

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN HENRY McMURRY, #223416,

Plaintiff,

Case No. 1:07-cv-905

v

HON. JANET T. NEFF

PATRICIA CARUSO, et al.,

Defendants.

OPINION

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. Defendants filed a motion for summary judgment, arguing that Plaintiff's Eighth Amendment rights were not violated; that Defendants lacked the personal involvement required for a 1983 action to proceed against them; that Plaintiff has no interest in remaining at a specific facility and therefore Plaintiff's claim for retaliation fails; and that Defendants are entitled to Eleventh Amendment and qualified immunity. The matter was referred to the Magistrate Judge, who issued a Report and Recommendation, recommending that this Court grant Defendants' motion and enter judgment for Defendants for several reasons: first, no reasonable trier of fact could find in Plaintiff's favor regarding his Eighth Amendment claims; second, no reasonable trier of fact could find in favor of Plaintiff regarding his First Amendment retaliation claims; and finally, the Defendants are alternatively entitled to judgment in their favor on the basis of qualified immunity. The Report and Recommendation urges this Court to decline to exercise supplemental jurisdiction over Plaintiff's state law claim.

The matter is presently before the Court on Plaintiff's objections to the Report and Recommendation. After filing his objections to the Report and Recommendation, the Plaintiff filed a Motion to Supplement (Dkt 37). Appended to Plaintiff's memorandum in support of this motion are several medical documents he argues supports his present claim. Defendants did not file a response to Plaintiff's motion. However, it is clear that the records Plaintiff seeks to submit are all dated outside of the time period his claim addresses and therefore have no impact on the merits of his claim or the analysis and findings in regard to the Defendants' Motion for Summary Judgment. Therefore, the Motion to Supplement is denied.

Plaintiff also filed a "Motion for Demand for Jury Trial and Expedited Proceedings" (Dkt 40). Because this Court denies Plaintiff's objections and adopts the Report and Recommendation, Plaintiff's motion is denied as moot.

In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion and Judgment pursuant to FED. R. CIV. P. 58.

Plaintiff first objects to the Magistrate Judge's Proposed Findings of Fact by pointing to evidence Plaintiff originally presented in his complaint regarding the sale of tobacco to prisoners housed in a Tobacco Free Housing Unit. The evidence the Plaintiff points to was already taken into consideration by the Magistrate Judge. Accordingly, there is no merit to Plaintiff's objection to the Magistrate's conclusions drawn from the facts.

Second, Plaintiff objects to the Magistrate Judge's analysis of Plaintiff's Eighth Amendment claims. Plaintiff claims that he satisfied both the objective and subjective elements to show an Eighth Amendment violation. Plaintiff's objections are without merit. Plaintiff argues that the Magistrate Judge erred in determining that Plaintiff's medical need was not serious and that Defendants were not deliberately indifferent to his need. The Magistrate Judge properly concluded that Plaintiff never alleged that he received constitutionally deficient medical care. The Magistrate Judge also properly found that Defendant's actions did not rise to the level of deliberate indifference.

Plaintiff also objects to the Magistrate Judge's determination that Plaintiff's First Amendment retaliation claim should be dismissed. Plaintiff reiterates his argument that he believes his transfer from the Riverside Correctional Facility to the Muskegon Correctional Facility was in response to his exercising his First Amendment rights. The Plaintiff's objections are without merit. The Magistrate Judge properly pointed out that the transfer from one prison to another generally cannot rise to the level of an adverse action needed to fulfill the elements of a First Amendment retaliation claim.

Fourth, the Plaintiff objects to the Magistrate Judge's determination that Defendants are entitled to qualified immunity. Plaintiff argues that the right he claims Defendants violated was so "clearly established" that reasonable officials in Defendants' positions would have known that they were violating that right. The Plaintiff's objection is without merit. The Magistrate Judge properly determined that there is no precedent from either the Supreme Court or the Sixth Circuit finding a Constitutional violation on facts similar to this case.

For these reasons and because this action was filed *in forma pauperis*, this Court also certifies pursuant to 28 U.S.C. § 1915(a)(3) that an appeal of this Opinion and Judgment would not be taken in good faith. *See McGore v. Wrigglesworth*, 114 F.3d 601, 610 (6th Cir. 1997)

A Judgment will be entered consistent with this Opinion.

Dated: January 27, 2009

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

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JUDGMENT

In accordance with the Opinion entered this date:

IT IS HEREBY ORDERED that the Motion to Supplement (Dkt 37) is DENIED.

IT IS FURTHER ORDERED that Objections (Dkt 35) are DENIED and the Report and Recommendation (Dkt 32) is APPROVED and ADOPTED as the opinion of the Court.

IT IS FURTHER ORDERED that the Motion for Summary Judgment (Dkt 19) is GRANTED and Judgment is entered against Plaintiff and in favor of Defendants.

IT IS FURTHER ORDERED that the Motion for Demand for Jury Trial and Expedited Proceedings (Dkt 40) is DENIED as moot.

IT IS FURTHER ORDERED that the Court certifies pursuant to 28 U.S.C. § 1915(a) that an appeal of the Judgment would not be taken in good faith.

Date: January 27, 2009

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge