

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

FILED  
Nov 2, 2023  
KELLY L. STEPHENS, Clerk

No. 22-4030

WALTER J. HIMMELREICH,

Plaintiff-Appellant,

v.

FEDERAL BUREAU OF PRISONS, et al.,

Defendants,

and

JANEL FITZGERALD,

Defendant-Appellee.

Before: MOORE, COLE, and GIBBONS, Circuit Judges.

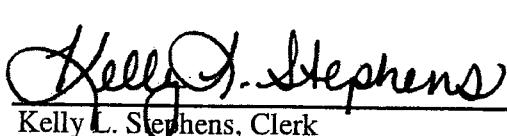
**JUDGMENT**

On Appeal from the United States District Court  
for the Northern District of Ohio at Youngstown.

THIS CAUSE was heard on the record from the district court and was submitted on the  
briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court  
is AFFIRMED.

ENTERED BY ORDER OF THE COURT

  
\_\_\_\_\_  
Kelly L. Stephens, Clerk

NOT RECOMMENDED FOR PUBLICATION

No. 22-4030

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**

Nov 2, 2023

KELLY L. STEPHENS, Clerk

WALTER J. HIMMELREICH, )  
Plaintiff-Appellant, )  
v. )  
FEDERAL BUREAU OF PRISONS, et al., ) ON APPEAL FROM THE UNITED  
Defendants, ) STATES DISTRICT COURT FOR  
and ) THE NORTHERN DISTRICT OF  
JANEL FITZGERALD, ) OHIO  
Defendant-Appellee. )

O R D E R

Before: MOORE, COLE, and GIBBONS, Circuit Judges.

Walter J. Himmelreich, proceeding pro se, appeals the district court's grant of summary judgment in favor of Janel Fitzgerald, the sole remaining defendant in this action filed under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the following reasons, we affirm.

Himmelrich was assaulted by a fellow inmate in 2008 while they were incarcerated in FCI Elkton. Himmelrich filed a lawsuit against several prison officials, alleging numerous claims related to the assault and events that followed. The full background on this case is available in *Himmelreich v. Federal Bureau of Prisons*, 5 F.4th 653, 656-58 (6th Cir. 2021).

By 2019, all but two of Himmelrich's claims had been dismissed. In February 2019, the defendants moved for summary judgment on the remaining claims, a First Amendment retaliation claim against Fitzgerald and an Eighth Amendment failure-to-protect claim against several prison officials. The defendants argued that Himmelreich's First Amendment retaliation claim is not cognizable under *Bivens* and that they were entitled to qualified immunity on the Eighth Amendment claim. The district court granted summary judgment on the Eighth Amendment claim, but denied summary judgment on the First Amendment claim. *Himmelreich v. Fed. Bureau of Prisons*, No. 4:10CV2404, 2019 WL 4694217, at \*16 (N.D. Ohio Sept. 25, 2019). Fitzgerald appealed, but we dismissed for lack of appellate jurisdiction. *Himmelreich*, 5 F.4th at 658. We thus did not reach the merits of the district court's order recognizing a *Bivens* action for First Amendment retaliation. *Id.* at 666.

After our decision, the Supreme Court decided *Egbert v. Boule*, 596 U.S. 482 (2022), holding that "that there is no *Bivens* action for First Amendment retaliation." *Id.* at 499. Relying on *Egbert*, Fitzgerald filed a renewed motion for summary judgment. The district court granted that motion, *Himmelreich v. Federal Bureau of Prisons*, No. 4:10CV2404, 2022 WL 6156942 (N.D. Ohio Oct. 7, 2022), and this appeal followed.

We review de novo the district court's grant of summary judgment. *Maben v. Thelen*, 887 F.3d 252, 258 (6th Cir. 2018). Summary judgment is proper "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).

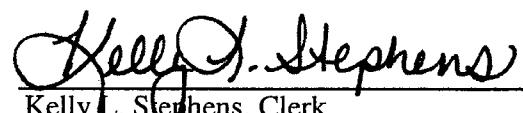
As Fitzgerald notes, the *Egbert* Court held that there is no *Bivens* cause of action for First Amendment retaliation claims. *Egbert*, 596 U.S. at 499. *Egbert* applies "to all pending cases, whether or not those cases involve predecision events." *Watkins v. Healy*, 986 F.3d 648, 665 (6th Cir. 2021) (quoting *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995)). Accordingly, even though the events giving rise to this suit predate *Egbert*, its holding applies, and the district court correctly granted summary judgment to Fitzgerald.

No. 22-4030

- 3 -

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

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens  
Kelly L. Stephens, Clerk

**United States Court of Appeals for the Sixth Circuit**

**U.S. Mail Notice of Docket Activity**

The following transaction was filed on 11/02/2023.

