Appx. - A

* SIXTH CIRCUIT DECISION *

Neutral
As of: July 18, 2024 4:44 PM Z

Rose v. Washington

United States Court of Appeals for the Sixth Circuit

November 1, 2023, Filed

Nos. 21-2764/21-2765/21-2882

Reporter
2023 U.S. App. LEXIS 29276 *; 2023 WL 9316268

WILLIE CHARLES ROSE, Plaintiff-Appellant, v. HEIDI E. WASHINGTON, Defendant, and JOSEPH DAMRON, Registered Nurse; GERALD COVERT, Registered Nurse, Defendants-Appellees.

Notice: CONSULT *6TH CIR. R. 32.1* FOR CITATION OF UNPUBLISHED OPINIONS AND DECISIONS.

Subsequent History: Rehearing denied by, En banc *Rose v. Washington, 2024 U.S. App. LEXIS 2293 (6th Cir., Feb. 1, 2024)*

Prior History: **[*1]** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN.

Rose v. Washington, 2021 U.S. Dist. LEXIS 141858, 2021 WL 3177307 (W.D. Mich., June 28, 2021)
Rose v. Washington, 2021 U.S. Dist. LEXIS 143130 (W.D. Mich., July 14, 2021)
Rose v. Washington, 2021 U.S. Dist. LEXIS 143128, 2021 WL 3177308 (W.D. Mich., July 14, 2021)

Core Terms

magistrate judge, appointment of counsel, argues, defense counsel, district court, pretrial order, witnesses, security procedures, retaliation claim, case management, adverse action, bench trial, adjournment, documents, exhibits, video, healthcare, grievances, pre-trial, motions, prison, abuse of discretion, medical record, deny a motion, fraudulent

Counsel: WILLIE CHARLES ROSE, Plaintiff - Appellant (21-2764), Pro se, Lenox Township, MI.

For JOSEPH DAMRON, Registered Nurse, GERALD COVERT, Registered Nurse, Defendants - Appellees (21-2764): Jessica Ellen Pelto, Office of the Attorney General, Lansing, MI.

WILLIE CHARLES ROSE, Plaintiff - Appellant (21-2764), Pro se, Lenox Township, MI.

For JOSEPH DAMRON, Registered Nurse, GERALD COVERT, Registered Nurse, Defendants - Appellees (21-2764): Jessica Ellen Pelto, Office of the Attorney General, Lansing, MI.

WILLIE CHARLES ROSE, Plaintiff - Appellant (21-2764), Pro se, Lenox Township, MI.

For JOSEPH DAMRON, Registered Nurse, GERALD COVERT, Registered Nurse, Defendants - Appellees (21-2764): Jessica Ellen Pelto, Office of the Attorney General, Lansing, MI.

Judges: Before: SILER, THAPAR, and READLER, Circuit Judges.

Opinion

ORDER

Willie Charles Rose, a Michigan prisoner proceeding pro se, appeals the district court's judgment following a bench trial in his civil rights suit filed under *42 U.S.C. § 1983*. (No. 21-2882). Rose also challenges various pre-trial issues and orders. (Nos. 21-2764/2765). The appeals have been consolidated and referred to a panel **[*2]** of the court that, upon examination, unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*. We affirm.

In 2016, Rose filed a complaint against numerous prison officials. His claims against all but two of the defendants were dismissed at initial screening or disposed of on summary judgment. The two remaining defendants were Nurses Joseph Damron and Gerald Covert. Relevant to those two defendants, Rose alleged in his amended complaint that he saw Damron for a health care visit on November 22, 2015. Rose informed Damron that he had gall bladder issues and complained of severe pain, vomiting, dizziness, nausea, fever, dehydration, and "an inability to use the restroom." Damron prescribed rest and over-the-counter medications. Rose disagreed with Damron's treatment and informed Damron that he needed to see a doctor. Damron ignored Rose and told him to leave. Rose returned to his cell and continued to suffer in pain. Later that day, when he was still in pain and vomiting, Damron refused to see Rose again "on an emergency basis" after correctional officers contacted Damron on Rose's behalf. Damron spoke to Rose on the phone, however, and Rose told Damron that his condition was getting **[*3]** worse and that the over-the-counter medications were not helping. But Damron stated that he was going home soon and would leave a note for the next nurse on duty to follow up with him. After additional calls to health care on Rose's behalf, Rose was eventually taken to health care in a wheelchair and then transported to a hospital, where he had emergency surgery to remove his gall bladder.

After his return from the hospital, Rose received follow-up medical treatment from prison health care. During one of his follow-up health care visits, Rose asserted that Covert "ripped up some medical papers" in his file because he had filed grievances regarding his medical emergency related to his gall bladder.

Rose claimed that Damron was deliberately indifferent to his serious medical needs by denying him necessary treatment for his gall bladder issue. He claimed that Covert retaliated against him by destroying his medical records because he filed grievances related to the denial of medical treatment. Rose's claims against Damron and Covert proceeded to a bench trial. The district court found in favor of the defendants.

On appeal, Rose challenges (1) the dismissal of his retaliation claims against **[*4]** Covert and Assistant Resident Unit Supervisor Rebecca Freytag, (2) the denial of his motions to issue a writ for the appearance at trial of Sam Bailey and to allow witnesses, including Bailey, to testify by video, (3) the United States Marshals' courtroom security procedures for prisoners, which caused him to waive a jury trial, (4) defense counsel's violation of the case management order by failing to provide him with the proposed final pretrial order, (5) defense counsel's interference with his motion for appointment of counsel, (6) the exclusion of case law as trial exhibits, (7) the denial of his motion for appointment of counsel, (8) the failure to strike defense exhibits and witnesses for failure to comply with the case management order, and (9) the denial of his request for adjournment of the trial to secure witnesses and documents. Rose requests oral argument, clarification of the necessity of documents, to supplement the record, and to submit a certified letter. The defendants move to dismiss the appeals.

ISSUE #1: RETALIATION

Rose argues that the district court improperly dismissed his retaliation claim against Freytag and Covert. He contends that the loss of his legal documents **[*5]** caused by his transfer from one prison to another was an adverse action for purposes of his retaliation claim.

Rose asserted that Freytag and Covert transferred him from the Chippewa Correctional Facility (URF) to the Kinross Correctional Facility (KCF) because he filed grievances. Rose asserted that Freytag initiated his transfer

after Covert told her that he had filed grievances. He asserted that the transfer resulted in the loss of legal documents and personal property and caused him "difficulty" in litigating pending court cases.

A magistrate judge recommended denying Freytag's and Covert's motion for summary judgment as to Rose's retaliation claim because they failed to show that Rose's transfer and the resulting loss of his legal documents was not an adverse action. The district court rejected the magistrate judge's recommendation and dismissed Rose's retaliation claims against these defendants for failure to state a claim for relief under 28 U.S.C. §§ 1915(e)(2) and 1915A and 42 U.S.C. § 1997e(c). The district court concluded that the loss of Rose's legal documents was not a foreseeable, negative consequence of his transfer that would transform an ordinarily common prison transfer into an adverse action.

We review de novo the **[*6]** dismissal of a complaint under § 1915(e), § 1915A, and § 1997e. Wershe v. Combs, 763 F.3d 500, 505 (6th Cir. 2014). A complaint must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

> To establish a claim of First Amendment retaliation, a plaintiff shows that: "(1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) . . . the adverse action was motivated at least in part by the plaintiff's protected conduct."

Berkshire v. Dahl, 928 F.3d 520, 531 (6th Cir. 2019) (quoting King v. Zamiara, 680 F.3d 686, 694 (6th Cir. 2012)).

Prisoners have a First Amendment right to file non-frivolous grievances. Maben v. Thelen, 887 F.3d 252, 264 (6th Cir. 2018). Here, Rose was engaged in protected conduct when he filed grievances. But Rose was not subjected to an adverse action when he was transferred from URF to KCF. "As a general matter, a prison official's decision to transfer a prisoner from the general population of one prison to the general population of another is not considered adverse." LaFountain v. Harry, 716 F.3d 944, 948 (6th Cir. 2013), because "transfer is merely an ordinary incident of prison life," Jones v. Caruso, 421 F. App'x 550, 553 (6th Cir. 2011) (quoting Siggers-El v. Barlow, 412 F.3d 693, 704 (6th Cir. 2005)). In the context of **[*7]** First Amendment retaliation claims, there is an exception for cases in which "foreseeable, negative consequences 'inextricably follow' from the transfer—such as the prisoner's loss of his high-paying job [to pay for his lawyer] and reduced ability to meet with his lawyer." *Id.* (quoting Siggers-El, 412 F.3d at 701-02).

