NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 21, 2022*
Decided August 11, 2023

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 21-2004

WALTER SMITH,
Plaintiff-Appellant,

v.

SANDRA HAUTAMAKI, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 14-cv-796-slc

Stephen L. Crocker,
Magistrate Judge.

No. 21-2005

WALTER SMITH,
Plaintiff-Appellant,

v.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 18-cv-189-slc

Stephen L. Crocker,

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* We have agreed to decide these cases without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

THERESA MURPHY, et al., *Magistrate Judge*.
Defendants-Appellees.

O R D E R

Walter Smith, a Wisconsin prisoner who practices Islam, sued various prison officials because he allegedly became sick from the meals he was given at Waupun Correctional Institution to accommodate his religious beliefs. Smith alleged that these conditions violated his rights under the First and Eighth Amendment and the Religious Land Use and Institutionalized Persons Act. *See* 42 U.S.C. § 2000cc-1. He also alleged another Eighth Amendment violation: that the water at Waupun was contaminated with heavy metals that made him sick. The district court severed Smith's claims into separate suits and later dismissed both cases as a sanction based on its finding that Smith fabricated evidence. We affirm.

Background

After the magistrate judge (presiding with the parties' consent, *see* 28 U.S.C. § 636) severed the lawsuit and screened the amended complaint in each under 28 U.S.C. § 1915A, Smith proceeded with the two suits. The first concerned the adequacy of the halal diet and the Ramadan meals Smith received from 2008 to 2011 as well as the availability of proper foods for the 2009 Eid-ul-Fitr feast. The second suit alleged that Waupun failed to provide him with safe drinking water. Counsel was recruited for Smith's religious-meals case.

I. Procedural history

In the religious-meals case, Smith sat for a deposition in May 2019. He testified that his irritable bowel syndrome was made worse by the meals he received for his religious diet. And he described a food log that he had been keeping since 2008, when his doctor told him to do so to help identify foods that aggravated his symptoms. Smith, who by then had been moved to a different prison, also testified that the part of the log from the relevant time at Waupun was with his cousin, Rashida Rogers (formerly Williams). Smith said that he had sent her the log because prison staff destroyed some of his property and he had wanted to protect the log. He testified that the rest of the log was in his cell.

Shortly after the deposition, the defendants made a document request under Rule 34(a)(1)(A) of the Federal Rules of Civil Procedure for copies of "any and all food logs" Smith had "ever started or maintained since being in prison." Smith took almost three months to provide the log to the defendants.

After receiving it, the defendants moved for the sanction of dismissal, arguing that Smith had fabricated the log. The log, in the form of a calendar, lists Smith's symptoms and other information written under each day (generally each page covers two weeks). As their strongest evidence of fabrication, the defendants pointed out that the dates for the holy month of Ramadan in 2010 were off by nine days, which, they maintained, could not have happened if Smith was recording his meals and symptoms in real time. (For instance, the log states that Smith started receiving Ramadan meals on August 2, 2010, but Waupun started providing Ramadan meals on August 11.) Moreover, at Smith's deposition, the parties had discussed the dates of Ramadan in every year but 2010; therefore, they inferred, he could use his notes to backdate the log for those years, but not for 2010. The defendants also suggested that the log looked too uniform to have been created over an 11-year span.

Smith responded to the sanctions motion with several explanations. He attributed the three-month delay in producing the logs to the fact that he was waiting for Rogers to mail him the part of the log that was in her possession. This took extra time, he explained, because when Rogers first mailed it to him, the prison returned it to her and Smith did not find out until later because he had been in segregation for a day. Rogers then waited a few weeks to re-mail the log because she was traveling. Further, Smith explained, prison officials had searched his cell and mixed up the pages of his log, so that he had to spend time putting it back together. As for the 2010 Ramadan dates, he did not definitively say how he came up with them, but said he could have gotten them in a number of ways. He included two documents as support: a to-do list, allegedly from October 2010, in which he had noted that the Ramadan dates were wrong in his "ledger," and a letter he sent to prison officials in June 2010 about his observance of Ramadan. There, he incorrectly stated that Ramadan would be from August 3 to September 2. He said (inaccurately) that the date in that letter was "the same date [he] used in the food logs." Smith also submitted a declaration in which he attested that he had not fabricated the log.

The court denied the sanctions motion, explaining that there were legitimate concerns about the log's authenticity, but dismissal was not appropriate because the defendants had not presented enough evidence, and they had not notified Smith's counsel in advance about their motion or given Smith a chance to explain. And the court noted that neither party had relied on the logs in moving or responding to the summary-judgment motion.