**Case Name:** Walter Himmelreich v. Federal Bureau of Prisons, et al  
**Case Number:** 22-4030

**Docket Text:**

ORDER filed: We AFFIRM the district court's grant of summary judgment. Mandate to issue, decision not for publication, pursuant to FRAP 34(a)(2)(C). Karen Nelson Moore, Circuit Judge; R. Guy Cole, Jr., Circuit Judge and Julia Smith Gibbons, Circuit Judge.

**The following documents(s) are associated with this transaction:**

Document Description: Order

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Dauphin County Prison  
501 Mall Road  
Harrisburg, PA 17111

**A copy of this notice will be issued to:**

Ms. Ruchi Asher  
Ms. Lisa Hammond Johnson  
Ms. Sandy Opacich

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Appendix A-6

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

FILED

Jan 25, 2024

KELLY L. STEPHENS, Clerk

WALTER J. HIMMELREICH, )  
Plaintiff-Appellant, )  
v. )  
FEDERAL BUREAU OF PRISONS, ET AL., )  
Defendants, )  
JANEL FITZGERALD, )  
Defendant-Appellee. )

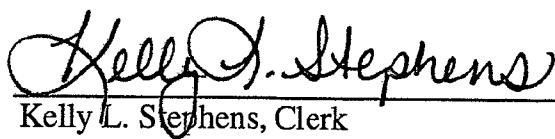
ORDER

**BEFORE:** MOORE, COLE, and GIBBONS, 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**

  
\_\_\_\_\_  
Kelly L. Stephens, Clerk

**WALTER J. HIMMELREICH, Plaintiff, v. FEDERAL BUREAU OF PRISONS, et al., Defendants.  
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN  
DIVISION**

**2022 U.S. Dist. LEXIS 184606**

**CASE NO. 4:10CV2404**

**October 7, 2022, Decided**

**October 7, 2022, Filed**

**Editorial Information: Subsequent History**

Appeal filed, 12/12/2022

**Editorial Information: Prior History**

Himmelreich v. Fed. Bureau of Prisons, 2011 U.S. Dist. LEXIS 25037 (N.D. Ohio, Mar. 9, 2011)

**Counsel** {2022 U.S. Dist. LEXIS 1}Walter J Himmelreich, Plaintiff, Pro se, Harrisburg, PA.

For J. Fitzgerald, Lieutenant Butts, Correctional Officer Simmons, Defendants: Lisa Hammond Johnson, LEAD ATTORNEY, Ruchi V. Asher, Office of the U.S. Attorney - Cleveland, Northern District of Ohio, Cleveland, OH.

**Judges:** Benita Y. Pearson, United States District Judge.

**Opinion**

**Opinion by:** Benita Y. Pearson

**Opinion**

**ORDER**

[Resolving ECF Nos. 183, 187, 188]

Pending before the Court is Defendant Fitzgerald's Renewed Motion for Summary Judgment. See ECF No. 183. The Motion has been fully briefed. Plaintiff Himmelreich responded in opposition (ECF No. 187) *pro se* and Defendant replied (ECF No. 188). For the following reasons, Defendant's Renewed Motion for Summary Judgment is granted.

**I. Background**

The background section in the prior Memorandum of Opinion and Order is hereby incorporated by reference. See ECF No. 165. The remaining claim pending in this action is Plaintiff's First Amendment retaliation claim against Defendant Fitzgerald, a former Captain at FCI Elkton. Plaintiff notes that in March 2009, Defendant oversaw his placement in the Special Housing Unit ("SHU") because Plaintiff had filed a grievance against the prison staff for failing to protect him from another inmate's assault. {2022 U.S. Dist. LEXIS 2} See ECF No. 1 at PageID #: 14-15. Plaintiff states that he remained in the SHU for a period of 60 days, and alleges that during his stay Defendant yelled at him: "You want to know why you're in here? You're in here because of the fuckin' Tort Claim you filed! That's why you're in here!" ECF No. 1 at PageID #: 15.

On September 25, 2019, this Court granted summary judgment in favor of Defendants Simmons, a Corrections Officer at FCI Elkton, and Butts, a former Special Investigative Services Lieutenant at FCI Elkton, and denied summary judgment to Defendant Fitzgerald. See ECF No. 165. The Sixth Circuit dismissed Defendant's appeal for lack of appellate jurisdiction. See ECF Nos. 173, 174. On August 8, 2022, Defendant renewed her motion for summary judgment. See ECF No. 183.

