he reported falls to Ojelade; he told Ojelade only that he sleeps on the cell floor to accommodate others. Thus, a jury could not reasonably infer from the record that at the June exam Jones notified Ojelade about falls. For the only record evidence is Ojelade's declaration that during this exam Jones complained only of back and knee pain, and Jones's testimony that his falls occurred months after his June exam. Consequently, no trial on the issue of notice is warranted.

Second, Jones contends that the district court overlooked his argument that his deposition testimony was the result of his confusion about the dates of his falls. This argument is also fatally flawed. He first made it only after he appealed, when he asked the district court for leave to proceed in forma pauperis. This was too late, because Ojelade cited Jones's deposition testimony in his motion for summary judgment, and in response Jones did not contend that he had been confused. So he waived the argument. *See Duncan Place Owners Ass'n v. Danze, Inc.*, 927 F.3d 970, 974–75 (7th Cir. 2019). Moreover, waiver to the side, Jones did not swear in an affidavit that he had been confused. So the district court could not have credited the argument under the rule that limits a party's ability to contradict his own deposition testimony. *See James v. Hale*, 959 F.3d 307, 315–17 (7th Cir. 2020).

We have considered Jones's other arguments, and none has merit.

AFFIRMED

E-FILED
Wednesday, 20 March, 2019 10:09:19 AM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

GREGORY DAVID JONES,	)	
	)	
Plaintiff,	)	
v.	)	**No.: 17-cv-1248-JBM**
	)	
DR. ANDREW TILDEN, *et al.*,	)	
	)	
Defendants.	)	

ORDER

Plaintiff, proceeding *pro se*, pursues a § 1983 action for deliberate indifference to his serious medical needs at the Pontiac Correctional Center ("Pontiac"). Plaintiff alleged that Defendant Dr. Tilden did not respond to his requests for treatment and refused to refer him to an outside orthopedist or neurologist. Plaintiff alleged that Defendant Physician's Assistant Riliwan Ojelade refused to give him a requested low bunk permit, and that Plaintiff fell on several occasions while trying to access the top bunk. Defendants have filed a motion for summary judgment [ECF 80] to which Plaintiff has responded [ECF 97], and Defendants have replied. For the reasons identified herein, Defendants' motion for summary judgment is hereby GRANTED.

MATERIAL FACTS

Plaintiff had testified at his deposition that he had suffered a prior back injury while at the Menard Correctional Center. The injury, however, had largely resolved by the time he was transferred to Pontiac. On March 28, 2016, while at Pontiac, Plaintiff was seen by Defendant Ojelade. Plaintiff presented at that time with complaints of bilateral shoulder pain, but not back pain. At the time of the exam, Plaintiff was noted to have had full range of motion of the shoulders with no joint deformity. Defendant Ojelade has provided an affidavit in which he

discloses that Plaintiff was a weightlifter and at-risk for shoulder problems as inmates with large muscle mass can sustain injury when they are handcuffed behind their backs. Defendant Ojelade prescribed a three-month course of Naproxen ("Naproxen").

On June 20, 2016, Plaintiff spoke with a nurse, requesting a renewal of the Naprosyn. It appears that the nurse scheduled Plaintiff for sick call, as on June 22, 2016, he was seen for the second time by Defendant Ojelade. On that date, Plaintiff complained of bilateral knee pain and lower back pain. Plaintiff informed Defendant that the Naprosyn was not effective, requesting a different pain medication. Defendant prescribed Motrin 800 mg twice daily for two months to be followed with Motrin 600 mg twice daily for one month. The reduction in dosage was ordered, so as to minimize the likelihood of side effects from the medication. Defendant noted that the medication profile substantiates that a nurse gave Plaintiff a blister pack of 60 doses of Motrin that same day.

The records document, and Defendant Ojelade attests in his affidavit, that on June 22, 2016, he conducted a physical exam of Plaintiff. He noted that there was no redness, swelling or joint deformity of Plaintiff's knees. An examination of the back revealed that the spine was aligned with no limitations in range of motion and no evidence of atrophy or muscular weakness. Plaintiff disputes this, claiming that Defendant "lied" when he claimed to have undertaken an examination.

Plaintiff claims that Defendant told him that as he aged, his back pain would likely get worse. In response, Plaintiff requested a low bunk permit which Defendant Ojelade allegedly refused to provide. There is nothing in the medical record which documents that Plaintiff made this request. Defendant attests that if Plaintiff had asked for a low bunk permit, he would have recorded it. It is Defendant's opinion that, even if Plaintiff had asked, he did not need a low

bunk permit at that time. Defendant believed that the prescribed medication would adequately address Plaintiff's symptoms and, as he was a muscular individual, it was unlikely that he would have difficulty getting in and out of a top bunk. It is undisputed that the June 22, 2016 exam was the last time Plaintiff was seen by Defendant Ojelade.

Plaintiff pled in his complaint, and testified at his deposition, that he fell on or about September 15, 2016 and December 13, 216 while attempting to climb to the top bunk, dates subsequent to those in which he had been seen by Defendant Ojelade. Plaintiff, however, attached a June 22, 2016 grievance to his complaint in which he claimed that he had fallen off the top bunk three times prior to seeing Defendant. Plaintiff reiterates this in his response to summary judgment, asserting that Defendant knew Plaintiff "was injured falling in his attempt to climb on to bunk " and "took no notes" when given this information. [ECF 97 p. 2].

Contrary to his grievance, Plaintiff testified at his deposition that the falls occurred in September and December 2016, months after his appointments with Defendant Ojelade. As a result, Defendant Ojelade would not have been aware of the falls and otherwise no basis to believe that on June 22, 2016, Plaintiff was at risk of falling when climbing to the top bunk. Plaintiff offers an additional, extraneous argument to support that Defendant Ojelade should have given him a low bunk permit. This is that, when he was seen by Defendant Tilden on February 2, 2017, this "real physician" recognized the need for a low bunk permit.

As to Defendant Tilden, Plaintiff asserts that he submitted sick call requests on August 14, 2016, August 17, 2016, September 15, 2016 and December 13, 2016, requesting a bottom bunk permit and received no response. Plaintiff has provided an August 14, 2016 medical request slip complaining that Defendant Ojelade refused to give him a bottom bunk permit even though he had twice fallen from the top bunk and a December 13, 2016 medical request slip,

asking for a bottom bunk permit. The medical request slips each has the notation "1 copy" on its face, in what appears to be Plaintiff's handwriting. Neither has any institutional markings to corroborate that the slip was received by, or reviewed at, the facility. [ECF 1 p. 15, 17].

On January 26, 2017, a correctional officer ordered Plaintiff to move to a top bunk as he was getting a new cellmate who had a low punk permit. When Plaintiff replied that he was unable to comply due to his back, he was issued a citation for refusing housing and disobeying a direct order. Plaintiff was found guilty at an Adjustment Committee hearing and sentenced to seven days in segregation. [ECF 1 p. 21].

On February 2, 2017, Plaintiff was seen by Dr. Tilden for the first, and apparently only time. Plaintiff claims that, while Dr. Tilden issued him a low bunk permit, he did not adequately treat his back pain. Plaintiff complains that Defendant Tilden recommended that Plaintiff apply a hot compress to his back but did not provide him with a compress. Plaintiff also claims that he should have been given a brace for his knee and referred to an outside specialist.

Dr. Tilden has submitted a sworn affidavit addressing Plaintiff's claims that he made four unsuccessful attempts to see him. Defendant explains that inmates may not request to be seen by a specific provider. Instead, they are to contact the nurse or medical technician who makes rounds in their housing unit. That individual makes the determination to either treat the issue or refer the inmate to sick call to be managed by the physician, nurse practitioner, or physician's assistant. Inmates may also submit a medical request slip which is forwarded to the medical records office so an appointment can be scheduled. Defendant asserts that he was never involved in scheduling appointments, and only saw patients when appointments were placed on his calendar.

Plaintiff testified that Defendant was aware he wanted to be seen as, on at least one occasion, he called out to Defendant as Defendant Tilden walked through the facility. Defendant attests that, as a practice, he does not stop to informally discuss or treat inmates' complaints while walking about the facility. If he were to respond as Plaintiff suggests, others would likely overhear confidential health information, he would not be able to accurately record complaints outside the clinical setting, and there would be a danger of confusing the many different inmates' varied conditions and medical histories.

Defendant asserts that he only examined Plaintiff on February 2, 2017, and that there was no record of Plaintiff complaining of related problems between this and his June 22, 2016 visit with Defendant Ojelade. At the time of the February 2017 exam, Plaintiff complained of low back pain, but his condition was not otherwise remarkable. Defendant conducted a physical exam which was positive for a mild to moderate decrease in range of motion of the back without tenderness, and without evidence of neural-vascular deficiencies. He observed Plaintiff to have a normal gait. Defendant prescribed Naproxen, a low bunk permit for two years, a slow walk permit for two years and the use of a security belt, rather than shackles, for a two-month period.

Defendant attests that he saw nothing warranting referral to an orthopedist or neurologist. He explains that he ordered the low bunk permit based only on Plaintiff's subjective complaints of back pain. It was his opinion that, while Plaintiff might experience some discomfort climbing in and out of the top bunk, he would not face a substantial risk of serious harm in so doing.

In his response, Plaintiff appears to assert an additional claim related to his shoulder. This, however, was not pled in the complaint and is not considered here. *See Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) ("A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment.")

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant if entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party has the burden of providing proper documentary evidence to show the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323-24. Once a properly supported motion for summary judgment is filed, the burden shifts to the non-moving party to demonstrate with specific evidence that a triable issue of fact remains for trial. *Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291, 294 (7th Cir. 1997). The party opposing summary judgment "must present definite, competent evidence in rebuttal." *Butts v. Aurora Health Care, Inc.*, 387 F.3d 921, 924 (7th Cir. 2004).

Accordingly, the non-movant cannot rest on the pleadings alone, but must designate specific facts in affidavits, depositions, answers to interrogatories or admissions that establish that there is a genuine triable issue; he "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Finally, a scintilla of evidence in support of the non-movant's position is not sufficient to oppose successfully a summary judgment motion; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

DELIBERATE INDIFFERENCE STANDARD

The Eighth Amendment prohibits punishments that are incompatible with "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). "The Eighth Amendment safeguards the prisoner against a lack of medical care that

may result in pain and suffering which no one suggests would serve any penological purpose." *Arnett v. Webster*, 658 F.3d 742, 750 (7th Cir. 2011)(internal quotations and footnote omitted). "Prison officials violate the Constitution if they are deliberately indifferent to prisoners' serious medical needs." *Id.* (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)); *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 828 (7th Cir. 2009)("[d]eliberate indifference to serous medical needs of a prisoner constitutes the unnecessary and wanton infliction of pain forbidden by the Constitution.").

The deliberate indifference standard requires an inmate to clear a high threshold in order to maintain a claim for cruel and unusual punishment under the Eighth Amendment. *Dunigan ex rel. Nyman v. Winnebago County*, 165 F.3d 587, 590 (7th Cir. 1999). "In order to prevail on a deliberate indifference claim, a plaintiff must show (1) that his condition was 'objectively, sufficiently serious' and (2) that the 'prison officials acted with a sufficiently culpable state of mind." *Lee v. Young*, 533 F.3d 505, 509 (7th Cir. 2008)(quoting *Greeno v. Daley*, 414 F.3d 645, 652 (7th Cir. 2005)); *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008)(same). "A medical condition is serious if it 'has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor's attention.'" *Lee*, 533 F.3d at 509 (quoting *Greeno*, 414 F.3d at 653). "With respect to the culpable state of mind, negligence or even gross negligence is not enough; the conduct must be reckless in the criminal sense." *Id.*; *Farmer v. Brennan*, 511 U.S. 825, 836-37 (1994)("We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference.")

ANALYSIS

Defendant Ojelade's only interaction with Plaintiff relating to his back claim was on June 22, 2016. While Plaintiff claims that Defendant did not perform a physical examination, the medical record documents that Defendant undertook and recorded an examination of Plaintiff's spine and knees. This is sufficient as competent, contemporaneous evidence that Defendant Ojelade conducted a physical examination on June 22, 2016.

There is the additional dispute as to whether, on June 22, 2016, Plaintiff told Defendant Ojelade that he had already fallen three times and that the falls occurred while climbing up or down from the top bunk. As noted, this claim is inconsistent with Plaintiff's deposition testimony where, under oath, he claimed that he had fallen in September and December 2016, months after his last treatment by Defendant Ojelade. *See Correa v. Illinois Dept. of Corr.*, 05 C 3791, 2007 WL 3052947, at *1 (N.D. Ill. Oct. 17, 2007) ("allegations from the plaintiff's complaint are not admissible evidence to defeat summary judgment.") *See also*, *Nisenbaum v. Milwaukee County*, 333 F.3d 804, 810 (7th Cir. 2003) ("Allegations in a complaint are not evidence.") Here, the Court finds that Plaintiff has failed to substantiate as a material issue of fact that, on June 22, 2016, Defendant Ojelade was aware that Plaintiff had suffered three prior falls while trying to access the top bunk.

Plaintiff asserts, further, that Defendant's statement that his back condition would get worse as he got older, stands as uncontroverted evidence that he should have been given a low bunk permit on June 22, 2016. Plaintiff argues that Defendant Tilden's issuance of a low bunk permit on February 2, 2017, establishes that Defendant Ojelade was deliberately indifferent for not acting earlier. Defendant Tilden, however, has indicated that he did not necessarily believe that Plaintiff needed a low bunk permit in February 2017, but issued it due to his subjective

complaints. Plaintiff offers nothing to support that Defendant Ojelade's failure to act some 7 ½ months prior evidenced deliberate indifference. This, particularly as Defendant Ojelade has submitted an uncontroverted affidavit attesting that Plaintiff did not require a low bunk permit in June 2016.

As to Defendant Tilden, Plaintiff fails to establish that Defendant was aware that he had submitted four sick call requests and received no response. Section 1983 liability is predicated on fault, so to be liable, a defendant must be "personally responsible for the deprivation of a constitutional right." *Sanville v. McCaughtry,* 266 F.3d 724, 740 (7th Cir.2001) (quoting *Chavez v. Ill. State Police,* 251 F.3d 612, 651 (7th Cir.2001)). "A defendant will be deemed to have sufficient personal responsibility if he directed the conduct causing the constitutional violation, or if it occurred with his knowledge or consent." *Ames v. Randle,* 933 F.Supp.2d 1028, 1037–38 (N.D.Ill.2013) (quoting *Sanville,* 266 F.3d at 740). *See also, Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009), "[p]ublic officials do not have a free-floating obligation to put things to rights, disregarding rules (such as time limits) along the way. Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another's job...."

Here, Plaintiff fails to identify as a material issue of fact that he presented with symptoms on June 22, 2016, which should have put Defendant Ojelade on notice that the failure to provide a low bunk permit would result in harm to Plaintiff. He also fails to establish that, prior to February 2, 2017, Defendant Tilden was aware that he had requested medical treatment. Finally, Plaintiff fails to identify as a material issue of fact that the care rendered by Defendant Tilden on February 2, 2017, exhibited deliberate indifference. As result, Defendants' motion for summary judgment is GRANTED.

IT IS THEREFORE ORDERED:

1) Defendants' motion for summary judgment of the Wexford Defendants [ECF 80] is GRANTED. The Clerk of the Court is directed to enter judgment in favor of Defendants and against Plaintiff. This case is terminated, with the parties to bear their own costs. All deadlines, internal settings and pending motions are vacated.

2) If Plaintiff wishes to appeal this judgment, he must file a notice of appeal with this Court within 30 days of the entry of judgment. Fed. R. App. P. 4(a)(4).

3) If Plaintiff wishes to proceed *in forma pauperis* on appeal, his motion for leave to appeal *in forma pauperis* must identify the issues Plaintiff will present on appeal to assist the Court in determining whether the appeal is taken in good faith. *See* Fed. R. App. P. 24(a)(1)(c); *see also Celske v. Edwards*, 164 F.3d 396, 398 (7th Cir. 1999) (an appellant should be given an opportunity to submit a statement of his grounds for appealing so that the district judge "can make a responsible assessment of the issue of good faith."); *Walker v. O'Brien*, 216 F.3d 626, 632 (7th Cir. 2000) (providing that a good faith appeal is an appeal that "a reasonable person could suppose . . . has some merit" from a legal perspective). If Plaintiff does choose to appeal, he will be liable for the $505.00 appellate filing fee regardless of the outcome of the appeal.

ENTERED: 3/20/2019

s/Joe Billy McDade
JOE BILLY McDADE
UNITED STATES DISTRICT JUDGE

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 2, 2020

Before

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 19-1829

GREGORY JONES,
Plaintiff-Appellant,

v.

ANDREW TILDEN and RILIWAN OJELADE,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois.

No. 17-cv-1248

Joe Billy McDade,
Judge.

ORDER

On consideration of the petition for rehearing and for rehearing en banc filed by Plaintiff-Appellant on November 13, 2020, no judge in active service has requested a vote on the petition for rehearing en banc, and the judges on the original panel have voted to deny rehearing.

Accordingly, the petition for rehearing is **DENIED**.

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