Rose's prison transfer was not an adverse action because there were no foreseeable, negative consequences that inextricably followed from it, such as the loss of a job or interference with an attorney-client relationship. *See* Siggers-El, 412 F.3d at 701-02. And the loss of legal property was neither foreseeable nor a negative consequence that inextricably followed from the transfer. *See id.* Rose did not allege that Freytag or Covert had any reason to believe that his legal property would be lost when he was transferred. *See* Jones, 421 F. App'x at 553. Thus, Rose's retaliation claim was properly dismissed.

ISSUE #2: WITNESSES

Rose argues that the magistrate judge erroneously denied his motions to issue a writ for Bailey's appearance at trial and allow witnesses to testify by video. . He argues that the magistrate judge erroneously determined that a writ could not be issued for Bailey's appearance at trial because Bailey, a former prisoner, was on parole. He also argues that **[*8]** the magistrate judge erroneously determined that his motion for witness testimony by video was a "blanket request."

On May 11, 2021, Rose filed a pre-trial motion requesting the issuance of a writ of habeas corpus ad testificandum for Bailey, a former prisoner, to appear in court to testify. Rose alternatively moved for permission to allow Bailey to

testify by video. That same day, Rose moved for permission to allow witnesses to testify by video if they were not able to appear in person. On June 28, 2021, the magistrate judge denied Rose's motions. The magistrate judge denied the motion pertaining to Bailey as moot because Bailey was paroled from the Michigan Department of Corrections (MDOC) on June 2, 2021. The magistrate judge denied the motion pertaining to video testimony of witnesses because Rose did not identify the other witnesses he intended to call and explain why they were unable to testify in person at trial.

Generally, we review the denial of pre-trial motions for an abuse of discretion. *See, e.g.*, Zakora v. Chrisman, 44 F.4th 452, 465 (6th Cir. 2022); Lavado v. Keohane, 992 F.2d 601, 604-05 (6th Cir. 1993). No abuse of discretion occurred here.

We likewise review the district court's denial of a petition for a writ of habeas corpus ad testificandum for an abuse of discretion. United States v. Guthrie, 557 F.3d 243, 251 (6th Cir. 2009) **[*9]** . "The district court's discretion is 'wide,' and 'a reviewing court should not reverse unless the exceptional circumstances of the case indicate that the defendant's right to a complete, fair and adequate trial is jeopardized.'" *Id.* (quoting United States v. Rigdon, 459 F.2d 379, 380 (6th Cir. 1972)). "Further, a court should issue a writ that requires the production of a prisoner only in those cases where the prisoner's physical presence will contribute significantly to a fair adjudication of his claims." Holt v. Pitts, 619 F.2d 558, 561 (6th Cir. 1980) (discussing § 1651(a) writs). Rose's motion provided no justification for why Bailey's presence and testimony were critical to his case; he merely provided Bailey's name and asked for a writ. Accordingly, in the absence of any specific claim of necessity, the magistrate judge did not abuse his wide discretion by denying the motion. *See* Dixon v. Clem, 492 F.3d 665, 673 (6th Cir. 2007) (noting the Court "may affirm on any grounds supported by the record even if different from the reasons of the district court" (citation omitted)).

Furthermore, witnesses ordinarily must testify in person at trial. Fed. R. Civ. P. 43(a). But "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." *Id.* Rose's request for permission to present witness testimony by video provided no reasons, much less "good cause" and "compelling circumstances" for his request. *See id.* At most, he identified Bailey by name but provided no reason why he would be unable to testify in person at trial.

ISSUE #3: COURTROOM SECURITY

Rose argues that courtroom security procedures for prisoners caused him to waive a jury trial and agree to a bench trial. He asserts that those security procedures prevent prisoners from sitting at the table closest to the jury and standing and **[*10]** approaching witnesses when questioning them. He also asserts that those procedures require prisoners to have two MDOC officers and at least two Marshals with them during court proceedings and to wear a stun cuff. He argues that these security procedures would have prejudiced him in front of a jury by making him appear as a dangerous monster.

This argument lacks merit. First, Rose's assertion that he waived a jury trial and agreed to a bench trial because of courtroom security procedures is somewhat disingenuous. The record indicates that the parties consistently expressed an intent to proceed to a bench trial, and eventually stipulated to a nonjury trial, to expedite the case. Second, assuming that the security procedures applied during Rose's bench trial, Rose does not contend that the bench trial was unfair because of those security procedures.

ISSUES #4 AND #8: PROPOSED FINAL PRETRIAL ORDER

Rose argues in his fourth issue that defense counsel refused to provide him with a copy of the proposed final pretrial order and proof of service before trial, in violation of the case management order. He contends that defense counsel's failure to do so was an intentionally fraudulent act. In his **[*11]** eighth issue, Rose argues that the

defense's exhibits and witnesses should have been stricken based on the failure to comply with the case management order.

The amended case management order required the parties to jointly prepare a proposed final pretrial order to be filed by defense counsel three days before the final pretrial conference on June 30, 2021. The case management order specified the information that the proposed final pretrial order should include, such as the signatures of both Rose and defense counsel. A proposed final pretrial order was filed on June 24, 2021. It was signed only by defense counsel. In a footnote on the signature page, the parties indicated that Rose did not sign the proposed final pretrial order because he had not consulted with his jailhouse lawyer when defense counsel called him to discuss it the day before it was filed. Thereafter, Rose objected to the proposed final pretrial order, and in his objections, he stated that he received the proposed final pretrial order on June 23, 2021. Following a telephonic final pretrial conference on June 28, 2021, a final pretrial order was entered that Rose did not sign.

These issues are meritless. The record shows **[*12]** that defense counsel complied with the amended case management order and provided Rose with a copy of the proposed final pretrial order. Rose admitted as much.

ISSUES #5 AND # 7: APPOINTMENT OF COUNSEL

In his fifth issue, Rose argues that defense counsel thwarted his effort to obtain appointment of counsel. He argues that the magistrate judge was willing to appoint counsel for him if he could show that he was receiving medical treatment for a "Traumatic Brain Injury" and "post-concussive syndro[m]e." Because he could not afford to pay for his medical records, he asserted that the magistrate judge authorized defense counsel to review his medical records and confirm his medical treatment. Rose argues that the affidavit that defense counsel submitted to the district court was "fraudulent" because it declared that he was not being treated for a brain injury and that the magistrate judge relied on it to deny his motion for appointment of counsel. Rose's seventh issue challenges the denial of his motion for appointment of counsel and the denial of his motion for sanctions based on the alleged fraudulent affidavit submitted by defense counsel.

Throughout the proceedings, Rose requested appointment **[*13]** of counsel. In particular, at a February 2021 status conference, Rose expressed difficulty proceeding without counsel because he had suffered a concussion. In a follow-up motion, he stated that he suffered a concussion in 2020 and was still being treated for post-concussive syndrome and symptoms related to the concussion. He submitted a medical kite response, which showed that his prescription for ibuprofen or propranolol was renewed in February 2021. Defense counsel consulted Nursing Director Heather Bailey and submitted Bailey's affidavit regarding her review of Rose's medical records. Bailey confirmed that Rose suffered a head injury in 2020 but stated that he was not currently being treated for that injury or any related symptoms despite his almost daily visits to health care. Based on the medical information presented by the parties, the magistrate judge concluded that Rose was "not currently suffering from a medical condition that has altered his ability to represent himself." The magistrate judge also concluded that the lawsuit was not complex and that Rose had demonstrated his ability to litigate his case. The magistrate judge therefore denied Rose's motion for appointment **[*14]** of counsel.

Following the magistrate judge's ruling, Rose moved for sanctions against the defense, claiming that Bailey's affidavit was fraudulent and that the magistrate judge denied his motion for counsel based on that affidavit. The magistrate judge considered Rose's motion under *Federal Rule of Civil Procedure 11* and denied it. The magistrate judge found no evidence to support Rose's contention that Bailey's affidavit was fraudulent.

We review the district court's denial of *Rule 11* sanctions for an abuse of discretion. *Mich. Div.-Monument Builders of N. Am. v. Mich. Cemetery Ass'n, 524 F.3d 726, 739 (6th Cir. 2008)*. Sanctions under *Rule 11* may be imposed when a party's conduct "was objectively unreasonable" or a party's claim lacked "a reasonable basis." *Montell v. Diversified Clinical Servs., Inc., 757 F.3d 497, 510 (6th Cir. 2014)*. Here, Rose failed to show that the submission of Bailey's affidavit, which was based on Rose's medical records, was unreasonable. *See id.* No abuse of discretion occurred.

We review for an abuse of discretion the denial of a motion for appointment of counsel. Lavado, 992 F.2d at 605. "Appointment of counsel in a civil case is not a constitutional right" but "a privilege that is justified only by exceptional circumstances." Id. at 605-06 (quoting Wahl v. McIver, 773 F.2d 1169, 1174 (11th Cir. 1985)). When evaluating whether appointment of counsel is warranted, courts generally examine the nature of the case, the plaintiff's ability to prosecute the case in a **[*15]** pro se capacity, and the "complexity of the factual and legal issues involved." Id. at 606 (quoting Cookish v. Cunningham, 787 F.2d 1, 3 (1st Cir. 1986)). After considering these factors and others, the magistrate judge concluded that appointment of counsel was not warranted. The record supports the magistrate judge's findings. This case presented non-complex issues, and Rose demonstrated his ability to litigate the case in a pro se capacity. The magistrate judge did not abuse his discretion in denying Rose's motion for appointment of counsel.

ISSUE #6: EXHIBITS

Rose argues that the district court refused to allow him to submit case law and court dockets as exhibits at trial. Rose moved to submit case law as trial exhibits. The district court denied the motion, finding the case law irrelevant to the facts at issue in Rose's case.

We review "a district court's evidentiary rulings for abuse of discretion." Nolan v. Memphis City Sch., 589 F.3d 257, 264 (6th Cir. 2009). "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. The district court properly concluded that case law was not relevant to the facts of Rose's case. Such evidence could not have made a fact more or less probable **[*16]** and affected the verdict. The district court did not abuse its discretion by denying Rose's motion to submit case law as trial exhibits. *See* Nolan, 589 F.3d at 264.

ISSUE # 9: ADJOURNMENT

Rose argues that the magistrate judge erroneously denied his motion for an adjournment to obtain material witnesses and documents for trial. Rose orally moved to adjourn the trial date at the June 28, 2021, final pretrial conference. The magistrate judge denied the motion, citing "the advanced age of the case, Rose's failure to comply with required deadlines despite ample notice, Defendants being prepared for trial, and Defendants' objection to the request."

A district court has broad discretion to manage its docket. Pittman v. Experian Info. Sols., Inc., 901 F.3d 619, 642 (6th Cir. 2018). Here, the magistrate judge did not abuse that discretion in denying Rose's motion for an adjournment. *See id.* When Rose orally requested the adjournment on June 28, 2021, his case had been pending since October 27, 2016, almost five years. Moreover, the trial had been rescheduled four times already. The trial was set to begin in less than one month from Rose's request to adjourn, and the defense objected, expressing their readiness to proceed. On this record, no abuse of discretion occurred.

For these reasons, **[*17]** we **GRANT** the motions to supplement the record and to submit a certified letter, **DENY** all remaining motions, and **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

MINUTES

WILLIE ROSE,

Plaintiff,

v.

HEIDI WASHINGTON, et al.,

Defendants.
_____/

CASE NO. 2:16-cv-242
DATE: July 20, 2021
TIME: 8:35am – 10:18am
10:31am – 11:53am
PLACE: Marquette, MI
JUDGE: Hala Y. Jarbou

APPEARANCES

PLAINTIFF(S): Willie Rose – Pro Se

DEFENDANT(S): Jessica Pelto
Sarah R. Robbins

PROCEEDINGS

WITNESSES

Plaintiff: Defendant Joseph Damron
Defendant Gerald Covert

Defendants: Defendant Joseph Damron

EXHIBITS

Plaintiff's Exhibit 1 and Defendants' Exhibits A, B and D admitted.

NATURE OF HEARING

Bench trial began – to be continued.

COURT REPORTER: Genevieve Hamlin

/s/ A. Seymore
DEPUTY CLERK

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

MINUTES

WILLIE ROSE,

Plaintiff,

v.

HEIDI WASHINGTON, et al.,

Defendants.
_____/

CASE NO. 2:16-cv-242
DATE: July 21, 2021
TIME: 3:05pm – 3:23pm
PLACE: Marquette, MI
JUDGE: Hala Y. Jarbou

APPEARANCES

PLAINTIFF(S): Willie Rose – Pro Se

DEFENDANT(S): Jessica Pelto
Sarah R. Robbins

PROCEEDINGS

WITNESSES
Plaintiff: Plaintiff Willie Rose

Defendants:

EXHIBITS
none

NATURE OF HEARING
Bench trial continued; to continue July 22, 2021, at 8:30am.

COURT REPORTER: Genevieve Hamlin

/s/ A. Seymore
DEPUTY CLERK

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

MINUTES

WILLIE ROSE,

Plaintiff,

v.

HEIDI WASHINGTON, et al.,

Defendants.
_____/

CASE NO. 2:16-cv-242
DATE: July 22, 2021
TIME: 8:58am – 10:15am
11:33am – 11:46am
PLACE: Marquette, MI
JUDGE: Hala Y. Jarbou

APPEARANCES

PLAINTIFF(S): Willie Rose – Pro Se

DEFENDANT(S): Jessica Pelto
Sarah R. Robbins

PROCEEDINGS

WITNESSES
Plaintiff: Plaintiff Willie Rose

Defendants:

EXHIBITS
none

NATURE OF HEARING
Bench trial continued from July 21, 2021. Plaintiff rested; Defendants rested. Closing arguments by both parties; Court rendered decision in favor of Defendants. Judgment to issue.

COURT REPORTER: Genevieve Hamlin

/s/ A. Seymore
DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

WILLIE ROSE,

Plaintiff,

v.

HEIDI WASHINGTON, et al.,

Defendants.
_____/

Case No. 2:16-cv-242

Hon. Hala Y. Jarbou

JUDGMENT

Pursuant to the Court's oral opinion finding no cause against the remaining Defendants in this case, made on the record at the close of the bench trial in this matter on July 22, 2021, and pursuant to Fed. R. Civ. P. 58, **JUDGMENT** hereby enters in favor of Defendants and against Plaintiff.

IT IS SO ORDERED.

Dated: July 22, 2021

/s/ Hala Y. Jarbou
HALA Y. JARBOU
UNITED STATES DISTRICT JUDGE

Appx.- B

* DISTRICT COURTS DECISIONS *

** Please Note: See pg. 6 (paragraphs 1-4) For Retalitory Transfer Claim That Caused The Access To The Court Claim, Loss of Legal Documents..

See Also pg. 10 (paragraph - 4) through pg. 11 to Review the Adverse Ruling that overruled The Access To The Court Claim Relief. Mentioned Above **

** See Also Related Cases In Appx.- D, pgs. 1-2 ; Rose v. Bauman 2018 U.S. Dist. Lexis 16339 (Denial of STAY / Amendment) ; And Appx.- D, pgs. 9-14 (to verify ongoing Injury caused by the above). **

Rose v. Damron

United States District Court for the Western District of Michigan, Northern Division

February 26, 2019, Decided; February 26, 2019, Filed

Case No. 2:16-cv-242

Reporter
2019 U.S. Dist. LEXIS 52944 *; 2019 WL 2261121

WILLIE ROSE #235893, Plaintiff, v. JOSEPH DAMRON, et al., Defendants.

Subsequent History: Adopted by, in part, Rejected by, in part, Objection overruled by, Summary judgment granted, in part, summary judgment denied, in part by, Claim dismissed by, in part *Rose v. Damron, 2019 U.S. Dist. LEXIS 52660 (W.D. Mich., Mar. 28, 2019)*

Prior History: *Rose v. Washington, 2017 U.S. Dist. LEXIS 140274 (W.D. Mich., Aug. 31, 2017)*

Core Terms

back pain, exam, undersigned, qualified immunity, grievances, medical care, argues, rectal, summary judgment, deliberately, indifferent, transferred, pain, serious medical needs, deliberate indifference, appointment, adverse action, Recommendation, retaliation, transport, symptoms, alleges, genuine, bunk, protected conduct, gallbladder, parties, bottom, prison, rights

Counsel: **[*1]** Willie Rose, plaintiff, Pro se, Munising, MI.

Judges: TIMOTHY P. GREELEY, UNITED STATES MAGISTRATE JUDGE.

Opinion by: TIMOTHY P. GREELEY

Opinion

REPORT AND RECOMMENDATION

This is a civil rights action brought by state prisoner Willie Rose pursuant to *42 U.S.C. § 1983*. Plaintiff asserts *First*, *Fourth*, and *Eighth Amendment* claims against Defendants Bienvenido Canlas, Danielle Paquette, Penny Rogers, Gerald Covert, Joseph Damron, Rebecca Freytag, Elizabeth Kinney, and Michael McDowell. Defendants Canlas, Paquette, and Rogers (the "Corizon Defendants") filed a motion for summary judgment. (ECF No. 291.) Plaintiff filed a response. (ECF No. 319.) Defendants Covert, Damron, Freytag, Kinney, and McDowell (the "MDOC Defendants") filed a separate motion for summary judgment and assert that they are entitled to qualified immunity. (ECF No. 361.) Plaintiff filed a response. (ECF No. 368.) This matter is ready for decision.

The claims in this case arise from a series of events that occurred at the Chippewa Correctional Facility (URF) and the Kinross Correctional Facility (KCF). On November 20, 2015, Plaintiff began to feel noxious and had pain in his stomach. At about 8:00 a.m. on November 22, 2015, Plaintiff was examined by Defendant Damron, RN. Plaintiff reported that **[*2]** he vomited several times over the past couple days. Plaintiff also claims that he told Defendant Damron that he had a family history of gallbladder problems. Defendant Damron checked Plaintiff's vitals and noted that Plaintiff's abdomen was a little tender, but no masses were found. Following the examination, Defendant

Damron gave Plaintiff over the counter medication including antacid tabs, Tylenol, and Mylanta. Defendant Damron also instructed Plaintiff to rest, avoid eating spicy food, drink water, and notify healthcare if his symptoms increased.

At about 2:15 p.m. on the same date, Plaintiff again requested medical care because his symptoms were getting worse. According to Plaintiff, Defendant Damron refused to see him in person for a second time. Instead, Defendant Damron spoke to Plaintiff by phone. During this phone conversation, Plaintiff explained that his condition had worsened. Defendant Damron told Plaintiff that he was going home soon but that he would leave a note for the next nurse to follow up with Plaintiff.

Over the next several hours, Plaintiff's condition continued to worsen. He states that he lost consciousness and fell out his bunk, injuring his back. At about 11:00 **[*3]** p.m., Plaintiff was returned to health care by wheelchair and examined by Defendant Kinney, RN. After taking Plaintiff's vitals, Defendant Kinney called Defendant Paquette, NP. Defendant Paquette ordered Plaintiff to be transferred to War Memorial Hospital by security transport for further evaluation and treatment. Plaintiff was then placed back in a wheelchair and left alone for twenty to thirty minutes before the security transport arrived. Plaintiff was subsequently transferred to the hospital by two untrained medical professionals.

When Plaintiff arrived at War Memorial Hospital, he was diagnosed with having acute cholecystitis. The doctor advised Plaintiff that he would have surgery as soon as his white blood cell count came down. On November 24, 2015, Plaintiff had a successful laparoscopic cholecystectomy to remove his gallbladder. After the surgery, the doctor told Plaintiff that his gallbladder had been gangrenous and that the infection had spread to his liver. Plaintiff was also prescribed Cipro and Flagyl. In addition, while at the hospital, Plaintiff had an x-ray on his back because he continued to complain of pain from falling on November 22, 2015. The results showed that **[*4]** Plaintiff had mild levoscoliosis but no fractures or any other abnormalities. Plaintiff returned to URF on November 26, 2015.

On November 30, 2015, Defendant Canlas saw Plaintiff for his post-op visit. At this appointment, Plaintiff again complained of pain in his lower back. After reviewing Plaintiff's file, Defendant Canlas told Plaintiff that he did not have any breaks or fractures in his back. Defendant Canlas suggested that Plaintiff should lose some weight. Defendant Canlas also told Plaintiff that if he wanted to be seen for his back, he should kite to set up an appointment. Plaintiff sent a kite later that day. On December 2, 2015, Defendant Damron examined Plaintiff for his back pain. Prior to this appointment, Plaintiff had a bottom bunk and was provided Tylenol for pain management. Following a consult with Defendant Canlas, Defendant Damron ordered Phenergan for nausea, a bottom bunk detail for two weeks, and Tylenol. Defendant Damron also gave Plaintiff instructions for several stretching exercises that could help reduce his back pain. Plaintiff continued to complain of back pain and was seen by a medical provider on December 7, 2015, and December 16, 2015. On December 17, **[*5]** 2015, Defendant Canlas saw Plaintiff again for his back pain. Defendant Canlas again gave Plaintiff Tylenol and extended his temporary bottom bunk detail. Defendant Canlas also instructed Plaintiff to avoid lifting weights, yard activity, and back bending.

On December 1, 2015, Plaintiff asked Defendant Freytag for the names of all individuals who were involved with Plaintiff's treatment on November 22, 2015. Defendant Freytag refused to provide any names. Plaintiff eventually filed a grievance against Defendant Freytag for her failure to provide him with the names. On December 16, 2015, Plaintiff was seen by Defendant Covert, who told Plaintiff that he was causing problems for good people. Plaintiff said he was not there to talk about the grievance, but only to be treated. Plaintiff also told Defendant Covert that according to Defendant Canlas, he should not be charged a co-pay. Defendant Covert told Plaintiff that there was nothing wrong with him, and that he was going to be charged a co-pay every time he visited health services. Defendant Covert then ripped up some papers from Plaintiff's medical chart and made him fill out a new kite. Plaintiff claims that Defendant Covert's treatment **[*6]** of Plaintiff was motivated by a desire to retaliate against him for writing the December 2, 2015, grievance and insinuated that Plaintiff was too comfortable at URF. Shortly thereafter, Defendant Freytag stated that Defendants Covert and Damron had told her that Plaintiff was trying to get them in trouble and that it was not going to work. Less than a week later, Plaintiff was transferred to KCF, which caused the loss of Plaintiff's property and made him miss a court deadline. Plaintiff claims that this transfer was motivated by a desire to retaliate against Plaintiff for engaging in protected conduct.

On May 24, 2016, Plaintiff visited health care and was seen by Defendant Rogers, NP. Plaintiff states that Defendant Rogers told him that his request for an EMG was finally approved. Defendant Rogers asked Plaintiff if he was feeling any serious pain, and Plaintiff responded that he was not because the recently prescribed Prednisone was effective. As Plaintiff was leaving, however, Defendant Rogers checked her computer and told Plaintiff to wait. Defendant Rogers then told Plaintiff that she needed to examine him to set up an MRI. Defendant Rogers proceeded to poke Plaintiff with a paper **[*7]** clip in the toes, feet, and legs. When Plaintiff said that he could feel the poking, Defendant Rogers smiled and said, "No, you didn't." Defendant Rogers subsequently asked Plaintiff if he had any incontinence and, when Plaintiff said that he did not, she stated, "Yes, you do." Defendant Rogers then told Plaintiff that she needed to do a rectal exam on Plaintiff. Plaintiff refused and asked Defendant Rogers why she was doing this. Defendant Rogers replied, "You're writing all of these complaints and trying to hold us accountable for your back pain so I need to perform this rectum exam on you." Plaintiff again refused the exam, thus, Defendant Rogers called Defendant McDowell into the exam room. Defendant McDowell told Plaintiff that he had to comply with the exam or he would be sent to segregation until he complied. Defendant McDowell also said that everyone was sick of Plaintiff's "crap" and he could write as many grievances as he wanted. Plaintiff finally complied, and Defendant Rogers conducted a rectal exam on Plaintiff.

Summary judgment is appropriate only if the moving party establishes that there is no genuine issue of material fact for trial and that he is entitled to judgment **[*8]** as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the movant carries the burden of showing there is an absence of evidence to support a claim or defense, then the party opposing the motion must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. Id. at 324-25. The nonmoving party cannot rest on its pleadings but must present "specific facts showing that there is a genuine issue for trial." Id. at 324 (quoting Fed. R. Civ. P. 56(e)). The evidence must be viewed in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Thus, any direct evidence offered by the plaintiff in response to a summary judgment motion must be accepted as true. Muhammad v. Close, 379 F.3d 413, 416 (6th Cir. 2004) (citing Adams v. Metiva, 31 F.3d 375, 382 (6th Cir. 1994)). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson, 477 U.S. at 247-48. Ultimately, the court must determine whether there is sufficient "evidence on which the jury could reasonably find for the plaintiff." Id. at 252. See also Leahy v. Trans Jones, Inc., 996 F.2d 136, 139 (6th Cir. 1993) (single affidavit, in presence of other evidence to the contrary, failed to present genuine issue of fact); cf. Moore, Owen, Thomas & Co. v. Coffey, 992 F.2d 1439, 1448 (6th Cir. 1993) (single affidavit concerning state of mind **[*9]** created factual issue).

The MDOC Defendants assert that they are entitled to qualified immunity. Government officials, performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Dietrich v. Burrows, 167 F.3d 1007, 1012 (6th Cir. 1999); Turner v. Scott, 119 F.3d 425, 429 (6th Cir. 1997); Noble v. Schmitt, 87 F.3d 157, 160 (6th Cir. 1996); Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). An "objective reasonableness" test is used to determine whether the official could reasonably have believed his conduct was lawful. Dietrich, 167 F.3d at 1012; Anderson v. Creighton, 483 U.S. 635, 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). "Qualified immunity balances two important interests-the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). In making a qualified immunity determination, the court must decide whether the facts as alleged or shown make out a constitutional violation or whether the right that was allegedly violated was a clearly established right at the time of the alleged misconduct. Id. at 232. If the court can conclude that either no constitutional violation occurred or that the right was not clearly established, qualified immunity is warranted. The court may consider **[*10]** either approach without regard to sequence. *Id.*

Plaintiff first asserts several Eighth Amendment claims stemming from the medical care he received at URF. The Eighth Amendment obligates prison authorities to provide medical care to incarcerated individuals, as a failure to provide such care would be inconsistent with contemporary standards of decency. Estelle v. Gamble, 429 U.S. 97,

103-04, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). A prisoner's Eighth Amendment rights are violated when a prison official is deliberately indifferent to the serious medical needs of a prisoner. Id. at 104-05; Comstock v. McCrary, 273 F.3d 693, 702 (6th Cir. 2001).

A claim for the deprivation of adequate medical care has an objective and a subjective component. Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). To satisfy the objective component, the plaintiff must allege that the medical need at issue is sufficiently serious. *Id.* In other words, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. *Id.* The objective component of the adequate medical care test is satisfied "[w]here the seriousness of a prisoner's need[ ] for medical care is obvious even to a lay person." Blackmore v. Kalamazoo Cnty., 390 F.3d 890, 899 (6th Cir. 2004). The subjective component requires an inmate to show that prison officials have "a sufficiently culpable state of mind in denying medical care." Brown v. Bargery, 207 F.3d 863, 867 (6th Cir. 2000) (citing Farmer, 511 U.S. at 834). Deliberate indifference "entails something more than mere negligence," **[*11]** Farmer, 511 U.S. at 835, but can be "satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Id.* Under *Farmer*, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 837.

The Sixth Circuit distinguishes "between cases where the complaint alleges a complete denial of medical care and those cases where the claim is that a prisoner received inadequate medical treatment." Westlake v. Lucas, 537 F.2d 857, 860 n.5 (6th Cir. 1976). If "a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law." *Id.*; see also Rouster v. Saginaw Cnty., 749 F.3d 437, 448 (6th Cir. 2014); Perez v. Oakland County, 466 F.3d 416, 434 (6th Cir. 2006). However, if a prisoner received "grossly inadequate care" accompanying "a decision to take an easier but less efficacious course of treatment," however, this may amount to deliberate indifference. Terrance v. Northville Reg'l Psychiatric Hosp., 286 F.3d 834, 843 (6th Cir. 2002) (quoting McElligott v. Foley, 182 F.3d 1248, 1255 (11th Cir. 1999)). In order to be considered "grossly inadequate care," the medical treatment must have been "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental **[*12]** fairness." Id. at 844 (quoting Waldrop v. Evans, 871 F.2d 1030, 1033 (11th Cir. 1989)).

Plaintiff alleges that Defendant Damron was deliberately indifferent to his serious medical needs when he provided inadequate medical treatment on November 22, 2015. Defendant Damron first examined Plaintiff at about 8:00 a.m. During this examination, Plaintiff reported that he vomited several times over the past couple days and that he had a family history of gallbladder problems. Defendant Damron gave Plaintiff over the counter medication including antacid tabs, Tylenol, and Mylanta and instructed Plaintiff to rest, avoid eating spicy food, drink water, and notify healthcare if his symptoms increased. At about 2:15 p.m., Plaintiff notified medical care because his symptoms were getting worse. However, Defendant Damron refused to see him and, instead, told Plaintiff that he he would leave a note for the next nurse to follow up with Plaintiff. Because of Defendant Damron's refusal to treat him, Plaintiff suffered for several hours while his condition worsened.

Defendant Damron argues that Plaintiff is simply disputing the adequacy of his treatment. Defendant Damron further states that "[a]t best, Rose has shown that Damron misdiagnosed Rose's injuries." However, **[*13]** accepting Plaintiff's version of events as true, Defendant Damron was aware that Plaintiff had been throwing up for two days, that he was in pain, and that he had a history of gallbladder issues. Despite knowing these symptoms, Defendant Damron refused to see Plaintiff a second time on November 22, 2015. The undersigned finds a question of fact exists regarding whether Defendant Damron's treatment of Plaintiff—specifically refusing to see Plaintiff when the condition worsened a second time because he was supposed to go home soon—was "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." Terrance, 286 F.3d at 844. Therefore, in the opinion of the undersigned, Defendant Damron has failed to show that he is entitled to summary judgment on Plaintiff's deliberate indifference claim.

In addition, Defendant Damron argues that he is entitled to qualified immunity. Thus, the undersigned must determine if the law was clearly established at the time. "Eighth Amendment jurisprudence clearly establishes that

deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain that is violative of the Constitution." *Darrah v. Krisher, 865 F.3d 361, 367 (6th Cir. 2017)* (quoting **[*14]** *Estelle v. Gamble, 429 U.S. 97, 104, 105, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*) (internal quotation marks omitted). Moreover, "'[t]he proposition that deliberate indifference to a prisoner's medical needs can amount to a constitutional violation has been well-settled since *Estelle* in 1976.'" *Id.* (quoting *Parsons v. Caruso, 491 Fed. App'x. 597, 602 (6th Cir. 2012)*). In the opinion of the undersigned, because a question of fact exists regarding Plaintiff's *Eighth Amendment* claim against Defendant Damron, Defendant Damron is not entitled to qualified immunity.

Plaintiff alleges that Defendant Kinney was deliberately indifferent to his serious medical needs when he left Plaintiff without medical supervision for twenty to thirty minutes before Plaintiff was transferred to War Memorial Hospital. Defendant Kinney argues that Plaintiff cannot maintain an *Eighth Amendment* claim because he did not suffer any physical injury from being left alone. It is unclear what precise role Defendant Kinney had in leaving Plaintiff unattended before being transferred to the hospital. The record establishes that Defendant Kinney examined Plaintiff and then called Defendant Paquette, who ordered Plaintiff to be transported to hospital by a private car transfer. After Defendant Kinney told Plaintiff that he was going to be taken to the hospital, two corrections officers moved **[*15]** Plaintiff to a "holding" "health care station" across the hall. (ECF No. 362-2, PageID.3936.) The officers then left the room and Plaintiff waited by himself for the private car transfer. In the opinion of the undersigned, Plaintiff has failed to show that Defendant Kinney was deliberately indifferent to his serious medical needs.

Plaintiff alleges that Defendant Paquette was deliberately indifferent when she did not call an ambulance and allowed non-medical professionals to transport Plaintiff to the hospital. Defendant Paquette argues that Plaintiff cannot meet the subjective component of the deliberate indifference test. Defendant Paquette is a physician assistant. In her affidavit, she states that "EMS or medical professionals need to be present only if the patient requires medical interventions such as monitors (e.g., EKG for chest pain), IV medications, oxygen, etc." (ECF No. 291-2, PageID.3171.) On the night in question, Defendant Paquette received a report that Plaintiff was experiencing stomach pain, back pain, and leg numbness. Based on this report, Defendant Paquette made the decision that Plaintiff could be transported to the hospital by a private car transfer and that an **[*16]** ambulance was not medically necessary. In the opinion of the undersigned, Plaintiff has not shown that Defendant Paquette had a sufficiently culpable state of mind. At most, Plaintiff has alleged a medical malpractice claim against Defendant Paquette.

Plaintiff alleges that Defendant Canlas was deliberately indifferent when he failed to treat Plaintiff for his back pain on November 30, 2015, and December 17, 2015. Defendant Canlas argues that Plaintiff has failed to meet both prongs of the deliberate indifference test. With respect to the objective prong, the question is whether Plaintiff's back pain constitutes a serious medical need. Assuming—without deciding—that Plaintiff's back pain meets the objective prong, the undersigned finds that the subjective prong has not been met. The medical records indicate that Plaintiff began complaining of back pain after he fell on November 22, 2015. After he was transported to War Memorial Hospital for his acute cholecystitis, Plaintiff apparently complained of back pain. He subsequently had an x-ray on his lumbar spine, which revealed "mild levoscoliosis" but "[n]o acute process." (ECF No. 293-1, PageID.3256.) The War Memorial Hospital physicians **[*17]** did not recommend any treatment for Plaintiff's mild back injury. When Plaintiff returned to URF, Defendant Canlas saw Plaintiff for a follow-up appointment after his surgery. The medical records indicate that Plaintiff never complained about his back pain at this appointment. Plaintiff states that he did complain about his back pain and that Defendant Canlas told him to kite his complaints. But even if Plaintiff complained of back pain at this appointment, Plaintiff did not have an urgent medical condition that required treatment. Medical providers addressed Plaintiff's back pain at appointments on December 2, December 7, December 16, and December 17. Further, Plaintiff's treatment plan demonstrates there was no real emergency to treat Plaintiff's mild back pain. He only received Tylenol, a bottom bunk detail, and instructions to avoid lifting weights, yard activity and back bending. Notably, Plaintiff was already taking Tylenol and had a bottom bunk before the first time he met with Defendant Canlas. In the opinion of the undersigned, Plaintiff has failed to show that Defendant Canlas was deliberately indifferent to his back pain.

Plaintiff next alleges that Defendants Freytag and **[*18]** Covert transferred him to a different prison in retaliation for filing grievances. Retaliation based upon a prisoner's exercise of his or her constitutional rights violates the Constitution. *See* Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999) (en banc). In order to set forth a First Amendment retaliation claim, a plaintiff must establish that: (1) he was engaged in protected conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from engaging in that conduct; and (3) the adverse action was motivated, at least in part, by the protected conduct. *Id.* "Once the plaintiff has met his burden of establishing that his protected conduct was a motivating factor behind any harm, the burden of production shifts to the defendant." *Id. at 399* (citing Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977)). "If the defendant can show that he would have taken the same action in the absence of the protected activity, he is entitled to prevail on summary judgment." *Id.*

Defendants Freytag and Covert argue that the transfer does not constitute an adverse action. "[A]n adverse action is one that would 'deter a person of ordinary firmness' from the exercise of the right at stake." Thaddeus—X, 175 F.3d at 396 (quoting Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982)). The Sixth Circuit has stated that "[s]ince transfers are common among **[*19]** prisons, ordinarily a transfer would not deter a prisoner of ordinary firmness from continuing to engage in protected conduct." Siggers-El v. Barlow, 412 F.3d 693, 701-02 (6th Cir. 2005) (citing Smith v. Yarrow, 78 Fed. App'x. 529, 543-44 (6th Cir. 2003)). But a limited exception applies when there are foreseeable consequences to the transfer that interfere with the prisoner's ability to access the courts. *Id. at 702*. "Only those consequences that inextricably follow from a defendant's alleged retaliatory conduct (a transfer from filling out a transfer screen, for instance) would be considered in determining whether the plaintiff suffered an adverse action." *Id.*

In this case, Plaintiff was transferred from URF to KCF. Although the two prisons are close to each other, they are separate prison facilities. Defendants Freytag and Covert correctly state that the transfer did not (1) cause Plaintiff to lose his job, (2) impact Plaintiff's ability to see his family; or (3) interfere with Plaintiff's ability to speak with his attorney. However, Plaintiff claims that he lost over 100 pages of legal documents because of the transfer. Plaintiff further states that he needed this material to appeal his state court conviction. Defendants Freytag and Covert fail to address the loss of legal documents in their argument section. **[*20]** In the opinion of the undersigned, Defendants Freytag and Covert have not met their burden to show that the transfer did not constitute an adverse act.

Defendants Freytag and Covert also argue that they are entitled to qualified immunity because "the law was not clearly established in 2015 that a transfer from housing unit within the same prison could be an adverse action when it had no impact on a prisoner's ability to access the courts." (ECF No. 362, PageID.3921.) However, Plaintiff was transferred to a different prison and the loss of legal documents may have interfered with Plaintiff's ability to access the courts. Therefore, in the opinion of the undersigned, Defendants Freytag and Covert are not entitled to qualified immunity.

Plaintiff finally asserts First, Fourth, and Eighth Amendment claims against Defendants Rogers and McDowell based on the May 24, 2016 rectal exam. The parties dispute what occurred during the May 24, 2016 examination. Defendants state that the rectal exam was a necessary medical procedure based on Plaintiff's symptoms. Defendants' version of events is supported by Defendant Roger's affidavit and the medical records. On the other hand, Plaintiff states that the rectal exam was unnecessary **[*21]** and conducted in retaliation for filing grievances. Plaintiff further states that Defendant Rogers falsified the medical records and that he never reported having any issues related to incontinence. Plaintiff also states that Defendant McDowell threatened him with segregation if he did not consent to the rectal exam.

The record establishes that the parties dispute whether the rectal exam was for a medical purpose. The majority of Defendants' arguments demonstrates that this is a significant factual dispute. For example, Defendant Rogers argues that Plaintiff's First Amendment claim fails because the adverse act "was really a proper medical exam." (ECF No. 291, PageID.3166.) But Plaintiff contends that the rectal exam was not a proper medical exam. Similarly, Defendants argue that Plaintiff's Fourth Amendment claim fails "because an examination by a medical provider for medical purposes is not a search and seizure." (ECF No. 329, PageID.3684.) Again, Plaintiff states that this examination was not done for a medical purpose. In addition, Defendant Rogers argues that Plaintiff's Eighth

Amendment claim fails because Plaintiff does not allege that Defendant Rogers was deliberately indifferent to Plaintiff's serious medical needs. However, **[*22]** as Plaintiff has made clear, this claim is an excessive-force *Eighth Amendment* claim; therefore, Plaintiff does not need to show that Defendant Rogers was deliberately indifferent to a *serious medical need.*

Defendant McDowell argues that the claims against him should be dismissed because he never physically touched Plaintiff. Plaintiff does not dispute that Defendant McDowell never touched him. Instead, Plaintiff claims that Defendant McDowell threatened him with segregation unless he allowed Defendant Rogers to conduct the rectal exam. In the opinion of the undersigned, Defendant McDowell's personal involvement in the incident is sufficient.

Defendant Rogers argues that she was not aware of any grievances filed by Plaintiff. However, Plaintiff explains that Defendant Rogers was aware of one of Plaintiff's grievances because of her involvement with Plaintiff's medical care. Plaintiff explains that Defendant Rogers was responsible for changing one of Plaintiff's medical prescriptions on May 9, 2016. Plaintiff's argument is confusing and hard to follow. In addition, the grievance was apparently rejected and, according to MDOC Policy, the MDOC does not conduct investigations into grievances that are rejected. **[*23]** See MDOC Policy Directive 03.02.130 (effective 7/9/2007) at ¶¶ X and AA. Nonetheless, Plaintiff claims that Defendant Rogers said, "[y]ou're writing all of these complaints and trying to hold us accountable for your back pain so I need to perform this rectum exam on you." Thus, the undersigned finds that a question of fact exists as to whether Defendant Rogers knew about Plaintiff's grievances.

Finally, Defendant McDowell argues that he is entitled to qualified immunity. However, as discussed above, there are factual disputes as to the purpose of the rectal exam and Defendant McDowell's role. Defendant McDowell's qualified immunity defense turns on these factual determinations. At this point, the undersigned cannot determine whether Defendant McDowell violated Plaintiff's clearly established rights. *See Bletz v. Gribble, 641 F.3d 743, 749 (6th Cir. 2011)* ("[I]f genuine issues of material fact exist as to whether the officer committed acts that would violate a clearly established right, then summary judgment is improper."). Therefore, in the opinion of the undersigned, Defendant McDowell is not entitled to qualified immunity.

Accordingly, the undersigned recommends that the Corizon Defendants' motion for summary judgment (ECF No. 291) **[*24]** be GRANTED as to Defendants Paquette and Canlas and DENIED as to Defendant Rogers. It is further recommended that the MDOC Defendants' motion for summary judgment (ECF No. 361) be GRANTED as to Defendant Kinney and DENIED as to Defendants Damron, Covert, Freytag, and Rogers. Therefore, Defendants Paquette, Canlas, and Kinney should be dismissed from this case.

NOTICE TO PARTIES: Objections to this Report and Recommendation must be served on opposing parties and filed with the Clerk of the Court within fourteen (14) days of receipt of this Report and Recommendation. *28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); W.D. Mich. LCivR 72.3(b).* Failure to file timely objections constitutes a waiver of any further right to appeal. *United States v. Walters, 638 F.2d 947 (6th Cir. 1981). See also Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).*

Dated: February 26, 2019

/s/ Timothy P. Greeley

TIMOTHY P. GREELEY

UNITED STATES MAGISTRATE JUDGE

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Rose v. Damron

United States District Court for the Western District of Michigan, Northern Division

March 28, 2019, Decided; March 28, 2019, Filed

Case No. 2:16-CV-242

Reporter
2019 U.S. Dist. LEXIS 52660 *; 2019 WL 1397087

WILLIE ROSE #235893, Plaintiff, v. JOSEPH DAMRON, et al., Defendants.

Prior History: *Rose v. Damron, 2019 U.S. Dist. LEXIS 52944 (W.D. Mich., Feb. 26, 2019)*

Core Terms

exam, Recommendation, rectal, retaliation claim, deliberate indifference, summary judgment motion, adverse action, Defendants', allegations

Counsel: **[*1]** Willie Rose #235893, plaintiff, Pro se, Munising, MI.

Judges: HON. GORDON J. QUIST, UNITED STATES DISTRICT JUDGE.

Opinion by: GORDON J. QUIST

Opinion

ORDER ADOPTING IN PART THE REPORT AND RECOMMENDATION

Plaintiff, Willie Rose, a prisoner with the Michigan Department of Corrections (MDOC), filed this pro se civil rights action pursuant to *42 U.S.C. § 1983*, alleging *First*, *Fourth*, and *Eighth Amendment* claims against Defendants Bienvenido Canlas, Danielle Paquette, Penny Rogers, Gerald Covert, Joseph Damron, Rebecca Freytag, Elizabeth Kinney, and Michael McDowell. Defendants Canlas, Paquette, and Rogers (Corizon Defendants) filed a motion for summary judgment. (ECF No. 291.) Plaintiff filed a response. (ECF No. 319.) Defendants Covert, Damron, Freytag, Kinney, and McDowell (MDOC Defendants) filed a separate motion for summary judgment, asserting qualified immunity. (ECF No. 361.) Plaintiff filed a response. (ECF No. 368.) On February 26, 2019, Magistrate Judge Timothy P. Greeley[1] submitted a Report and Recommendation (R & R) recommending that the Court grant the Corizon Defendants' motion for summary judgment with respect to Defendants Paquette and Canlas but deny the motion as to Defendant Rogers; grant the MDOC Defendants' motion for summary judgment as to Defendant **[*2]** Kinney but deny the motion as to Defendants Damron, Covert, Freytag, and McDowell;[2] and (3) dismiss Defendants Paquette, Canlas, and Kinney from the case. (ECF No. 377.)

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[1] Judge Greeley recently retired on March 14, 2019.

[2] In the R & R, the magistrate judge states, "It is further recommended that the MDOC Defendants' motion for summary judgment (ECF No. 361) be GRANTED as to Defendant Kinney and DENIED as to Defendants Damron, Covert, Freytag, and *Rogers*." (ECF No. 377, PageID.4094-95) (emphasis in italics added). However, Rogers is not an MDOC Defendant and in the body of the R & R, the magistrate judge had stated that McDowell was one of the MDOC Defendants that he recommended keeping in the case. Thus, the Court assumes that the inclusion of Rogers as an MDOC Defendant was simply a typographical

Defendant Rogers and Plaintiff both filed objections to the R & R. (ECF Nos. 382, 383.) Upon receiving objections to the R & R, the district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *28 U.S.C. § 636(b)(1)*. This Court may accept, reject, or modify any or all of the magistrate judge's findings or recommendations. *28 U.S.C. § 636(b)(1)*; *Fed. R. Civ. P. 72(b)*. After conducting a de novo review of the R & R, the objections, and the pertinent portions of the record, the Court concludes that the R & R should be adopted in part and rejected in part. Specifically, in addition to dismissing Defendants Paquette, Canlas, and Kinney from the case, the Court concludes that Plaintiff's claims against Defendants Rogers, McDowell, and Freytag should also be dismissed, as well as one claim against Defendant Covert.

Defendant Rogers

Plaintiff asserts First, Fourth, and Eighth claims against Defendant Rogers arising out of treatment on May 24, 2016, in which Defendant Rogers performed **[*3]** a rectal exam on Plaintiff. According to Defendant Rogers, she considered the rectal exam medically necessary in response to Plaintiff's complaints of incontinence and to support Plaintiff's request for an MRI. Plaintiff, however, maintains that the rectal exam was unnecessary and was done in retaliation for filing grievances against health care.

First, Defendant Rogers argues in her objections that Plaintiff cannot maintain an *Eighth Amendment* claim. The R & R construed the *Eighth Amendment* claim as a claim of excessive force, rather than a deliberate indifference claim, but under either standard, Plaintiff cannot support an *Eighth Amendment* claim.

In evaluating "whether a particular use of force was objectively reasonable" in the context of an excessive force claim, courts consider "the extent of the injury suffered, the need for the application of force, the relationship between the need and the amount of force used, the threat reasonably perceived by the prison official, and any efforts made to temper the severity of the forceful response." *Richmond v. Settles, 450 F. App'x 448, 453 (6th Cir. 2011)* (citing *Whitley v. Albers, 475 U.S. 312, 320-21, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251 (1986)*). However, even accepting Plaintiff's most grievous accusations against Defendant Rogers, Plaintiff merely alleged that Defendant Rogers coerced him to submit to the rectal exam, not **[*4]** that she applied any physical force. In this Court's opinion, an excessive force claim does not fit this situation where the only use of "force" was the actual medical exam.

For Plaintiff to prevail on a deliberate indifference claim, he must show that he faced a sufficiently serious risk to his health or safety and that Defendant Rogers acted with deliberate indifference to Plaintiff's health or safety. *Mingus v. Butler, 591 F.3d 474, 479-80 (6th Cir. 2010)*. In this Court's opinion, a deliberate indifference claim also does not fit this situation, in which Defendant Rogers provided more medical treatment than Plaintiff considered necessary.

Defendant Rogers correctly notes that Plaintiff's claim is more accurately characterized as an issue of informed consent. (ECF No. 382, PageID.4111.) But "claims arising from the individual defendants' failure to obtain [the plaintiff's] informed consent prior to administering medical treatment do not establish a constitutional violation." *Davis v. Agosto, No. CIV.A.3:01-CV-180-S, 2002 U.S. Dist. LEXIS 15487, 2002 WL 1880761, at *3 (W.D. Ky. Aug. 15, 2002)*, *aff'd*, *89 F. App'x 523 (6th Cir. 2004)*. Thus, Plaintiff cannot maintain an *Eighth Amendment* claim against Defendant Rogers.

Next, Defendant Rogers argues in her objections that Plaintiff cannot maintain a *Fourth Amendment* claim. Plaintiff's *Fourth Amendment* claim is based on his right to be free from unreasonable **[*5]** searches and seizures. However, this claim fails for two reasons. First, "the *Fourth Amendment* does not apply to searches and seizures in prison." *Weatherspoon v. Woods, No. 16-1277, 2017 U.S. App. LEXIS 18370, 2017 WL 3923335, at *3 (6th Cir. Feb. 24, 2017)* (citing *Hudson v. Palmer, 468 U.S. 517, 529-30, 104 S. Ct. 3194, 3202, 82 L. Ed. 2d 393 (1984)*).

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error and that the magistrate judge meant to say that McDowell was one of the MDOC Defendants for which he recommended denying the motion for summary judgment.

Second, "[i]nvasions of the body by doctors for medical purposes are neither a search nor a seizure," when the medical procedure was performed "not at the request, advice or encouragement of any . . . law enforcement agency." *United States v. Chukwubike, 956 F.2d 209, 212 (9th Cir. 1992)*. Thus, Plaintiff cannot maintain a *Fourth Amendment* claim against Defendant Rogers.

Finally, Defendant Rogers argues in her objections that Plaintiff cannot maintain a *First Amendment* retaliation claim. Plaintiff's *First Amendment* claim is based on his perception that Defendant Rogers performed the rectal exam in retaliation for Plaintiff writing grievances against health care services. To prevail on this claim, Plaintiff must establish that (1) he was engaged in protected conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from engaging in that conduct; and (3) the adverse action was motivated, at least in part, by the protected conduct. *Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999)*. Defendant Rogers argued that she was not aware of any grievances, which would negate a retaliation claim. The R & R recommends that the Court find that there is still a genuine issue **[*6]** of material fact, though, based on Plaintiff's statement in his declaration that Defendant Rogers told Plaintiff, "Since you're writing these complaints[,] I'm going to have to perform a rectal exam on you." (ECF No. 319-1, PageID.3644.) However, Plaintiff's declaration contradicted his own sworn deposition testimony. When asked about the incident during his deposition, Plaintiff testified that Defendant Rogers told him that she needed to perform the rectal exam for Plaintiff to get an MRI. (ECF No. 362-2 at PageID.3944.) The Sixth Circuit has "barred the nonmoving party from avoiding summary judgment by simply filing an affidavit that directly contradicts that party's previous testimony." *Aerel, S.R.L. v. PCC Airfoils, L.L.C., 448 F.3d 899, 907 (6th Cir. 2006)*. The Court will not deny summary judgment to Defendant Rogers on Plaintiff's retaliation claim on the basis of a statement that Plaintiff made in his declaration that contradicted his prior deposition testimony. Thus, Plaintiff cannot maintain a *First Amendment* claim against Defendant Rogers.

Defendant McDowell

Plaintiff's primary allegations against Defendant McDowell were that he would not leave the exam room when Plaintiff requested that he do so and "that he aided Ms. Rogers in illegally violating [Plaintiff] **[*7]** with the rectal exam that wasn't necessary." (ECF No. 362-2, PageID.3944.) A correctional officer refusing to leave a room when requested is not a constitutional violation, and for the same reasons that Plaintiff cannot maintain a claim against Defendant Rogers, Plaintiff also cannot maintain a claim against Defendant McDowell for aiding Defendant Rogers. Therefore, Plaintiff's claims against Defendant McDowell will be dismissed.

Defendants Freytag and Covert

Plaintiff alleges that on December 1, 2015, Plaintiff asked Defendant Freytag for the names of all individuals involved with Plaintiff's treatment on November 22, 2015, but Defendant Freytag refused to provide any names. Plaintiff also alleges that Defendants Freytag and Covert initiated Plaintiff's transfer from Chippewa Correctional Facility (URF) to Kinross Correctional Facility (KRF) in retaliation for writing grievances. The Court is required to dismiss prisoner actions brought under federal law if "at any time" the Court determines that the complaint is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant immune from such relief. *28 U.S.C. §§ 1915(e)(2), 1915A*; *42 U.S.C. § 1997e(c)*. The Court must read **[*8]** Plaintiff's *pro se* complaint indulgently, *see Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 596, 30 L. Ed. 2d 652 (1972)*, and accept Plaintiff's allegations as true, unless they are clearly irrational or wholly incredible. *Denton v. Hernandez, 504 U.S. 25, 33, 112 S. Ct. 1728, 1733, 118 L. Ed. 2d 340 (1992)*. The Court finds that even accepting Plaintiff's allegations as true, Plaintiff's claims against Defendant Freytag and Plaintiff's claim against Defendant Covert regarding transfer to another facility should be dismissed for failure to state a claim.

First, the Court can find no authority holding that a correctional officer's refusal to provide information to a prisoner constitutes adverse action. In this Court's opinion, with multiple reasons why prison staff would choose to withhold information from prisoners, such a refusal to provide names cannot be the basis for a retaliation claim.

Second, transfer to another prison facility can only constitute adverse action in limited circumstances not present here. According to the Sixth Circuit, "since transfers are common among prisons, ordinarily a transfer would not deter a prisoner of ordinary firmness from continuing to engage in protected conduct." *Siggers-El v. Barlow, 412 F.3d 693, 701 (6th Cir. 2005)*. A narrow exception applies when there are foreseeable consequences to the transfer that interfere with the prisoner's ability to access the **[*9]** courts. *Id. at 702*. These foreseeable consequences would include the loss of a high-paying job that the prisoner needed to pay his attorney and a long-distance transfer that would make it more difficult for the prisoner's attorney to visit or represent the prisoner. *Id.* However, Plaintiff's transfer from URF to KRF did not cause Plaintiff to lose his job or interfere with Plaintiff's ability to speak with his attorney.

The R & R recommends expanding the exception to encompass Plaintiff's allegation that upon his transfer, he lost over 100 pages of legal documents. But in this Court's opinion, the limited exception should remain limited. Allowing prisoners to bring constitutional claims every time documents are allegedly lost during transfer would open up prison staff to unlimited and unwarranted litigation. Thus, because the Court finds that ordinarily transfer to another prison does not constitute adverse action and that the limited exception to the general rule does not apply to Plaintiff, Plaintiff's retaliation claims against Defendants Freytag and Covert relating to the transfer should also be dismissed.

Conclusion

For the foregoing reasons, the February 26, 2019, Report and Recommendation **[*10]** (ECF No. 377) is **adopted in part** and **rejected in part**. Plaintiff's objections to the R & R (ECF No. 383) are **overruled**. Corizon Defendants' motion for summary judgment (ECF No. 291) is **granted**. MDOC Defendants' motion for summary judgment (ECF No. 361) is **granted in part** and **denied in part**. Plaintiff's claims against Defendants Paquette, Canlas, Kinney, Rogers, McDowell, and Freytag are **dismissed with prejudice**. Therefore, the above-mentioned Defendants are dismissed from the case. Plaintiff's retaliation claim against Defendant Covert based on Plaintiff's transfer to a different prison is **dismissed with prejudice**. The claims that survive summary judgment are (1) Plaintiff's deliberate indifference claim against Defendant Damron and (2) Plaintiff's retaliation claim against Defendant Covert regarding the allegation that Defendant Covert ripped up papers from Plaintiff's medical chart.

IT IS SO ORDERED.

Dated: March 28, 2019

/s/ Gordon J. Quist

GORDON J. QUIST

UNITED STATES DISTRICT JUDGE

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Appx. - C

* PETITION FOR REHEARING *

Neutral
As of: July 18, 2024 5:06 PM Z

Rose v. Washington

United States Court of Appeals for the Sixth Circuit

February 1, 2024, Filed

Nos. 21-2764, 21-2765, 21-2882

Reporter
2024 U.S. App. LEXIS 2293 *

WILLIE CHARLES ROSE, Plaintiff-Appellant, v. HEIDI E. WASHINGTON, Defendant, JOSEPH DAMRON, REGISTERED NURSE; GERALD COVERT, REGISTERED NURSE,

Prior History: *Rose v. Washington, 2023 U.S. App. LEXIS 29276, 2023 WL 9316268 (6th Cir. Mich., Nov. 1, 2023)*

Core Terms

petition for rehearing, en banc

Counsel: **[*1]** WILLIE CHARLES ROSE (21-2764, 21-2765, 21-2882), Plaintiff - Appellant, Pro se, Lenox Township, MI.

For JOSEPH DAMRON, Registered Nurse, GERALD COVERT, Registered Nurse (21-2764, 21-2765, 21-2882), Defendants - Appellees: Jessica Ellen Pelto, Office of the Attorney General, Lansing, MI.

Judges: BEFORE: SILER, THAPAR, and READLER, Circuit Judges.

Opinion

ORDER

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 cases. 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.

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