

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT’S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION “SUMMARY ORDER”). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of February, two thousand twenty.

PRESENT: GUIDO CALABRESI,
ROSEMARY S. POOLER,
SUSAN L. CARNEY,
Circuit Judges.

BRIAN S. MUNGER,

Plaintiff-Appellant,

v.

18-2950

DR. GERALD CAHILL, Facility Health Service
Director, Franklin Correctional Facility, NURSE
WHITE, Franklin Correctional Facility,

*Defendants-Appellees.*¹

FOR PLAINTIFF-APPELLANT:

Brian S. Munger, pro se, Attica, NY.

FOR DEFENDANTS-APPELLEES:

Jeffrey D. Lang, Deputy Solicitor General,
Jonathan D. Hitsous, Assistant Solicitor
General, *for* Letitia James, Attorney General
of the State of New York, Albany, NY.

¹ The Clerk of Court is respectfully directed to amend the official caption as set forth above.

Appeal from a judgment of the United States District Court for the Northern District of New York (Sannes, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Appellant Brian Munger, pro se, appeals from the August 31, 2018 order of the United States District Court for the Northern District of New York (Sannes, J.), granting summary judgment for Appellees Dr. Gerald Cahill and Nurse Jerre White in Munger's claims under 42 U.S.C. § 1983 alleging retaliation for Munger's exercise of his First Amendment rights and deliberate indifference to serious medical needs in violation of the Eighth Amendment. We assume the parties' familiarity with the underlying facts, procedural history, and the issues on appeal.

We review de novo a district court's grant of summary judgment, which is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Sousa v. Marquez*, 702 F.3d 124, 127 (2d Cir. 2012) (quoting Fed. R. Civ. P. 56(a)) (internal quotation marks omitted).

I. Retaliation Claim

The district court properly granted summary judgment to Nurse White on Munger's First Amendment retaliation claim because Munger failed to exhaust his administrative remedies. Under the Prison Litigation Reform Act ("PLRA"), "[n]o action shall be brought with respect to prison conditions under [S]ection 1983 . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The PLRA requires "proper exhaustion," meaning exhaustion in "compliance with an agency's deadlines and other critical procedural rules." *Woodford v. Ngo*, 548 U.S. 81, 90 (2006). In New York, a specific defendant need not be named in the grievance to exhaust administrative remedies. *Espinal v. Goord*, 558 F.3d 119, 126 (2d Cir. 2009). Nevertheless, the grievance should "contain a concise, specific description of the problem." *Id.* (quoting 7 N.Y.C.R.R. § 701.7(a)(1)(i)); see also *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004) (a grievance is sufficient if it provides adequate notice to prison officials of the type of claim for which redress is sought).

Munger failed to exhaust his administrative remedies with respect to his First Amendment claim. None of the relevant grievances complains that a member of the nursing staff retaliated against him because of his complaints against Nurse White. Munger's January 10, 2013 grievance complains of general harassment by the nursing staff, and that his pain medication could not be abruptly stopped "without a face to face appt. with a doctor (Cahill) not on the orders of a nurse, correctional officer or any[one] other than a doctor." ROA doc. 89-5 at 7-8 (emphasis and internal quotation marks omitted). But Munger did not specify that his medication was taken away because of a lie a nurse told in retaliation against him for an earlier complaint, which is the allegation that Munger raises in his lawsuit. Because Munger's grievances did not mention retaliation, Appellees

were not on notice of Munger's complaint of retaliation by Nurse White. *See Johnson*, 380 F.3d at 697.

II. Eighth Amendment Deliberate Indifference Claim

The district court also properly granted summary judgment to Dr. Cahill on Munger's deliberate indifference claim. "[T]o establish an Eighth Amendment claim arising out of inadequate medical care, a prisoner must prove deliberate indifference to his serious medical needs." *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998) (internal quotation marks and brackets omitted). Deliberate indifference has objective and subjective components: "First, the alleged deprivation must be, in objective terms, sufficiently serious. Second, the defendant must act with a sufficiently culpable state of mind." *Id.* (internal quotation marks and citation omitted). To satisfy the subjective component, a plaintiff must establish the equivalent of criminal recklessness, i.e., "that the charged official act[ed] or fail[ed] to act while actually aware of a substantial risk that serious inmate harm will result." *Salahuddin v. Goord*, 467 F.3d 263, 280 (2d Cir. 2006). "[N]egligence, even if it constitutes medical malpractice, does not, without more, engender a constitutional claim." *Chance*, 143 F.3d at 703.

Even if Munger offered sufficient evidence to meet the objective component, we conclude that he failed to establish the subjective component. "Whether a course of treatment was the product of sound medical judgment, negligence, or deliberate indifference depends on the facts of the case." *Id.* Dr. Cahill stated that he initially discontinued the MS Contin on January 9, 2013, because he had no reason to disbelieve Nurse White's report that Munger sold the drug to other inmates, misuse of medication is a health and safety issue for Munger and the facility, Munger had self-carry pain medications that he could administer himself, and an appointment had been scheduled two days later so Munger could be assessed.

Further, the record shows no evidence of subjective deliberate indifference in Dr. Cahill's January 11, 2013 decision to discontinue the MS Contin after evaluating Munger. During that evaluation, Dr. Cahill observed no signs of withdrawal, and Munger was able to ambulate and move without apparent issue, suggesting that his level of pain was not so severe as to prevent him from going about his daily tasks and that the self-carry medications were sufficient. Nor did Munger allege that he was experiencing any withdrawal symptoms or back pain during this examination. Dr. Cahill's further decision on January 23, 2013, to not re-prescribe the MS Contin was based on his review of Munger's x-rays, which revealed degenerative disc disease, and his medical judgment that such a condition could be treated by non-prescription pain medication.

Munger thus offered no evidence that Dr. Cahill's determination that Munger's condition did not warrant narcotics was so erroneous as to constitute reckless indifference to Munger's medical needs. Munger argues that he offered evidence that Dr. Cahill acted to discontinue the medication only because of Nurse White's report, not based on any medical judgment. Solely the doctor's initial decision on January 9, 2013, could be attributed to White's alleged lie, however. Munger's claims as to Dr. Cahill's later decisions to not re-prescribe MS Contin were based on

medical evidence and Dr. Cahill's professional judgment about the amount of medication necessary to treat Munger's condition. Munger's disagreement with Dr. Cahill's choice of treatment does not rise to the level of a constitutional claim. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976) ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment."); *Chance*, 143 F.3d at 703 ("It is well-established that mere disagreement over the proper treatment does not create a constitutional claim.").

We have reviewed the remainder of Munger's arguments and find them to be without merit. Accordingly, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk