

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

April 7, 2022

Christopher M. Wolpert
Clerk of Court

PATRICK C. LYNN,

Plaintiff - Appellant,

v.

LAURA KELLY, Governor, in her individual and official capacity; STATE OF KANSAS; DAN SCHNURR, Warden, Hutchinson Correctional Facility, in his individual and official capacity; CLAY VAN HOOSE, Major/Chief of Security, Hutchinson Correctional Facility, in his individual and official capacity; TOMMY WILLIAMS, Deputy Warden, Hutchinson Correctional Facility, in his individual and official capacity; JESSICA ZAGER, CO1/Segregation Officer, Hutchinson Correctional Facility, in her individual and official capacity; JEREMY WILKERSON-RODRIGUEZ, Master Sergeant, Hutchinson Correctional Facility, in his individual and official capacity; THOMAS JACKSON, CO1/Segregation Officer, Hutchinson Correctional Facility, in his individual and official capacity; RICHARD GOLDEN, CO1/Segregation Officer, Hutchinson Correctional Facility, in his individual and official capacity; RUSSELL COOK, CO1/Segregation Officer, Hutchinson Correctional Facility, in his individual and official capacity; JERRY KIPP, Captain, Hutchinson Correctional Facility, in his individual and official capacity; CURTIS PRICE, Captain, Hutchinson Correctional Facility, in his individual and official capacity; STEVE FOSTER, Captain, Hutchinson

No. 21-3094

(D.C. No. 5:19-CV-03003-EFM-KGG)

(D. Kan.)

Correctional Facility, in his individual and official capacity; DOUGLAS SHERWOOD, CO1/Segregation Officer, Hutchinson Correctional Facility, in his individual and official capacity; JEFFREY PETTIJOHN, Unit Counselor, Hutchinson Correctional Facility, in his individual and official capacity; RAYMOND STIGGINS, Lieutenant, Hutchinson Correctional Facility, in his individual and official capacity; JOHN MARKUS, EAI Supervisor, Hutchinson Correctional Facility, in his individual and official capacity; DEVIN CARPENTER, EAI Special Agent, Hutchinson Correctional Facility, in his individual and official capacity; JASON KRAMER, EAI Special Agent, Hutchinson Correctional Facility, in his individual and official capacity; MIKE NICKLES, Unit Manager, Hutchinson Correctional Facility, in his individual and official capacity; CHRISTINA WISE, Grievance and Property/Injury Claims Officer, Hutchinson Correctional Facility, in her individual and official capacity; CORIZON, INC.; BARRY LEWIS-HARRIS, Chief Medical Director, Corizon Health, Inc. in his individual and official capacity; DEBRA LUNDRY, Health Services Administrator, Corizon Health, Inc. @ Hutchinson Correctional Facility, in her individual and official capacity; MARTHA MILLER, RN, Corizon Health, Inc. @ Hutchinson Correctional Facility, in her individual and official capacity; CARMEN BAYNHAM, HCP, Corizon Health, Inc. @ Hutchinson Correctional Facility, in her individual and official capacity; GENE MILLER, RN, Corizon Health, Inc. @ Hutchinson Correctional Facility, in his individual and official capacity; (FNU) HUSEL, RN, Corizon Health, Inc. @ Hutchinson Correctional

Facility, in his individual and official capacity; HOLLY POOLE, Mental Health Counselor, Corizon Health, Inc. @ Hutchinson Correctional Facility, in her individual and official capacity; KEVIN STANSBURY, Mental Health Counselor, Corizon Health, Inc. @ Hutchinson Correctional Facility, in her individual and official capacity; MISTY KEOLAVONE, Mental Health Counselor, Corizon Health, Inc. @ Hutchinson Correctional Facility, in her individual and official capacity; KARLA SCHROEDER, Mental Health Counselor, Corizon Health, Inc. @ Hutchinson Correctional Facility, in her individual and official capacity; RUSSELL JENNINGS, Representative, in his individual and official capacity; DEREK SCHMIDT, Kansas Attorney General, in his individual and official capacity; (FNU) SCHROEDER, Reno County District Attorney, in his individual and official capacity; (FNU) HENDERSON, Reno County Sheriff, in his individual and official capacity; ROGER WERHOLTZ, Secretary of Corrections, Kansas Department of Corrections, in his individual and official capacity; DOUG BURRIS, CM1, Kansas Department of Corrections, in his individual and official capacity; MARCI CHAMIDILING, EIA Director, Lansing Correctional Facility, in her individual and official capacity; STEPHEN MCCALLISTER, Kansas U.S. Attorney, in his individual and official capacity; MARCUS DAWES, Unit Counselor, Hutchinson Correctional Facility, in his individual and official capacity; (FNU) DIAZ, CO1, Hutchinson Correctional Facility, in their individual and official capacity; WENDY WASINGER, Med Tech, Corizon Health, Inc. @ Hutchinson Correctional Facility, in

her individual and official capacity;
TERRY WEBSTER, RN, Corizon Health,
Inc. @ Hutchinson Correctional Facility, in
his individual and official capacity; LEO
DELPERGANG, Representative, in his
individual and official capacity; JOHN
DOE, Kansas FBI/SAIC, in his individual
and official capacity; (FNU)
MCCARVILLE, Reno County Judge, in
his individual and official capacity;
MACKIE DICK, Reno County Judge, in
his individual and official capacity,

Defendants - Appellees.

ORDER AND JUDGMENT*

Before **MATHESON, KELLY**, and **ROSSMAN**, Circuit Judges.**

Plaintiff-Appellant Patrick C. Lynn, a state inmate appearing pro se, appeals from the district court's dismissal of his civil rights action, 42 U.S.C. § 1983, based on a failure to exhaust administrative remedies. Lynn v. Cline, No. 19-CV-3003, 2021 WL 2104981 (D. Kan. May 25, 2021). The district court granted summary judgment to various Defendants-Appellees on this basis and declined to recuse. On appeal, Mr. Lynn challenges these decisions. Mr. Lynn also seeks appointment of appellate

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

counsel. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm and deny appointment of appellate counsel.

Background

In 2019, Mr. Lynn alleges that he suffered chest pains and a heart attack but was ignored by correctional staff for several hours. He alleges that once he returned to prison following a stint in the ICU, he was ridiculed by the staff. He submitted three “Property Damage/Loss or Personal Injury Claim Forms” regarding the incident. He also sent letters to various public officials, which were returned with the suggestion that he pursue informal resolution with correctional staff. However, Mr. Lynn neither pursued an informal resolution nor submitted a grievance.

On a motion for summary judgment, the district court found Mr. Lynn’s claims barred for failure to exhaust administrative remedies. In particular, the district court found Mr. Lynn failed to comply with the requirements of Kansas Administrative Regulation § 44-15-101. Consequently, the court dismissed the suit.

Analysis

A. Failure to Exhaust

Before an inmate may bring a § 1983 claim regarding prison conditions, he must exhaust his administrative remedies. 42 U.S.C. § 1997e(a); Little v. Jones, 607 F.3d 1245, 1249 (10th Cir. 2010). We review the district court’s grant of summary judgment de novo. Brown v. Austin, 13 F.4th 1079, 1084 (10th Cir. 2021). Under Kansas law, inmates must attempt “to reach an informal resolution of the matter with the personnel who work with the inmate on a direct or daily basis,” before using the

established grievance procedure. Kan. Admin. Regs. § 44-15-101(b) (2002). If no informal resolution is reached, an inmate must file a grievance report first with “an appropriate unit team member of the facility,” next with the warden, and finally, if not resolved, with the secretary of corrections. Id. § 44-15-101(d). While Mr. Lynn submitted three personal injury claims in 2019, and wrote letters to various officials, he has not shown that he pursued an informal resolution or that he filed a grievance with either the warden or the secretary of corrections. Mr. Lynn may have attempted to comply with the distinct requirements of § 44-16-104a, but he wholly ignored the requirements of § 44-15-101. See id. § 44-15-101a(d)(2). As Mr. Lynn failed to comply with the established grievance process, summary judgment was proper. Thomas v. Parker, 609 F.3d 1114, 1118–19 (10th Cir. 2010). Mr. Lynn also makes several arguments that were not raised below, including that the regulations were impossible to follow and that he was prevented from exercising administrative remedies because of threats and retaliation. Mr. Lynn did not present these claims to the district court and does not argue for plain error. Thus, we do not consider them.

B. Recusal

Mr. Lynn also challenges the district court’s decisions declining to recuse. Mr. Lynn generally alleges that the district court has a bias against prisoners and that it previously endorsed Paul Morrison for Kansas Attorney General. We review for an abuse of discretion. Burke v. Regalado, 935 F.3d 960, 1052 (10th Cir. 2019). Judicial recusal is proper under 28 U.S.C. § 455 where there is the appearance of partiality or actual partiality. Id. at 1053. This court considers “whether a reasonable

person might question the judge’s impartiality.” Id. at 1054. Adverse rulings, without more, rarely constitute a basis for recusal, and Mr. Lynn’s baseless allegations against the district court are likewise insufficient. See Liteky v. United States, 510 U.S. 540, 555 (1994). We find no abuse of discretion.

C. Appellate Counsel

Alternatively, in lieu of relief, Mr. Lynn requests this court appoint appellate counsel in order to prepare a revised appellate brief. However, this court is “not authorized to appoint counsel in § 1983 cases; instead, [it] can only ‘request’ an attorney to take the case.” Rachel v. Troutt, 820 F.3d 390, 396 (10th Cir. 2016) (quoting 28 U.S.C. § 1915(e)(1)). A request for an attorney may be proper “where the lack of counsel results in fundamental unfairness.” Toevs v. Reid, 685 F.3d 903, 916 (10th Cir. 2012) (quoting Hill v. SmithKline Beecham Corp., 393 F.3d 1111, 1115 (10th Cir. 2004)). Mr. Lynn has the burden of demonstrating a request for appellate counsel is appropriate. Hill, 393 F.3d at 1115. Here, Mr. Lynn fails to explain why his request is more deserving of counsel, Rachel, 820 F.3d at 397, or how a lack of counsel has resulted in fundamental unfairness, Toevs, 685 F.3d at 916. Consequently, this court declines to appoint counsel.

AFFIRMED. We DENY the request for counsel.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge