NOT RECOMMENDED FOR PUBLICATION
File Name: 22a0372n.06

Case No. 21-3722

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SCOTT D. CREECH,

Plaintiff-Appellant,

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, et al.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

OPINION

Before: DONALD, BUSH, and NALBANDIAN, Circuit Judges.

BERNICE BOUIE DONALD, Circuit Judge. Plaintiff Scott Creech appeals from the district court's opinion and order granting summary judgment in favor of Defendant Ohio Department of Rehabilitation and Correction ("ODRC"). On appeal, Creech argues that (1) the district court erred in finding that he failed to present a genuine dispute on his claim under Title II of the Americans with Disabilities Act ("ADA"); and (2) the district court erred in concluding that ODRC is entitled to immunity under the Eleventh Amendment. For the reasons stated below, we affirm the district court's grant of summary judgment for ODRC on ADA grounds alone.

I. BACKGROUND

Creech is currently an inmate at the Chillicothe, Ohio, Correctional Institution ("CCI"), which is operated by the Ohio Department of Rehabilitation and Correction ("ODRC"). He has been an inmate at CCI since 2008.

Appendix - A

In June 1988, Creech was involved in a motorcycle accident, which resulted in him receiving Social Security disability benefits.[1] Then, in 1999, after another motorcycle crash, Creech was flown by helicopter to Grant Medical Center in Columbus, where he was hospitalized for 31 days. Creech suffered a brain hemorrhage, a separated AC joint in his right shoulder, multiple rib fractures, a spinal compression fracture, and various other injuries.[2] At his deposition, Creech testified that he was placed in a medically induced coma for two weeks and that his torn ACL was never surgically repaired.

During his recovery from the 1999 crash, Creech was prescribed painkillers and a cane. In the years immediately following the crash, Creech would always keep the cane with him on the street so that he could use the cane whenever he needed. Creech was prescribed a cane again in 2006, which he continued to carry in his car and use periodically as needed.

Creech found himself back in ODRC custody in 2008. Creech's cane was taken before he was transferred to CCI in December 2008. By 2012, Creech was reissued a cane by CCI medical staff, and, due to his shoulder injury that stemmed from the 1999 crash, he also had a bottom-bunk restriction. The cane and the bottom-bunk assignment were issued as medical restrictions in accordance with ODRC policy.[3] The Amended Complaint alleges that an orthopedic surgeon at Correctional Medical Center ("CMC") instructed Creech to continue using the cane, but as the

[1] Creech continued to receive disability payments from 1989 until 2008, when his benefits were suspended because of his current prison sentence.

[2] Although Creech filed his 1999 medical records as a supplement in support of his motion for summary judgment, there is no indication that the information from his hospital records was ever made known to CCI medical personnel, or even incorporated into his prison medical file.

[3] Per ODRC's guidelines for medical restrictions, a medical restriction is "[a] medical accommodation written by a physician or other advanced health care provider, used to address a serious medical need. Medical restriction orders are temporary and must be regularly reviewed and rewritten." R. 74-3, PageID# 926.

magistrate judge points out, there is no order to that effect. As required, Creech's medical restrictions—the cane and bottom-bunk—were reviewed several times prior to August 2016.

Prior to August 2016, Creech was able to walk four or five miles at a time with the aid of his cane. On August 23, 2016, Creech had a general medical examination with Nurse Practitioner Gary Artrip. During the examination, Artrip expressly noted Creech's "swift gait [when] using [a] cane," R. 66-1, PageID# 743, and at the conclusion of the appointment, Artrip took Creech's cane. Artrip's medical opinion that Creech's "cane was no longer medically indicated [was] based on [his] medical judgment after personally observing [] Creech during a clinic evaluation, personal observations of [Creech] walking in the [prison], review of [Creech's] medical file, and the institutional security concerns regarding the use of a cane." R. 74-2, PageID# 925.

