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JOHN UMBARGER, Plaintiff-Appellant, v. CORRECTIONAL MEDICAL SERVICES, et al., Defendants-Appellees.

No. 03-1994

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

93 Fed. Appx. 734; 2004 U.S. App. LEXIS 5106

March 16, 2004, Filed

NOTICE: [**1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY: Western District of Michigan. 03-00033. Enslin. 07-21-03.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff prisoner appealed a judgment of the United States District Court for the Western District of Michigan, which dismissed his 42 U.S.C.S. § 1983 claim against defendant warden for failure to exhaust administrative remedies under 42 U.S.C.S. § 1997e(a) and against defendants, prison medical service, prisons, employees and officers of the prisons, and hearing officers, for failure to state a claim.

OVERVIEW: The prisoner alleged that defendants retaliated against him by transferring him from one prison facility to another facility due to his litigation activities, conspired to deny him medical care, denied him adequate medical care, and violated his due process rights during a misconduct hearing. On appeal, the court held that the prisoner failed to show he exhausted his administrative remedies as to the warden because there was no evidence that the prisoner appealed the denial of his grievance beyond the first step of the administrative process. The inadequate medical care claim failed because the complaint alleged negligence or disagreement as to treatment, which did not state an Eighth Amendment claim. The prisoner alleged no evidence to support a conspiracy claim. The prisoner's

due process claims arising from the misconduct process failed to state a claim because the hearing officers were entitled to immunity.

OUTCOME: The court affirmed the judgment of the district court.

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > Dismissals > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN1] A federal court of appeals reviews de novo the district court's dismissal of a plaintiff's complaint for failure to exhaust available administrative remedies under 42 U.S.C.S. § 1997e(a).

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims

Civil Procedure > Dismissals > Involuntary Dismissals > Failures to State Claims

Civil Rights Law > Prisoner Rights > Prison Litigation Reform Act > Appellate Review

[HN2] A federal court of appeals reviews de novo the district court's dismissal of a plaintiff's complaint for failure to state a claim upon which relief may be granted under 28 U.S.C.S. § 1915A, 28 U.S.C.S. § 1915(e), and 42 U.S.C.S. § 1997e(c).

Civil Rights Law > Prisoner Rights > Medical Treatment

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment

[HN3] Negligence and a prisoner's disagreement with the medical treatment that he received during his incarceration are insufficient to state an Eighth Amendment claim.

COUNSEL: JOHN UMBARGER, Plaintiff - Appellant, Pro se, Marenisco, MI.

For CORRECTIONAL MEDICAL SERVICES, Defendant - Appellee: Kimberley A. Koester, Chapman & Associates, Ronald W. Chapman, Bloomfield Hills, MI.

JUDGES: Before: ROGERS and COOK, Circuit Judges; SCHWARZER, District Judge. *

* The Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

OPINION:

[*735] ORDER

John Umbarger, a Michigan prisoner proceeding pro se, appeals a district court judgment dismissing his civil rights complaint filed pursuant to 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that [**2] oral argument is not needed. *Fed. R. App. P. 34(a)*.

On February 19, 2003, Umbarger filed a complaint against Correctional Medical Services (CMS), CMS President Reed Heflin, CMS Director of Michigan Operations Craig Hutchinson. Michigan Department of Corrections (MDOC) Director William Overton, MDOC Chief Medical Officer George Pramstaller, Kinross Correctional Facility (KCF) Warden Linda Metrish, Newberry Correctional Facility (NCF) Warden Jeri-Ann Sherry, NCF Staff Physician Unknown Warren, MDOC Physician Mike Kinerly, Registered Nurse Donna Quinlan, NCF Hearings Investigator J. Sage, and NCF Hearings Officer G. Heisler. Relying upon the *First*, *Eighth*, and *Fourteenth Amendments*, Umbarger alleged that the defendants retaliated against him by transferring him from KCF to NCF because of his litigation activities, conspired to deny him medical care, denied him adequate medical care, and violated his due process rights during his misconduct hearing. Umbarger sought declaratory, injunctive, and monetary relief.

The district court dismissed Umbarger's complaint against Metrish without prejudice for failure to exhaust administrative remedies pursuant [**3] to the provisions of 42 U.S.C. § 1997e(a), and dismissed the complaint with prejudice against the remaining defendants for failure to state a claim upon which relief may be granted pursuant to the provisions of 28 U.S.C. §§ 1915A,

1915(e), and 42 U.S.C. § 1997e(c). Umbarger subsequently filed a motion for relief from judgment and a motion to reconsider his supplemental pleadings. The district court denied Umbarger's motion for relief from judgment, granted Umbarger's motion to reconsider his supplemental pleadings, and upon consideration, denied relief. Umbarger has filed a timely appeal.

With respect to Metrish, [HN1] we review de novo the district court's dismissal of Umbarger's complaint for failure to exhaust available administrative remedies under § 1997e(a). *See Curry v. Scott*, 249 F.3d 493, 503 (6th Cir. 2001). Upon review, we conclude that the district court properly dismissed Umbarger's complaint against Metrish without prejudice because Umbarger failed to demonstrate that he had exhausted his administrative remedies as to the retaliation claim asserted against her. *See Freeman v. Francis*, 196 F.3d 641, 645 [*736] (6th Cir. 1999). [**4] The record indicates that Umbarger filed a grievance on January 27, 2003, in which he alleged a retaliatory transfer. Umbarger's grievance was denied at the Step I level of review. There is no evidence to suggest that Umbarger appealed the denial of his grievance beyond the Step I level before filing his complaint.

With respect to the remaining defendants, [HN2] we review de novo the district court's dismissal of Umbarger's complaint for failure to state a claim upon which relief may be granted under §§ 1915A, 1915(e), and 1997e(c). *See Brown v. Bargery*, 207 F.3d 863, 867 (6th Cir. 2000); *Ruiz v. United States*, 160 F.3d 273, 275 (5th Cir. 1998). Upon review, we conclude that the district court properly dismissed Umbarger's complaint against the remaining defendants. First, Umbarger's allegations against CMS, Heflin, Hutchinson, Overton, Pramstaller, Sherry, Warren, Kinerly, and Quinlan failed to allege facts that, if proven, would rise to the level of the serious deprivation and deliberate indifference required to support an *Eighth Amendment* claim. *See Farmer v. Brennan*, 511 U.S. 825, 835, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994). Instead, Umbarger's complaint, [**5] at most, alleged [HN3] negligence and his disagreement with the medical treatment that he received during his incarceration, which are insufficient to state an *Eighth Amendment* claim. *See Estelle v. Gamble*, 429 U.S. 97, 106, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976); *Westlake v. Lucas*, 537 F.2d 857, 860 n.5 (6th Cir. 1976).

Second, Umbarger's allegations that CMS, Heflin, Hutchinson, Overton, Pramstaller, Sherry, Warren, Kinerly, and Quinlan conspired to deprive him of necessary medical care also failed to state a claim for relief. *See Collyer v. Darling*, 98 F.3d 211, 233 (6th Cir. 1996). Aside from Umbarger's bare assertion of a conspiracy, he offered no factual support or evidence upon which a conspiracy claim could be based.

Third, Umbarger's allegations that Sage and Heisler violated his *Fourteenth Amendment* due process rights during his misconduct hearing process failed to state a claim for relief as well. Umbarger's claims against Sage and Heisler may not proceed because they are entitled to

immunity. *See Shelly v. Johnson*, 849 F.2d 228, 229-30 (6th Cir. 1988).

Accordingly, we affirm the district court's judgment. *Rule 34(j)(2)(C)*, [**6] *Rules of the Sixth Circuit*.