

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

JOEL FLAKES,

Plaintiff,

v.

CORRECTIONS CORPORATION
OF AMERICA, MATTHEW J. FRANK
and JANE SONDALE,

Defendants.

OPINION
and
ORDER

04-C-189-C

This is a civil action brought pursuant to 42 U.S.C. § 1983. Presently before the court is the motion of defendants Matthew Frank and Jane Sondalle in which they seek summary judgment in their favor on the claims plaintiff brought against them. These claims are that 1) defendant Sondalle retaliated against plaintiff for exercising his First Amendment right to file a grievance by directing staff to harass him and by refusing him the assistance of an aide to help him move about the prison in his wheelchair; and 2) defendant Frank violated plaintiff's rights under the Americans with Disabilities Act of 1990 by failing to arrange for him to receive the services of an aide while he was confined at the Oshkosh Correctional Institution.

Before addressing defendants' motion on its merits, a preliminary matter requires attention. In an order dated June 17, 2004, I granted plaintiff's motion for appointment of counsel after concluding that it was warranted because of plaintiff's painful physical condition, in combination with the number of claims on which he had been allowed to proceed and the potential complexity of his ADA claims. In the same order, I stayed all proceedings pending the appointment of counsel. On November 29, 2004, I lifted the stay after extensive efforts had failed to find a lawyer to assist plaintiff from within the Western District of Wisconsin or the Seventh Circuit. In the order lifting the stay, I explained:

For more than five months, this court has attempted to find a lawyer who would be willing and able to represent plaintiff on these claims. After trying for three months to find a lawyer in this district with no success, I abandoned my efforts and requested assistance from the office of the Circuit Executive for the Court of Appeals for the Seventh Circuit. Despite the circuit's assistance, no lawyer who was approached about taking the case has agreed to represent plaintiff, even though I have made it known to potential counsel that I would be willing to sever plaintiff's claims so as to allow counsel to choose from among the claims that counsel would be willing to prosecute on plaintiff's behalf and that counsel would prefer not to prosecute.

Having made every effort to find a lawyer for plaintiff and having failed in those efforts, I have no recourse but to require plaintiff to prosecute his claims on his own. In the order granting plaintiff's motion for appointed counsel, I noted that plaintiff has osteoarthritis in his hips, which causes him substantial pain. I noted also that plaintiff's ADA claim in the prison context raised novel legal issues that may be more difficult to litigate than plaintiff's other claims, which have for years been routinely litigated by prisoners without counsel. Plaintiff's physical impairment may make it more difficult for him to spend steady periods of time researching the law or, for example, responding to a motion for summary judgment. Therefore, I will ask the

magistrate judge to take plaintiff's condition into account when he schedules the various deadlines for moving this case to resolution.

The magistrate judge set generous deadlines for filing dispositive motions and completing trial preparation procedures. Later, the court extended the deadline established for plaintiff to oppose one of the former defendants' dispositive motions when plaintiff pointed out that he had not received all of the moving parties' submissions in a timely fashion. In every aspect of these proceedings, this court has taken care to insure that plaintiff has had ample opportunity to prosecute his claims and defend against defendants' motions. Nevertheless, in responding to the motion for summary judgment presently before this court, plaintiff did not comply with this court's procedures to be followed on motions for summary judgment, although he was provided a copy of the procedures with the magistrate judge's preliminary pretrial conference order. In particular, plaintiff failed to respond to defendants' proposed findings of fact in the manner prescribed in the procedures. Instead, he submitted a single affidavit containing a few factual assertions that he bases on his own personal knowledge and to which he attaches copies of two letters he avers he wrote to Warden Smith in March of 2002 about his need for an aide and a letter he wrote to defendant Sondelle in June 2002.

Ordinarily, in determining the material and undisputed facts on a motion for summary judgment, I consider only those proposed findings of fact that have been submitted

in compliance with this court's procedures. Under the circumstances of this case, however, I have made an exception and considered the factual averments plaintiff made in his affidavit that meet the requirements of Fed. R. Civ. P. 56(e) and the copies of the authenticated letters plaintiff attached to his affidavit.