Creech unsuccessfully appealed Artrip's decision through the ODRC grievance process. During the appeal process, three additional CCI medical personnel, including the Chief Medical Inspector, the reviewer of last resort, all concluded that the cane was not medically indicated. In denying Creech's grievance as a "valid exercise of discretion," the of the reviewers explained that although Creech's "treatment" plan might not be to his "satisfaction," "the doctor's decision [was] based on [her] expert medical opinion" and "the Chief Medical Officer [had] sole responsibility for all matters involving purely clinical judgment." R. 74-4, PageID# 934. The Inspector expressly noted that Creech's "record [] indicates that you currently have no diagnosed mobility issues . . . that suggest your need for [a cane]." *Id.* at PageID# 931. After the conclusion of the grievance process, Creech did not mention the cane again in his written Health Services Requests until 2019.

After losing his cane, Creech went from walking four or five miles a day to at most one or two miles a day, if at all. If there was nice weather and Creech was not suffering from chronic

pain, he was able to walk two or three times a week, but he still suffered from significant pain while standing still, which caused him to stop going to the chow hall. Creech asserts that, without the cane, he was prevented from having full access to the law library and that he also had reduced access to the gym and the yard. Although Creech does not identify any new diagnoses stemming from the deprivation of the cane, he asserts that his health has generally diminished because he is out of shape, that he has continuous leg pain, and that he has also gained between ten and twenty pounds.

During this time, Creech continued to see medical personnel at the prison. In June 2017, Creech submitted a Health Services Request complaining of back and shoulder pain, but neither his request nor the notes from his medical appointment mention a cane. In September 2018, Creech submitted another request and asked for his bottom-bunk restriction to be renewed. In the subsequent appointment, a prison medic noted Creech "smooth[ly] [walked] without difficulty." R. 66-1, PageID# 758.

A few months later, Creech filed this lawsuit on January 11, 2019. He had another medical appointment on January 14, 2019. At the appointment, the prison personnel noted Creech walked with a "swift/steady" "gait" and "briskly r[ose] from [the] exam table." *Id.* at PageID# 763. Creech was seen at the CCI medical clinic by another nurse-practitioner on April 9, 2019. Despite not having any complaints at his April 9 examination, Creech filed a Health Services Request on April 23, 2019, stating that he needed a cane, in addition to a back brace and a knee brace. And while this was the first written record of Creech's request for a cane since the 2016 grievance process, Creech asserts that he verbally asked prison medical staff to reissue the cane at all appointments.

On May 1, 2019, Dr. Sonya Peppers saw Creech about his request for a cane, a back brace, and a knee brace. Creech informed Dr. Peppers that he had a cane for several years, that it was

recently taken from him, that his knee occasionally gave out on him and he used the cane for support, and that, at one point, he was walking four miles each day with the assistance of his cane. During the May 1, 2019 appointment, Dr. Peppers observed that Creech walked with a limp, and that there was no medical indication for the cane, but she also noted that she would review his records to determine the need for a cane. *See id.* at PageID# 774. She also noted that Creech "admitted that he does not use the cane, he had it 'just in case.'" R. 74-1, PageID# 923. Finally, in September 2019, after another physical exam, Dr. Peppers issued Creech a cane to assist with his ambulation. Her decision to issue the cane was based on several factors, including her review of Creech's medical records, new complaints of joint pain, a new physical exam, and her medical opinion. *See id.*

Creech, proceeding pro se below, brought this action under Title II of the Americans with Disabilities Act ("ADA"), seeking damages and injunctive relief stemming from ODRC denying him the use of a cane from August 2016 until September 2019. At the close of discovery, the parties filed cross motions for summary judgment. The magistrate judge issued a Report and Recommendations; Creech filed objections; the magistrate judge filed a Supplemental Report and Recommendations; and Creech filed objections to the magistrate's Supplemental Report and Recommendations. The district court overruled Creech's objections and adopted the magistrate judge's Report and Supplemental Report, granted ODRC's motion for summary judgment, and denied Creech's motion for summary judgment. *See* R. 94, PageID# 1126. We now consider Creech's appeal.

I.

We review de novo a district court's grant of summary judgment, viewing the evidence in the light most favorable to the nonmoving party and drawing all justifiable inferences in the

nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). At the summary judgment stage, the central question is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251–52. In other words, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks omitted). "This court can affirm a decision of the district court on any grounds supported by the record, even if different from those relied on by the district court." *Garza v. Lansing Sch. Dist.*, 972 F.3d 853, 877 (6th Cir. 2020) (quoting *Brown v. Tidwell*, 169 F.3d 330, 332 (6th Cir. 1999) (per curiam)). And because Creech proceeded pro se below, we construe liberally his district court filings. *See Franklin v. Rose*, 765 F.2d 82, 85 (6th Cir. 1985) (noting that the liberal construction of pro se filings may require "active interpretation").

Title II of the ADA provides that "no qualified individual with a disability shall, because of that disability, 'be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.'" *Mingus v. Butler*, 591 F.3d 474, 481–82 (6th Cir. 2010) (quoting 42 U.S.C. § 12132). The ADA's broad definition of discrimination includes failing to provide "reasonable accommodations to the *known* physical or mental limitations of an otherwise qualified individual with a disability who is an applicant . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such entity." 42 U.S.C. § 12112(b)(5)(A) (emphasis added). Under the ADA, a disability is "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A). Major life activities include, but are not limited to, walking, standing, lifting, and working. *See* 42 U.S.C.

§ 12102(2)(A). And, "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures[,]" including mobility devices, or other "reasonable accommodations or auxiliary aids or services[.]" 42 U.S.C. § 12102(4)(E)(i)(I), (III).

Creech brought his claim solely under Title II of the ADA, which expressly states that "no qualified individual with a disability shall," because of their disability, "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. Essentially everything a public entity does is covered by the phrase "services, programs, or activities[.]" *Anderson v. City of Blue Ash*, 798 F.3d 338, 356 (6th Cir. 2015) (citations omitted). "The ADA applies to both federal and state prisons." *Mingus*, 591 F.3d at 482. This Court has explained that "covered entities," including prisons, must provide "meaningful access" to their services, programs, and utilities. *Keller v. Chippewa Cnty., Mich, Bd. of Comm'rs*, 860 F. App'x 381, 386 (6th Cir. 2021) (quotation omitted). We have also noted that because the ADA expressly includes failure to accommodate in the definition of disability discrimination, we apply the direct test for failure-to-accommodate claims. *See Fisher v. Nissan N. Am., Inc.*, 951 F.3d 409, 416–17 (6th Cir. 2020) (collecting cases and noting that failure-to-accommodate claims "necessarily involve direct evidence . . . of discrimination"); *Keller*, 860 F. App'x at 385 (citations omitted) (framing failure to provide reasonable accommodations as direct evidence of disability discrimination). To state a prima facie case of disability discrimination based on a failure to provide reasonable accommodations, Creech must show that: (1) he has a disability; (2) he is otherwise qualified; and (3) he was excluded from participation in, denied the benefits of, or subjected to discrimination under the program because of his disability. *Anderson*, 798 F.3d at 356; *cf.*, *Keller*, 860 F. App'x at 385–86. In other words, Creech must demonstrate that ODRC

knew that he was disabled and refused to provide a reasonable accommodation for his disability. *See Anderson,* 798 F.3d at 357 (citing *Turner v. City of Englewood*, 195 F. App'x 346, 353 (6th Cir. 2006)).

Creech asserts that ORDC failed to accommodate his disability when it took his cane in August 2016 because, without his cane, his mobility decreased to the point that he eventually could not walk safely to and from the chow hall, and that his reduced mobility prevented "full access" to both law library and the exercise facilities at CCI. Creech argues that taking his cane constituted a denial of meaningful access to CCI's chow hall, law library, and the exercise facilities at the gym and yard. On appeal, ODRC argues that that Creech failed to establish that providing a cane was a reasonable accommodation where the cane was removed based on the medical opinion of a duly qualified medical professional; and that Creech has not demonstrated that he was denied meaningful access to any prison services, programs, or activities. *See* Appellee Br. at 14–32.

In the prison context, as here, Title II plainly covers recreational, medical, educational, and vocational activities. *See United States v. Georgia*, 546 U.S. 151, 157 (2006) (citations omitted). The critical question, however, is whether Creech created a genuine dispute regarding whether ODRC *knew* Creech was disabled and denied him a reasonable accommodation. *See Anderson,* 798 F.3d at 357 (citations omitted). The district court found, and we agree, that Creech failed to present evidence that he was denied a reasonable accommodation. Creech's medical restrictions were reviewed several times between 2012 and 2016, as required by ODRC policy. ODRC expressly requires regular review of medical restrictions. Creech's medical records also reflect that—and Creech concedes as much—Artrip removed the cane based on his medical judgment, and Dr. Peppers reissued the cane based on her own medical judgment. And in his deposition,

Creech recognized that mobility devices like canes can present a security risk to inmates and prison staff alike. *See* R. 66-1, PageID# 515–17.

Further, each time Creech submitted a Health Services Request, he was promptly seen by a qualified medical professional. As noted above, after Creech exhausted the grievance process, not one of Creech's Health Services Requests mentioned a cane until April 2019. And the medical records from his appointments do not mention any requests for a cane.[4] Rather, the medical personnel noted his "smooth ambulation without difficulty" and that his gait was "swift/steady." R. 66-1, PageID# 758, 763. Creech similarly does not argue that these medical opinions were objectively unreasonable. *See Keller*, 860 F. App'x at 386 (finding that although plaintiff "may not have received" the type of medical treatment he sought, he nonetheless received "meaningful access to medical treatment"). The record also lacks evidence to suggest that ODRC medical personnel had actual knowledge of the injuries he sustained in his two motorcycle crashes.

To his credit, Creech rightfully points out that the ADA states "episodic" impairment is a disability if it "substantially limit[s] a major life activity when active." *See* Appellant Br. at 22 (quoting 42 U.S.C. § 12102(4)(D)). The ADA also instructs that "whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as . . . mobility devices." *Id.* § 12102(4)(E)(i). Putting these provisions together, Creech argues that he was impermissibly deprived of a reasonable accommodation because Artrip considered the "ameliorative effect[]" of Creech's cane. Creech's argument does not change the outcome of this case. True, during the August 23, 2016 examination, Artrip observed that Creech had a swift gait when using the cane, and, based on his medical judgment,

[4] Creech admits he did not renew his request for a cane in any of his *written* Health Services Requests until his April 23, 2019 request. And when Creech did put his request in writing, in April 2019, he was reissued a cane in a matter of months.

Artrip concluded that the cane was not medically indicated. But Creech does not argue that Artrip's medical judgment was objectively unreasonable. Even if we were to assume that Creech's proposed accommodation was a reasonable one for his disability, the ADA specifies that an entity is not required to provide the proposed accommodation if it would "fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved." 42 U.S.C. § 12201(f). And it can hardly be disputed that providing a cane in express contravention of ODRC policy, where competent medical professionals' medical judgment goes unchallenged, would fundamentally alter the nature of the accommodations involved.

Ultimately, Creech simply has not created a genuine issue of material fact regarding whether ODRC denied or removed a reasonable accommodation where the relevant decisions were all made by competent, qualified medical professionals acting in accordance with ODRC policy. Therefore, the district court properly awarded summary judgment on Creech's failure-to-accommodate claim.

II.

Although the district court's merits decision was clearly supported by law and the record, the district court should have confined its inquiry to the reasonable accommodation analysis. *See Zibbell v. Michigan Dept. of Human Services*, 313 F. App'x 843, 850 (6th Cir. 2009) (affirming district court's dismissal of nonviable Title II ADA claim, but declining to affirm district court's independent ground that defendants were entitled to immunity under the Eleventh Amendment despite conclusions regarding ADA claim). Indeed, the Supreme Court's opinion in *United States v. Georgia*, 546 U.S. 151 (2006), sets out "a procedure for lower courts to follow when confronted with a state's claim of immunity under the Eleventh Amendment" in cases involving Title II of the ADA. *See Zibbell*, 313 F. App'x at 847. We explained that, "under *Georgia*, the constitutional

question—abrogation of Eleventh Amendment immunity—will be reached *only* after finding a viable claim under Title II." *Id.* at 847–48 (emphasis added) (cleaned up). Here, the district court concluded that Creech's Title II ADA claim was nonviable and properly granted summary judgment on that ground. The district court's determination that Creech's Title II claim was not viable should not have been accompanied, or even preceded, by any consideration of the second and third steps of the *Georgia* analysis. *See id.* at 848. Therefore, we affirm the district's court's decision on Title-II grounds only.

III.

Because Creech failed to present a genuine issue of material fact on his Title II ADA claim, the district court's opinion should not have addressed ODRC's Eleventh Amendment immunity defense. Accordingly, we affirm the district court's grant of summary judgment in favor of ODRC on Title II grounds alone.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

SCOTT D. CREECH,

Plaintiff, : Case No. 2:19-cv-104

District Judge James L. Graham
- vs - Magistrate Judge Michael R. Merz

OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS,

Defendant. :

DECISION AND ORDER

This action under Title II of the Americans with Disabilities Act was brought *pro se* by Plaintiff Scott Creech to seek damages and declaratory relief related to the ODRC's denying him the use of a cane from August 2016 until September 2019. It is before the Court upon Plaintiff's Objections (ECF No. 85) to the Magistrate Judge's Report and Recommendations recommending dismissal of the case (ECF No. 82) and Plaintiff's Objections (ECF No. 91) to the Magistrate Judge's Supplemental Report and Recommendations (ECF No. 88) reaching the same conclusion.

When a party objects to a Magistrate Judge's recommended decision on a dispositive motion, such as the cross-motions for summary judgment at issue here, the District Judge is required to review *de novo* those portions of the Reports and Recommendations to which substantial objection is made. Fed.R.Civ.P. 72(b)(3). This Decision embodies the results of that *de novo* review.

Appendix - A

Plaintiff first objects to the Magistrate Judge's conclusion that the source of Plaintiff's medical records in support of his claim is immaterial because Defendant ODRC made no authenticity objection. (Objections, ECF No. 91, PageID 1072). Instead he asserts the source is material because he intended to show ODRC had refused to comply with discovery requests. While this point may have been material on a motion to compel discovery, it is not material to the issues in the summary judgment motions.

Plaintiff objects that infliction of unnecessary pain violates his Eighth Amendment rights as those are incorporated into the Fourteenth Amendment, citing *Estelle v. Gamble*, 429 U.S. 97 (1976), and *In re Kemmler*, 136 U.S. 436 (1890)(approving use of the electric chair for executions over an Eighth Amendment objection). He asserts, "There is no denying that Creech suffered unnecessary pain that could have been alleviated by simply reissuing the cane when it was arbitrarily taken without explanation at the time of its removal."

This is not a case where a lay prison guard is accused of intentionally inflicting pain by using excessive force. Nor is it a case where a lay prison guard took away the cane. Instead, as the Magistrate Judge reported, the cane was taken away by a trained medical person, Nurse Practitioner Artrip, who was qualified to make the decision about what assistive aids Plaintiff needed. Creech has presented no medical evidence questioning Artrip's medical judgment. A prisoner is constitutionally entitled to qualified medical attention to serious medical needs, but not to self-diagnose and then self-prescribe, particularly when the prescription is for a cane, which Creech has acknowledged creates a security risk in a prison. Creech points out several times that there is no allegation he ever used his cane as a weapon. (Objections, ECF No. 91, PageID 1074-75). However, his

good behavior does not obviate the risk, which could reasonably be considered by prison authorities, that another prisoner might take it from him and use it as a weapon. It is also true, as Creech asserts, that there is no prohibitive cost involved with providing him a cane, but no such claim has been made by ODRC.

Creech objects that he has presented some evidence questioning Artrip's judgment by noting that in May 2019, when he made a new request for the cane plus a back brace and a knee brace, CCI's Chief Medical Officer, Sonya Peppers, M.D., said she would review the old records, and then, in September, 2019, reissued the cane. (Objections, ECF No. 91, PageID 1077). Creech asks the Court to infer from this that she disagreed with Nurse Practitioner Artrip's judgment, but is a logical leap too far. Creech's medical records went considerably further back than Artrip's 2016 decision and Dr. Peppers' eventual decision was based on all the medical evidence she considered. She did not find Artrip's judgment was in error.

Creech objects that in June, 2020, he asked for an expert medical opinion, but was denied that relief because the discovery period had closed. The docket reflects that Creech did move for an expert medical opinion on June 16, 2020, (ECF No. 57) and Magistrate Judge Vascura, to whom this case was then referred, denied that request because the discovery period had closed (ECF No. 58). The docket further reflects that after the case had been pending for about three months, Magistrate Judge Vascura set a discovery cut-off date six months in the future. (Scheduling Order, ECF No. 14). She later extended that deadline five times. (ECF Nos. 28, 36, 44, 50, 52). Several of those extensions were at Plaintiff's request and he engaged actively during discovery while the discovery period

was open. Plaintiff never sought an expert medical opinion until well after the discovery period had closed and only two weeks before the dispositive motion deadline. Hence he could hardly claim surprise at the deadline or at Judge Vascura's denial of his request.

Instead, Creech claims that had he been given the expert opinion, "he could have proved that the new injuries were a direct result of N.P. Artrip's decision to remove the cane." (ECF No. 91, PageID 1077). Therefore, he says, "This matter should be for a jury to decide." Creech's claim about what an expert medical opinion would show is purely speculative. With no medical evidence at this point to call Artrip's medical judgment into question, there is no question for a jury to decide.

Creech objects that Artrip's medical judgment has been questioned in other cases, citing to *Kline v. Artrip,* 2021 U.S. Dist. Lexis 48617 (S.D. Ohio, Mar. 16, 2021), adopted 2021 U.S. Dist. LEXIS 61617 (Mar. 31, 2021). In that case, Magistrate Judge Vascura recommended that plaintiff's Eighth Amendment claim against Nurse Practitioner Artrip be dismissed for failure to state a claim, essentially because every time Kline claimed he sought treatment, Artrip had prescribed tests to determine what medical care was needed, which did not show deliberate indifference to serious medical need. This Court adopted her recommendation. *Phelps v. Ohio Dep't f Rehab & Corr.,* 2015 Ohio Misc. Lexis 104 (Ohio Ct. Cl., Aug 1 , 2015), also cited by Creech, is a case in the Court of Claims in which Artrip was a witness, in which his own referral of the plaintiff for an emergency visit to Ohio State University hospital was noted, and in which the magistrate concluded Phelps had not presented a convincing case for compensation against any of the CCI personnel.

Creech objects to the Magistrate Judge's recommendation that ODRC is immune from damages liability under the Eleventh Amendment. (ECF No. 91, PageID 1082). However, he has

offered no authority to overcome the Magistrate Judge's conclusion to the contrary, nor has he offered any rebuttal to the Magistrate Judge's observation that he was able to vigorously litigate his habeas corpus case in this Court.

Conclusion

Having considered *de novo* those portions of the Magistrate Judge's Report and Supplemental Report to which Plaintiff has objected, the Court finds that Plaintiff has not shown them to be clearly erroneous or contrary to law and they are accordingly ADOPTED. Plaintiffs' Objections are OVERRULED. The Court finds that there is no genuine dispute of material fact and Defendant is entitled to judgment as a matter of law. Defendant's motion for summary judgment (ECF No. 74) is granted. Plaintiff's motion for summary judgment (ECF No. 65) is denied. The Clerk will enter judgment in favor of Defendant and against the Plaintiff, dismissing this case with prejudice.

The Court hereby certifies to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

IT IS SO ORDERED.

Date: June 30, 2021

s/James L. Graham
James L. Graham
United States District Judge

No. 21-3722

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 5, 2023
DEBORAH S. HUNT, Clerk

SCOTT D. CREECH,

Plaintiff-Appellant,

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL.,

Defendant-Appellee.

ORDER

BEFORE: DONALD, BUSH, and NALBANDIAN, 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

*Judge Murphy recused himself from participation in this ruling.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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Filed: January 05, 2023

Mr. Scott David Creech
Chillicothe Correctional Institution
P.O. Box 5500
Chillicothe, OH 45601

Re: Case No. 21-3722, Scott Creech v. Ohio Dept of Rehabilitation
Originating Case No.: 2:19-cv-00104

Dear Mr. Creech,

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: Ms. Lori Duckworth
Mr. Salvatore Messina
Ms. Madeline Hennie Meth
Ms. Margaret Moore
Ms. Hannah Mullen
Mr. Oren Nissim Nimni
Mr. Charles A. Schneider
Mr. Samuel Weiss
Mr. Brian Wolfman
Ms. Mindy Ann Worly

Enclosure