

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Giraldes v. Roche

357 F. App'x 885 (9th Cir. 2009) · Decided December 14, 2009

SUMMARY

The Ninth Circuit affirmed in part, vacated in part, and remanded a prisoner's 42 U.S.C. § 1983 action alleging First Amendment retaliation and Eighth Amendment deliberate indifference to medical needs. The court upheld summary judgment on claims concerning the plaintiff's knee condition and pain management but remanded claims involving gastrointestinal disease, dumping syndrome, and retaliation for consideration of evidence that treatment decisions may have been medically unacceptable or retaliatory. The court also upheld the denial of appointed counsel.

OPINION

PER CURIAM.

MEMORANDUM ** Larry Giraldes, Jr., a California state prisoner, appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging retaliation and medical deliberate indifference in violation of the First and Eighth Amendments.

We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir.2006), and we affirm in part, vacate in part, and remand. The district court properly granted summary judgment on Giraldes's Eighth Amendment claims regarding his knee condition and need for pain management because Giraldes failed to raise a triable issue as to whether defendants' chosen course of treatment was medically unacceptable under the circumstances.

See *To-guehi v. Chung*, 391 F.3d 1051, 1058 (9th Cir.2004). As for the remaining Eighth Amendment claims, the district court's ruling was based on (1) defendants' showing that Giraldes was provided some treatment and referred to a specialist, and (2) Giraldes's failure to establish that he was denied treatment altogether.

Although Giraldes admitted that the defendants provided some treatment, he argued that the treatment provided was medically unacceptable under the circumstances. See *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir.1996) (stating that a plaintiff can support a claim of deliberate indifference by showing that a physician's treatment decision was motivated by something other than medical judgment).

In opposition to summary judgment, Giraldes submitted medical records, a sworn declaration, and deposition testimony and contended that, as reprisal to Giraldes for filing a previous lawsuit, defendants refused to follow the course of treatment recommended by the specialist.

Because the district court's order is silent regarding the evidence submitted in opposition to summary judgment, we vacate the judgment with respect to the Eighth Amendment claims concerning Giraldes's gastrointestinal disease and dumping syndrome, and the First Amendment retaliation claims, and remand for the district court to consider in the first instance whether that evidence raises a triable issue.

The district court did not abuse its discretion by denying Giraldes's motions for appointment of counsel because, at that stage of proceedings, Giraldes failed to demonstrate "exceptional circumstances" warranting appointment of counsel. *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir.1991).

Accordingly, we vacate the grant of summary judgment on Giraldes's Eighth Amendment claims related to his gastroe-sophageal disease and dumping syndrome, vacate the grant of summary judgment on the First Amendment claims, and remand for further proceedings.

The parties shall bear their own costs on appeal. AFFIRMED in part, VACATED in part, and REMANDED. This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.