

APP-A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 31 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

STEPHEN L. FARRAR,

Plaintiff-Appellant,

v.

COLETTE PETERS, director of O.D.O.C.;
et al.,

Defendants-Appellees.

No. 16-35964

D.C. No. 6:15-cv-00618-KI
District of Oregon,
Eugene

ORDER

Before: SCHROEDER, HAWKINS, and N.R. SMITH, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Farrar's petition for rehearing en banc (Docket Entry No. 36) is denied.

No further filings will be entertained in this closed case.

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NOT FOR PUBLICATION

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OCT 4 2017

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MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Judge, Presiding

Submitted September 21, 2017**

Before: SCHROEDER, HAWKINS, and N.R. SMITH, Circuit Judges.

Oregon state prisoner Stephen L. Farrar appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging various constitutional violations. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Toguchi v. Chung*, 391 F.3d 1051, 1056 (9th Cir. 2004). We

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

affirm.

The district court properly granted summary judgment on Farrar's due process claims arising from his disciplinary proceedings because Farrar failed to raise a genuine dispute of material fact as to whether defendants afforded him all of the process that he was due. *See Superintendent v. Hill*, 472 U.S. 445, 455 (1985) (requirements of due process are satisfied if "some evidence" supports disciplinary decision); *Wolff v. McDonnell*, 418 U.S. 539, 563-70 (1974) (setting forth due process requirements for prison disciplinary proceedings); *see also Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (no constitutional entitlement to a specific administrative review procedure).

Third
Farrar
claims
C 02/05

The district court properly granted summary judgment on Farrar's medical deliberate indifference claims arising from his mental health diagnosis, change in single cell status, and sciatic nerve pain because Farrar failed to raise a genuine dispute of material fact as to whether defendants knew of or disregarded an excessive risk to Farrar's health. *See Toguchi*, 391 F.3d at 1057-60 (prison officials are deliberately indifferent only if they know of and disregard an excessive risk to inmate health; negligence, or a difference of opinion regarding diagnosing or treating a medical condition, does not violate a prisoner's Eighth Amendment rights); *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002) (requiring a showing of personal participation in the alleged rights deprivation).

Fifth
claim
also
450

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The district court properly granted summary judgment on Farrar's retaliation claims because Farrar failed to raise a genuine dispute of material fact as to whether defendant acted with retaliatory motive. *See Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009) (setting forth elements of a retaliation claim in the prison context).

The district court did not abuse its discretion by denying Farrar's motions for appointment of counsel because Farrar did not demonstrate "exceptional circumstances." *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (setting forth standard of review and requirement of "exceptional circumstances" for appointment of counsel).

13
The district court did not abuse its discretion by denying Farrar's motion for appointment of an expert witness because Farrar's claims were not so complex as to require an independent expert. *See Walker v. Am. Home Shield Long Term Disability Plan*, 180 F.3d 1065, 1070-71 (9th Cir. 1999) (setting forth standard of review).

11
The district court did not abuse its discretion by denying Farrar's discovery requests because Farrar failed to show that the denial of discovery would result in actual and substantial prejudice. *See Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) (setting forth standard of review and describing trial court's broad discretion to deny discovery).

The district court did not abuse its discretion by denying Farrar's motion for a preliminary injunction because Farrar failed to establish that he is likely to suffer irreparable harm in the absence of such relief. *See Jackson v. City and County of San Francisco*, 746 F.3d 953, 958-59 (9th Cir. 2014) (setting forth standard of review and standard for issuance of a preliminary injunction).

It was not an abuse of discretion to deny leave to amend because amendment would be futile. *See Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (standard of review).

We reject as meritless Farrar's contentions regarding the Americans with Disabilities Act.

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

STEPHEN L. FARRAR,

Plaintiff,

v.

Case No. 6:15-cv-0618-KI

SUPPLEMENTAL OPINION
AND ORDER

**COLETTE PETERS, Director, O.D.O.C.;
SUPT. J. PREMO, Asst. Supt.; M.
YODER; CAPT. D. LONG; C. COFFEY,
OSP Medical Services; S. SHELTON,
M.D., Medical Director, O.D.O.C.; J.
RUSSELL, BHS Administrator; T.
BYERLY, BHS Manager OSP; B
MILLER, BHS (PMHNP) OSP; C.
GORDON, BHS (QMHP) OSP; C.
FARRELL (QMHP) OSP; LEONARD
WILLIAMSON, Inspector General;
GARRETT LANEY, Deputy Inspector
General; E. BRYANT, Inspector 2; J.
NOFZIGER, OSP; D. PARKER, OSP; K.
ENGLE, C/O OSP; DR. GULICK, SRCI,**

Defendants.

KING, Judge:

Plaintiff Stephen L. Farrar, an Oregon Department of Corrections' inmate, brings this civil rights action pursuant to 42 U.S.C. § 1983. I previously deferred ruling on defendants' motion for summary judgment as to a portion of Claim Two and I directed defendants to provide to the Court a copy of a video that plaintiff claimed was exculpatory.

I have now reviewed the video and I do not require additional briefing to resolve defendants' motion for summary judgment as to Claim Two.¹ For the following reasons, I now grant defendants' motion for summary judgment and enter judgment as to all claims.

BACKGROUND

Plaintiff's remaining claim arises from a May 2014 misconduct report and the subsequent disciplinary proceeding; plaintiff alleges defendants Kennan Engle (Correctional Officer), Denise Parker (Correctional Hearings Officer), and Leonard Williamson (Inspector General) violated his due process rights. I previously dismissed Engle and Williamson. *See Op. and Order*, Sept. 29, 2016 (ECF No. 143).

The facts relevant to the remaining claim are as follows:

On May 26, 2014, Engle charged plaintiff with Contraband I, False Information to Employees I, and Distribution I. In the misconduct report, Engle reported that he watched plaintiff put something small in inmate Britt Brock's palm. Engle saw plaintiff holding

¹To make a complete record, I note the following: the Court received a disc purporting to contain the entire interaction referenced in Parker's report. However, the video did not start until 14:21:03, which fell past the time marked in Parker's report. Court staff contacted defendants' attorney and obtained a corrected version of the video. Since the Court could independently confirm that the video it received corresponded with the video entered into evidence at plaintiff's disciplinary hearing (as described by Parker in her report), plaintiff's Objections to Video Docket (ECF No. 145) are deemed moot.

something in his hand. Engle ordered plaintiff to show what was in his hand, at which time plaintiff showed Engle a small piece of what looked like plastic wrap. Plaintiff threw the plastic away at Engle's direction. Engle then approached Britt and ordered him to empty his pockets. Britt held on to something in his right hand, tried to put it behind his back, and then put whatever was in his hand into his mouth. Officers handcuffed Britt and took him to DSU where he admitted to taking Neurontin. When Engle asked plaintiff if he passed anything to Britt he said no. Plaintiff then said he passed the piece of plastic to Britt.² Plaintiff admitted he was prescribed Neurontin.

Parker postponed the initial disciplinary hearing to allow plaintiff to watch a surveillance video. At the subsequent June 10, 2014 disciplinary hearing, Parker denied plaintiff's request to call Britt as a witness. She found plaintiff in violation of Distribution II, Contraband I, and Disobedience of an Order I.³ She imposed a punishment of 25 days in DSU, 14 days loss of privileges, and a \$35 fine suspended pending no Level I or II rule violations.

² Plaintiff says he told the investigator he passed paper to Britt. Pl.'s First Aff. ¶ 72.

³ An inmate commits Distribution II if he "[d]istributes or has distributed to him/her or manufactures contraband that creates a threat to the safety, security and orderly operation of the facility[.]" OAR 291-105-0015(4)(g)(A). Contraband I includes possessing any intoxicant. OAR 291-105-0015(1)(d). Disobedience of an Order I occurs when an inmate "overtly refuses to promptly, or in a timely manner, comply with a valid order, which creates a threat to the safety, security, or orderly operation of the facility (such as when one or more other persons are present)." OAR 291-105-0015(4)(a). I note Parker also references the charge of False Information to Employees I, which is what Engle initially charged plaintiff with. See Parker Decl. Att. 1, at 3. Regardless, the discipline plaintiff received was based on the Distribution II charge alone.

LEGAL STANDARDS

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). On a motion for summary judgment, the court “must view the evidence on summary judgment in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party.” *Nicholson v. Hyannis Air Service, Inc.*, 580 F.3d 1116, 1122 n.1 (9th Cir. 2009) (citation omitted).

DISCUSSION

Due process protections called for by the Supreme Court in this context require that a decision to discipline a prisoner be supported by “some evidence.” *Bruce v. Ylst*, 351 F.3d 1283, 1287 (9th Cir. 2003) (citing *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 454 (1985)). “Evidence must meet minimal standards of reliability.” *Toussaint v. McCarthy*, 926 F.2d 800, 806 (9th Cir. 1990). A court does not “reweigh the evidence; rather, ‘the relevant question is whether there is any evidence in the record that could support the conclusion.’” *Bruce*, 351 F.3d at 1287 (quoting *Hill*, 472 U.S. at 455-56). The Constitution does not mandate that the evidence logically preclude any conclusion other than the one reached by the hearings officer. *Hill*, 472 U.S. at 457.

Plaintiff takes issue with Parker’s review of the video and asserts there was insufficient evidence to support her decision. Compl. 50, ¶¶ (a), (d). Plaintiff summarizes the surveillance

video, which he contends shows he passed a white, folded piece of paper to Britt, who placed it in his front left pocket. Plaintiff then showed Engle a piece of plastic oatmeal bag with a few oats in it. At Engle's direction, plaintiff threw the bag out and left for work. The video then shows Engle ordered Brock to empty his pockets. Brock pulled the contents out of his left pocket with his left hand and placed them on the counter. The video then depicts Brock pulling the contents out of his right pocket and quickly placing something into his mouth using his right hand. Pl.'s First Aff. ¶¶ 64-70.

Based on plaintiff's description of the video, and the fact that he contends the video clearly shows he passed Britt a piece of white paper, which went into Britt's left pocket, when Britt took the Neurontin out of his right pocket, I felt it necessary to watch the video in order to determine whether the video constitutes exculpatory evidence sufficient to undermine Parker's decision. *See Williams v. Thomas*, 492 F. App'x 732, 734 (9th Cir. 2012) (unpublished) (district and appellate court reviewed video evidence in order to help determine whether it constituted exculpatory evidence). Accordingly, I deferred decision on defendants' summary judgment as to this portion of plaintiff's second claim.

I have now reviewed the video. The video does indeed reflect that plaintiff passed Britt a folded piece of paper. Britt took the folded paper from plaintiff's hand but did not open it or read it. Instead, he put it in the left front pocket of his pants and kept his left hand in his pocket while he and plaintiff continued their conversation. Britt then stroked his chin with his left hand, hitched his pants with his left hand, then turned back to the counter. While continuing to talk to plaintiff, Britt glanced toward the security camera then clasped his hands together and stretched them over his head. At 14:20:29, Britt turned and leaned his back against the counter while

plaintiff faced toward the counter. Britt's right shoulder then nearly touched plaintiff's right shoulder. At 14:20:30, Britt looked down at plaintiff's right side and continued looking down through 14:20:32 while both of their right arms moved. The security footage does not capture what they did with their hands. By 14:20:33 both plaintiff and Britt shifted away from each other and by 14:20:36 plaintiff had begun walking away from Britt.

The video is not conclusive evidence in plaintiff's favor. Engle reported that he saw plaintiff put something small in Britt's palm. The video reflects that plaintiff and Britt were close enough for plaintiff to pass something to Britt's right hand, and showed their arms moving, from 14:20:30 to 14:20:32. While I agree with plaintiff that Engle overstated the evidence when he said the video shows plaintiff "clearly giving Inmate Britt something," the interaction in the context of the entire video is sufficient to corroborate Engle's statement that he observed plaintiff put something small in Britt's hand. When Engle told Britt to empty his pockets, Britt pulled something from his right pocket and put it in his mouth with his right hand. In short, Engle's report and the video provide "some evidence" to support Parker's conclusion that plaintiff committed the offenses of which he was charged.

Defendants are entitled to summary judgment on this claim.

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CONCLUSION

Based on the foregoing, defendants' motions for partial summary judgment (ECF No. 59) as to claim two and as to defendant Parker is now granted. Judgment will be entered dismissing this case.

IT IS SO ORDERED.

DATED this 9th day of November, 2016.

/s/ Garr M. King
Garr M. King
United States District Judge

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