Three months later, the defendants renewed their motion for sanctions, this time filing it in both cases. They had since conferred with opposing counsel in the religious-

meals case, and Smith had filed the log as evidence in his (pro se) contaminated-water case. The defendants argued that Smith had lied about who had possession of the food log, and that they had new information showing he had sent some blank and completed pages to Natalie Johnson, his friend (and not to Rogers).

II. The evidentiary hearing

The court held an evidentiary hearing on November 18 and December 10, 2020. The testimony focused mainly on the 2010 Ramadan dates, whether Smith had enlisted Johnson to help him fabricate the log, and whether Smith had ever sent the log to Rogers. Smith and Rogers testified by videoconference. Because Johnson died before the hearing, the parties played recorded phone calls between Smith and Johnson and filed the transcript of her deposition.

Regarding the incorrect Ramadan dates, Smith testified that he had miscalculated them at the time—not erred when creating the log for purposes of these lawsuits. He said that he estimated when Ramadan began by subtracting 10 days from the previous year's dates. But he mistakenly subtracted the days twice. He was then called upon to explain how he had not noticed the Ramadan dates were incorrect even though the other August entries *were* correct. He testified that he was using a separate notebook to keep track of his food and symptoms in real time and that he had a separate pile of documents like medical slips or complaints. He later (sometimes not until the end of the month) transferred the information to the calendar log. He said that he labeled his notebook using the days of Ramadan (*i.e.*, Ramadan Day 1, Ramadan Day 2), but he switched back to Western calendar dates once Ramadan ended.

The defendants presented recordings of several phone calls between Smith and Johnson. The first occurred less than two weeks after Smith was deposed, and two days after the defendants asked Smith to produce his food log in discovery. Smith told Johnson he needed her to copy something for him "involving [his] lawsuit." Smith sent Johnson blank and completed calendar pages for her to photocopy. Smith testified that he was asking Johnson to make the copies for a different suit—filed several months later—that involved issues that overlapped with his religious-meals case. The defendants played two other phone calls between Smith and Johnson. In the first, Smith told Johnson that she had made the copies incorrectly, but there was time to resend them because his attorney knew he needed time. While testifying, Smith conceded he had been talking about his attorney in this (the religious diet) suit. In the other call, Johnson told Smith that she had sent the corrected copies, and Smith stated that he wanted them for the "the Attorney General" who was "arguing for the defendants in

[his] lawsuit." On the stand, Smith conceded that he had been talking about defense counsel in this suit.

Rogers's testimony generally supported Smith's account; she testified that, around 2012, Smith sent her part of his food log and that it was returned to her when she first mailed it back to Smith. Her recollection was spotty (she admitted she had trouble recalling some details), however, and her testimony at times conflicted with Smith's. For instance, she testified that she communicated with Smith around five times over roughly 20 years, while Smith said they spoke every two to three months from 2007 to 2012.

After post-hearing briefing, the district court dismissed both cases under its inherent power. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991); *Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 776 (7th Cir. 2016). The court found that Smith had fabricated the food log and lied repeatedly to the court and to defense counsel about it.

Analysis

Smith, now pro se, appeals the dismissal of both cases; by previous order, we consolidated the appeals for briefing and disposition. We requested supplemental briefs on the timeliness of the appeals and are now satisfied that the appeals are timely. We also ordered the defendants to provide Smith with the phone recordings, which he had been unable to review in preparing his appellate briefs. The defendants provided transcripts of the calls, and Smith has submitted a supplemental brief, arguing generally that the phone calls contradict the district court's conclusions. The appeals are now ready for our consideration.

First, Smith has not established that the district court incorrectly concluded that he fabricated the food log and imposed sanctions erroneously. We review the district court's decision on sanctions for abuse of discretion and its underlying findings of fact for clear error. *See Secrease v. W. & S. Life Ins. Co.*, 800 F.3d 397, 401 (7th Cir. 2015).

Smith fails to show that the court clearly erred in its factual finding that he fabricated the food log. Properly applying a preponderance of the evidence standard, *see Ramirez*, 845 F.3d at 781, the court determined that it was more likely than not that the log was fabricated, in large part because of Smith's changing story. For instance, Smith originally attested that he had kept the "food logs contemporaneously over the course of many years." But at the hearing, Smith testified that he entered information into a *separate* notebook and then later (sometimes weeks later) transferred the information into his food log. This notebook was no longer in his possession and was never mentioned until the hearing (despite the defendants' broad discovery request for such

documents). The court permissibly found this eleventh-hour explanation implausible. *See Salmeron v. Enter. Recovery Sys., Inc.*, 579 F.3d 787, 794 (7th Cir. 2009) (given shifting stories, court entitled to disbelieve latest explanation).

Smith argues that the district court improperly shifted the burden to him to prove he had not fabricated the food log and suggests that he did not mention the additional notebook because he was never asked about it. But as the court stated, the defendants raised the Ramadan date discrepancies 15 months before the hearing. Yet, in multiple responses, Smith never mentioned a separate notebook. And the court reasonably determined that Smith's testimony about his notetaking practices did not explain why the Ramadan days were wrong while other August 2010 entries were correctly dated. As further evidence of the fabrication, the court reasonably found (citing, for instance, the timing of the calls and Smith's references to his attorneys in this case) that it was more likely than not that Johnson was making photocopies for Smith to use in creating a log for this case.

The court also found that Smith was generally not credible. When a district court's credibility determination is based on live testimony, we will not disturb the court's assessment "unless it is completely without foundation." *See United States v. Freeman*, 691 F.3d 893, 900 (7th Cir. 2012) (quoting *United States v. Huebner*, 356 F.3d 807, 812 (7th Cir. 2004)). Here, the district court had an adequate foundation to conclude that Smith was not credible, given, for instance, the impeachment evidence presented by the defendants (for example, evidence that Smith had testified untruthfully about emails with his daughter). Contrary to Smith's argument on appeal, the district court did not apply the fallacy of *falsus in uno, falsus in omnibus*. Instead, it permissibly found based on other evidence that he was lying about material points. *See United States v. Edwards*, 581 F.3d 604, 612 (7th Cir. 2009).

Nor did the court clearly err in discrediting Rogers's testimony and concluding that she never possessed the original log. The court pointed to her spotty recollection and the inconsistencies with Smith's testimony, her incentive to support Smith (he had promised her money from this lawsuit), and the court's conclusion that Johnson, not Rogers, was helping Smith. *See Coleman v. Lemke*, 739 F.3d 342, 352 (7th Cir. 2014) (credibility undermined in part by inconsistencies and bias).

True, Smith presented some evidence to support his version of events, such as the June 2010 letter, his inmate complaint and recorded statements about his legal materials being mixed up, and Johnson's deposition testimony (including that she had been copying blank calendar templates for Smith since 2014). But there was sufficient evidence for the court to conclude that he fabricated the log, and the court's choice

between "two permissible views" of evidence "cannot be clearly erroneous." *See Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). And, contrary to Smith's arguments in his supplemental brief, nothing in the phone conversations so undermines the district court's finding as to make it clearly erroneous. He simply urges us to interpret his statements differently than the district court, which is not our role.

Having determined that Smith fabricated evidence, the district court did not abuse its discretion in dismissing both cases. Sanctions "must be proportionate to the circumstances." *Donelson v. Hardy*, 931 F.3d 565, 569 (7th Cir. 2019). In determining what is proportionate, courts consider "the extent of the misconduct, the ineffectiveness of lesser sanctions, the harm from the misconduct, and the weakness of the case." *See id.* Dismissal is a severe penalty, *see Salmeron*, 579 F.3d at 793, and here *two* of Smith's cases were dismissed. Further, the court did not explicitly consider the strength of Smith's cases, and its actions—letting claims proceed beyond screening, recruiting counsel in one of them—suggest that it did not view either as weak. *Cf. Donelson*, 931 F.3d at 570.

Nevertheless, the district court did not abuse its discretion because a reasonable jurist could have decided to dismiss in these circumstances. *See Greviskes v. Univs. Research Ass'n, Inc.*, 417 F.3d 752, 758 (7th Cir. 2005). Here, the court explained that Smith had not just submitted evidence he knew was false, but he had fabricated the evidence himself and repeatedly lied about it to the defendants and the court. Submitting false evidence "to secure a court victory" is an abuse of the judicial process that "undermines the most basic foundations of our judicial system." *See Secrease*, 800 F.3d at 402. And although Smith may not have (yet) relied on the log in this (the religious-meals) case, he did falsely testify about the log in his deposition for this case, and he submitted it as evidence in his contaminated-water case. Additionally, sorting out the fabrication question took almost two years—incurring significant costs to the judiciary and the defendants. *See Rivera v. Drake*, 767 F.3d 685, 686 (7th Cir. 2014).

Further, the court properly considered other sanctions, *see id.*, but found that they were inadequate. It concluded that a monetary sanction would be pointless because Smith was indigent and could not pay a fine. *See Secrease*, 800 F.3d at 402. And it found that excluding the log from evidence would simply return the parties to a pre-fraud status without punishing Smith's wrongdoing. The court observed that dismissal also served the broader purpose of deterring others from behaving similarly. *See id.*

We have considered Smith's other arguments, including those about the evidence admitted at the hearing, but none is substantial enough to merit discussion.

AFFIRMED