NONPRECEDENTIAL DISPOSITION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 June 23, 2023*
Decided July 17, 2023

Before

DIANE P. WOOD, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 22-3188

KENYATTA CURSEY,
Plaintiff-Appellant,

v.

ZACHARY SCHROEDER,
Defendant-Appellee.

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

No. 21-cv-0906-bhl

Brett H. Ludwig,
Judge.

O R D E R

Kenyatta Cursey, a Wisconsin prisoner, appeals from the district court's grant of summary judgment against him on his two claims against Zachary Schroeder, a prison staff member. First, relying on the Eighth Amendment, Cursey alleged that Schroeder was deliberately indifferent when he failed to protect Cursey from another prisoner's

* We have agreed to decide the case 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).

sexual harassment; second, invoking the Equal Protection Clause of the Fourteenth Amendment, Cursey claimed that Schroeder disregarded his complaint about harassment because he is Black and heterosexual. With regard to the Eighth Amendment claim, we conclude that a reasonable jury could find that Schroeder knew of a substantial risk of harm to Cursey but did nothing meaningful to avert that risk, and that a jury could also find that the risk materialized. On that ground (and that ground only), we remand for further proceedings on the Eighth-Amendment theory.

Cursey's equal-protection claim is a different matter. We conclude that he has not adduced sufficient evidence to permit a trier of fact to find that Schroeder discredited Cursey's harassment complaint based on Cursey's race or sexual orientation, and so we affirm the judgment dismissing that claim.

Because we are reviewing the entry of summary judgment, we view the evidence in the light that most favors Cursey. *Henry v. Hulett*, 969 F.3d 769, 774 (7th Cir. 2020) (en banc). In August 2020, Cursey, who was housed at Redgranite Correctional Institution in Redgranite, Wisconsin, was assigned a new cellmate, identified only as J.E. In time, Cursey came to fear J.E. Within two months of the assignment, Cursey asked to switch cellmates. A few days later, before the prison could act on that request, J.E. told prison staff that he was not feeling well; as a result, he and Cursey were moved to a quarantine unit under the prison's then-applicable COVID-19 policies. Cursey's unit manager told him that she would review his request for a new cellmate after he returned from quarantine.

While housed in the quarantine unit, the situation between Cursey and J.E. deteriorated, leading Cursey to contact Schroeder, who was that unit's manager. Schroeder was also one of the staff members responsible for receiving complaints that prisoners file under the Prison Rape Elimination Act (PREA). Under Wisconsin's administration of PREA, prisoners may file complaints if they believe they have been sexually harassed, defined as "repeated and unwelcome sexual advances, requests for sexual favors, or verbal comments, gestures, or actions of a derogatory or offensive nature[.]" Under the prison's rules, Schroeder conducts screening interviews with PREA filers and prepares reports and recommendations. If Schroeder determines that a possible PREA violation has occurred, he forwards a report to another staff member who decides whether to investigate. If Schroeder concludes that no violation has occurred, the rules require him to mark the report as "non-PREA" and send it to superiors for approval.

Soon after Cursey moved to the quarantine unit, he voiced his concerns about living with J.E. to Schroeder. Cursey told Schroeder that he wanted to file a PREA

complaint because he believed that J.E. was touching him as he slept. (He based this allegation on the fact that he would awaken to find J.E. standing over him). He also told Schroeder that J.E. would suggestively suck on a spoon and gaze at him as he ate, leaving Cursey to fear more unwanted contact. Schroeder called the manager of Cursey's previous unit (before his quarantine) and asked if she had seen any conflict between the two cellmates. The manager told Schroeder that, "to [her] knowledge, there was no reason they could not be celled together." Schroeder did nothing else. Deciding that the two prisoners could remain celled together, he ordered Cursey to remain in his quarantine cell with J.E. When Cursey refused, Schroeder issued him a disciplinary report and placed him in temporary lockup. Schroeder never prepared the required "non-PREA" report in response to Cursey's complaints.

This suit came next. Cursey alleged that Schroeder violated the Eighth Amendment by his deliberate indifference to J.E.'s sexual harassment. Cursey also alleged that Schroeder violated the Equal Protection Clause of the Fourteenth Amendment by discounting his PREA complaint because he was not white or gay. He pointed to four white or gay prisoners who, he alleged, had received more favorable PREA treatment from Schroeder. Schroeder moved for summary judgment and submitted a declaration from Cursey's former unit manager, who had investigated the records of the four prisoners to whom Cursey had pointed to support his equal-protection claim. Three of them had no record of filing a PREA complaint. The fourth prisoner (who Cursey attests was white) did file a PREA complaint, but Schroeder determined that it did not state a PREA violation, and so he prepared a "non-PREA" report for approval by superiors.

The district court granted Schroeder's motion for summary judgment. It first questioned whether Cursey had faced from J.E. a serious risk of harm under the Eighth Amendment. But it ruled that in any case no reasonable jury could find that Schroeder disregarded any such risk to Cursey because Schroeder had followed up on Cursey's complaint by contacting his previous unit manager. The court also rejected Cursey's equal-protection claim, because Cursey had not presented evidence that his race or sexual orientation motivated Schroeder's response to his complaint about J.E.

On appeal, Cursey first argues that the district court erred by entering summary judgment for Schroeder on his Eighth Amendment claim. We agree that Cursey alleged just enough to move along with these allegations. To overcome summary judgment, Cursey needed to furnish evidence from which a jury could reasonably conclude that Schroeder knew of and deliberately disregarded a substantial risk of serious harm to Cursey's safety. *Gevas v. McLaughlin*, 798 F.3d 475, 480 (7th Cir. 2015) (reversing

decision of district judge who did not let a jury decide whether to credit prisoner's testimony that the prisoner told defendants that other inmates planned to attack him). In failure-to-protect cases, a prisoner may normally prove that prison officers had actual knowledge of impending harm by showing that the prisoner credibly reported a specific threat to his safety. *Id.* (citation omitted); *Horshaw v. Casper*, 910 F.3d 1027, 1029 (7th Cir. 2018) (reversing grant of summary judgment to prison guards where a jury could find that the prisoner credibly notified guard of substantial danger and took no action).

Cursey has presented sufficient evidence to survive summary judgment on his failure-to-protect claim. First, a jury could find that he experienced a severe risk of serious harm from J.E. and that the risk materialized. In particular, a factfinder could conclude that, because Cursey caught J.E. hovering over him as he tried to sleep, J.E. had been touching him while he was unconscious. A jury could also find that J.E. severely distressed Cursey and caused him to fear more unwanted sexual contact when J.E. made suggestive sucking sounds and gazed at Cursey while eating. Second, the record allows a jury to conclude that Cursey told Schroeder about this unwanted contact and his fears of more to come. Third, a reasonable jury could decide that Schroeder considered these concerns credible, but did nothing meaningful to investigate or abate them, despite his obligations under the Eighth Amendment to do so. *See id.* Other than briefly consulting with Cursey's previous unit manager, Schroeder did nothing. And that brief consultation gave Schroeder next to nothing on which to rely. The manager responded only that "to [her] knowledge" nothing would prevent the two prisoners from living together. But a jury could find that this statement did not reasonably assure Schroeder that Cursey faced no substantial risk of harm. The manager did not say, and Schroeder did not ask, if she regularly (or ever) observed the two prisoners in her two months as their manager, that she had investigated their co-habitation, or that she had spoken to others who had.

This is enough to permit a reasonable jury to find that Schroeder deliberately disregarded the risk of sexual-harassment harm to Cursey; we therefore vacate the entry of summary judgment on that claim. We caution, however, that Cursey faces additional hurdles. On remand, the district court will need to assess the applicability of 42 U.S.C. § 1997e(e) (not cited by the defendants in their brief to this court) to Cursey's case. It provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18)." As of now, we have Cursey's inference from J.E.'s actions that Cursey was the victim of unwanted touching while Cursey was

sleeping and thus unconscious. If J.E. touched him sexually under those circumstances, he might have a case, either on a physical harm theory analogous to common-law battery, or as an unwanted "sexual act" as defined in 18 U.S.C. § 2246(2)(C) ("sexual act" occurs if there is even a slight penetration "of the anal or genital opening of another by a hand or finger or by any object … ."). We express no opinion on the proper resolution of that inquiry. The court should also revisit Schroeder's invocation of qualified immunity on this point.

We affirm the district court's judgment with regard to the rest of the case. Cursey contends that Schroeder was not entitled to summary judgment on his equal-protection claim to the effect that Schroeder responds more favorably to PREA complaints from white or gay prisoners. Cursey maintains that Schroeder decided not to protect him from J.E., and declined to prepare a "non-PREA report," because Cursey is Black and heterosexual. To overcome summary judgment, Cursey needed to furnish evidence that could persuade a reasonable jury that Schroeder handled Cursey's PREA complaint differently for a forbidden, discriminatory reason. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Alston v. City of Madison*, 853 F.3d 901, 906–07 (7th Cir. 2017).

As the district court recognized, he has failed to do so. The record contains evidence of only two prisoners who filed PREA complaints with Schroeder: Cursey and a white prisoner. In *both* cases, Schroeder did not regard their complaints of sexual harassment as worthy of further protective action. In other words, there was no forbidden discrimination.

Cursey replies that, for the white prisoner but not for Cursey, Schroeder wrote a "non-PREA" report and submitted it to his superiors; this report, Cursey insists, shows more favorable treatment based on race. The problem for Cursey is that he provides no information about the nature of that prisoner's allegations of harm or the details that he provided to Schroeder. Without that information, a reasonable jury could not conclude that this other prisoner was identical "in all relevant respects," let alone that any differential treatment was based on race. *See McDonald v. Village of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004). Further, Cursey pointed to no other evidence that his race or sexual orientation motivated Schroeder's decision not to file a "non-PREA" report. Thus, only speculation could tie Schroeder's decision not to prepare a "non-PREA" report to Cursey's race or sexual orientation. And, as the district court explained, "inferences supported by only speculation or conjecture will not defeat a summary judgment motion." *Lavite v. Dunstan*, 932 F.3d 1020, 1029 (7th Cir. 2019).

Therefore, we VACATE the judgment with regard to Cursey's deliberate-indifference claim against Schroeder and REMAND for further proceedings consistent with this order. We AFFIRM the judgment in all other respects.