

NONPRECEDENTIAL DISPOSITION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 25, 2024*

Decided June 27, 2024

Before

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 23-1390

MALCOM D. COBB, JR.,
Plaintiff-Appellant,

v.

GEORGE PAYNE,
Defendant-Appellee.

Appeal from the United States District
Court for the Northern District of
Indiana, South Bend Division.

No. 3:20-CV-837-MGG

Michael G. Gotsch, Sr.,
Magistrate Judge.

ORDER

Malcom Cobb, an Indiana prisoner who uses a wheelchair, sued the Deputy Warden of Miami Correctional Facility, George Payne, for acting with deliberate indifference in violation of the Eighth Amendment by allegedly placing Cobb in a cell that was not handicap-accessible and that was covered in feces. *See* 42 U.S.C. § 1983. A magistrate judge, presiding with the parties' consent, *see* 28 U.S.C. § 636(c), entered

* 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).

summary judgment for Payne. Because Cobb did not supply evidence sufficient to raise a genuine issue of material fact about whether Payne knew that conditions in Cobb's cell posed an excessive risk to his safety, we affirm.

We draw our account of the facts from the record at summary judgment, which we view in the light most favorable to Cobb, the nonmoving party. *See Thomas v. Blackard*, 2 F.4th 716, 720 (7th Cir. 2021). On December 10, 2019, Cobb exchanged his old, broken wheelchair for a replacement wheelchair. Prison staff noticed that two pieces of steel tubing were missing from the old wheelchair and became concerned because prisoners had previously used scraps of metal to make weapons. When Payne learned of the missing metal fragments, he asked Cobb where they were; Cobb responded that staff had removed a handle from the wheelchair a while back. Payne then ordered officers to transfer Cobb to restrictive housing pending an investigation into the missing parts. The investigation was inconclusive, and on December 12, Payne told staff that Cobb could be transferred out of segregation. Cobb was moved six days later.

The parties disagree about what happened in the interim. Cobb swore that he told Payne on December 10 that he needed a handicap-accessible cell. Officers in the restrictive housing unit told Payne that a cell on the bottom floor was open but was "not clean." Payne "walked away," and the officers put Cobb in the cell, which was not handicap-accessible and was covered in feces. Cobb complained to prison guards and officials, his family, and his attorney; finally, someone came to clean it. Cobb also sent informal complaints (the first step of the grievance process) to Payne about the cell.

In this lawsuit, Cobb alleged that Payne violated his rights under (1) the Eighth Amendment, by placing him in a cell that posed a serious risk to his health and safety; (2) the First Amendment, by placing him in segregation as an act of retaliation; and (3) the Rehabilitation Act, by refusing to place him in an accessible cell. At screening under 28 U.S.C. § 1915A, the district court allowed Cobb to proceed only with his Eighth Amendment claim. As for the retaliation claim, the court noted that Cobb had not alleged that any protected activity motivated his transfer to segregation. And, with respect to the claim under the Rehabilitation Act, the court concluded that Payne, an individual, was not a proper defendant. *See Jaros v. Illinois Dep't of Corr.*, 684 F.3d 667, 670 (7th Cir. 2012). Cobb did not amend his complaint.

During the discovery period, Cobb asked the district court for permission to subpoena ten non-party officers as "witnesses" who knew when his wheelchair had broken. The court construed this as a request for production of documents related to a

“trip log” that Cobb mentioned in the request, and it ordered Payne to respond. Payne objected to the request, stating that it was overbroad because it did not specify a date or timeframe for the trip log. Cobb made no further effort to obtain this information.

Payne later moved for summary judgment based primarily on his own declaration. He attested that he was not aware of what cell Cobb was taken to, that all cells are to be cleaned by staff before a prisoner is placed inside, that he was not aware of the alleged conditions of Cobb’s cell, and that he was not aware of Cobb’s complaints about the cell until after Cobb left segregation. Therefore, Payne argued, he could not have acted with deliberate indifference. Cobb responded that Payne must have known about the cell’s conditions because an officer had informed Payne that the first-floor cell was “not clean,” and because Payne (Cobb assumes) eventually sent someone to clean it. The district court concluded that no reasonable jury could find that Payne knew of and disregarded an excessive risk to Cobb’s safety and granted Payne’s motion.

In his appellate brief, Cobb primarily restates the factual basis for his claim. But we understand him to argue generally that there is a genuine factual dispute about whether Payne was aware of the conditions in Cobb’s cell. We review the summary-judgment decision *de novo*. See *Thomas*, 2 F.4th at 720. For his Eighth Amendment claim to withstand the summary-judgment motion, Cobb needed evidence that (1) the conditions in his cell were sufficiently serious, and (2) Payne knew of and disregarded the excessive risk to Cobb’s safety. See *Farmer v. Brennan*, 511 U.S. 825, 834, 837 (1994). The district court declined to reach Payne’s argument that the conditions were not sufficiently serious, and Payne does not press the argument on appeal, so we confine our analysis to the subjective component of our inquiry.

Cobb did not produce sufficient admissible evidence from which a reasonable jury could find that Payne had a culpable state of mind. Cobb highlights the informal complaints he wrote, contending that they prove Payne’s awareness of the conditions in his cell. But Cobb offered no evidence that Payne received those forms before his release from segregation, whereas Payne attested that he was not aware of the complaints or the alleged conditions of the cell until after Cobb left segregation. See *Daugherty v. Harrington*, 906 F.3d 606, 611 (7th Cir. 2018).

Other evidence that Cobb relies upon is equally unhelpful to his claim. Although Cobb attested that Payne told staff that the cell was “not clean,” this does not establish

that Payne knew it was “covered in feces” and posed an excessive risk to Cobb’s safety.¹ *See id.* And Cobb’s assertion that Payne must have known about the feces or he would not have sent someone to clean the cell is speculative: there is no evidence that Payne is the one who instructed the cell to be cleaned. *See id.* Therefore, on this record, no reasonable factfinder could conclude that Payne acted with deliberate indifference.

Finally, to the extent that Cobb takes issue with Payne’s refusal to provide certain discovery materials or the court’s dismissal of his claim under the Rehabilitation Act, he did not preserve either issue and so cannot claim error now. *See Markel Ins. Co. v. Rau*, 954 F.3d 1012, 1018 (7th Cir. 2020). First, after Payne objected to Cobb’s discovery request, Cobb did not adjust the request or move to compel Payne to provide the information, *see* FED. R. CIV. P. 37(a)(3)(B)(iv), and so we have no ruling to review. Second, Cobb abandoned his claim under the Rehabilitation Act when he did not amend his complaint to name a proper defendant. (He does not argue that suing Payne was correct.) He had ample time after screening to amend as a matter of course, *see* FED. R. CIV. P. 15(a)(1)(B), and he never asked for leave to amend under Rule 15(a)(2).

AFFIRMED

¹ In his verified complaint, Cobb alleged that an officer made a more specific statement to Payne about the cell’s condition, but Cobb did not cite his complaint or otherwise put this statement before the district court at summary judgment, *see* FED. R. CIV. P. 56(c)(1)(A), and so the court had no reason to consider it, *see Hildreth v. Butler*, 960 F.3d 420, 429 (7th Cir. 2020). Cobb also does not discuss that statement on appeal.