IN THE

SUPREME COURT OF THE UNITED STATES

FRANK JOHN RICHARD,

-against-

O'BELL T. WINN, et al.,

APPENDIX FOR
PETITION FOR A WRIT OF CERTIORARI

Appendices [A.1] to [F.2]

APPENDIX

E.) Ninth Circuit cases:

F.) BVA decisions, for Frank J. Richard:

APPENDIX

A.

[A.1], Richard v. Winn, et al., 2024 U.S. App. LEXIS 12922*, (6th Cir. May 29, 2024)

[A.2], Richard v. Winn, et al., 2024 U.S. App. LEXIS 25669, (6th Cir. Oct. 10, 2024)

NOT RECOMMENDED FOR PUBLICATION

Rec'd on 6/3/24

No. 23-1429

FILED
May 29, 2024
KELLY L. STEPHENS, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK JOHN RICHARD,	)	
	)	
Plaintiff-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE EASTERN DISTRICT OF
O'BELL T. WINN, et al.,	)	MICHIGAN
	)	
Defendants-Appellees.	)	

ORDER

Before: LARSEN, NALBANDIAN, and READLER, Circuit Judges.

Frank John Richard, a Michigan prisoner proceeding pro se, appeals a district court judgment dismissing his civil rights action filed under 42 U.S.C. § 1983. 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.

Richard sued five employees of the Michigan Department of Corrections (MDOC): Warden O'Bell T. Winn, Prison Counselors Thomas Haynes and Michael Guerin, Resident Unit Manager Jodie Anderson, and Classification Director Christopher LaBreck. The district court later granted Richard's motion to file an amended complaint, which became the operative pleading.

Richard alleged that on May 1, 2018, Winn told him and other military veteran inmates that they must sign "a 'Regaining Honor' agreement" during a meeting at the Saginaw Correctional Facility (SRF). Three days later, Haynes told Richard that if he did not sign the honor agreement, he would lose his prison job as a dog handler in the Veterans' Unit Dog Program and be moved to another prison unit. Richard signed the agreement "under protest" and complained to the MDOC director about Haynes's conduct.

On June 14, 2019, Haynes issued a work report about Richard. A few months later, Richard wrote a fake adoption notice for one of the dogs in the program and left it in his cell. Two days later, on September 5, 2019, Haynes showed Richard that adoption notice, in Guerin's presence, and asked if he wrote it. When Richard responded that he did so as a joke, Haynes told him to sign a blank work report, which he refused to do. Haynes terminated Richard's job in the dog program and moved him to another prison unit. A few days later, Richard asked LaBreck to remove the June 14 and September 5 work reports from his prison file, but LaBreck refused to do so. Richard was transferred to the Muskegon Correctional Facility (MCF) in late September 2019.

In February 2020, Richard was returned to SRF for a medical appointment. Although Anderson initially told Richard that he would not be staying at SRF, he remained at SRF due to COVID-19. Richard tried to get his dog-handler job back, but Assistant Resident Unit Supervisor Amy Novak did not hire him. She stated that he was "probably" not hired because of the September 5 work report in his prison file. Richard alleged that he exhausted his administrative remedies by filing a grievance regarding the September 5 work report and contacting the MDOC director, the Ombudsman's Office, Internal Affairs, and others.

Richard claimed that Winn retaliated against him by authorizing his transfer to MCF after he challenged the loss of his job and move to another prison unit and violated his free speech rights by threatening to retaliate against him if he did not sign the honor agreement; that Haynes violated his free speech rights by coercing him to sign the honor agreement, violated his due process rights by ordering him to sign a blank work report, and retaliated against him for exercising his free speech rights by terminating his job; that Guerin violated his free speech rights and denied him due process by responding to his grievance because he was not impartial; that Anderson violated his due process rights when reviewing Guerin's response to his grievance; and that LaBreck violated his due process rights by denying his request to remove two work reports from his prison file. He claimed that the defendants' conduct caused the denial of his disability claim for hearing loss, his removal from the dog program, and his inability to obtain a prison job and psychological treatment. He sought declaratory, injunctive, and monetary relief.

The defendants moved for summary judgment under Federal Rule of Civil Procedure 56(a), asserting that Richard failed to exhaust his administrative remedies. A magistrate judge recommended that the district court grant in part and deny in part the defendants' motion. The magistrate judge determined that Richard pursued two grievances, one alleging that Haynes ordered him to sign the honor agreement or he would lose his prison dog-handler job and be moved to another prison unit (SRF-18-06-0531-28b ("531")) and one alleging that Haynes told him to "sign a blank work report" on September 5 (SRF-19-09-0966-28e ("966")). The magistrate judge concluded that only the claim raised in the 531 grievance was exhausted. Over Richard's objections, the district court adopted the magistrate judge's report, denied summary judgment as to Richard's claim that Haynes coerced him to sign the honor agreement, granted summary judgment as to his remaining claims, and dismissed Winn, Guerin, Anderson, and LaBreck as parties. Richard moved to file a second amended complaint to add two defendants, Novak, and D. Schur, which the magistrate judge denied as futile.

Haynes moved to dismiss the remaining claim against him under Federal Rule of Civil Procedure 12(b)(1), (2), and (6) on various grounds. The magistrate judge recommended granting the motion because the honor-agreement claim was untimely. Over Richard's objections, the district court adopted the magistrate judge's report, granted Haynes's motion, and dismissed Richard's complaint.

On appeal, Richard argues that the district court improperly (1) granted partial summary judgment on exhaustion grounds; (2) granted the defendants' summary-judgment motion "based on unsworn statements" in Richard's response to the motion; (3) denied his motion to file a second amended complaint; and (4) granted Haynes's motion to dismiss before the parties could conduct discovery. Richard moves for appointment of counsel.

I. EXHAUSTION

We review de novo the district court's partial grant of summary judgment based on Richard's failure to exhaust his administrative remedies. *See Does 8-10 v. Snyder*, 945 F.3d 951, 961 (6th Cir. 2019). "Summary judgment is appropriate only if defendants establish the absence

of a 'genuine dispute as to any material fact' regarding non-exhaustion." *Risher v. Lappin*, 639 F.3d 236, 240 (6th Cir. 2011) (quoting Fed. R. Civ. P. 56(a)).

Prisoners are required to exhaust all available administrative remedies before filing civil rights suits in federal court. 42 U.S.C. § 1997e(a). A prisoner "exhausts a claim by taking advantage of each step the prison holds out for resolving the claim internally and by following the 'critical procedural rules' of the prison's grievance process to permit prison officials to review and, if necessary, correct the grievance 'on the merits' in the first instance." *Reed-Bey v. Pramstaller*, 603 F.3d 322, 324 (6th Cir. 2010) (quoting *Woodford v. Ngo*, 548 U.S. 81, 90 (2006)). Proper exhaustion requires a prisoner to comply with the grievance procedures established by his prison. *Jones v. Bock*, 549 U.S. 199, 218 (2007). Failure to exhaust is an affirmative defense, which defendants bear the burden to prove. *Risher*, 639 F.3d at 240.

The MDOC has a three-step grievance process that prisoners must follow to exhaust their administrative remedies. *See* MDOC Policy Directive 03.02.130. Before beginning the process, a prisoner must "attempt to resolve the issue with the staff member involved within two business days" and, if unsuccessful, proceed to Step I of the grievance process. At Step I, a prisoner must submit a grievance within five days after attempting informal resolution. If the Step I response is unsatisfactory or untimely, a prisoner may submit a Step II grievance to the warden, the warden's delegate, or another appropriate official. If the Step II response is unsatisfactory or untimely, a prisoner may submit a Step III grievance to the MDOC's Grievance Section.

Richard submitted the 966 Step I grievance on the same day that he was transferred from SRF to MCF. He alleged that Haynes told him to sign a blank work report, that he refused to do so, and that the prison classification director refused to remove the work report from his prison file. Guerin responded to the Step I grievance, and Anderson reviewed it. The investigation summary states that Richard was unavailable for an interview due to his transfer to MCF, that Haynes denied asking Richard to sign a blank work report when interviewed, and that "Refused to Sign" was inserted in the space for Richard's signature. Because Richard's refusal to sign was notated on the work report and the form was sent to the classification director as required by prison

policy, no policy violation was found and the Step I grievance was denied. Richard requested a Step II grievance form but did not submit a Step II grievance. In his Step III grievance, Richard explained that he did not file a Step II grievance because he received the response to his Step I grievance three days after the deadline for filing his Step II grievance. At Step III, Richard reiterated his allegations against Haynes and LaBreck. The Step III decision stated, without elaboration, that "the rejection is upheld." An affidavit from the Step III respondent, Richard Russell—which defendants submitted in reply to Richard's response to their summary-judgment motion—stated that the Step III grievance was rejected because it did not include Step II grievance documents.

The district court concluded that the 966 grievance did not exhaust any of Richard's claims because he did not file a Step II grievance.

In this court, Richard argues that the Step III grievance decision, stating that "the rejection is upheld," appears to be a merits decision rather than the enforcement of a procedural rule. "When prison officials decline to enforce their own procedural requirements and opt to consider otherwise-defaulted claims on the merits, so as a general rule will we." *Reed-Bey*, 603 F.3d at 325. Thus, Richard's exhaustion argument does not turn on whether he complied with the grievance procedure. It is about whether the MDOC forgave his failure to do so and considered his grievance on the merits.

Richard's argument presents interesting questions about the application of the summary-judgment standard to forgiveness of procedural requirements. This is not the case to answer those questions, though, because Richard did not make this argument in district court.

In district court, Richard argued that the magistrate improperly credited Russell's affidavit, which he says is false. But the district court did not rely on Russell's affidavit or the reason for the rejection of Richard's Step III grievance. Instead, it relied on Richard's failure to pursue a Step II grievance. Notably absent from Richard's district court filings is *any* reference to forgiveness or an argument that because the Step III appeal was resolved on the merits, his failure to exhaust should be overlooked.

"In this circuit, the failure to object to a magistrate judge's Report and Recommendation results in a waiver of appeal on that issue as long as the magistrate judge informs the parties of the potential waiver." *United States v. Wandahsega*, 924 F.3d 868, 878 (6th Cir. 2019). The Report and Recommendation in this case contained such a warning. And neither Richard's response in opposition to summary judgment nor his objections to the Report and Recommendation suggested that he should be forgiven for failing to comply with the exhaustion requirement because the Step III decision was on the merits. As a result, we need not consider this argument further.

II. UNSWORN STATEMENT

Richard argues that the district court improperly granted the defendants' summary-judgment motion without addressing the magistrate judge's determination that Richard failed to support with a sworn statement his explanation for his failure to file a Step II grievance in the 966 grievance process.

In response to the defendants' motion for summary judgment, Richard stated that he asked for a Step II grievance form on October 21, 2019, but did not receive one. The magistrate judge did not credit that statement, however, because it was not sworn or verified, and Richard's response did not include an affidavit swearing to that fact. The district court agreed that Richard "did not provide evidence to support the assertion that he requested, but did not receive, the Step II [grievance] form." While some statements in Richard's response were verified, the statement concerning his alleged request for a Step II grievance form on October 21 was not. And he did not support the statement with an attached affidavit declaring that fact to be true or an unsworn declaration under penalty of perjury. *See* 28 U.S.C. § 1746 (providing that written and dated unsworn declarations subscribed "as true under penalty of perjury" have "like force and effect" as sworn declarations).

Richard also argues that his amended complaint should be treated as an affidavit because it was verified. But because the amended complaint was not verified, it could not serve as an opposing affidavit sufficient to rebut the defendants' summary-judgment motion. *See id.*; *King v.*

Harwood, 852 F.3d 568, 578 (6th Cir. 2017) (explaining that a verified complaint may be treated as an opposing affidavit in response to a summary-judgment motion).

III. AMENDED COMPLAINT

Richard challenges the denial of his motion to file a second amended complaint, arguing that the two new defendants he sought to add are sufficiently related to the original defendants.

The magistrate judge denied Richard's motion to amend as futile. The magistrate judge concluded that Richard's proposed claim against Novak, which was based on the denial of a prison job, did not implicate a constitutional right. The magistrate judge concluded that Richard's proposed claims against Schur—that Schur retaliated against him for complaining to staff of a veterans' agency, denied him medical care, and failed to give him notice that he was no longer a client of a veterans' agency—were unrelated to his sole remaining claim against Haynes related to the honor agreement.

We review de novo a district court's denial of a motion to amend based on the determination that "amendment would be futile." *Williams v. City of Cleveland*, 771 F.3d 945, 949 (6th Cir. 2014). An amendment is futile if it could not survive a motion to dismiss under Rule 12(b)(6). *Id.* Leave to amend should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). But leave need not be given if amendment would be futile. *Pittman v. Experian Info. Sols., Inc.*, 901 F.3d 619, 640-41 (6th Cir. 2018).

Richard's proposed second amended complaint was futile. His proposed claim against Novak was futile because prisoners do not have a due process right to a prison job. *See Bethel v. Jenkins*, 988 F.3d 931, 943 (6th Cir. 2021); *Dellis v. Corr. Corp. of Am.*, 257 F.3d 508, 511 (6th Cir. 2001). And his proposed claims against Schur were futile because they were unrelated to his remaining claim against Haynes. The proposed claims did not arise from "the same transaction, occurrence, or series of transactions or occurrences" as his claim against Haynes. *See* Fed. R. Civ. P. 20(a)(2)(A). Nor did his proposed claims against Schur and the claim against Haynes present common questions "of law or fact." *See* Fed. R. Civ. P. 20(a)(2)(B). Moreover, Richard's proposed claims against Schur are unrelated to his claims against Haynes and LaBreck concerning

the September 5 work report. *See* Fed. R. Civ. P. 20(a)(2). Richard's second motion to amend was properly denied.

IV. DISCOVERY

Richard argues that the district court prematurely granted Haynes's motion to dismiss before the parties could conduct discovery. Although he does not explicitly address the merits of the motion to dismiss or the district court's timeliness determination, his discovery argument implicitly challenges the dismissal of his remaining claim against Haynes as untimely.

Richard's honor-agreement claim against Haynes was time-barred. For § 1983 actions, federal courts apply the state personal injury statute of limitations. *Wallace v. Kato*, 549 U.S. 384, 387 (2007). The appropriate statute of limitations for personal injury actions arising in Michigan is three years. Mich. Comp. Laws § 600.5805(2); *Garza v. Lansing Sch. Dist.*, 972 F.3d 853, 868 n.8 (6th Cir. 2020). "[T]he statute of limitations begins to run when the plaintiff knows or has reason to know of the injury which is the basis of his action." *McCune v. City of Grand Rapids*, 842 F.2d 903, 905 (6th Cir. 1988).

Based on his own allegations, Richard knew about his honor-agreement claim against Haynes on, at the latest, May 31, 2018.[1] The statute of limitations "is tolled while the [prisoner] exhausts his required administrative remedies." *Surles*, 678 F.3d at 458. Richard began the grievance process on June 5, 2018. The grievance process was completed 40 days later when he received a Step III grievance decision on July 15, 2018. Giving Richard the benefit of the latest possible accrual date and tolling the statute of limitations during the exhaustion process, the statute of limitations expired on July 10, 2021. Because Richard's complaint, considered filed on August 23, 2021, under the prison mailbox rule, was filed beyond the expiration of the statute of limitations, this claim was untimely. *See Houston v. Lack*, 487 U.S. 266, 276 (1988) (holding that

[1] As the district court observed, it is unclear whether Richard's injury occurred on May 4, 2018, as he alleges in his compliant, or on May 31, 2018, as he alleges in the grievance related to this conduct. But the exact date upon which his injury occurred is immaterial; his compliant was not filed within the statute of limitations as calculated from either date.

a prisoner's notice of appeal is deemed filed on the date given to prison officials for mailing to the court).

Richard neither explained in the district court nor explains on appeal what discovery he needs or how discovery would change the timeliness determination. In his response to Haynes's motion to dismiss, Richard did not assert a need for discovery or indicate that he was unable to respond to Haynes's motion in the absence of discovery. He stated that it was "far too early to dismiss this case, without first allowing the parties" to conduct discovery in his objections to the magistrate judge's report recommending that Haynes's motion to dismiss be granted. But he did not elaborate. Similarly, Richard's appellate brief does not state what information he sought to discover or how the absence of discovery prevented him from presenting his case and responding to Haynes's motion to dismiss.

For these reasons, we **AFFIRM** the order granting summary judgment on exhaustion grounds and the district court's judgment dismissing the remaining claim against Haynes as untimely, and we **DENY** as moot the motions for appointment of counsel.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

Richard v. Winn

United States Court of Appeals for the Sixth Circuit

October 10, 2024, Filed

No. 23-1429

Reporter
2024 U.S. App. LEXIS 25669 *

FRANK JOHN RICHARD, Plaintiff-Appellant, v. O'BELL T. WINN, ET AL., Defendants-Appellees.

Prior History: Richard v. Winn, 2024 U.S. App. LEXIS 12922 (6th Cir. Mich., May 29, 2024)

Core Terms

petition for rehearing, en banc

Counsel: [*1] FRANK JOHN RICHARD, Plaintiff - Appellant, Pro se, Carson City, MI.

For O'BELL T. WINN, THOMAS HAYNES, MICHAEL GUERIN, JODIE ANDERSON, CHRISTOPHER LABRECK, Defendants - Appellees: James E. Keathley, Office of the Attorney General, Lansing, MI.

Judges: BEFORE: LARSEN, NALBANDIAN, 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 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.

End of Document

* Judge Davis recused herself from participation in this ruling.

APPENDIX

B.

[B.1], Richard v. Winn, et al., 2022 U.S. Dist. LEXIS 162185, (Sept. 8, 2022, ECF No. 32)

[B.2], Richard v. Haynes, 2022 U.S. Dist. LEXIS 244164, (DEC. 15, 2022, ECF No. 53)

[B.3], Richard v. Haynes, 2023 U.S. Dist. LEXIS 849, (April 10, 2023, ECF No. 68)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FRANK RICHARD,

Plaintiff,

v.

Civil Case No. 21-12064
Honorable Linda V. Parker

O.T. WINN, THOMAS HAYNES, MICHAEL GUERIN, JODIE ANDERSON and CHRISTOPHER LABRECK,

Defendants.
_____/

OPINION AND ORDER (1) REJECTING PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S JULY 27, 2022 REPORT AND RECOMMENDATION; (2) ADOPTING REPORT AND RECOMMENDATION; AND (3) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff, a Michigan Department of Corrections inmate, initiated this pro se civil rights lawsuit against Defendants on August 26, 2021. In an Amended Complaint filed November 12, 2021, Plaintiff asserts violations of his rights under the First, Eighth, and Fourteenth Amendments. (ECF No. 16.) Defendants filed a motion for summary judgment based on the failure of Plaintiff to exhaust his administrative remedies (ECF No. 21), which this Court referred to Magistrate Judge Curtis Ivy, Jr. (ECF No. 24).

On July 27, 2022, Magistrate Judge Ivy issued a Report and Recommendation ("R&R") in which he recommends that this Court grant in part and deny in part Defendants' motion. (ECF No. 25.) Specifically, Magistrate Judge Ivy finds that Plaintiff administratively exhausted only his claim that Defendant Thomas Haynes forced Plaintiff to sign an agreement or face the loss of his job and a prison transfer. (*Id.* at Pg ID 247.) Magistrate Judge Ivy therefore recommends the dismissal of the remaining claims alleged in Plaintiff's Complaint and the remaining Defendants. (*Id.*) At the conclusion of the R&R, Magistrate Judge Ivy informs the parties that they must file any objections to the R&R within fourteen days. Plaintiff filed objections on August 16. (ECF No. 28.)

When objections are filed to a magistrate judge's R&R on a dispositive matter, the Court "make[s] 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). The Court, however, "is not required to articulate all of the reasons it rejects a party's objections." *Thomas v. Halter*, 131 F. Supp. 2d 942, 944 (E.D. Mich. 2001) (citations omitted). A party's failure to file objections to certain conclusions of the R&R waives any further right to appeal on those issues. *See Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir.1987). Likewise, the failure to object to certain conclusions in the magistrate

judge's report releases the Court from its duty to independently review those issues. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985).

The Court has reviewed Plaintiff's objections to the R&R but reaches the same conclusion as Magistrate Judge Ivy with respect to the issue of whether Plaintiff administratively exhausted his pending claims. For the most part, Plaintiff's objections do not even relate to Magistrate Judge Ivy's analysis of the issue at hand. The only objections that appear to address the issue are Plaintiff's second objection related to the failure of the grievance coordinator to provide a Step II appeal form to Plaintiff and his seventh objection in which he argues that a Step II appeal would have been "moot" because of Defendant Winn's participation. [1]

Taking the latter objection first, mere conclusory assertions of futility are insufficient to excuse exhaustion. *Davis v. Keohane*, 835 F.2d 1147, 1149 (6th Cir. 1987). "To further the purposes behind the [Prison Litigation Reform Act], exhaustion is required even if the prisoner subjectively believes the remedy is not available; even when the state cannot grant the particular relief requested; and

[1] Plaintiff maintains that, had he filed a Step II appeal, it would have been invalid as Defendant Winn would have reviewed it and this would have violated Plaintiff's due process rights because Defendant Winn was involved in the involuntary transfer. (ECF No. 28 at Pg ID 286.) This grievance, however, related to Defendant Hayne's alleged attempt to have Plaintiff sign a blank work report form and Plaintiff's request to have an evaluation removed from his file. (*See* ECF no. 21-3 at Pg ID 192.)

'even where the prisoners believe the procedure to be ineffectual or futile.'" *Barnett v. Laurel Cnty., Kentucky*, No. 16-5658, 2017 WL 3402075, at *2 (6th Cir. 2017) (quoting *Napier v. Laurel Cnty., Ky.*, 636 F.3d 218, 222 (6th Cir. 2011)) (brackets and ellipsis removed).

As to Plaintiff's second objection, Magistrate Judge Ivy correctly explained that Plaintiff did not provide evidence to support the assertion that he requested, but did not receive, the Step II form. (ECF No. 25 at Pg ID 246.) Moreover, the "evidence" Plaintiff cites to support this assertion (*See* ECF No. 22 at Pg ID 210 (citing ECF No. 21-3 at Pg ID 200)) reflects that he requested the Step II form on October 21, 2019, which is the same date he filed his Step III appeal (ECF No. 21-3 at Pg ID 199). Thus, as Magistrate Judge Ivy found, Plaintiff did not afford the prison the opportunity to provide the Step II form before he filed his Step III appeal. (ECF No. 25 at Pg ID 246.)

For these reasons, the Court rejects Plaintiff's objections to Magistrate Judge Ivy's R&R and adopts Magistrate Judge Ivy's recommendations.

Accordingly,

IT IS ORDERED that Defendants' motion for summary judgment (ECF No. 21) is **GRANTED IN PART AND DENIED IN PART** in that summary judgment is denied as to Plaintiff's claim that Defendant Haynes forced Plaintiff to sign an agreement or risk losing his job and being transferred to a different prison

facility. However, summary judgment is granted as to Plaintiff's remaining claims and Defendants O.T. Winn, Michael Guerin, Jodie Anderson, and Christopher Labreck are **DISMISSED AS PARTIES** to this action.

IT IS SO ORDERED.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: September 8, 2022

I hereby certify that a copy of the foregoing document was mailed to counsel of record and/or pro se parties on this date, September 8, 2022, by electronic and/or U.S. First Class mail.

s/Aaron Flanigan
Case Manager

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FRANK JOHN RICHARD

Plaintiff,
v.

THOMAS HAYNES,

Defendant.
_____/

Case No.: 21-12064

Linda V. Parker
United States District Judge

Curtis Ivy, Jr.
United States Magistrate Judge

ORDER DENYING MOTION TO AMEND COMPLAINT (ECF No. 27); MOTION FOR SANCTIONS (ECF NO. 37).

Plaintiff Frank John Richard filed this prisoner civil rights suit on August 26, 2021, without the assistance of counsel, alleging violations of the First, Eighth, and Fourteenth Amendments. (ECF No. 1). It was referred to the undersigned for all pretrial matters. (ECF No. 31). This matter is currently before the Court on Plaintiff's motions to amend (ECF No. 27) and for sanctions (ECF No. 37).

For the reasons discussed below, the Court **DENIES** Plaintiff's motions.

I. DISCUSSION

a. Standard Governing Motions to Amend.

Rule 15(a) provides that leave to amend "shall be freely given when justice so requires." There are several factors courts consider in deciding whether to allow amendment: "the delay in filing, the lack of notice to the opposing party, bad

faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment." *Perkins v. Am. Elec. Power Fuel Supply, Inc.*, 246 F.3d 593, 605 (6th Cir. 2001).

The Court need not grant leave to amend where the amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Amendment of a complaint is futile when the proposed amendment would not permit the complaint to survive a motion to dismiss. *Miller v. Calhoun Cnty.*, 408 F.3d 803, 817 (6th Cir. 2005) (citing *Neighborhood Dev. Corp. v. Advisory Council on Historic Pres.*, 632 F.2d 21, 23 (6th Cir. 1980)). A complaint may be dismissed under Rule 12(b)(6) when the plaintiff fails to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6).

b. Analysis of Plaintiff's Motion to Amend.

Plaintiff seeks to amend his complaint to add two proposed Defendants: Amy Novak and D. Schur. (ECF No. 27, PageID.276). Plaintiff alleges Novak violated his right to Due Process when she "knowingly relied upon false information on a state form, to deny employment to the Plaintiff." (*Id.*). Plaintiff alleges three claims against Schur. (*Id.*). Plaintiff asserts that Schur retaliated against him "for complaints the Plaintiff made to Michigan Department of Veterans Affairs Agency Staff." (*Id.* at 277). In his second claim, Plaintiff

explains that Schur also denied him medical care because Schur is responsible for arranging appointments for incarcerated veterans and Schur denied Plaintiff a medical examination. (*Id.*). Plaintiff alleges the denial of a medical examination is also retaliation. (*Id.*). In his third claim, Plaintiff claims Schur violated his procedural due process rights under the Fourteenth Amendment for informing Plaintiff that "he had been 'revoked' as a client of the Michigan Veterans Affairs Agency ['M.V.A.A.']." (*Id.*). Plaintiff asserts Schur is liaison to the M.V.A.A. and "should have given prior notice to the Plaintiff of the M.V.A.A.'s intent to 'drop' him as a client." (*Id.* at PageID.277-78). Plaintiff indicates he is seeking to amend his complaint because "[a]t the time of the original filing, these Defendants were not yet 'ripe . . . as the Exhaustion of Administrative Remedies, had not yet been completed." (*Id.* at PageID.276).

Defendant Haynes asserts that Plaintiff's motion to amend should be denied because he failed to follow E.D. Mich. Local Rule 15.1 which provides "[a] party who moves to amend a pleading shall attach the proposed amended pleading to the motion." Beyond this procedural issue, Defendant Haynes argues the Court should deny Plaintiff's motion to amend as the motion is futile. Defendant asserts the motion fails to state a claim against proposed Defendant Novak and the claims against proposed Defendant Schur do not arise from the same transaction or occurrence as his sole remaining claim against Haynes, which relates to Haynes

allegedly forcing Plaintiff to sign an agreement or else face loss of his job and a prison transfer. (ECF No. 46, PageID.389).

In Plaintiff's reply brief, Plaintiff attaches his proposed second amended complaint in order to comply with E.D. Mich. Local Rule 15.1, which he states he was unaware of. (ECF No. 51, PageID.427). The proposed second amended complaint is an amalgamation of his first amended complaint (ECF No. 16) and the factual allegations from his motion to amend (ECF No. 27). (ECF No. 51). The undersigned has already addressed and dismissed the claims Plaintiff reiterates against Defendants Jodie Anderson, M. Guerin, C. LaBreck, and O.T. Winn in the July 27, 2022, report and recommendation. (ECF No. 25). The report and recommendation was adopted over Plaintiff's objections. (ECF No. 32). As to these allegations, the Court finds considering them would be futile because this Court has already ruled on these claims.

Despite the procedural deficiency in his motion, the Court will consider the allegations in the brief, reply, and proposed second amended complaint together to assess whether amendment would be futile. In his reply, Plaintiff alleges that potential Defendant Novak denied him a "high-paying" job and Plaintiff asked her if she did not hire him because of a work report by Defendant Haynes she replied "[p]robably[.]" (ECF No. 51, PageID.441). Plaintiff contacted Novak about returning to the Veterans Unit Dog Program on February 26, 2021, and alleges

there was not an available bottom-bunk in the program area. (*Id.* at PageID.452). Plaintiff asked Healthcare to remove the bottom-bunk detail from his file, and Plaintiff indicates they rescinded the detail a month later. (*Id.*) Plaintiff alleges he worked with a third-party organization, Humanity for Prisoners, to attempt to re-enter the dog program, but that the head of the program "declined to hear" Plaintiff's version of events. (*Id.* at PageID.453).

The other allegations against potential Defendant Schur are that Schur denied Plaintiff medical examinations for two outstanding Veterans Affairs ("VA") claims and that Schur threatened him in his cell stating, "[i]f this continues, you won't get shit from me." (ECF No. 51, PageID.441). More specifically, Plaintiff provides that he asked Schur to fax a "hearing loss/tinnitus disability claim" to the M.V.A.A. on July 27, 2029, and Schur returned the claim form the same day stating "[i]t's taken care of." (*Id.* at PageID.450). On September 23, 2019, Plaintiff contacted the M.V.A.A. to ask if a hearing test had been scheduled and the M.V.A.A. responded "[t]here is no hearing loss claim on record for you, we can file this now[.]" (*Id.* at PageID.451). Plaintiff alleges he wrote a letter to the Michigan Department of Corrections ("MDOC") Director where he "complained of being retaliated against for the filing of this lawsuit." (*Id.* at PageID.453). On January 11, 2022, Plaintiff alleges Schur "confronted the Plaintiff" regarding comments about Schur's "lack of professionalism." (*Id.*). Plaintiff indicates Schur

threatened him by stating "[i]f this continues, you won't get shit from me." (*Id.*). Plaintiff conveyed this interaction to the M.V.A.A. and Schur's supervisor. (*Id.*). M.V.A.A. recommended Plaintiff "reevaluate your relationship with CPC. D. Schur" on January 13, 2022. (*Id.*). Schur informed Plaintiff he had been "revoked" as a client of the M.V.A.A. on June 6, 2022. (*Id.* at PageID.454). Plaintiff alleges Schur threatened to have him removed from the Veterans Unit Program in response to a letter to the Director of the M.V.A.A., which he states is an act of retaliation. (*Id.* at PageID.441). These are all the additional factual allegations against potential Defendants Novak and Schur contained in Plaintiff's proposed second amended complaint. (ECF No. 51).

As to potential Defendant Novak, Plaintiff's motion is futile because he has not identified a sufficient liberty or property interest which can sustain a Due Process claim. Taking as true Plaintiff's assertions against Novak, he fails to state a claim because prisoners do not have a "constitutional right to prison employment or a particular prison job." *Martin v. O'Brien*, 207 F. App'x 587, 590 (6th Cir. 2006); *see also Williams v. Straub*, 26 F. App'x 389, 390-91 (6th Cir. 2001) (affirming dismissal of prisoner's § 1983 Due Process claim that being placed on "unemployable status" without a hearing violated his Due Process rights). Where, as here, a plaintiff has not identified "a protected liberty or property interest, there can be no federal procedural due process claim." *Experimental Holdings, Inc. v.*

Farris, 503 F.3d 514, 519 (6th Cir. 2007). Accordingly, the Court concludes that granting Plaintiff's motion to amend would be futile as to Novak.

As to potential Defendant Schur, the Court concludes the amendment would be futile because the allegations do not arise from the same transaction or occurrence his sole remaining claim against Haynes. With respect to the joinder of parties and claims in a single lawsuit, Federal Rule of Civil Procedure 20(a) limits the joinder of parties, whereas Federal Rule of Civil Procedure 18(a) limits the joinder of claims. Rule 20(a)(2) governs when multiple defendants may be joined in one action: "[p]ersons . . . may be joined in one action as defendants if: (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2). Rule 18(a) states: "A party asserting a claim . . . may join, as independent or alternative claims, as many claims as it has against an opposing party." Fed. R. Civ. P. 18(a).

Under Rule 20, "a civil plaintiff may not name more than one defendant in his original or amended complaint unless one claim against each additional defendant is transactionally related to the claim against the first defendant and involves a common question of law or fact." *Proctor v. Applegate*, 661 F. Supp. 2d 743, 778 (E.D. Mich. Sept. 30, 2009) (internal quotation marks omitted); *see*

also United States v. Mississippi, 380 U.S. 128, 142–43 (1965) (discussing that joinder of defendants is permitted by Rule 20 if both commonality and same transaction requirements are satisfied). When determining whether civil rights claims arise from the same transaction or occurrence, a court may consider various factors, including, "the time period during which the alleged acts occurred; whether the acts . . . are related; whether more than one act . . . is alleged; whether the same supervisors were involved, and whether the defendants were at different geographical locations." *Proctor*, 661 F. Supp. 2d at 778 (quoting *Nali v. Mich. Dep't of Corr.*, No. 07-10831, 2007 WL 4465247, at *3 (E.D. Mich. Dec. 18, 2007)). "Permitting the improper joinder in a prisoner civil rights action also undermines the purpose of the PLRA, which was to reduce the large number of frivolous prisoner lawsuits that were being filed in the federal courts." *Mims v. Simon*, No. 1:22-CV-323, 2022 WL 1284106, at *4 (W.D. Mich. Apr. 29, 2022) (citing *Riley v. Kurtz*, 361 F.3d 906, 917 (6th Cir. 2004)).

Plaintiff's claims against Schur are not transactionally related to the claim against the first defendant and do not involve a common question of law or fact. Plaintiff's allegations against Schur in his proposed second amended complaint are that Schur retaliated against him for complaints made to Michigan Department of Veterans Affairs Agency ("M.V.A.A.") staff, that Schur denied Plaintiff medical examinations by failing to make him an appointment, and that Schur did not give

him notice of M.V.A.A.'s intent to drop him as a client. (ECF No. 27, PageID.276-78; ECF No. 51, PageID.441; PageID.450-51). The remaining claim against Haynes relates to Haynes allegedly forcing Plaintiff to sign an agreement in 2018 or else face loss of his job and a prison transfer. (ECF No. 16, PageID.106; ECF No. 25, PageID.247).

There are no questions of common fact between the conduct ascribed to Schur and Haynes. Plaintiff does not allege the events occurred at the same time, nor does he allege the acts are related or that the same supervisors were involved. *Proctor*, 661 F. Supp. 2d at 778 ("the time period during which the alleged acts occurred; whether the acts . . . are related; whether more than one act . . . is alleged; whether the same supervisors were involved, and whether the defendants were at different geographical locations."). Indeed, in his reply brief, Plaintiff himself acknowledges his "claims against Schur are not related to his remaining claim against Haynes." (ECF No. 51, PageID.427). As Plaintiff does not allege any common questions of law or fact, joinder of Schur would be improper.[1]

For all these reasons, Plaintiff's motion to file a second amended complaint is **DENIED**. (ECF No. 27; PageID.277).

c. Plaintiff's Motion for Sanctions.

[1] The Court notes that denying Plaintiff's motion to amend does not preclude him from filing a separate suit on the merits of the claims alleged. (ECF No. 27; PageID.275) (raising concerns of res judicata)

On October 27, 2022, Plaintiff filed a motion seeking sanctions against Defendant's counsel because he "filed a document he knew to be false." (ECF No. 37, PageID.336). Plaintiff indicates the allegedly false document is an affidavit by Mr. Richard Russell related to rejection of grievances and that the affidavit references "records attached" but there are no such attachments. (*Id.* at PageID.336-37). Plaintiff also asserts that a paragraph of the affidavit is "complete fabrication" because it misstates the grievance record. (*Id.*). Plaintiff argues that Defendant's counsel and Russell failed to produce documents that indicate Plaintiff did not file a Step II grievance. (*Id.*).

In response, Defendant argues there is a "misunderstanding" related to a paragraph of Russell's March 2022 affidavit which states "[a]ny copy of these records attached to or accompanying this affidavit are true and accurate copies of the original records." (ECF No. 42, PageID.366). Defendant argues this language is used to authenticate any MDOC business records which may be attached to an affidavit but does not mean any documents were actually attached to the affidavit. (*Id.* at PageID.367). Russell produced an affidavit regarding his March affidavit, clarifying that he did not attach any documents to his March affidavit. (*Id.*; ECF No. 43). Defendant argues there is "another misunderstanding" regarding grievance SRF-19-09-0966-28e. (ECF No. 42, PageID.368). Defendant indicates he did not argue, as Plaintiff alleges, that SRF-19-09-0966-28e was rejected for a

failure to file at Step II. (*Id.*). Counsel asserts that SRF-19-09-0966-28e was rejected at Step III because the Step III submission "did not contain the Step II documents." (*Id.*) (quoting ECF No. 23, PageID.229.) Russell affirms this in his affidavit on these issues. (ECF No. 43, PageID.375). Defendant asks the Court to deny Plaintiff's motion for sanctions.

In his reply, Plaintiff argues Defendant is "doubling-down on the lie[.]" (ECF No. 50, PageID.418) (internal quotations omitted). Plaintiff asserts he demanded production of documents in his motion for sanctions, which he asserts are removed from the shield of Fed. R. Civ. P. 26(a)(1)(b)(iv) under Fed. R. Civ. P. 11(d). (*Id.*). He argues that Defendant's counsel and Russell have still not disclosed the aforementioned documents. (*Id.*). Plaintiff asserts that MDOC ignored their own policy directives in appointing Guerin as a Step I respondent, when he witnessed the events complained of in the grievance. (*Id.*).

The touchstone for sanctions under Federal Rule of Civil Procedure 11 is whether the party conducted a reasonable inquiry into the factual and legal basis of the challenged content and whether that inquiry was objectively reasonable under the circumstances. *Bus. Guides, Inc. v. Chromatic Comm'cns Enters., Inc.*, 498 U.S. 533, 548-51 (1991); *Cruz v. Don Pancho Mkt., LLC*, 171 F. Supp. 3d 657, 667-68 (W.D. Mich. Mar. 8, 2016) (further citation omitted). Here, the dispute arises from the language of Russell's affidavit stating "[a]ny copy of these records

attached to or accompanying this affidavit are true and accurate copies of the original records" ("authentication language") and the reason Defendant asserted SRF-19-09-0966-28e was rejected. (ECF No. 42, PageID.366-67). The Court interprets the authentication language as a statement that any accompanying documents are true and genuine copies, not a statement that there are necessarily documents attached. As to the reason the grievance was rejected, the reasonable inquiry requirement allows an attorney to rely on representations that another person makes. *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1278 (3d Cir.1994). Russell submitted an affidavit as to why this grievance was rejected, which Defendant may reasonably rely on. (ECF No. 23, PageID.229; ECF No. 43, PageID.375).[2] The Court concludes the conduct here does not warrant sanctions because Defendant's conduct was reasonable. The Plaintiff's motion for sanctions is **DENIED**. (ECF No. 37).

IT IS SO ORDERED.

The parties here may object to and seek review of this Order, but are required to file any objections within 14 days of service as provided for in Federal Rule of Civil Procedure 72(a) and Local Rule 72.1(d). A party may not assign as

[2] The Court notes the issue of the exhaustion on this grievance was not decided on the merits of why Step III rejected the grievance. (ECF No. 25; PageID.246-47). The Court determined Plaintiff failed to pursue a Step II appeal as required by MDOC policy and therefore this grievance was not exhausted. (*Id.*).

error any defect in this Order to which timely objection was not made. Fed. R. Civ. P. 72(a). Any objections are required to specify the part of the Order to which the party objects and state the basis of the objection. When an objection is filed to a magistrate judge's ruling on a non-dispositive motion, the ruling remains in effect unless it is stayed by the magistrate judge or a district judge. E.D. Mich. Local Rule 72.2.

Date: December 15, 2022.

s/Curtis Ivy, Jr.
Curtis Ivy, Jr.
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that this document was served on counsel of record and any unrepresented parties via the Court's ECF System or by First Class U.S. mail on December 15, 2022.

s/Kristen MacKay
Case Manager
(810) 341-7850

Rec'd 12/20/22

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FRANK JOHN RICHARD,

Plaintiff,

v.

Civil Case No. 21-12064
Honorable Linda V. Parker

THOMAS HAYNES,

Defendant.
_____/

ORDER REGARDING PLAINTIFF'S OBJECTIONS AND MOTION TO HOLD MAGISTRATE JUDGE'S REPORT AND RECOMENDATION IN ABEYANCE

Plaintiff Frank Richard, an individual incarcerated in the Michigan Department of Corrections, initiated this pro se civil rights lawsuit against Defendants on August 26, 2021. On March 7, 2023, Magistrate Judge Ivy issued a report and recommendation (R&R) (ECF No. 63) recommending that the Court grant Defendant's Motion to Dismiss because Plaintiff failed to file his lawsuit within the three-year statute of limitations pursuant to 42 U.S.C. § 1983, which the Court adopted on April 4, 2023. (ECF No. 64.) The matter is presently before the Court on Plaintiff's objections[1] to Magistrate Judge Ivy's Report &

[1] Plaintiff's objections arrived on April 6, 2023, which was well after the 14-day window to provide objections to an R&R. However, due to the Prisoner Mailbox Rule, *see Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008), the Court will accept the delayed filing of objections and address them accordingly.

Recommendation ("R&R") (ECF No. 66.) and Plaintiff's "Motion to Hold in Abeyance Magistrate's R&R to Grant Defendant's Motion to Dismiss." (ECF No. 67.)

When objections are filed to a magistrate judge's R&R on a dispositive matter, the Court "make[s] 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). The Court, however, "is not required to articulate all of the reasons it rejects a party's objections." *Thomas v. Halter*, 131 F. Supp. 2d 942, 944 (E.D. Mich. 2001) (citations omitted). A party's failure to file objections to certain conclusions of the R&R waives any further right to appeal on those issues. *See Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir.1987). Likewise, the failure to object to certain conclusions in the magistrate judge's report releases the Court from its duty to independently review those issues. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985).

Plaintiff raises two objections: (1) Magistrate Judge Ivy made a "judicial error" by citing to Federal Rule of Civil Procedure 12(g)(6) in a footnote when Plaintiff cited to Rule 12(g)(2) in response to Defendant's motion to dismiss; and (2) Magistrate Judge Ivy made a "judicial error" by not converting Defendant's motion to dismiss into a motion for summary judgment. (ECF No. 66 at Pg ID 595-96.) First, Magistrate Judge Ivy's citation to "Rule 12(g)(6)," which does not

exist under the Federal Rules, instead of 12(g)(2) was obviously a typo. (ECF No. 63 at Pg ID 583 n.2.) The subsequent language where he quotes the correct rule, Rule 12(g)(2), and applies it makes the fact that it was a typo apparent. (*Id.*) A typo does not amount to a valid objection to an R&R. *See Cole v. Yukins*, 7 F. App'x 354, 356 (6th Cir. 2001) (citing *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995)) ("The filing of vague, general, or conclusory objections does not meet the requirement of specific objections and is tantamount to a complete failure to object."); *see also Thomas*, 474 U.S. at 147 (noting that the purpose of filing objections is to focus the district judge's "attention on those issues—factual and legal—that are at the heart of the parties' dispute.").

Next, Magistrate Judge Ivy did not commit "judicial error" by failing to convert Defendant's motion to dismiss to a motion for summary judgment. If in a 12(b)(6) motion to dismiss, "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." *Wysocki v. Int'l Bus. Mach. Corp.*, 607 F.3d 1102, 1104 (6th Cir. 2010) (citing Fed. R. Civ. P. 12(d)). However, some documents may be considered without converting a motion to dismiss into a motion for summary judgment, including "public records, matters of which a court may take judicial notice, and letter decisions of governmental agencies."

Thomas v. Noder-Love, 621 F. App'x 825, 829 (6th Cir. 2015). Moreover, "when a document is referred to in the pleadings and is integral to the claims, it may be considered without converting a motion to dismiss into one for summary judgment." *Com. Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 335–36 (6th Cir. 2007). Here, Magistrate Judge Ivy's R&R relied on Plaintiff's grievance against Mr. Haynes and the Step III response—which are both in the Court record—and caselaw to reach his conclusion. Nothing in the R&R and nothing in Plaintiff's objections assert otherwise. As such, Magistrate Judge Ivy was not required to convert the motion to dismiss into a motion for summary judgment.

Finally, Plaintiff requests that the Court hold the R&R in abeyance but fails to provide a reason why other than listing allegedly disputed and undisputed facts and requests that "(ECF No. 63) be held for discovery." The Court assumes that the request for an abeyance is due to the objections presented. Because the Court rejects Plaintiff's objections, the motion for an abeyance is moot.

Accordingly,

IT IS ORDERED that Defendant's objections to Magistrate Judge Ivy's R&R (ECF No. 66) are rejected, and Plaintiff's "Motion to Hold in Abeyance Magistrate's R&R to Grant Defendant's Motion to Dismiss" (ECF No. 67) is

DENIED AS MOOT.

SO ORDERED.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: April 10, 2023
Rec'd on 4/13/23

I hereby certify that a copy of the foregoing document was mailed to counsel of record and/or pro se parties on this date, April 10, 2023, by electronic and/or U.S. First Class mail.

s/Aaron Flanigan
Case Manager

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