

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000683-MR

THOMAS MITCHELL

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL III, JUDGE
ACTION NO. 07-CI-00118

CHRIS VINSON

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND KELLER, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Thomas Mitchell, an inmate at the Kentucky State Penitentiary, filed a complaint in the Lyon Circuit Court alleging that he was injured while providing a urine sample during a drug test supervised by Sergeant Chris Vinson, a corrections officer. The circuit court ruled that Vinson was

¹ Senior Judges Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

shielded by qualified official immunity and granted summary judgment to him.

We affirm.

We set forth the pertinent facts in the light most favorable to Mitchell. *See Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App.2001). Mitchell suffers from a medical condition which requires him to self-catheterize when urinating. On April 8, 2007, he was randomly selected to provide a urine sample for drug testing. According to Mitchell, he told Sergeant Vinson, the supervising officer, that Dr. Jackson had issued instructions that he must be allowed to sit while he was self-catheterizing. Mitchell further explained that he required two chairs because the commode that was provided was covered in other inmates' urine and that it was not sanitary or safe for him to sit on it while inserting the catheter. Vinson refused Mitchell's request and Mitchell had to self-catheterize while standing. Mitchell claims that he consequently suffered a serious injury that required medical treatment to stop the bleeding.

Mitchell filed suit against Vinson in Lyon Circuit Court, alleging intentional infliction of emotional distress, negligence, gross negligence, deliberate indifference to medical needs, and battery. On December 16, 2008, summary judgment was granted to Vinson on all the claims except negligence and gross negligence. Summary judgment on these remaining claims was entered on March 17, 2010, on the grounds that Vinson was shielded by qualified official immunity. Mitchell filed a notice of appeal only as to the March 17, 2010 order and his

appellate brief addresses only that order and the issue of qualified official immunity.

In reviewing a grant of summary judgment, our inquiry focuses on “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App.1996); Kentucky Rules of Civil Procedure (CR) 56.03. “[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky.1991).

A three-part test is used to determine whether an official is entitled to qualified immunity.

[P]ublic officers and employees are entitled to “qualified official immunity” for negligent conduct when the negligent act or omissions were (1) discretionary acts or functions, that (2) were made in good faith (i.e. were not made in “bad faith”), and (3) were within the scope of the employee's authority.

Rowan County v. Sloas, 201 S.W.3d 469, 475 (Ky. 2006) *citing Yanero v. Davis*, 65 S.W3d 510, 522 (Ky. 2001).

Discretionary acts are “those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment.” *Id.* at 477 (citation omitted). According to the affidavit of Lieutenant Troy Bell, the officer in charge

of staff training in drug testing, the administration of drug tests at Kentucky penitentiaries is mandatory but correctional staff members are granted discretion to delay or postpone drug testing and notify medical staff in the event of a medical emergency involving an inmate selected for drug testing. The correctional staff members are required to assess the severity of the inmate's symptoms and also the credibility of the inmate in making these determinations.

In this case, neither party disputes the discretionary character of Vinson's supervision of the drug testing, although Mitchell further argues that when Vinson denied his request for two chairs, his actions became ministerial. In our view, Vinson was acting in a discretionary capacity throughout the alleged episode and there is no legal foundation for Mitchell's contention that the character of his act changed. Indeed, Vinson's denial of Mitchell's request for two chairs represented an exercise of his discretion.

“[O]nce the officer or employee has shown *prima facie* that the act was performed within the scope of his/her discretionary authority, the burden shifts to the plaintiff to establish by direct or circumstantial evidence that the discretionary act was [in bad faith].” *Id.* at 475 (internal citations omitted).

Bad faith can be shown in one of two ways: (1) that the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive or (2) upon proof that a clearly-established right of the plaintiff was violated. *Id.* at 475 -476.

Mitchell argues that the law is clearly established that a prisoner has a constitutional right to have all medical orders and instructions followed by prison officials. He contends that Vinson acted in bad faith because any person in a supervisory position should have known that refusing to obey a doctor's instructions concerning his special medical needs was unconstitutional.

The United States Supreme Court has held that "deliberate indifference to the serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' . . . proscribed by the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 97, 104-105, 50 L.Ed.2d 251, 97 S.Ct. 285, 291 (1976) (internal citations omitted).

"When inquiring into deliberate indifference, . . . a court must ask both (1) if the officials acted with a sufficiently culpable state of mind and (2) whether the alleged wrongdoing was objectively harmful enough to establish a constitutional violation." *Smith v. Franklin County*, 227 F.Supp.2d 667, 677 (E.D.Ky. 2002) (internal citations and quotation marks omitted). "Mere 'indifference,' 'negligence,' or 'medical malpractice' will not support this cause of action." *Broughton v. Cutter Labs*, 622 F.2d 458, 460 (9th Cir. 1980). "[A] prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847, 114 S.Ct. 1970, 1984, 128 L.Ed.2d 811 (1994).

In this case, Mitchell failed to present any evidence that Vinson acted with deliberate indifference to a substantial risk of serious harm. Although the Kentucky Supreme Court has stated that the determination of whether a party acted in good faith is a question of fact that is rarely suitable for resolution by summary judgment, *Rowan*, 201 S.W.3d at 474, “[a] party opposing a motion for summary judgment cannot rely merely on the unsupported allegations of his pleadings, but is required to present ‘some affirmative evidence showing that there is a genuine issue of material fact for trial.’” *Godman v. City of Fort Wright*, 234 S.W.3d 362, 370 (Ky.App.2007). There is no evidence beyond Mitchell’s own allegation that Dr. Jackson had issued a medical order that Mitchell required two chairs.

On the other hand, the record is replete with evidence (including the affidavits of two physicians) that Mitchell did not need two chairs in order to self-catheterize. Affidavits from correctional staff employees reported observing Mitchell self-catheterizing in a standing position and Mitchell himself admitted that he occasionally self-catheterizes in a standing position in his cell. Furthermore, there is no evidence, beyond Mitchell’s own allegations, that he suffered harm as a direct result of the incident. He did not request medical care for urethral bleeding until April 17, 2007, nine days after the drug testing took place.

We conclude that Mitchell has presented no evidence that Vinson acted with the “deliberate indifference” necessary to state a successful Eighth Amendment claim and hence has also failed to establish that Vinson acted in bad

faith. The circuit court correctly determined that Vinson was entitled to qualified official immunity and its order granting summary judgment is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Thomas Chester Mitchell, *pro se*
Kentucky State Penitentiary
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Jonathan S. Milby
Justice & Public Safety Cabinet
Frankfort, Kentucky