NONPRECEDENTIAL DISPOSITION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 December 18, 2024*
Decided December 30, 2024

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

NANCY L. MALDONADO, *Circuit Judge*

No. 22-2882

JAMES OWENS,
Plaintiff-Appellant,

v.

WEXFORD HEALTH SOURCES, INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois.

No. 17-cv-01387-SPM

Stephen P. McGlynn,
Judge.

O R D E R

James Owens sued Wexford Health Sources, Inc., the healthcare contractor for Illinois prisons; several of Wexford's employees; and multiple prison staff members under 42 U.S.C. § 1983 for deliberate indifference to his serious medical condition in

* 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).

violation of the Eighth Amendment. On appeal, Owens argues that the district court abused its discretion when it denied his motions to recruit counsel.[†] He also submits that the defendants were not entitled to summary judgment. Because the court erroneously denied Owens's request for counsel for his claims against Wexford, but correctly entered summary judgment on his other claims, we affirm in part and vacate in part.

Owens was transferred to Lawrence Correctional Center in December 2012. While there, he suffered from environmental allergies and daily pain in his left hip and lower back, which eventually caused him to need a cane to walk and, later, a wheelchair for longer distances. His cellmate attested that Owens had difficulty standing and turning over in bed because of the pain in his hip. Doctors prescribed meloxicam and naproxen for Owens's pain and various antihistamines for his allergies.

Owens did not, however, receive a continuous supply of his prescribed medications. He attests that he was without his pain medication about 18% of the time from November 2013 to April 2017, sometimes going as many as 37 days consecutively. He also went without his sinus medication about 42% of the time from January 2014 to April 2017, the longest gap being over 200 days. Owens submitted numerous grievances about lapses in the renewal and distribution of his prescriptions, but nothing was done.

Owens learned that Wexford has policies intended to ensure that medication refills and distributions are accurate and properly recorded. The onsite medical director is responsible for enacting these policies and training and supervising the health care staff. Under the medical director, the director of nursing supervises the maintenance of pharmacy records and the nurses who are responsible for removing refill stickers from medication, placing the stickers in patients' charts, and having patients sign those stickers. When properly maintained, these records can be consulted when a patient claims he never received his medication. In Owens's experience, the nursing staff did not follow these protocols.

Owens sued Wexford and twelve individuals for violating his rights under the Eighth Amendment by causing him unnecessary pain and suffering. 42 U.S.C. § 1983. At screening, *see* 28 U.S.C. § 1915A(a), the district court dismissed Owens's claim against Wexford relying on a theory of *respondeat superior*, leaving only a claim under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Six individual defendants

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[†] Three different judges had responsibility for the case over its life. Having noted this, we refer to the "district court" without further distinctions.

were also dismissed at screening, and because Owens does not challenge this ruling, we say no more about them. Seven defendants remained: Wexford for failing to train and supervise its employees to follow its pharmacy policies; Lori Cunningham Shinkle (health care unit administrator) and John Coe (medical director) for failing to ensure that their staff maintained medication records and timely distributed medications as required by prison and Wexford policies; Lori Jackman (nurse) under the supervision of William McFarland (director of nursing) for failing to provide Owens with his prescribed medications; and Dede Brookhart (assistant warden of programs) and Julia Petty (counselor) for failing to address the issue after it was brought to their attention.

In response to an early motion for summary judgment, the court entered judgment for three defendants—Petty (counselor), Jackman (nurse), and McFarland (director of nursing)—because Owens failed to exhaust the available administrative remedies. *See* 42 U.S.C. § 1997e(a). The court identified only one grievance that adequately identified Petty, Jackman, and McFarland, but Owens provided no evidence that he appealed the denial to the grievance officer, *see* ILL. ADMIN. CODE tit. 20, § 504.820(a). The court determined that Owens did, however, exhaust his administrative remedies with regard to the remaining four defendants.

Owens then submitted two discovery motions. The court denied the first—a motion to compel—because Owens had never served any written discovery; instead, he had requested documents orally during his deposition. The court also denied his motion for an extension of time to complete discovery because Owens did not act with diligence to adhere to the deadlines set in the scheduling order.

Owens also moved (for a third time) to have the court recruit counsel for him. (His first motion, which argued that he needed counsel to retain an expert witness, was denied because the case had not yet progressed beyond the pleading stage; his second motion was denied because the issues were not too complicated for Owens, "a college graduate and an experienced litigator.") In his third motion, Owens argued that he needed counsel because of the complexity of the medical issues and the difficulty of establishing defendants' states of mind, especially in the later stage of litigation; his inability to find witnesses after being transferred and losing boxes of his legal records; and the need for an attorney to help him hire an expert witness. The court again denied his motion "[b]ased on his education, litigation experiences, and communication skills" and because his problems during discovery stemmed from a lack of diligence rather than self-representation. The court did not address the arguments about state of mind or the need for an expert witness.

The four remaining defendants filed a motion for summary judgment on the merits, which the district court granted as to all four: Brookhart (assistant warden of programs), Cunningham Shinkle (health care unit administrator), Coe (medical director), and Wexford. First, the court determined that Brookhart was simply misidentified—she was not the person Owens believed had received or read his grievances. The court also concluded that no reasonable jury could find that Cunningham Shinkle was deliberately indifferent because she reviewed one of Owens's relevant grievances and responded to it, advising him to continue to submit medication refill requests. As to Coe, the court first ruled that any claims of lapses in medication from 2012 through 2015 were barred by claim preclusion. *See Owens v. Duncan*, No. 15-cv-1169-MJR-SCW, 2018 WL 575065 (S.D. Ill. Jan. 26, 2018), *aff'd*, 798 F. App'x 9 (7th Cir. 2020). For claims that arose after the time period relevant to *Duncan*, the court determined that Owens lacked evidence: (1) that Coe was aware of the delays in medication; and (2) that Owens was harmed by the delay in medication. Finally, the court concluded that Owens presented no evidence that Wexford had a de facto or official policy that caused violations of his constitutional rights. It rejected as speculation Owens's argument that gaps in Wexford's records showed that it failed to adequately train or supervise its personnel with respect to prescription medication.

On appeal, Owens first challenges the early dismissal of his *respondeat superior* claim against Wexford; Owens believes that Wexford should be liable in its capacity as the employer of the individuals who allegedly violated his rights. But this argument is a non-starter because there is no employer liability under § 1983. *See Monell*, 436 U.S. at 691; *Whiting v. Wexford Health Sources, Inc.*, 839 F.3d 658, 664 (7th Cir. 2016).

Next, Owens challenges the decision on the first motion for summary judgment based on failure to exhaust administrative remedies with respect to claims against Petty, Jackman, and McFarland. To properly exhaust administrative remedies, Owens needed to complete each step set out in the prison's grievance process. *See Woodford v. Ngo*, 548 U.S. 81, 85 (2006); *Jones v. Bock*, 549 U.S. 199, 218 (2007). Illinois has a three-step process for non-emergency grievances: (1) attempt to resolve the problem through the counselor; (2) file a written grievance with a grievance officer within 60 days after discovering the problem; and (3) appeal to the designee of the Illinois Department of Corrections, who relies on the review and recommendations of the Administrative Review Board (ARB). ILL. ADMIN. CODE tit. 20, §§ 504.810(a), 504.850(a); *Williams v. Wexford Health Sources, Inc.*, 957 F.3d 828, 831 (7th Cir. 2020).

The record shows that Owens did not strictly comply with the prison's exhaustion requirements with respect to his claims against Petty, Jackman, and McFarland. *See Smallwood v. Williams*, 59 F.4th 306, 313 (7th Cir. 2023). Owens argues that he could not have complied with step two within 60 days because his counselor did not respond to him until after the deadline passed. But the grievance process did not require Owens to wait for a response from his counselor before filing a formal written grievance. Owens also argues that the court overlooked that he filed a grievance directly with the ARB after he was transferred. But his complaints about these defendants concern medical issues, which are not among the subjects that a prisoner can bring directly to the ARB after a facility transfer. ILL. ADMIN. CODE tit. 20, § 504.870(a)(4). The judgment for the three defendants must therefore be affirmed.

We next consider the denial of Owens's two discovery motions. With respect to the motion to compel, the district court appropriately determined that Owens had not served written discovery nor made a good faith effort to confer with the defendants to secure information before moving to compel answers to the oral requests he made at his deposition. *See* FED. R. CIV. P. 33, 34, 37(a)(1). Second, the court reasonably denied Owens's motion to extend discovery based on his lack of diligence. *Alioto v. Town of Lisbon*, 651 F.3d 715, 720 (7th Cir. 2011). The scheduling order of July 10, 2020, set the fact discovery deadline for May 10, 2021. During those eight months, Owens did not conduct any discovery and moved for an extension two months after the deadline.

Next, Owens challenges the denials of his motions to recruit counsel, which we review for abuse of discretion. *James v. Eli*, 889 F.3d 320, 328 (7th Cir. 2018). District courts are uniquely equipped to balance the limited supply of pro bono attorneys in their jurisdictions with the needs of pro se plaintiffs and the potential merits of a given case. *See McCaa v. Hamilton*, 959 F.3d 842, 844–45 (7th Cir. 2020). But when deciding whether to recruit counsel under 28 U.S.C. § 1915(e)(1), a court must consider (as relevant here) whether, "given the difficulty of the case," the plaintiff is "competent to litigate it himself." *Pruitt v. Mote*, 503 F.3d 647, 654 (7th Cir. 2007) (en banc). Though this inquiry must be case- and plaintiff-specific, we have identified circumstances that tend to diminish a prisoner-plaintiff's ability to litigate pro se, such as when: (1) the case reaches later stages of litigation, (2) the plaintiff is transferred to another facility and loses access to relevant witnesses or evidence, (3) the claim depends on the state of mind of the defendant, and (4) expert testimony is necessary to prove the claim. *James*, 889 F.3d at 327–28.

Here, the district court abused its discretion by not fully considering the circumstances that Owens brought to the court's attention in his third motion. The court briefly addressed the stage of litigation (noting Owens's experience litigating at the summary-judgment stage, albeit never successfully) and Owens's multiple prison transfers (opining that a lack of diligence, not the transfers, caused lapses in discovery). But Owens also raised the probable requirement of an expert witness—a prediction that proved true—and the difficulty of obtaining evidence of the state of mind of the defendants. Pro se prisoners may have no way to produce expert testimony without an advocate, and even sophisticated litigants can struggle with nuanced legal issues like deliberate indifference. *Pruitt*, 503 F.3d at 664 (Rovner, J., concurring); *see also Perez v. Fenoglio*, 792 F.3d 768, 784–85 (7th Cir. 2015); *James*, 889 F.3d at 327–28. "[F]ailing to consider the complexities of advanced-stage litigation activities and whether a litigant is capable of handling them is an abuse of discretion." *Eagan v. Dempsey*, 987 F.3d 667, 683 (7th Cir. 2021) (quoting *Perez v. Fenoglio*, 792 F.3d 768, 785 (7th Cir. 2015)) (cleaned up).

It is not enough, however, for Owens to show that the district court abused its discretion in denying the recruitment of counsel; on appeal, he must also show that there is a reasonable likelihood that the presence of counsel would have made a difference in the outcome of the case. *Pruitt*, 503 F.3d at 659. To succeed on a deliberate-indifference claim, Owens had to show (1) that he suffered from an objectively serious medical condition and (2) that prison officials knew of and consciously disregarded an excessive risk to his health. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Petties v. Carter*, 836 F.3d 722, 728 (7th Cir. 2016) (en banc). The district court presumed Owens met the first element, so we focus only on whether, with counsel, he likely would have met the second.