## II. Standard of Review

"Summary judgment is appropriate where '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.'" *Scola v. Publix Supermarkets, Inc.*, 557 F. App'x 458, 462 (6th Cir. 2014) (quoting Fed. R. Civ. P. 56(a)). The fact under dispute must be "material," and the dispute itself must be "genuine." A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). In determining whether a factual issue{2022 U.S. Dist. LEXIS 3} is "genuine," the Court assesses whether the evidence is such that a reasonable jury could find that the non-moving party is entitled to a verdict. *Id.* ("[Summary judgment] will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."). The moving party is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of an essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

To survive summary judgment, the non-moving party "must 'do more than simply show that there is some metaphysical doubt as to the material facts.'" *Baker v. City of Trenton*, 936 F.3d 523, 529 (6th Cir. 2019) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). Once the movant makes a properly supported motion, the burden shifts to the nonmoving party to demonstrate the existence of a genuine dispute. An opposing party may not simply rely on its pleadings; rather, it must "produce evidence that results in a conflict of material fact to be resolved" by a factfinder. *KSA Enterprises, Inc. v. Branch Banking & Tr. Co.*, 761 F. App'x 456, 464 (6th Cir. 2019) (quoting *Cox v. Ky. Dep't of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995)). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence{2022 U.S. Dist. LEXIS 4} on which the jury could reasonably find for the plaintiff."

F.3d 608, 613 (6th Cir. 2013) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). In analyzing a motion for summary judgment, the Court "must view the evidence in the light most favorable to the nonmoving party." *Lossia v. Flagstar Bancorp, Inc.*, 895 F.3d 423, 428 (6th Cir. 2018) (citing *Latits v. Phillips*, 878 F.3d 541, 547 (6th Cir. 2017) U.S. v. \$774,830.00 in U.S. Currency, 4:20CV2084, 2022 U.S. Dist. LEXIS 45228, 2022 WL 788064 (N.D. Ohio Mar. 14, 2022)

## III. Discussion

"[T]he denial of summary judgment has no *res judicata* effect, and the district court may, in its discretion, allow a party to renew a previously denied summary judgment motion or file successive motions, particularly if good reasons exist" such as an intervening change in controlling law. *Lexicon, Inc. v. Safeco Ins. Co. of Am.*, 436 F.3d 662, 673 n.6 (6th Cir. 2006). At issue in this case is Plaintiff's First Amendment retaliation claim against former Captain Janel Fitzgerald in her individual capacity.

Plaintiff alleges that Defendant threatened him and placed him in the SHU as a retaliatory action against him for filing a tort claim. In Defendant's Brief in Support of the Renewed Motion for Summary Judgment, she remarks that the Plaintiff's pending claim is extinguished by a recent Supreme Court ruling and argues that, alternatively, as a government official she had qualified immunity<sup>2</sup> and, thus, is entitled to summary judgment. See ECF No. 183; *Egbert v. Boule*, 142 S. Ct. 1793, 213 L. Ed. 2d 54 (2022). In Plaintiff's Response (ECF No. 187), he retorts that the Supreme Court and Sixth Circuit case law Defendant<sup>{2022 U.S. Dist. LEXIS 5}</sup> relies on in the Brief are not on point and, thus, insufficient to support a granting of summary judgment. See ECF No. 187 at PageID #: 1847-49. Plaintiff also raises myriad tangential arguments, such as insufficient notice of filings, that neither address the assertions made by Defendant in her Brief in Support of the Renewed Motion for Summary Judgment (ECF No. 183) nor the principal issue of the pending matter. Each filing in these proceedings has been timely docketed and made accessible to both parties. The Court finds that Plaintiff's tangential complaints deserve no further attention.

The Court turns now to the matter at issue. In the Court's previous ruling denying Defendant Fitzgerald summary judgment, the First Amendment retaliation claim against her survived because the claim arose in a context that had not previously been recognized by the Supreme Court. See ECF No. 165. Since the Court's September 2019 decision, Defendant correctly notes (ECF No. 183 at PageID #: 1814-15) that both the Supreme Court of the United States and the Sixth Circuit Court of Appeals have ruled against recognizing causes of action brought by inmates for retaliation under the First Amendment against federal officers serving<sup>{2022 U.S. Dist. LEXIS 6}</sup> in their individual capacities. See *Egbert v. Boule*, 142 S. Ct. 1793, 1808, 213 L. Ed. 2d 54 (2022)<sup>3</sup> *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 523 (6th Cir. 2020) ("The Supreme Court has not recognized a new *Bivens* action in the 40 years since *Carlson*. And it has repeatedly declined invitations, many just like *Callahan*'s, to create such actions.").

Defendant accurately indicates that the Court's reliance on the *Egbert* decision is not negated by the fact that *Egbert* was issued after these proceedings were initiated. See ECF No. 183. "As a general rule, new constitutional decisions are not applied retroactively to cases that were finalized prior to a new Supreme Court decision." *United States v. Quackenbush*, 369 F. Supp. 2d 958, 963 (W.D. Tenn. 2005) (quoting *Goode v. United States*, 305 F.3d 378, 383 (6th Cir. 2002)). As indicated by the pending renewed motion for summary judgment before the Court, this case has yet to be finalized. Therefore, there is no issue of retroactivity.

#### IV. Conclusion

This Court is bound by the decisions of the Sixth Circuit. See *Hall v. Eichenlaub*, 559 F. Supp. 2d 777, 782 (E.D. Mich. 2008). Furthermore, the Sixth Circuit Court is bound by the decisions of the Supreme Court. See *Henderson v. Collins*, 262 F.3d 615, 623 (6th Cir. 2001). It follows, therefore, that the Court is bound by the decisions of the Supreme Court. The resolution of the matter is dictated by the Supreme Court's explicit ruling that "there is no *Bivens* action for First Amendment retaliation." *Egbert*, 142 S. Ct. at 1807. For this reason, Defendant's Renewed Motion for Summary Judgment is granted.<sup>4</sup> A separate<sup>{2022 U.S. Dist. LEXIS 7}</sup> Judgment Entry will issue.

IT IS SO ORDERED.

October 7, 2022

Date

/s/ Benita Y. Pearson

Date Benita Y. Pearson

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United States District Judge

**JUDGMENT ENTRY**

For the reasons set forth in the Memorandum of Opinion and Order filed contemporaneously with this Judgment Entry, Defendant's Renewed Motion for Summary Judgment (ECF No. 183) is granted.

This ruling concludes the case. The matter is resolved in favor of Defendants and against Plaintiff.

**IT IS SO ORDERED.**

October 7, 2022

Date

/s/ *Benita Y. Pearson*

Benita Y. Pearson

United States District Judge

**Footnotes**

1

The Court appointed Plaintiff pro bono counsel who, pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), were subsequently given permission to withdraw. See ECF Nos. 185, 186.

2

Defendant raised qualified immunity to support her original motion for summary judgment, which the Court found to be waived because it was brought forth for the first time in the reply brief (ECF No. 163). See ECF No. 165 at PageID #: 1687. The Court does not find this argument to be dispositive in granting summary judgment in this renewed motion.

3

The Supreme Court has declined to imply a *Bivens* action in the following cases over the past 40 years: *Chappell v. Wallace*, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983); *Bush v. Lucas*, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983); *United States v. Stanley*, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987); *Schweiker v. Chilicky*, 487 U.S. 412, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988); *FDIC v. Meyer*, 510 U.S. 471, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994); *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001); *Wilkie v. Robbins*, 551 U.S. 537, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007); *Hui v. Castaneda*, 559 U.S. 799, 130 S. Ct. 1845, 176 L. Ed. 2d 703 (2010); *Minanei v. Pollard*, 565 U.S. 118, 132 S. Ct. 617, 181 L. Ed. 2d 606 (2012); *Ziglar v. Abbasi*, 582 U.S. \_\_, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017); *Hernández v. Mesa*, 589 U.S. \_\_, 140 S. Ct. 735, 206 L. Ed. 2d 29 (2020).

4

Because the instant ruling is necessitated by law, the Court does not reach the question of qualified immunity.

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

Kelly L. Stephens  
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Filed: January 25, 2024

Walter J. Himmelreich  
Dauphin County Prison  
501 Mall Road  
Harrisburg, PA 17111

Re: Case No. 22-4030, *Walter Himmelreich v. Federal Bureau of Prisons, et al*  
Originating Case No.: 4:10-cv-02404

Dear Mr. Himmelreich,

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. Ruchi Asher  
Ms. Lisa Hammond Johnson

Enclosure

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

Kelly L. Stephens  
Clerk

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Filed: February 02, 2024

Ms. Sandy Opacich  
Northern District of Ohio at Cleveland  
801 W. Superior Avenue  
Suite 100 Carl B. Stokes U.S. Courthouse  
Cleveland, OH 44113-1830

Re: Case No. 22-4030, *Walter Himmelreich v. Federal Bureau of Prisons, et al*  
Originating Case No. : 4:10-cv-02404

Dear Ms. Opacich,

Enclosed is a copy of the mandate filed in this case.

Sincerely yours,

s/Mackenzie A. Collett  
For Ryan Orme

cc: Ms. Ruchi Asher  
Mr. Walter J. Himmelreich  
Ms. Lisa Hammond Johnson

Enclosure

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

No: 22-4030

---

Filed: February 02, 2024

WALTER J. HIMMELREICH

Plaintiff - Appellant

v.

FEDERAL BUREAU OF PRISONS, et al.

Defendants

and

JANEL FITZGERALD

Defendant - Appellee

MANDATE

Pursuant to the court's disposition that was filed 11/02/2023 the mandate for this case hereby issues today.

COSTS: None

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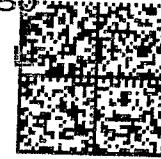
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