

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LONNIE L. JACKSON,

Plaintiff,

v.

DR. PATRICK J. MURPHY, DR. DAVID BURNETT,
RN J. KLETTKE, SHARON ZUNKER, AMY SMITH,
RN WENDY CARIVOU, ISMAEL OZANNE and
HOLLY GUNDERSON,

Defendants.

ORDER

10-cv-425-slc¹

Plaintiff Lonnie L. Jackson brought this lawsuit originally as part of a larger action in which he complained about an assortment of abuses and inadequate treatment he was receiving from prison officials. Jackson v. Raemisch, 10-cv-212-bbc. The claims dealing with inadequate medical care were severed from the original suit and placed in this case. Defendants in both cases filed motions for summary judgment for plaintiff's failure to exhaust, arguing that all the claims remaining in the original case and the claims in this case related to treatment of plaintiff's right ear were not properly exhausted because plaintiff

¹ For the purpose of issuing this order, I am assuming jurisdiction over the case.

waited too long to file a grievance about the matters relevant to those claims. Plaintiff opposed the motions and submitted documentation purporting to show that he had indeed filed a timely grievance. Because there was a factual dispute, I held a hearing on the matter, and ultimately concluded that plaintiff did not file a timely grievance. As a result, I granted defendants' motions for summary judgment and dismissed the entire original case without prejudice and the claim in this case for inadequate treatment of his right ear for failure to exhaust.

Following the hearing, defendants moved for dismissal of the remaining claims as a sanction for plaintiff's false submissions to the court. That motion is now briefed and ready for resolution. Plaintiff argues that the court has not found that he indeed filed fraudulent documents, but only that he failed to exhaust his administrative remedies. Plaintiff relied on a grievance that he said he filed one year before the grievance on record with the prison. I found that he had not filed that grievance at all. If I did not make it apparent at the hearing, I will do so now. From the evidence presented at the hearing, I find that not only did plaintiff fail to file the first grievance, but that his purported grievance not exist at the time he said it was created. Instead, he created the document after the fact to save his case from dismissal for failure to exhaust.

Moreover, although there is some doubt about the standard of proof required to apply a substantial sanction, compare Maynard v. Nygren, 332 F.3d 462, 470-71 (7th Cir. 2003)

(applying “clear and convincing standard”) with, e.g., Ty Inc. v. Softbelly’s, Inc., 517 F.3d 494, 498 (7th Cir. 2008) (suggesting lower standard than one set in Maynard would be appropriate but declining to reach question), in this case, the question does not matter because the evidence against plaintiff is clear and convincing. Although plaintiff attempted to explain how the document could have been filed but not processed and why he would have waited for a year to act on the grievance he allegedly filed, his explanations were wholly unpersuasive. The suspect annotation on the grievance detailing the recipient of the document is even further evidence that plaintiff created the grievance after the fact.

Plaintiff contends that dismissal is not an appropriate sanction because he was not given a warning. Bolt v. Loy, 227 F.3d 854, 856 (7th Cir. 2000). However, Bolt does not stand for the proposition that a warning is required in every instance; instead, “[e]ven without a warning, egregious misconduct can be punished by dismissal.” Id. (citation omitted). Plaintiff’s decision to create a false document and submit it to the court in an effort to save his case is the most egregious sort of misconduct. He lied intentionally to the court and, by creating a factual dispute where none existed, forced the court and defendants in the original case to expend resources for a hearing. In making the same kind of assertions in this case he required defendants to respond to his false evidence and would have required an evidentiary hearing to be held had I not already held such a hearing on the same issue in the original case. Plaintiff required no warning to be aware that lying to the court and

falsifying documents could have serious consequences. Cf. Ridge Chrysler Jeep, LLC v. DaimlerChrysler Financial Services Americas LLC, 516 F.3d 623, 626 (7th Cir. 2008) (“One who misuses litigation to obtain money to which he is not entitled is hardly in a position to insist that the court now proceed to address his legitimate claims, if any there are.”).

Plaintiff argues that dismissal of his remaining claims with prejudice is too harsh a sanction because he has already had his non-exhausted claims dismissed and has been “forced” to pay a second filing fee. As for the first point, dismissal of the non-exhausted claims was not a result of his filing fraudulent documents, but rather a result of his failing to exhaust. To the extent he is suggesting that a proper sanction might be dismissal of those claims with prejudice instead of without prejudice, this would be an empty sanction as well. As plaintiff must know, he will have little if any success exhausting his claims now because any grievance he filed would be untimely; indeed, he has already tried this once and had his late grievance rejected. Thus, although in this case his claims for failure to treat his ear were dismissed without prejudice, there is little difference between that result and a dismissal with prejudice; plaintiff will likely never be able to pursue those claims in either instance.

Plaintiff’s point about having been “forced” to pay two filing fees is also out of place. He was not forced to pay additional filing fees because he falsified a document but because he chose to bring groups of claims that could not be litigated in a single lawsuit. It is no “punishment” to require a plaintiff bringing two lawsuits to pay two filing fees.

Dismissal of plaintiff's remaining claims with prejudice is necessary to effectively deter litigants with "nothing to lose" from falsifying documents to further their case. Plaintiff is a prisoner proceeding in forma pauperis, so monetary sanctions would not be effective, Hoskins v. Dart, 633 F.3d 541, 544 (7th Cir. 2011), and dismissal of the claims directly related to the fraud would be an empty punishment when they are or will be dismissed on the merits. To make litigants such as plaintiff think twice about fraudulent filings, it is appropriate to dismiss any remaining related claims. This tells a plaintiff that lying to the court will not be tolerated and ties the punishment to the fraud on the related claims. Cf. id. (not abuse of discretion to dismiss complaint for fraudulent statements made related to plaintiff's past litigation). I conclude that plaintiff's remaining claims should be dismissed with prejudice as a sanction for his falsifying a document and using it to overcome a motion for summary judgment. (Because plaintiff's case will now be dismissed in its entirety, plaintiff's motion for summary judgment and motion for clarification as to remaining claims and defendant's motion for extension of time to file a summary judgment motion will be denied as moot.)

ORDER

IT IS ORDERED that

1. The motion for dismissal filed by defendants Dr. Patrick J. Murphy, Dr. David

Burnett, RN J. Klettke, Sharon Zunker, Amy Smith, RN Wendy Carivou, Ismael Ozanne and Holly Gunderson as a sanction for plaintiff Lonnie L. Jackson's material alteration of documents, dkt. #32, is GRANTED. The remaining claims in this case are DISMISSED with prejudice.

2. Plaintiff's motion for summary judgment, dkt. #41, and motion for clarification of which claims remain in the case, dkt. #34, and defendant's motion for an extension of time to file a summary judgment motion, dkt. #45, are DENIED as moot.

3. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 6th day of June, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge