NONPRECEDENTIAL DISPOSITION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 May 24, 2023*
Decided May 25, 2023

Before

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 22-1296

GREGORY D. JONES,
Plaintiff-Appellant,

v.

DUSTIN BAYLER,
Defendant-Appellee.

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

No. 17-1344-EIL

Eric I. Long,
Magistrate Judge.

ORDER

Gregory Jones, incarcerated in Illinois, contends that after he helped police investigate the death of another inmate, a guard harassed him in retaliation. The district court granted the guard's motion for summary judgment. The court reasoned that,

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* This appeal is successive to case nos. 19-2323 and 18-1352 and is being decided under Operating Procedure 6(b) by the same panel. We have agreed to decide the 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).

because more than six months had elapsed between Jones's role in the investigation and the alleged harassment, a jury could not infer causation. This ruling, and the other procedural orders contested on appeal, were correct, so we affirm.

Background[†]

Jones believes that Dustin Bayler, a guard at Jones's prison, is out to get him because he participated in a police investigation of the October 2015 death of a prisoner. Within a month of the death, police interviewed Jones, who said that he saw guards kill the prisoner. Bayler escorted Jones to and from the interview and gave Jones a "menacing glower." Over the next several months—according to unsworn prison grievances that Jones filed—Bayler "accost[ed]" him, targeted him for "shakedowns," continued to give him "threatening looks," rifled through and threw away his medication and legal mail, and challenged him to fights. Jones is specific about only three events: In May 2016, about six months after Jones's police interview, Jones filed a grievance complaining that Bayler and another guard put Jones in a cell with a prisoner who wanted to harm Jones. Then, in March 2017, about 15 months after the interview, Jones filed a grievance accusing Bayler of strip searching him and saying, "he'll strip search [Jones] every chance he gets." These are the only two claims that Jones fully exhausted. Finally, about a year and a half after the interview, Jones filed a grievance asserting that Bayler told a guard to assault him sexually while Bayler stood as lookout.

Jones sued prison staff under 42 U.S.C. § 1983, alleging, among other things, that they retaliated against him for exercising his First Amendment rights. The case moved in stages. First, we dismissed an interlocutory appeal. *See Jones v. Bayler* (*Jones I*), 756 F. App'x 635 (7th Cir. 2019). Later, a magistrate judge, presiding by consent, entered summary judgment for the defendants, reasoning that Jones had failed to exhaust administrative remedies. We reversed in part, ruling that Jones could proceed only with his retaliation claim, only against Bayler, and only regarding the cell assignment and strip search events. *See Jones v. Bayler* (*Jones II*), 834 F. App'x 283, 285 (7th Cir. 2021).

On remand, the case continued to progress. First, the district court reopened discovery. Jones responded with motions to compel documents he said he had sought before remand about Bayler and the alleged sexual assault. Bayler argued that he had

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[†] The district court deemed most of the defendant's proposed facts in his summary judgment motion undisputed because of Jones's noncompliance with local rules. We recount those facts, and those in genuine dispute, in the light most favorable to Jones. *See McCurry v. Kenco Logistics Servs., LLC*, 942 F.3d 783, 786–87 (7th Cir. 2019).

produced them, and Jones replied he had never received them. Scattered throughout these motions were filings styled under 28 U.S.C. § 144, seeking to disqualify the magistrate judge because of supposed partiality. The court denied all these motions.

Next, the district court set a dispositive-motion deadline of September 3, 2021. One week after that deadline, Bayler moved for an extension of time, explaining that a four-month-long ransomware attack on the Office of the Illinois Attorney General prevented file access until August 18. (Bayler did not say why he filed his motion three weeks after August 18.) Before the district court ruled, Bayler moved for summary judgment. In a two-sentence order, the court granted Bayler his requested extension and reset the deadline to receive Bayler's motion for summary judgment. In his response to that motion, Jones contended the district court should have denied Baylor's requested extension because Bayler had filed it after the original deadline. *See* C.D. ILL. R. 6.1. (Jones attached what purported to be a timely objection to the extension motion, but it does not appear that the district court received it.)

The district court later entered summary judgment for Bayler, accepting one of his principal arguments. He had argued that the time between Jones's police interview and the housing assignment (six months) or the strip search (15 months) was too long by itself for a reasonable jury to infer a causal connection. Jones did not engage with this argument. Instead, he reargued that the court should have granted his discovery and recusal motions. The court agreed with Bayler's argument and entered summary judgment for him.

Analysis

On appeal, Jones challenges the decisions (1) to grant Bayler the extension of time, (2) to grant Bayler's motion for summary judgment, (3) to deny Jones's motion to compel, and (4) to deny Jones's motion to disqualify the magistrate judge.

Bayler's Motion for Extension of Time

Jones argues the district court was required to deny Bayler's request for more time because Bayler made this request after the deadline of September 3, 2021, and, under the court's local rules, "[m]otions [for extension of time] filed out of time *will* be denied." C.D. ILL. R. 6.1 (emphasis added). But Jones's reading of this local rule would put it at odds with Rule 6(b)(1)(B) of the Federal Rules of Civil Procedure. The federal rule says that a district court may grant an extension motion filed after the deadline "if the party failed to act because of excusable neglect." This means that courts have

discretion to grant a post-deadline motion. *See Nartey v. Franciscan Health Hosp.*, 2 F.4th 1020, 1024 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 2770 (2022). And we interpret the local and federal rules to operate consistently. *See* FED. R. CIV. P. 83(a)(1); *Marcure v. Lynn*, 992 F.3d 625, 632 (7th Cir. 2021).

The issue is thus whether the district court abused its discretion when it ruled that Bayler showed excusable neglect and gave him more time. We conclude that it did not. District courts "enjoy wide latitude" when determining whether a litigant has shown excusable neglect, and we do not "micromanage" judges' decisions regarding their dockets. *Nartey*, 2 F.4th at 1024. Jones is correct that for three weeks after the end of the ransomware attack, Bayler neglected to ask for more time. But "[t]he point of the excusable-neglect standard is that neglect is assumed." *Mayle v. Illinois*, 956 F.3d 966, 968 (7th Cir. 2020). And the district court could reasonably conclude that Bayler's motion—coming only one week after the deadline, following a months-long cyber-attack, and causing Jones no prejudice—was excusably late. *See id.* (neglect excusable when an extension motion came two days after the deadline); *cf. Bowman v. Korte*, 962 F.3d 995, 997–98 (7th Cir. 2020) (neglect inexcusable when filing came almost two years after deadline). The order granting the motion was terse, but we can affirm an unexplained exercise of discretion when, as here, the record discloses a reason for the court's discretion. *Mayle*, 956 F.3d at 696.

Bayler's Motion for Summary Judgment

The district court ruled that no reasonable jury could find that Jones's protected activity of participating in the police investigation was "a motivating factor" for adverse actions by Bayler. *FKFJ, Inc. v. Vill. of Worth*, 11 F.4th 574, 585 (7th Cir. 2021). The court reasoned that, without other evidence, the two events subject to the remand order (cell assignment and strip search) occurred too long (six to 15 months) after the investigation to infer causation. *See id.* at 586–87 (two-to-three-month gap by itself insufficient to infer retaliation).

Jones responds that the district court overlooked other evidence. He contends that Baylor conducted a "campaign of retaliation" beginning almost immediately after the investigation and culminating in events like the cell assignment and strip search. It is true that "an ongoing pattern of retaliation" can support a retaliation claim even if the apex of the retaliation came months after the protected activity. *Carlson v. CSX Transp., Inc.*, 758 F.3d 819, 829 (7th Cir. 2014). But for two reasons, Jones's theory of a "campaign of retaliation" fails.

First, Jones waived this argument by not raising it in the district court. *See Bradley v. Vill. of Univ. Park*, 59 F.4th 887, 897 (7th Cir. 2023). His summary judgment response—even when read liberally, *see Atkins v. Gilbert*, 52 F.4th 359, 361 (7th Cir. 2022)—focused on discovery, disqualification, and the extension-of-time issue. Jones barely discussed the merits of his retaliation claim, and he never mentioned his new "campaign" theory.

Second, waiver aside, this argument fails because the record does not contain sufficient admissible evidence of a campaign. Jones references his grievances, where he accuses Bayler of glowering, shaking him down, challenging him to fights, and rifling through possessions. But evidence cited at summary judgment must be admissible at trial. *Igasaki v. Ill. Dep't of Fin. & Pro. Regul.*, 988 F.3d 948, 955–56 (7th Cir. 2021); *see* FED. R. CIV. P. 56(c)(2). The grievances—unsworn statements not subject to the penalties of perjury—are, however, inadmissible. *See Vaughn v. King*, 167 F.3d 347, 354 (7th Cir. 1999); FED. R. EVID. 801(c), 802; *accord United States v. Caraway*, 534 F.3d 1290, 1295 (10th Cir. 2008). Jones's deposition testimony, though admissible, is too vague. There, he describes several events, but he does not date them. In any case, it was neither the district court's job nor is it ours to "scour the record ... for factual disputes." *Burton v. Bd. of Regents of the Univ. of Wis. Sys.*, 851 F.3d 690, 695 (7th Cir. 2017).

We address two final points related to summary judgment. First, Jones stresses that the district court "ignored" his allegations that Bayler directed another guard to sexually assault him. But in one of the prior appeals, we affirmed the court's dismissal of that claim because Jones failed to exhaust it. *See Jones II*, 834 F. App'x at 285. Thus, the court properly treated that claim as outside the scope of the suit on remand. Second, in his reply brief, Jones includes an affidavit from another prisoner who swears he heard Bayler admit that he was retaliating against Jones. But we do not consider this evidence because it was not part of the summary judgment record and because Jones only belatedly raises it for the first time in his reply brief. *See Bradley*, 59 F.4th at 897.

Jones's Motion to Compel

Jones next challenges the denial of his motion to compel documents about Bayler and the sexual assault. But Jones omits a necessary element from his argument: how the denial prejudiced him. *See Kuttner v. Zaruba*, 819 F.3d 970, 974 (7th Cir. 2016). He does not explain how these documents could have possibly addressed the problem with the gap of time between the protected activity and the cell assignment and strip search. Accordingly, he gives us no reason to disturb this ruling.

Jones's Motion to Disqualify

Jones argues last that the magistrate judge should have recused himself. Judges must recuse themselves if, in addition to other procedural requirements, a party files an affidavit detailing the judges' "personal bias or prejudice." 28 U.S.C. § 144; *United States v. Betts-Gaston*, 860 F.3d 525, 537 (7th Cir. 2017). Jones contends the affidavit he filed detailed the magistrate judge's prejudice against him and favor for Bayler, so the judge should have removed himself from the case. We independently review the judge's decision not to remove himself. *Hoffman v. Caterpillar, Inc.*, 368 F.3d 709, 713 (7th Cir. 2004). Because § 144 requires that a judge be removed from a case if a party's affidavit is sufficient, we strictly enforce the statute's procedural requirements. *Betts-Gaston*, 860 F.3d at 537.

The magistrate judge did not err in denying Jones's motion to disqualify because Jones's affidavit lacked necessary detail. An affidavit under § 144 must contain "facts that are sufficiently definite and particular to convince a reasonable person that bias exists; simple conclusions, opinions, or rumors are insufficient." *Hoffman*, 368 F.3d at 718 (internal citation omitted); *accord United States v. Sypher*, 684 F.3d 622, 628 (6th Cir. 2012); *see generally* 13D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, ET AL., FEDERAL PRACTICE & PROCEDURE § 3551 (3d ed. 2008 & Supp. 2022). Jones filed many documents he labeled as "affidavits," but the one that targets the magistrate judge's supposed prejudice is too conclusory. He asserted that the district and magistrate judges in his case "have demonstrated blithe bias and favor for the defense" and thus "have demonstrated their allegiance as enemies of civil rights." This is the opposite of the concrete facts that a § 144 affidavit must contain to force a judge's removal from a case. The closest Jones gets to specifics is to refer to the times the magistrate judge ruled against him. But adverse rulings alone are generally insufficient evidence to show prejudice, *see Liteky v. United States*, 510 U.S. 540, 555 (1994), and we do not see sufficient evidence to depart from that rule here.

AFFIRMED

E-FILED
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Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

GREGORY DAVID JONES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No.: 17-1344-CSB**
	)	
	)	
DUSTIN BAYLER, *et al.*,	)	
	)	
Defendants.	)	

ORDER

COLIN S. BRUCE, U.S. District Judge:

This cause is before the Court on Plaintiff Gregory David Jones' pending motions.

Jones has filed two motions asking the Court to enter a preliminary injunction. In his first motion, Jones asserts that the Court misconstrued his original motion for a preliminary injunction, in that, he was not asking to be transferred to an Illinois Department of Corrections ("IDOC") facility of his own choosing. Instead, Jones states that he was merely informing the Court that it should not send him to certain IDOC facilities based upon the retaliation and other issues that he has encountered at those institutions.

In addition, Jones argues that it is impossible for him to identify all of the individuals who are retaliating against him based upon his attempts to speak with the Illinois States Police concerning the murder of an inmate in protective custody at the Pontiac Correctional Center ("Pontiac"). Jones contends that he has a First Amendment

right to speak with the Illinois State Police and that there is a "campaign of terror" being waged against him by nearly all of the employees at Pontiac to silence his attempts to speak with the Illinois State Police. These attempts include, but are not limited to, removing Jones' legal papers and his medications during cell shakedowns. Accordingly, Jones again asks the Court to transfer him to a safer facility.

In his second motion for preliminary injunctive relief, Jones again asks the Court for an Order compelling the IDOC to transfer him to a "safer" facility. Jones argues that such an Order is necessary because, after he filed his previous motion for injunctive relief and other motions, Defendant Warden Michael Melvin assigned the correctional officer who Jones witness kill another inmate to guard Jones, and Warden Melvin ordered another inmate to sexually assault Jones during a cell shakedown. As a result, Jones asserts that an injunction requiring the IDOC to transfer him to a different facility is necessary to save his life.

The law governing a request for a temporary restraining order or a preliminary injunction is well-established. Jones seeks a mandatory preliminary injunction, and mandatory injunctions are very rarely issued except on the clearest equitable grounds. *W.A. Mack v. General Motors Corp.*, 260 F.2d 886, 890 (7th Cir. 1958).

The standards for entering a temporary restraining order are identical to those for entering a preliminary injunction. *Anthony v. Village of South Holland*, 2013 WL 5967505, * 2 (N.D. Ill. Nov. 8, 2013). "To obtain a preliminary injunction, the moving party must show that its case has 'some likelihood of success on the merits' and that it has 'no adequate remedy at law and will suffer irreparable harm if a preliminary

injunction is denied.'" *Stuller, Inc. v. Steak N Shake Enter., Inc.*, 695 F.3d 676, 678 (7th Cir. 2012) (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011).

If the moving party meets these threshold requirements, the district court "must consider the irreparable harm that the nonmoving party will suffer if preliminary relief is granted, balancing such harm against the irreparable harm the moving party will suffer if relief is denied." *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). The district court must also consider the public's interest in an injunction. *Id.*

In this balancing of harms, the district court must weigh these factors against one another "in a sliding scale analysis." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). "The sliding scale approach is not mathematical in nature, rather 'it is more properly characterized as subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief.'" *Ty, Inc.*, 237 F.3d at 895-96 (quoting *Abbot Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992)).

A preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). The movant must carry his burden of persuasion on each of the elements necessary to enter injunctive relief in order to obtain injunctive relief. *Rust Envt. & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1219 (7th Cir. 1997) (holding that a party seeking a preliminary injunction must satisfy each element).

Here, Jones' motions for preliminary injunctive relief are denied. Contrary to Jones' contention, the injunction sought by him is against public policy. As the Court

has previously explained to Jones, involvement in the day-to-day operations of a prison is something that courts should be hesitant to do. *Johnson v. California*, 543 U.S. 499, 529 (2005)("Well before *Turner*, this Court recognized that experienced prison administrators, and not judges, are in the best position to supervise the daily operations of prisons across this country."); *Lewis v. Casey*, 518 U.S. 343, 361(1996) (same). This hesitancy specifically includes becoming involved in prison designations and cell assignments. *Pippin v. Frank*, 2005 WL 1378725, * 10 (W.D. Wis. June 6, 2005)(citing *Veney v. Wyche*, 293 F.3d 726, 733 (4th Cir. 2002)). Prison officials, not federal courts, are the experts in prison administration and are, therefore, in the best position to make policy decisions and decisions regarding prison assignments. *Charles v. Neal*, 2017 WL 4075217, * 3 (N.D. Ind. Sept. 14, 2017)("Typically, prison officials are afforded 'wide-ranging deference' in the day-to-day operations of a correctional facility. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). Thus, prison officials have authority to house an inmate in any correctional facility they deem appropriate, and an inmate has no constitutional right to be housed in a particular correctional facility or in the facility of her choosing."); *Scruggs v. Penning*, 2017 WL 2664767, * 2 (N.D. Ind. June 21, 2017)(same).

Although Jones denies that he is requesting to be placed in an IDOC facility of his choosing, he identifies three, in addition to Pontiac, facilities where the Court should not send him. Therefore, Jones' argument is a distinction without a difference. Jones is, essentially, asking the Court to send him to an IDOC of his choosing (or, at least, to a facility from a list that he deems appropriate), and the Court will not engage in such micromanagement of the IDOC.

Furthermore—and again contrary to Jones' claim—Jones has not established that he is likely to succeed on the merits of his claim. Jones has asked the Court to enter a very broad, sweeping injunction that would require his constant protection from harm and that would transfer him to a different IDOC facility. Jones further wants the Court to enter an injunction against un-named and un-identified individuals who have engaged in a grand conspiracy to retaliate against him. Such injunctions are contrary to the Prison Litigation Reform Act's requirement that injunctions be narrowly drawn. 18 U.S.C. § 3626(a)(2). In addition, prisons are dangerous places, and Jones' safety cannot be assured by this Court no matter how many times he is transferred to a different facility. *Armalin v. Grant County Jail*, 2018 WL 620380, * 1 (N.D. Ind. Jan. 30, 2018) (quoting *Grieveson v. Anderson*, 538 F.3d 763, 777 (7th Cir. 2008)(holding that "prisons are dangerous places. Inmates get there by violent acts, and many prisoners have a propensity to commit more.").

Finally, Jones offers no evidence to show that he is likely to succeed on his retaliation claim. "Although it is easy to state a retaliation claim, *Walker v. Thompson*, 288 F.3d 1005, 1009 (7th Cir.2002) (petitioner need not allege a chronology of events from which retaliation could be plausibly inferred), the burden of proving the claim is heavy, *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996)." *Cole v. Litscher*, 2005 WL 627791, * 6 (W.D. Wis. Mar. 15, 2005). Jones offers nothing other than his unverified statements contained within his motions to show that anyone is retaliating against him or threatening to retaliation against him because he has and desires to assist the Illinois State Police. *Johnson v. City of Rock Island, Illinois*, 2012 WL 5425605, * 2 (C.D. Ill. Nov. 6,

2012)(internal citations omitted)("District Court does not have jurisdiction to award a preliminary injunction for an injury unrelated to any cause of action found in the complaint."). Accordingly, Jones' motions for preliminary injunctive relief are denied.

Finally, Jones' motion for extension of time is denied. As the Court under understands Jones' motion, he is asking this Court to extend the time within which he has to file a notice of appeal to challenge an Order entered by the Honorable Joe Billy McDade in another case that Jones has pending with this Court. *See* CDIL Case Number 17-1248.

This Court lacks the authority to grant any type of relief in a matter that is not pending before it. Any request for an extension of time in case number 17-1248 should be filed in that case with Judge McDade. Regardless, the Court has reviewed the docket in case number 17-1248, and Jones has filed a notice of appeal in that case. Accordingly, Jones' motion is moot.

To the extent that Jones is seeking an extension to file a notice of appeal challenging the instant Order, Jones has failed to demonstrate that an extension is necessary. A notice of appeal is not an onerous document to prepare or to file as is evidenced by the notice that Jones filed in case number 17-1248. Moreover, the Court is unwilling to give an extension to Jones to file a notice of appeal to challenge an Order that Jones has neither read or received.

IT IS, THEREFORE, ORDERED:

1. **Plaintiff's motions for preliminary injunctive relief [26 & 29] are DENIED.**

2. Plaintiff's motion for an extension of time [33] is DENIED.

Entered this 14th day of February, 2018

s/ Colin S. Bruce
COLIN S. BRUCE
UNITED STATES DISTRICT JUDGE

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Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

GREGORY DAVID JONES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No.: 17-1344-EIL**
	)	
	)	
DUSTIN BAYLER,	)	
	)	
Defendant.	)	

ORDER

ERIC I. LONG, U.S. Magistrate Judge:

This cause is before the Court on Defendant Dustin Bayler's motion for summary judgment. As explained more fully below, Sgt. Bayler is entitled to the summary judgment that he seeks because Plaintiff Gregory David Jones has failed to identify a genuine issue of material fact that would preclude summary judgment in Sgt. Bayler's favor and because Sgt. Bayler has demonstrated that he is entitled to judgment as a matter of law.

I.
MATERIAL FACTS

Plaintiff Gregory David Jones is an inmate with the Illinois Department of Corrections ("IDOC") who is currently incarcerated at the IDOC's Western Illinois Correctional Center. However, Plaintiff was incarcerated at the IDOC's Pontiac Correctional Center ("Pontiac") during all times relevant to his Complaint. Defendant Dustin Bayler is a Correctional Sergeant at Pontiac.

On July 25, 2017, Plaintiff filed this lawsuit, under 42 U.S.C. § 1983, alleging that Sgt. Bayler retaliated against him because he cooperated with an Illinois State Police investigation into the murder of another Pontiac inmate (*i.e.*, Terrance Jenkins) and because Plaintiff had filed several emergency grievances. In his Complaint, Plaintiff claimed that Sgt. Bayler recruited other officers to retaliate against him, including convincing an officer to sexually assault Plaintiff. Plaintiff further claimed that Michael Melvin, who was the Warden at Pontiac when Plaintiff was there, did nothing to protect him from Sgt. Bayler's retaliation despite his knowledge of the retaliation.

After a merit review of Plaintiff's Complaint under 28 U.S.C. § 1915A, the Court found that Plaintiff's Complaint stated a First Amendment retaliation claim against Sgt. Bayler and a claim against Warden Melvin for failure to protect him from Sgt. Bayler's retaliation in violation of his Eighth Amendment rights. Thereafter, however, the Court dismissed this case based upon Plaintiff's failure to exhaust his administrative remedies before he filed this suit as required by the Prison Litigation Reform Act.

The United States Court of Appeals affirmed, in part, and reversed, in part, this Court's Summary Judgment Order on the issue of exhaustion. Specifically, the Seventh Circuit reversed the Court's decision as to Sgt. Bayler but affirmed this Court's Order in all other respects. Accordingly, the Seventh Circuit held that Plaintiff could proceed on his First Amendment retaliation claim against Sgt. Bayler as it related to Plaintiff's second (May 2016) and third grievances (March 2017).

In his second grievance that he submitted May 2016, Plaintiff alleged that he feared that his life was in danger at Pontiac because Sgt. Bayler and another officer had

retaliated against him for cooperating with a murder investigation of another inmate (*i.e.*, Terrance Jenkins) by housing him with a prisoner who they knew wanted to hurt him. In the third grievance, filed in March 2017, Plaintiff asserted that Sgt. Bayler strip searched him and taunted him by claiming that he [Sgt. Bayler] would "strip search [Jones] every chance he gets."

Sgt. Bayler has now moved for summary judgment on Plaintiff's First Amendment retaliation claim against him. Further facts will be included *infra* as necessary.[1]

II.
STANDARDS GOVERNING SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(a) provides that summary judgment shall be granted if 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); *Ruiz-Rivera v. Moyer*, 70 F.3d 498, 500-01 (7th Cir. 1995). The moving party has the burden of providing proper documentary evidence to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Once the moving party has met its

[1] Although he filed a response to Sgt. Bayler's motion for summary judgment, Plaintiff did not comply with the Court's Local Rules in formulating his response. Local Rule 7.1(D)(2)(b)(6) provides that "[a] failure to respond to any numbered fact [contained within a motion for summary judgment] will be deemed an admission of the fact." *Id.* Plaintiff's response does not respond to each of Sgt. Bayler's numbered facts, and therefore, Plaintiff has admitted all of the relevant facts that show that Sgt. Bayler is entitled to summary judgment. The Court incorporates those facts herein. *Parra v. Neal*, 614 F.3d 635, 636 (7th Cir. 2010), *as revised* (July 19, 2010)(internal citations omitted)("At summary judgment, the plaintiffs filed an opposition to the defendants' motion but did not bother to respond to their statement of material facts.").

burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine issue for trial. *Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291, 294 (7th Cir. 1997). "[A] party moving for summary judgment can prevail just by showing that the other party has no evidence on an issue on which that party has the burden of proof." *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1183 (7th Cir. 1993).

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 fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 261 (Brennan, J., dissenting) (1986)(quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)); *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 818 (7th Cir. 1999). 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*, 477 U.S. at 252.

III.
SGT. BAYLER DID NOT VIOLATE PLAINTIFF'S FIRST AMENDMENT RIGHTS

The undisputed evidence demonstrates that Sgt. Bayler did not violate Plaintiff's First Amendment rights by retaliating against him because he exercised his First Amendment rights. Accordingly, Sgt. Bayler is entitled to summary judgment.

As other district courts have noted, "[a] retaliation claim is easy to plead yet difficult to prove." *Hashim v. Hamblin*, 2015 WL 1840434, * 5 (E.D. Wis. Apr. 22, 2015). In order "[t]o prevail on a First Amendment retaliation claim, [a plaintiff] must ultimately show that (1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation that would likely deter First Amendment activity in the future; and (3) the First Amendment activity was at least a motivating factor in the Defendants' decision to take the retaliatory action." *Id.* at 546 (internal quotations omitted); *Gomez v. Randle*, 680 F.3d 859, 866 (7th Cir. 2012)(same); *Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006).

If the plaintiff is able to satisfy this *prima facie* case, the burden shifts to the defendant "to rebut with evidence that the [defendant's animus] though a sufficient condition was not a necessary condition of the conduct, *i.e.*, it would have happened anyway." *Green v. Doruff*, 660 F.3d 975, 980 (7th Cir. 2011). If the defendant can make such a showing, the plaintiff "must then demonstrate that the defendant's proffered reasons for the decision were pretextual and that the retaliatory animus was the real reason for the decision." *Zellner v. Herrick*, 639 F.3d 371, 378-79 (7th Cir. 2011).

"An act taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir. 2000). "Otherwise permissible actions by prison officials can become impermissible if done for retaliatory reasons." *Zimmerman v. Tribble*, 226 F.3d 568, 573 (7th Cir 2000). "A 'motivating factor' in this context 'is a factor that weighs in [on] the defendant's decision to take the action complained of-in other words, it is a consideration present to his mind that favors, that

pushes him toward action." *Dace v. Smith-Vasquez*, 658 F. Supp. 2d 865, 881 (S.D. Ill. 2009)(quoting *Hasan v. United States Dept. of Labor*, 400 F.3d 1001, 1006 (7th Cir. 2005)).

A plaintiff may demonstrate that his speech was a motivating factor behind the defendant's retaliatory actions by presenting direct or circumstantial evidence. *Kidwell v. Eisenhauer*, 679 F.3d 957, 965 (7th Cir. 2012).

"Direct evidence is evidence which, if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption." *Rudin v. Lincoln Land Cmty. College*, 420 F.3d 712, 720 (7th Cir. 2005)(internal quotation omitted). Direct evidence is rare and is something along the lines of a direct admission. *Naficy v. Illinois Dept. of Human Servs.*, 697 F.3d 504, 512 (7th Cir. 2012); *Benders v. Bellows & Bellows*, 515 F.3d 757, 764 (7th Cir. 2008).

On the other hand, "[c]ircumstantial evidence . . . is evidence from which a trier of fact may infer that retaliation occurred." *Kidwell*, 679 F.3d at 966. "Circumstantial evidence may include suspicious timing, ambiguous oral or written statements, or behavior towards or comments directed at other[s] . . . ." *Long v. Teachers' Retirement Sys. of Illinois*, 585 F.3d 344, 350 (7th Cir. 2009). Regardless of whether the plaintiff offers direct or circumstantial evidence, "[t]o demonstrate the requisite causal connection in a retaliation claim, [a] plaintiff[] must show that the protected activity and the adverse action are not wholly unrelated." *Sauzek v. Exxon Coal USA, Inc.*, 202 F.3d 913, 918 (7th Cir. 2000). "If he can show that retaliatory animus was a factor, then the burden shifts to the defendants to prove that the same actions would have occurred in the absence of the protected conduct." *Soto v. Bertrand*, 2009 WL 1220753, * 1 (7th Cir. 2009).

In the instant case, Sgt. Bayler has offered several reasons why he is entitled to summary judgment, but it is sufficient for the Court to focus on only one. Specifically, the Court agrees with Sgt. Bayler that Plaintiff has failed to demonstrate a nexus between his second and third grievances (*i.e.*, his First Amendment protected activity) and the alleged adverse actions taken against him by Sgt. Bayler.

Pontiac inmate Terrance Jenkins died at Pontiac on October 4, 2015. Illinois State Police Special Agent Robert Matos interviewed Plaintiff between October 4, 2015, and November 18, 2015, about Jenkins' death. Plaintiff sent a letter to Special Agent Matos about Jenkins' death on November 18, 2015. The Illinois State Police interviewed Plaintiff a second time about Jenkins' death on June 15, 2017. Plaintiff sent a second letter to the Illinois State Police on June 31, 2017.

This timeline clearly demonstrates that no reasonable jury could find in Plaintiff's favor on his First Amendment retaliation claim. In order to succeed on his First Amendment claim, Plaintiff needed to demonstrate "'a chronology of events from which retaliation may plausibly be inferred.'" *Comi v. Godinez*, 2015 WL 196576, * 8 (S.D. Ill. Jan. 14, 2015)(*Cain v. Lane*, 857 F.2d 1139, 1143 n. 6 (7th Cir. 1988)). Plaintiff has failed to do so.

On the contrary, the undisputed evidence shows that Plaintiff spoke to and wrote to the Illinois State Police about inmate Jenkins' death in October and November 2015. However, Plaintiff did not submit his May 2016 grievance until six months later, claiming that Defendant retaliated against him by moving an undesirable cellmate into his cell. There are no facts in the record to suggest that Plaintiff's new cellmate had

anything to do with his communications with ISP months earlier or any pending litigation.

Similarly, Plaintiff submitted his March 2017 grievance nearly sixteen months after he spoke with the Illinois State Police. This time delay between the alleged retaliation and Plaintiff's First Amendment activities is too great for a reasonable jury to find that the grievances or the underlying communications were a motivating factor in any alleged adverse actions taken by Sgt. Bayler against Plaintiff. *Carlson v. CSX Transp., Inc.*, 758 F.3d 819, 828 (7th Cir. 2014)("[A] retaliation claim can indeed be so bare-bones that a lengthy time period between the protected activity and the alleged retaliation will make any causal connection between the two implausible."); *Ghiles v. City of Chicago Heights*, 2016 WL 561897, * 2 (N.D. Ill. Feb. 12, 2016)(holding that the plaintiff had failed to state a claim for First Amendment retaliation because the six-month time gap, with no other evidence, was too large to plausibly support his claim)); *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 665 (7th Cir. 2006)(holding that "a temporal connection of four months fail[s] to establish a causal connection between a protected activity and an adverse action.").

Sgt. Bayler also is entitled to summary judgment relating to Plaintiff's subsequent contacts with the Illinois State Police. The undisputed evidence shows that Plaintiff spoke with and wrote to the Illinois State Police again in June 2017.[2] But by then, Plaintiff had already submitted the relevant grievances complaining about the

[2] This certainly suggests that the prior alleged retaliation did not discourage him from the protected activity at issue.

retaliatory conduct. It is axiomatic that someone cannot be the victim of retaliation for an act that has not yet occurred. *Malin v. Hospira, Inc.*, 762 F.3d 552, 562 (7th Cir. 2014)(holding that there was no causal connection in a retaliation claim where the adverse action occurred before the employee's protected activity); *Sklyarsky v. Harvard Maint., Inc.*, 2014 WL 3509485, * 7 (N.D. Ill. July 15, 2014)("To sustain a retaliation claim, [the plaintiff] must have engaged in some protected activity, prior to an employer's adverse actions taken in retaliation for exercising his right to engage in protected activity). Accordingly, Sgt. Bayler is entitled to the summary judgment that he seeks because Plaintiff has failed to offer any evidence that would constitute a causal link that a reasonable jury could find was a motivating factor in any alleged retaliation taken by Sgt. Bayler against Plaintiff because he had exercised his First Amendment rights.

IT IS, THEREFORE, ORDERED:

1. **Defendant's motion for summary judgment [156] is GRANTED. Accordingly, the Clerk of the Court is directed to enter judgment in all Defendants' favor and against Plaintiff. All other pending motions are denied as moot,[3] and this case is terminated. All deadlines and settings on the Court's calendar are vacated.**

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[3] Plaintiff has filed a motion asking for injunctive relief. [164]. However, Plaintiff's complaints in that motion concern actions that occurred since the filing of this suit and are unrelated to the claim made in this suit. In addition, Plaintiff has failed to offer any admissible evidence with which to show that he is entitled to injunctive relief. *Stuller, Inc. v. Steak N Shake Enter., Inc.*, 695 F.3d 676, 678 (7th Cir. 2012) (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). Accordingly, Plaintiff's motion is denied.

2. If Plaintiff wishes to appeal this judgment, he must file a notice of appeal with this Court within thirty (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 that he will present on appeal to assist the Court in determining whether the appeal is taken in good faith. Fed. R. App. P. 24(a)(1)(c); *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 chooses to appeal, he will be liable for the $505.00 appellate filing fee regardless of the outcome of the appeal.

ENTERED this 1st day of February, 2022

s/ Eric I. Long
ERIC I. LONG
UNITED STATES MAGISTRATE JUDGE

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