IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
Dmitry Pronin,

Plaintiff, v. Charles Wright; Neal Urch; and L. Blackwell,

Defendants.

C/A No.: 5:16-3635-HMH-KDW

REPORT AND RECOMMENDATION

Dmitry Pronin ("Plaintiff"), proceeding pro se, filed this amended complaint pursuant to 42 U.S.C. § 1983 alleging violations of his constitutional rights while housed at the Spartanburg County Detention Center ("SCDC").

1 This matter is before the court on Defendants' Motion for Summary Judgment filed on September 28, 2018. ECF No. 174. As Plaintiff is proceeding pro se, the court entered a Roseboro 2

order on September 28, 2018, advising Plaintiff of the importance of such motions and of the need for him to file an adequate response. ECF No. 175. After being granted an extension, Plaintiff filed a Response to the Motion on November 1, 2018. ECF No. 183. This motion having been fully briefed ECF Nos. 184, 185, it is ripe for disposition. This case was referred to the undersigned United States Magistrate Judge for all pretrial proceedings pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(d) and (e), D.S.C. Because this motion is dispositive, a Report and Recommendation is entered for the court's review.

For the reasons that follow, the undersigned recommends Defendants' Motion for Summar y Judgment be granted.

1 Plaintiff is currently incarcerated at Sheriff Al Cannon Detention Center. 2 Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975) (requiring the court provide explanation of dismissal/summary judgment procedures to pro se litigants).

I. Factual and Procedural Background

Plaintiff claims he experienced severe undernourishment while he was housed at SCDC from June 27 to August 22, 2016. ECF No. 92 at 2; ECF No. 174-2 at 7–8. Plai ntiff states he was served three food trays daily but claims the trays' total calories were less than 2000 calories, which is the bare minimum and national standard. ECF No. 92 at 2. Plaintiff contends he normally weighs 165 pounds, but he weighed approximately 138 pounds while at SCDC. Id. II. Standard of Review

The court shall grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the initial burden of demonstrating that summary judgment is appropriate; if the movant carries its burden, then the burden shifts to the non-movant to set forth specific facts showing that there is a genuine issue for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). If a movant asserts that a fact cannot be disputed, it must support that assertion either by "citing to particular parts of material s in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials;" or "showing . . . that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

In considering a motion for summary judgment, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in favor of the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry

of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248. Further, while the federal court is charged with liberally construing a complaint filed by a pro se litigant to allow the development of a potentially meritorious case, see, e.g., Cruz v. Beto, 405 U.S. 319 (1972), the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts that set forth a federal claim, nor can the court assume the existence of a genuine issue of material fact when none exists. Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990). III. Analysis

A. Failure to Exhaust Defendants argue Plaintiff's amended complain t should be dismissed because he failed to exhaust his administrative remedies before filing this action. ECF No. 174-1 at 10–11. 42 U.S.C. Section 1997e provides that "[n] o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." This requirement "applies to all inmate suits abou t prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."

Porter v. Nussle, 534 U.S. 516, 532 (2002). To satisfy this requirement, a plaintiff must avail himself of all available administrative review. See Booth v. Churner, 532 U.S. 731 (2001). Those remedies "need not meet federal standards, nor must they be 'plain, speedy, and effective.'" Porter, 534 U.S. at 524 (quoting Booth, 532 U.S. at 739).

Satisfaction of the exhaustion requirement requires "using all steps that the agency holds out and doing so properly." Woodford v. Ngo, 548 U.S. 81, 90 (2006) (quoting Pozo v. McCaughtry, 286 F.3d 1022, 1024 (7th Cir. 2002)). Thus, "it is the prison's requirements, and not

5:16-cv-03635-HMH Date Filed 04/02/19 Entry Number 193 Page 3 of 9

the PLRA, that define the boundaries of proper exhaustion." Jones v. Bock, 549 U.S. 199, 218 (2007). Defendants have the burden of establishing that a plaintiff failed to exhaust his administrative remedies. Anderson v. XYZ Corr. Health Servs., Inc., 407 F.3d 674, 683 (4th Cir. 2005). However, '[d]efendants may . . . be estopped from raising non-exhaustion as an affirmative defense when prison officials inhibit an inmate's ability to utilize grievance procedures.'" Stenhouse v. Hughes, C/A No. 9:04-23150-HMH-BHH, 2006 WL 752876, at *2 (D.S.C. Mar. 21, 2006) (quoting Abney v. McGinnis, 380 F.3d 663, 667 (2d Cir. 2004)).