Owens's claims against Brookhart, Cunningham Shinkle, and Coe would not have survived summary judgment even if he had a lawyer. First, the record shows that Owens misidentified Brookhart because she had not yet started working at Lawrence Correctional Center when Owens believed they first met. And there is no evidence that Brookhart ever knew about Owens's medication lapses because she never reviewed the relevant grievances. Next, the record shows that Cunningham Shinkle received one grievance about lapses in Owens's medication. And by responding to that grievance with instructions to submit refill requests with medical personnel, she did not consciously disregard Owens's medical needs. *See Stewart v. Wexford Health Sources, Inc.*, 14 F.4th 757, 767 (7th Cir. 2021). In any case, someone who simply reviews a grievance cannot be liable for the conduct underlying the prisoner's complaint. *See Owens v. Evans*, 878 F.3d 559, 563 (7th Cir. 2017). Finally, Owens clarifies on appeal that he sued Coe in

his official capacity as medical director. This is effectively the same as the *Monell* claim against Wexford, *see Holloway v. Delaware Cnty. Sheriff*, 700 F.3d 1063, 1071 (7th Cir. 2012), which we turn to next.

Owens's lack of counsel was prejudicial with respect to his *Monell* claim against Wexford. Owens argues that the district court overlooked evidence that Wexford, through its medical director (Coe), failed to adequately train and supervise its staff, generating a widespread practice of ignoring procedures intended to protect patients. Specifically, he asserts that he submitted sufficient evidence that Jackman (nurse) and the other nurses, under the supervision of McFarland (director of nursing), failed to provide his medications on time because they did not use medication stickers and signatures to track refills and distribution.

We cannot conclude that Owens would have lost his *Monell* claim even with counsel. His evidence—the lack of sticker signatures in his charts and the discrepancies among the pharmacy records, patient records, and Owens's datebook—supports a widespread practice of Wexford tolerating the frequent failure to order timely refills and consistently distribute medications. *See Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917, 927 (7th Cir. 2004). Moreover, Wexford did not cite evidence that its staff generally follows the required procedures. Because these policies were intended to safeguard against the very harm Owens alleges, Wexford's disregard for enforcing its policy could show that the risk of patients missing medication was so high, and the need for training so obvious, that Wexford's failure to act reflected deliberate indifference and institutional culpability. *J.K.J. v. Polk County.*, 960 F.3d 367, 380 (7th Cir. 2020) (en banc). Thus, if Owens had counsel to assist in marshaling and citing evidence, there is reasonable probability that he could have demonstrated deliberate indifference.

Further evidence of prejudice is the district court's conclusion that Owens failed to show that delays in medication worsened his health conditions because he did not offer "any expert testimony" or medical records. First, it is unclear how Owens could have established causation with "medical records." The prison's records could show the decline in Owens's condition over time, but they would not likely document any providers' opinions that his irregular receipt of medications was causing that harm. Second, as Owens told the court more than once, he was not able to offer expert testimony because, without a lawyer, he had no means of finding and paying for one. If an expert witness had testified that lapses in Owens's medication worsened his chronic conditions or caused unnecessary pain and suffering, Owens could have raised a genuine issue of material fact. *See James*, 889 F.3d at 331.

We AFFIRM the judgment in all respects other than the ruling on the third motion to recruit counsel, and therefore, the summary judgment ruling for Wexford. As to those two rulings, we VACATE and REMAND the case to the district court for proceedings consistent with this order. Specifically, the district court should recruit counsel for Owens and reopen discovery with respect to the *Monell* claim against Wexford. Furthermore, given the limited supply of volunteer lawyers in many districts, this court will identify a willing candidate in a future order and invite the district court to allow counsel's appearance for Owens pursuant to § 1915(e)(1).