

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

NOV 14 1990

ROBERT L. HOECKER
Clerk

IMAM 'SHAHID MUHAMMAD,)
)
Plaintiff-Appellant,)
)
v.)
)
UNITED STATES BUREAU OF)
PRISONS,)
)
Defendant-Appellee.)

No. 90-3121
(D. C. No. 88-3004-R
(D. Kan.)

ORDER AND JUDGMENT*

Before MCKAY, MOORE, and BRORBY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(1); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Mr. Muhammad appeals the district court's decision that granted defendant's motion to dismiss plaintiff's claim for

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

monetary damages and defendant's motion for summary judgment on the remaining claims.

Mr. Muhammad filed his pro se complaint against the United States Bureau of Prisons. His pleadings are voluminous yet can be summarized by stating that he claims his constitutional rights were violated by defendant when he was transferred from the United States Medical Center for Federal Prisoners at Springfield, Missouri, to the United States Penitentiary at Leavenworth, Kansas. Specifically, Mr. Muhammad claims that the Eighth Amendment prohibition against cruel and unusual punishment was violated as he was transferred before he had been adequately rehabilitated from the effects of a stroke.

Defendant filed a motion to dismiss concerning Mr. Muhammad's claims for monetary damages contending the court lacked jurisdiction to consider the claim. This contention was based upon the doctrine of sovereign immunity and Mr. Muhammad's failure to fulfill the jurisdictional prerequisites, including the denial of a timely filed administrative tort claim. Defendant also filed a motion for summary judgment with supporting material concerning Mr. Muhammad's claim for equitable relief. The district court granted both of defendant's motions.

Mr. Muhammad appeals these decisions pro se. On appeal, he makes many conclusory assertions, such as, "[d]efendant's [sic] are covering up for the food poison or some type of chemical that

was placed in plaintiff cream of corn" He also asserts that if he has AIDS, defendant gave it to him and should be charged with conspiracy to commit murder.

We grant Mr. Muhammad leave to proceed in forma pauperis.

After reviewing the voluminous record on appeal de novo, Abercrombie v. City of Catoosa, 896 F.2d 1228, 1230 (10th Cir. 1990), we find ourselves in substantial agreement with the decision of the district court.

Since filing his brief, Mr. Muhammad has filed a motion for writ of mandamus on October 9, 1990. In this "motion" he is complaining of his threatened transfer to a New Jersey prison. The record on appeal fails to show that this claim was presented to the district court and fails to show what action, if any, was taken by the district court. For this reason, we will not consider this issue. Mr. Muhammad, in his latest filing, has also requested that we enter a default judgment in his favor as appellee has failed to file a response. In cases such as this, an appellee is not required to file a response unless directed to do so by this court. We have not so directed, and we therefore refuse to grant the motion for default.

Accordingly, we **AFFIRM** the decision of the district court for substantially the same reasons as set forth by the district court order of March 14, 1990, a copy of which is attached hereto. Mr.

Muhammad also appeals the district court's denial of various post-judgment motions. We again **AFFIRM** these actions of the district court.

The mandate shall issue forthwith.

Entered for the Court:

WADE BRORBY
Circuit Judge

FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

MAR 14 11 00 AM '90

RALPH J. DELOACH,

BY [Signature] DEPUTY
ATTORNEY GENERAL, KS.

IMAM SHAHID MUHAMMAD,

Plaintiff,

v.

UNITED STATES BUREAU OF PRISONS,

Defendant.

CASE NO. 88-3004-R

O R D E R

This matter is before the court on defendant's motion to dismiss and motion for summary judgment. Having reviewed the pleadings and materials filed in this matter, the court makes the following findings and order.

Plaintiff Imam Shahid Muhammad claims that his constitutional rights were violated by the defendant when he was transferred from the United States Medical Center for Federal Prisoners ("USMCFP"), Springfield, Missouri, to the United States Penitentiary ("USPL"), Leavenworth, Kansas, in the spring of 1987. Specifically, plaintiff appears to claim that the defendant violated the Eight Amendment prohibition against cruel and unusual punishment by transferring plaintiff away from USMCFP before he had been adequately rehabilitated from the effects of a stroke. Plaintiff seeks a transfer back to USMCFP and damages.

Factual Background

After reviewing the documents filed by both parties, the court finds that the following facts are not genuinely in dispute.

Plaintiff suffered a stroke (right cerebellar infarct) on March 3, 1986, which left him with some right-side disability. Plaintiff was subsequently treated at USMCFP from March 31, 1986, until March 4, 1987. At USMCFP, plaintiff received active exercises, resistive exercises and cardiovascular conditioning. Medical records indicate that at the time of his initial discharge from USMCFP, he had fine motor point functioning impairment of the right upper extremity.

After his transfer from USMCFP to USPL, plaintiff continued to complain of mid-back pain and occasional numbness of the right side of his head, hand and upper leg. Physical examinations of plaintiff by USPL medical staff members confirmed plaintiff's complaints. Plaintiff was transferred back to USMCFP on April 29, 1988, for evaluation and treatment of his symptoms.

While at USMCFP, plaintiff's treatment included a physical therapy regime directed at relieving plaintiff's complaints of weakness and lack of coordination on his right side. On June 30, 1988, plaintiff was discharged from physical therapy at USMCFP because medical staff determined that he had received the maximum benefit from physical therapy. On July 18, 1988, plaintiff was discharged from USMCFP and transferred back to USPL.

MOTION TO DISMISS

Defendant asserts that plaintiff's claims for monetary damages should be dismissed because this court lacks jurisdiction to consider plaintiff's claims for damages against the Bureau of Prisons. The court agrees. Sovereign immunity bars lawsuits against agencies of the United States unless Congress has

specifically waived that immunity. United States v. Mitchell, 455 U.S. 535 (1980); United States v. Testan, 424 U.S. 392 (1976). Neither § 1331 nor the constitution acts as such a waiver. Garcia v. United States, 666 F.2d 960, 966 (5th Cir. 1982). Moreover, plaintiff has failed to file an administrative tort claim, which would have allowed him to bring his claims pursuant to the Federal Tort Claims Act, 28 U.S.C. 2671-80. Accordingly, plaintiff's claims for monetary damages are hereby dismissed.

MOTION FOR SUMMARY JUDGMENT

Standard for Grant of Summary Judgment

A moving party is entitled to summary judgment only when the evidence indicates that no genuine issue of material fact exists. Fed. R. Civ. P. 56(c); Maughan v. SW Servicing, Inc., 758 F.2d 1381, 1387 (10th Cir. 1985). The requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party has the burden of showing the absence of a genuine issue of material fact. This burden "may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). "[A] party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Anderson, 474 U.S. at 256. Thus, the mere existence of some alleged factual dispute

between the parties will not defeat an otherwise properly supported motion for summary judgment. Id. The court must consider factual inferences tending to show triable issues in the light most favorable to the existence of those issues. United States v. O'Block, 788 F.2d 1433, 1435 (10th Cir. 1986). The court must also consider the record in the light most favorable to the party opposing the motion. Bee v. Greaves, 744 F.2d 1387, 1396 (10th Cir. 1984), cert. denied, 469 U.S. 1214 (1985).

Discussion

The court finds that the defendant is entitled to a judgment as a matter of law. In Estelle v. Gamble, 429 U.S. 97 (1976), the Supreme Court concluded that deliberate indifference to the serious medical needs of a prisoner constitutes a violation of the Eighth Amendment prohibition against cruel and unusual punishment. Estelle, 429 U.S. at 105. However, the court has defined "deliberate indifference" to include only "obduracy and wantonness" and not "inadvertence or error in good faith". Whitley v. Albers, 475 U.S. 312, 319 (1986). In this case, the evidence presented by plaintiff demonstrates, at most, inadvertence or good faith error on the part of the defendant's employees in discharging plaintiff from USMCFP in the spring of 1987. Accordingly, the court finds that plaintiff has failed to set forth facts sufficient to establish a violation of the plaintiff's constitutional rights and warrant the granting of equitable relief.

PLAINTIFF'S MOTION TO ADD DEFENDANT

As a final matter, the court finds that plaintiff's motion

to add Dr. Stanley E. Nelson as a defendant must be denied. Pursuant to 28 U.S.C. § 1391(b), venue for a § 1331 claim against Dr. Nelson would be proper only in the district where Dr. Nelson resides or where the claim arose. A review of plaintiff's motion demonstrates that Dr. Nelson is a resident of Missouri and that the cause of action arose in Missouri. Because venue would not be proper in this district, plaintiff's motion is appropriately denied.

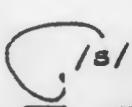
IT IS THEREFORE ORDERED that the defendant's motion to dismiss is hereby granted.

IT IS FURTHER ORDERED that the defendant's motion for summary judgment is hereby granted.

IT IS FURTHER ORDERED that plaintiff's motion to add defendant is hereby denied.

IT IS FURTHER ORDERED that this action is hereby dismissed and all relief denied. The clerk of the court is directed to transmit copies of this order to plaintiff and to counsel for defendant.

DATED: This 13th day of March, 1990, at Topeka, Kansas.

 /s/ RICHARD D. ROGERS
RICHARD D. ROGERS
United States District Judge