Defendants argue Plaintiff filed one grievance regarding the food at SCDC, and multiple grievances demanding Ensure, but he did not appeal any of the findings of the Director/Major/Designee or medical department as required by SCDC's grievance system. ECF No. 174-1 at 11. Accordingly, Defendants contend Plaintiff's Complaint should be dismissed. Id. In response, Plaintiff argues SCDC does not have appeal forms or provide instructions on how to file an appeal. ECF Nos. 183 at 3. Plaintiff attests he asked several SCDC employees about the appeal process and no one could describe the process or tell him how to obtain appeal forms. ECF No. 183-3 at 3–7. In reply, De fendants state SCDC's grievan ce process is outlined in the SCDC inmate handbook which is available to all inmates. ECF No. 184 at 2–3.

Viewing the evidence in the light most favorable to Plaintiff, the undersigned finds there is a question of fact whether Plaintiff's ability to use the grievance system was inhibited by a failure to inform him how to appeal the grievance and medical decisions. Although Defendants contend the grievance process is described in the SCDC inmate handbook, they have not produced any evidence Plaintiff was provided a copy of this document. "[A] n administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it." Moore v. Bennette, 517 F.3d 717, 725 (4th Cir. 2008); see also Stenhouse,

5:16-cv-03635-HMH Date Filed 04/02/19 Entry Number 193 Page 4 of 9

2006 WL 752876 at *2 ("[E]xhaustion may be achieved in situations where prison officials fail to timely advance the inmate's grie vance or otherwise prevent him from seeking his administrative

remedies."). The undersigned finds Defendants have not met their burden of showing "there is no genuine dispute as to any material fact" regarding Plaintiff's failure to exhaust his administrative remedies. The undersigned recommends Defendants' motion for summary judgment based on Plaintiff's failure to exhaust be denied.

B. Deliberate Indifference to Health and Safety Defendants argue Plaintiff has failed to show he suffered any serious or significant injury as a result of the food provided at SCDC, or that defendants acted with a sufficiently culpable state of mind. ECF No. 174-1 at 14. To establish a claim under the Eighth Amendment, a prisoner must satisfy two elements. First, the deprivation alleged must be, objectively, "sufficiently serious." Wilson v. Seiter, 501 U.S. 294, 298 (1991). "Only extreme depr ivations are adequate to satisfy the objective component of an Eighth Amendment claim regarding conditions of confinement." De'Lonta v. Angelone, 330 F.3d 630, 634 (4th Cir. 2003). "[T]o demonstrate such an extreme deprivation, a prisoner must allege a serious or significant physical or emotional injury resulting from the challenged conditions or demonstrate a substantial risk of such serious harm resulting from the prisoner's exposure to the challenged conditions." Id. (internal quotation marks and citation omitted). Second, a prisoner must present evidence that the prison officials had a "'sufficiently culpable state of mind.'" Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quoting Wilson, 501 U.S. at 297). When an inmate challenges the conditions of his confinement under the Eighth Amendment, the requisite "state of mind is one of deliberate indifference to inmate health or safety." Id. (quotation and citation omitted). A prison official shows deliberate indifference if he "knows of and disregards an excessive risk to inmate health or safety; the official must both be

aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 837. "In addition, prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the Eighth Amendment is to ensure reasonable safety." Id. at 844 (internal quotation marks omitted).

Defendants argue they are entitled to summary judgment because: (1) Plaintiff did not lose any weight while at SCDC and (2) he has failed to show Defendants knew of and disregarded an actual excessive risk to Plaintiff's health a nd safety. ECF No. 174-1 at 14. In support of their motion, Defendants offer Plaintiff's medical records and affida vits from SCDC officers and medical staff. See ECF Nos. 174-3, 174-4, and 174-6. SCDC medical administrator Kathy White ("White") attests that Plainti ff was weighed when he arrived at SCDC on June 27, 2016, and his weight was recorded as 138 pounds. ECF No. 174-3 at 1. White states in response to Plaintiff's concerns about his weight and his July 15 and 17 requests for a medical examination and nutritional supplement, SCDC medical staff examined and weighed Plaintiff on July 19, 2016. Id. at 2. Plaintiff weighed 138 pounds. Id. Medical Staff advised Plaintiff they would monitor his weight weekly for four weeks before deciding whether to order him a dietary supplement. Id. Plaintiff was weighed on July 26 and August 2 and his weight

was recorded at 140 and 141 pounds. Id. at 3. Former SCDC director of food services Larry Blackwell ("Blackwell") atte sts that SCDC utilized a state licensed dietician who periodically reviewed and approved SCDC's inmate daily menus. ECF No. 174-4 at 2. Blackwell states SCDC meals were properly and fully cooked and the portions provided were consistent with the portions set forth in the inmate menus. Id. Registered dietician Carole Mabry attests that she reviewed SCDC's proposed menus of meals and the menus appeared

5:16-cv-03635-HMH Date Filed 04/02/19 Entry Number 193 Page 6 of 9

to have met the calorie and protein needs of the majority of the population being served. ECF No. 174-6 at 1.

In response, Plaintiff argues defendants knew about problems with feeding inmates. ECF No. 183 at 7–8. Plaintiff contends he weighed 168 pounds months before he arrived at SCDC and claims staff at a Federal Bureau of Prisons ("BOP") facility noted in his medical chart on September 1, 2016, that he had abnormal weight loss, unintentional. ECF Nos. 183 at 7; 183-3 at 12. Plaintiff also provides a copy of a June 25, 2015 BOP clinical encounter record that notes "No anorexia, or fatigue," and a BO P print out that states that he weighed 168 pounds in July and December 2015. ECF No. 183-3 at 13–15.

The undersigned has reviewed the record, including the parties' respective pleadings and affidavits, and Plaintiff's medical records, and fi nds Plaintiff has failed to furnish sufficient facts or evidence to survive summary judgment. Plaintiff has not offered any evidence, other than his own conjecture or speculation, to show that he suffered any injury from the meals he was served at SCDC from June to August 2016. In fact, the evidence is undisputed that Plaintiff weighed 138 pounds when he arrived at SCDC and he gained at least three pounds while he was housed there. Plaintiff has also not offered any evidence to contradict Defendants' cont entions that the meals SCDC served while Plaintiff was housed there met the inmates' calorie and protein needs. The undersigned recommends Defendants be granted summary judgment.

C. Strike Defendants request that the court impose a strike against Plaintiff based on "the frivolity of this suit." ECF No. 174-1 at 23. The undersigned finds Plaintiff's Complaint was not filed frivolously. Rather, Plaintiff simply was unable to prove he suffered any adverse effects from the

5:16-cv-03635-HMH Date Filed 04/02/19 Entry Number 193 Page 7 of 9

food served at SCDC. Accordingly, the undersigned recommends the district court deny Defendants' request to consid er this action as a strike. IV. Conclusion and Recommendation For the foregoing reasons, the undersigned recommends Defendants' Motion for Summary Judgment, ECF No. 174, be granted. IT IS SO RECOMMENDED.

April 2, 2019 Kaymani D. West Florence, South Carolina United States Magistrate Judge

The parties are directed to note the important information in the attached

"Notice of Right to File Objectio ns to Report and Recommendation." 5:16-cv-03635-HMH Date Filed 04/02/19 Entry Number 193 Page 8 of 9

Notice of Right to File Objections to Report and Recommendation The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. [I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation. Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committees note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to: Robin L. Blume, Clerk United States District Court Post Office Box 2317

Florence, South Carolina 29503 Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

5:16-cv-03635-HMH Date Filed 04/02/19 Entry Number 193 Page 9 of 9