

NONPRECEDENTIAL DISPOSITION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 May 26, 2023*

Decided May 30, 2023

BeforeILANA DIAMOND ROVNER, *Circuit Judge*DAVID F. HAMILTON, *Circuit Judge*MICHAEL Y. SCUDDER, *Circuit Judge*

No. 21-3082

MICHAEL SMITH,
*Plaintiff-Appellant,**v.*KIMBERLY BUTLER, et al.,
*Defendants-Appellees.*Appeal from the United States District
Court for the Southern District of Illinois.

No. 3:17-cv-00189-GCS

Gilbert C. Sison,
*Magistrate Judge.***ORDER**

Michael Smith, an Illinois prisoner, sued guards, medical staff, and the warden under 42 U.S.C. § 1983, alleging claims under the First and Eighth Amendments regarding an injury to the fifth finger of his right hand. He asserts that, first, defendants culpably delayed treating the injury; second, a doctor retaliated against him for complaining about the delay; and third, a guard needlessly exacerbated his pain months

* 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).

after the injury while handcuffing him. The district court, through a magistrate judge presiding by consent, entered summary judgment for the defendants, reasoning that Smith lacked evidence for his claims. Although Smith's lack of evidence may be attributable to the performance of his recruited counsel, the court's conclusion was right, and we affirm.

We recite the facts in the light most favorable to Smith, beginning with his claim about delayed treatment of his injured finger. *See Miles v. Anton*, 42 F.4th 777, 780 (7th Cir. 2022). In May 2016, Smith was lifting weights in the gym when his spotter dropped a 40-pound weight on his finger. Two guards on duty told him that, to maintain security, he could not go to the health unit until prisoners returned to their cells and the guards finished a shift change and completed a prisoner headcount. Smith arrived at the health unit about two hours after the injury and his hand was swollen, discolored, and painful. By that time, it was too late to get an X-ray that day. A nurse ordered an X-ray the next week, and the health unit sent the scans to a radiologist.

The results of the X-ray exam led to further treatment. Two days after the exam, Smith received a pass to see Dr. John Trost to review the results. He went to the health unit, where Dr. Trost was present and had access to his records. But the appointment was cancelled—his records state that the prison had not received the radiologist's report yet—prompting Smith to file a grievance. Two weeks after the injury, the health unit received the radiologist's report, which showed swelling but no fracture, and ten days later Dr. Trost discussed it with Smith. Dr. Trost ordered more X-rays because, he later testified, fractures may appear after time. Based on this meeting, the warden denied the grievance that Smith had filed earlier. The health unit received the results of the second X-ray a week later, but they were inconclusive. Dr. Trost discussed these results with Smith two weeks after the prison received them and had more X-rays taken that day. He also requested that Smith see an outside hand surgeon because Smith could not extend his injured finger. The prison doctor who oversaw referrals initially denied the request until Dr. Trost had more information, but approved it the following week.

Smith saw the hand surgeon a couple of months later. The surgeon noted that Smith's finger was fractured, diagnosed him with a Boutonniere deformity (a condition that affects mobility of the finger joint), and discussed follow-up appointments, the use of a splint, and surgery, which the prison approved. Smith visited the surgeon's clinic two months later and received a splint to wear while handcuffed. On a third visit about three months after that, the surgeon recommended surgery at Smith's request, although

the surgeon stated that it would be reasonable to leave the finger as it was. Smith received surgery in April 2017, within a year of his injury.

We next recite the facts about Smith's claim of retaliation. About four months after he filed his grievance about Dr. Trost, Smith asked Dr. Trost to approve a permit requiring that when guards handcuffed him, they do so in front of his body. Dr. Trost denied the permit. He explained that Smith's medical records at the time did not show that he met its requirements—a shoulder injury, morbid obesity, or recent surgery.

Finally, we recount the facts about Smith's claim that a guard was deliberately indifferent to his injury and used needless force on him. In December 2016, a fight (not involving Smith) occurred. All prisoners in the area needed to be cuffed for security, and Officer Larry Kania cuffed Smith behind his back. Smith had the splint from the surgeon in his pocket. After three hours and believing that some prisoners' cuffs had been loosened, Smith told Kania that his cuffs were too tight and asked to put his splint on. Kania did not change the cuffs. Smith says that both hands went numb and his shoulders burned. He later filed another grievance, this time complaining about the lack of a front-cuff permit, but the warden denied it based on Dr. Trost's rationale.

Smith sued on these facts, and initially, the case ended quickly. The defendants moved for summary judgment, arguing that no evidence supported his claims. When Smith's counsel, who the court had recruited for him, never responded to the motions, the district court evaluated the motions and granted them.

Almost a year after entering summary judgment, the district court reopened the case at Smith's request. Smith told the court that his attorney had not responded to him for over a year, and he did not know about the motions for summary judgment and his attorney's failure to oppose them. After the attorney ignored the district court's orders to explain his absence, the court held him in civil contempt (though it later discharged the citation when the attorney responded). It then took steps to give Smith his day in court. It allowed him to proceed pro se, ordered the attorney to send Smith all discovery materials, and, after Smith told the court that his attorney never sent him those materials, reopened the case and gave Smith a chance to respond to the motions for summary judgment. Although Smith never received the discovery materials from his former counsel, Smith submitted evidence and contested the defendants' arguments that he had no basis for his claims.

The district court reentered summary judgment for the defendants. It ruled that, regarding the Eighth Amendment claims, security reasons justified the two guards'

decision to delay Smith's arrival at the health unit on the day of his injury, and no evidence suggested that the delay harmed Smith. Next, it ruled that Dr. Trost and the doctor who approved the visit with the surgeon furnished care compatible with the Eighth Amendment. It also ruled that no jury could find that, by denying Smith a front-cuff permit, Dr. Trost had retaliated against Smith for his grievance in violation of the First Amendment, because Dr. Trost aptly treated Smith after his grievance. Regarding the Eighth Amendment claim that Kania culpably refused to alter Smith's cuffs, the court stated that security reasons indisputably justified the cuffing and Smith had not shown sufficient harm. Finally, the court ruled that the warden did not violate Smith's Eighth Amendment rights because she reasonably relied on Dr. Trost's expertise.

On appeal, Smith contests the summary judgment rulings, which we review de novo. *Miles*, 42 F.4th at 780. To get past summary judgment on his Eighth Amendment claim about delayed medical treatment, Smith needed to point to evidence suggesting that the defendants knew about but disregarded a serious medical condition. See *Farmer v. Brennan*, 511 U.S. 825, 839–40 (1994). A delay in treatment that is “inexplicable” and “serves no penological interest” may suggest deliberate indifference. *Petties v. Carter*, 836 F.3d 722, 730 (7th Cir. 2016) (en banc). But Smith has not furnished such evidence.

We start with Smith's claim that two guards assigned to his gallery the day he injured his finger showed deliberate indifference by delaying for two hours Smith's arrival in the health unit. But the undisputed evidence is that the delay was necessitated by the penological interest of returning prisoners to their cells, conducting a headcount, and completing a shift change before bringing Smith to the health unit. Thus, this claim fails. See *Murphy v. Walker*, 51 F.3d 714, 717 (7th Cir. 1995) (dismissing claim about two-hour delay to treat broken hand); *O'Malley v. Litscher*, 465 F.3d 799, 806 (7th Cir. 2006) (ruling that delay caused by shift change was not deliberate indifference).

Likewise, Smith's claim that Dr. Trost deliberately ignored his medical needs lacks evidence. Smith focuses on two events. First, he complains that his appointment with Dr. Trost shortly after the injury should not have been cancelled because Dr. Trost had Smith's medical records handy. But that delay is explicable: Smith's uncontradicted medical records say that the health unit did not have the radiologist's report of Smith's first X-ray exam then; thus a meeting was unnecessary. Moreover, Dr. Trost's later treatment of Smith evinces ample care: Dr. Trost met with Smith after receiving the radiologist's report (which showed no fracture), ordered additional X-rays, and, after receiving those results, recommended that Smith see an outside surgeon who later agreed to surgery but said it was not essential. Smith's second argument is that

Dr. Trost deliberately ignored Smith's needs when he denied Smith a front-cuff permit. But Dr. Trost testified that Smith did not meet the requirements (the validity of which Smith does not contest) for a permit—a current shoulder injury, morbid obesity, or recent surgery. Smith responds that he showed Dr. Trost old prescription slips for a shoulder “condition.” But these appear to have been dated 15 years earlier; therefore they could not have put Dr. Trost on notice of a qualifying, current shoulder injury.

Smith's claim against the doctor who approved Dr. Trost's referral to the hand surgeon similarly fails. He argues that this doctor deliberately ignored his needs by asking for more information about Smith's hand before approving the referral a week later. But a medical professional may reasonably seek more information before deciding on medical care, *see Walker v. Wexford Health Sources, Inc.*, 940 F.3d 954, 965 (7th Cir. 2019), and Smith does not offer evidence that the one-week delay was reckless.

That brings us to Smith's Eighth Amendment claim against Kania. He first argues that when Kania needed to secure prisoners after a fight, he deliberately ignored Smith's medical need—which we will assume that Kania knew of—for a splint when cuffing him. But when a court balances “security and medical” concerns, “a deliberate indifference standard does not adequately capture” the proper inquiry. *Stewart v. Wexford Health Sources, Inc.*, 14 F.4th 757, 764 (7th Cir. 2021) (quoting *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986)). We must ask whether Kania “maliciously” or “sadistically” refused to use the splint. *See id.* But Smith does not cite evidence of malice or sadism.

Alternatively, Smith argues that the tightness of the cuffs violated his Eighth Amendment rights. To get past summary judgment on this version of his claim, he had to supply evidence that the difference in force between the cuffs as Kania applied them and looser cuffs (as Smith preferred) was more than *de minimis* or “repugnant to the conscience” of humanity. *See Hudson v. McMillian*, 503 U.S. 1, 5, 9–10 (1992). He did not. He says only that after three hours the cuffs hurt him and that some prisoners had their cuffs loosened. But Smith does not point to evidence suggesting that the other cuffs became looser than his, or if so, that the difference was more than marginal. And we have held that even “deliberately” and “unnecessarily” inflicting a slight increase in pain during legitimate security measures does not violate the Eighth Amendment. *Outlaw v. Newkirk*, 259 F.3d 833, 839–40 (7th Cir. 2001).

Smith's last Eighth Amendment claim is against the warden for denying his two grievances. But this claim fails because the warden (or her designees) reasonably relied on Dr. Trost's judgment when determining that Smith was receiving adequate care. *See Giles v. Godinez*, 914 F.3d 1040, 1050–51 (7th Cir. 2019).

We now address Smith's First Amendment claim against Dr. Trost. Smith argues that the doctor refused to grant him a front-cuff permit to retaliate for the grievance he filed four months earlier. To begin, Smith does not argue this claim in his opening brief; thus it is waived. *See Tuduj v. Newbold*, 958 F.3d 576, 579 (7th Cir. 2020). In any case, the claim fails. To make a triable case, Smith had to offer evidence that First Amendment activity (his grievance) motivated Dr. Trost to deny the front-cuff permit in order to deter that activity. *See Holleman v. Zatecky*, 951 F.3d 873, 878 (7th Cir. 2020). He did not. First, the passage of four months between the grievance and the denial undercuts an inference of retaliation. *See Kidwell v. Eisenhower*, 679 F.3d 957, 966–967 (7th Cir. 2012) (five-week gap too long to infer causation without more evidence). Second, during those four months Dr. Trost gave Smith appropriate care—including ordering X-rays and referring him to a hand surgeon. No reasonable jury could find that after four months of steady care Dr. Trost suddenly decided to retaliate. Third, Dr. Trost had an un rebutted, non-retaliatory reason for denying the permit: He genuinely believed that Smith did not qualify for it.

Finally, Smith asks us to vacate summary judgment because he did not have effective counsel. Although Smith may understandably be frustrated with his attorney, we may not vacate based on a theory of ineffective counsel in civil cases. Most important, the district court handled the problem reasonably: it held former counsel in contempt, ordered him to turn over discovery, and when he did not, reopened the case. Although the court might have also ordered the defendants to reproduce discovery or recruit new counsel, Smith did not ask for these steps, and we thus find no error in the court's rulings.

AFFIRMED