I conclude that defendant Frank is entitled to summary judgment in his favor because no reasonable jury could find from the evidence submitted by the parties that plaintiff was qualified under the ADA for the services of an aide to push his wheelchair. In addition, I will grant defendant Jane Sondalle's motion for summary judgment on plaintiff's claim that Sondalle retaliated against him by directing staff to harass him because plaintiff has submitted no evidence of such retaliation. However, I must deny the motion for summary judgment with respect to plaintiff's claim that defendant Sondalle retaliated against him for filing an inmate complaint by refusing to allow him the help of an aide, because plaintiff has succeeded in putting into dispute defendants' proposed facts concerning Sondalle's motivation for denying plaintiff an aide.

From the proposed facts submitted by defendants Frank and Sondalle and plaintiff's affidavit, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Joel Flakes is an inmate at Stanley Correctional Institution in Stanley, Wisconsin.

Defendant Matthew Frank is Secretary of the Wisconsin Department of Corrections.

Defendant Jane Sondalle is employed by the Wisconsin Department of Corrections as a correctional unit supervisor.

B. Background

Defendant Sondalle has worked at the Oshkosh Correctional Institution for the last fourteen years. Plaintiff arrived at the Oshkosh facility in March 2002 and was assigned to a cell in the U building, where defendant Sondalle was the unit supervisor.

When plaintiff arrived at Oshkosh on March 8, 2002, he was in a wheelchair. For the first few days, an inmate aide pushed plaintiff's wheelchair for him. On March 9, 2002, nurse J. Johnson completed a medical restrictions and special needs form, indicating that plaintiff should be assigned to a lower bunk and should be allowed to use a wheelchair as needed.

During plaintiff's first week at Oshkosh he met with social worker Carol Wetzel so that she could determine what functions he could perform without assistance and what accommodations he would require. On March 15, 2002, plaintiff filed an inmate complaint against Wetzel, complaining that she had taken glee in his disability and associated pain.

Wetzel and defendant Sondalle were friends and both had an office in the U building.

On March 19, 2002, plaintiff wrote a letter to Oshkosh warden Judy Smith. He wrote in part:

Ms. Sondalle has wrote special condition for me on this unit the aids can't push me in my wheelchair to and from HSU if I am unable to wheel myself to and from HSU I am going to been sent to the infirmary in Dodge.

On March 21, 2003, plaintiff met with occupational therapist Nick Heinritz. Heinritz conducted an evaluation of plaintiff's self-help skills in order to assure that (1) he was functioning at his maximum safe and independent status; (2) existing accommodations were appropriate; and (3) he was realizing his maximum potential to improve his functional skills. Heinritz's report from that appointment stated in part:

Advanced self cares: Limited assist. Client reports he depends on the other inmates to get his food tray, push him in his w/c [wheelchair] for long distances, and other everyday tasks as needed.

Recommendation: The client would not be safe trying to carry his own food tray while either sitting in his w/c or pushing it. Therefore, accommodations should be made for delivering his food tray as needed. Also, it would be advisable to allow Mr. Flakes to propel himself in his w/c as much as possible in light of physical benefits and maintaining his maximum independent status. Specifically, in order to allow Mr. Flakes to wheel himself to different locations in the institution the following recommendations are provided:

- W/c footrests are not needed if client is allowed adequate rest periods.
- A common sense approach to providing rest periods such as one minute of rest for every 100 yards of wheeling himself in the w/c would be a safe accommodation.

- A regular routine for improving independent ambulation and w/c skills per Physical Therapy recommendations would be beneficial for the client.

Summary: Mr. Flakes continues to possess the capacity to perform almost all of his self care independently except for getting his food tray and long distance ambulation/wheelchair skills. He has the potential to improve his independent status if he is provided with Physical Therapy and a daily routine of exercise out of his w/c. Unfortunately, his dependence on his w/c has exacerbated his mobility difficulties. Therefore, from a medical perspective it is imperative to keep Mr. Flakes as active as possible by maximizing his self care requirements, and begin a graded, low level exercise/walking program as soon as possible per Physical Therapy recommendations.

Defendant Sondalle read Heinritz's report. Defendant Sondalle told plaintiff that he should move about in his wheelchair on his own. After she told him this, she saw another inmate pushing plaintiff's wheelchair. Defendant Sondalle told plaintiff he would receive a conduct report if he continued to disobey her order.

Numerous inmates in wheelchairs at Oshkosh are able to propel themselves and are required to do so because of the therapeutic benefits of doing so. Requiring able inmates to propel themselves minimizes the use of scarce resources for inmates who do not need the service.

Plaintiff filed an inmate complaint challenging defendant Sondalle's decision not to assign him an aide to push his wheelchair. At no time did defendant Sondalle direct staff to harass plaintiff in retaliation for any complaints or grievances he voiced or filed.

DISCUSSION

A. Standard of Review

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); O’Neal v. City of Chicago, 392 F.3d 909, 910 (7th Cir. 2004). In ruling on a motion for summary judgment, the court must construe the evidence, resolve factual disputes and draw inferences in the light most favorable to the non-movant. Loeb Industries, Inc. v. Sumitomo Corp., 306 F.3d 469, 480 (7th Cir. 2002). If the non-moving party fails to make a sufficient showing on an essential element of her case, the moving party is entitled to judgment as a matter of law. Lewis v. Holsum of Fort Wayne, Inc., 278 F.3d 706, 709 (7th Cir. 2002).

B. Retaliation

_____A state official may be liable to an inmate for damages if the official takes action against an inmate to retaliate against him for exercising a constitutional right, such as filing inmate complaints. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). To prevail on a retaliation claim, a prisoner must prove that his constitutionally protected conduct was a substantial or motivating factor in a defendant's actions, that is, that the prisoner's protected conduct was one of the reasons a defendant took adverse action against him. Mt. Healthy Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Johnson v. Kingston, 292 F. Supp.

2d 1146, 1153 (W.D. Wis. 2003). “Once the plaintiff proves that an improper purpose was a motivating factor, the burden shifts to the defendant . . . to prove by a preponderance of the evidence that the same actions would have occurred in the absence of the protected conduct.” Spiegla v. Hull, 371 F.3d 928, 943 (7th Cir. 2004).

Plaintiff contends that defendant Sondalle directed staff at the Oshkosh facility to harass him, but he has produced no evidence to support this claim. Therefore, no reasonable jury could find for plaintiff. Accordingly, I will grant defendant Sondalle’s motion for summary judgment on this claim.

Plaintiff contends as well that defendant Sondalle retaliated against him for filing an inmate complaint against her friend, Carol Wetzel, when she refused him an aide to assist him in moving about the prison. It is undisputed that defendant Sondalle did refuse plaintiff an aide. However, plaintiff has the burden to “establish by a preponderance of the evidence that a motivating factor in the defendants’ action was retaliation.” Spiegla at 941 (citing Rakovich v. Wade, 850 F.2d 1180, 1189 (7th Cir. 1988) (en banc)). “As we said in Klunk v. County of St. Joseph, ‘ . . . the [plaintiff] must show that the protected speech caused, or at least played a substantial part in, the [defendant’s] decision’ to take adverse action against the plaintiff. 170 F.3d 772, 775 (7th Cir. 1999).” Spiegla at 943. If the plaintiff can make this showing, the burden shifts to the defendant to prove by a preponderance of the evidence that she would have taken the same adverse action if plaintiff had not engaged in the

protected speech. Id.

Defendant Sondalle asserts that she decided to deny plaintiff an aide after she read the report Heinritz wrote following his meeting with plaintiff on March 21, 2002. However, the facts reveal that plaintiff wrote a letter to the Oshkosh warden on March 19, 2002, two days before plaintiff met with Heinritz, stating that defendant Sondalle had instructed the aides not to push him in his wheelchair. Although plaintiff has not submitted evidence suggesting how defendant Sondalle might have known about the complaint he filed against Ms. Wetzel, drawing all inferences in plaintiff's favor as I must, I cannot find that no reasonable jury could conclude that Sondalle's instructions were not issued in retaliation for plaintiff's filing a complaint against her friend and colleague Wetzel.

C. Americans with Disabilities Act of 1990

Plaintiff contends that defendant Frank violated his rights under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12132-12134, by failing to arrange for him to receive the services of an aide while he was confined at the Oshkosh facility.

Title II prohibits public entities from excluding qualified persons with disabilities from participating in or receiving the benefits of the services, programs or activities offered by the entity and from discriminating against qualified disabled persons. 42 U.S.C. § 12132. The act applies to correctional institutions. Pennsylvania Dept. of Corrections v. Yeskey,

U.S. 206, 208-210 (1998); Crawford v. Indiana Dept. of Corrections, 115 F.3d 481, 483 (7th Cir. 1997).

The ADA defines a “qualified individual with a disability” as:
an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. 12131.

A person is disabled within the meaning of the ADA if he suffers from a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(2). Major life activities include “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.” 29 C.F.R. § 1630.2(I) (1998). A major life activity is “substantially limited” when the person is unable to perform it or is significantly restricted in the manner, condition, or duration in which she can perform it in comparison to the general population. 29 C.F. R. § 1630.2(j) (1998); Byrne v. Board of Education, 979 F.2d 560, 563 (7th Cir. 1992).

Plaintiff contends that he was a qualified person with a disability and yet defendant Frank did not see to it that he had an aide to propel him around the facility. Other inmates had aides and plaintiff contends he was also entitled to that service.

The first question is whether plaintiff was disabled within the meaning of the ADA.

The only facts in the record regarding plaintiff's disability are those set forth in Heinritz's report. From that report, it seems that plaintiff had difficulty walking and used a wheelchair to move about. His ability to walk was clearly limited and he may well have fit within the ADA's definition of "disabled."

However, I cannot conclude from the record that plaintiff was a qualified individual with a disability as defined in the ADA. A qualified individual must meet "the essential eligibility requirements for the receipt of services," and plaintiff has not proffered any facts to show that he met the program's requirements for the receipt of an aide. Plaintiff did not set forth what those requirements were. Common sense would suggest that a basic requirement would be that the inmate not be able to propel himself. Heinritz found that plaintiff was able to propel himself around in his wheelchair. Even construing the evidence in the light most favorable to plaintiff, there is no evidence in the record suggesting that plaintiff needed an aide to push his wheelchair.

In the absence of evidence that plaintiff was a qualified individual with a disability, I cannot find that defendant Frank violated plaintiff's rights under the ADA. Plaintiff states in his affidavit in opposition to defendants' motion for summary judgment that his intent was that the Wisconsin Department of Corrections be the defendant in this claim. I do not need to address this because there is no evidence in the record to support a finding that his rights under Title II of the ADA were violated by anyone or any entity when he was denied

an aide at the Oshkosh facility. Accordingly, I will grant defendant's motion for summary judgment on this claim.

ORDER

IT IS ORDERED that

1. Defendants' motion for summary judgment on plaintiff's claim that defendant Matthew Frank violated his rights under the Americans with Disabilities Act is GRANTED and Matthew Frank is DISMISSED from this lawsuit.

2. Defendants' motion for summary judgment on plaintiff's claim that defendant Jane Sondalle retaliated against him for exercising his First Amendment right to file a grievance by directing staff to harass him is GRANTED.

3. Defendants' motion for summary judgment on plaintiff's claim that defendant Sondalle retaliated against him for exercising his First Amendment right to file a grievance

by refusing him the assistance of an aide is DENIED.

Entered this 29th day of September, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge