22-2698

United States Court of Appeals for the Second Circuit

JAMEL UPSON,

Plaintiff-Appellant,

v.

GERALDINE WILSON, Nurse, Upstate Correctional Facility,
ELIZABETH WHITE, Upstate Correctional Facility, FKA NURSE WHITE,

Defendants-Appellees,

(Caption continues inside front cover.)

On Appeal from the United States District Court
for the Northern District of New York

BRIEF FOR APPELLEES

BARBARA D. UNDERWOOD
Solicitor General
JEFFREY W. LANG
Deputy Solicitor General
SEAN P. MIX
Assistant Solicitor General
of Counsel

LETITIA JAMES
Attorney General of the
State of New York
Attorney for Appellees
The Capitol
Albany, New York 12224
(518) 776-2010

Dated: July 8, 2024

(*Caption continues from front cover.*)

NURSE TRAVERSE, Upstate Correctional Facility, SHAWN WOODS, Correction Officer; Upstate Correctional Facility, JOHN DOE #1, C.O.; Upstate Correctional Facility, JOHN DOE #2, C.O.; Upstate Correctional Facility, DEBORAH SHIPMAN, NURSE, Upstate Correctional Facility,

Defendants.

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PRELIMINARY STATEMENT

In this civil rights action, plaintiff Jamel Upson asserts Eighth Amendment claims against two employees of the New York Department of Corrections and Community Supervision (DOCCS) who worked as nurses during his incarceration at Upstate Correctional Facility. Plaintiff brought claims under 18 U.S.C. § 1983, alleging that defendants Geraldine Wilson and Elizabeth White violated his rights under the Eighth Amendment by their deliberate indifference to his medical needs concerning what was later diagnosed as a bowel obstruction. The United States District Court for the Northern District of New York (Kahn, J.) granted defendants' motion for summary judgment.

This Court should affirm. As the district court held, no reasonable jury could find in favor of plaintiff on his deliberate indifference claims. To the contrary, the record reflects that neither Nurse Wilson nor Nurse White acted with deliberate indifference. Rather, Nurse Wilson responded to plaintiff's complaints of stomach pains, performed a physical examination of him, and determined that plaintiff did not require outside treatment at that time. She then advised plaintiff not to eat anything and to contact medical staff should his symptoms continue or intensify.

Similarly, Nurse White, who was simply passing by plaintiff's cell to deliver medication to other individuals, told plaintiff to use the facility's sick call procedures to obtain medical assistance if he believed he was experiencing a health problem. Shortly thereafter, plaintiff was sent to an outside hospital for treatment. Because no rational juror could find defendants acted with deliberate indifference to plaintiff's medical needs, this Court should affirm.

QUESTION PRESENTED

Does the record contain insufficient evidence to create a genuine dispute as to any material fact concerning plaintiff's Eighth Amendment deliberate indifference claims arising from defendants' treatment of him while incarcerated?

STATEMENT OF THE CASE

A. Factual Background

1. Upstate Correctional Facility's Sick Call Procedures

At all relevant times, plaintiff was housed at Upstate Correctional Facility in the Special Housing Unit (SHU). Incarcerated individuals at Upstate have access to medical staff at all times. (JA39 at ¶ 4.) To receive

medical attention, an incarcerated individual generally requests "sick call" to have medical staff evaluate the individual's health. (JA39 at ¶ 4.) For "normal" sick call, an individual submits a written request on a designated form describing the reason for the request. (JA39-40 at ¶¶ 4, 10; *see also* JA323.) The request is then reviewed by medical staff, who are required to triage and prioritize all requests based on their apparent severity. (JA39-40 at ¶¶ 4, 10; JA41 at ¶ 14; JA324.) During medical staff's next available rounds in the cell block, staff will evaluate the requesting individual and determine what, if any, medical treatment is necessary. (*See* JA40 at ¶¶ 11-12.) Staff will then carry out that treatment in a timely manner based on urgency. (*See* JA41 at ¶¶ 15-16.)

Importantly, medical staff cannot and will not stop at every individual's cell during their medical rounds. This would prevent staff from timely providing medication and treatment to those who have already been scheduled for sick call. (JA40-41 at ¶ 12.) If an individual has not requested sick call by form, but has an emergent condition, the individual can always request "emergency sick call" from an on-duty correction officer. (JA41 at ¶ 15.) The officer will document the emergency sick call request and forward it to medical staff, who will then

evaluate the individual as necessary based on urgency. (JA41 at ¶ 16; JA323-325.)

At all relevant times, plaintiff was aware of the above procedures and had used Upstate's sick call procedure to obtain medical attention. (JA29-30 at ¶ 28.)

2. Plaintiff Begins Experiencing Stomach Pains and Nurse Wilson Examines Him

The following facts are undisputed unless noted. On April 30, 2015, plaintiff began experiencing stomach pains, which prompted him to request emergency sick call from a nearby correction officer. (*See* JA28 at ¶¶ 7-8; JA74-75.) Approximately thirty minutes later, Nurse Wilson arrived at plaintiff's cell and asked him to turn on his light so she could observe him. (JA28 at ¶¶ 8-9; JA76, 78-79.)[1] Plaintiff testified that he

[1] The exact time of plaintiff's initial request for emergency sick call is unclear. Although in some filings, plaintiff claims he made his initial request around 2:20 p.m. and that Nurse Wilson came around 3:00 p.m. (*see, e.g.*, JA239), the logbook for plaintiff's building shows that Nurse Wilson arrived at plaintiff's cell around 6:30 p.m. (*see* JA139), which is consistent with Nurse Wilson's own declaration stating she arrived around 6:20 p.m. (JA34 at ¶ 7)—and would imply that his initial request was later in the day. In any event, it is undisputed that, whatever the time of plaintiff's emergency sick call request, Nurse Wilson arrived approximately thirty to forty-five minutes after he made it. (JA76.)

remained on his bed due to stomach pains and did not turn on his light. (JA79.) And contrary to his deposition testimony, plaintiff later claimed to have shown Nurse Wilson visible evidence of him having vomited. (*Compare* JA78-80 *with* JA248.)

According to plaintiff, Nurse Wilson was impatient, asked him "what's wrong with you?" and told him that she had to "do a medical run" so "this better be an emergency." (JA77.) Plaintiff told Nurse Wilson to "calm down" and "relax." (JA77-79; JA34 at ¶ 8.) Plaintiff perceived that Nurse Wilson took his response as being "disrespectful," and thus terminated the sick call, and performed her medication run for the cell block. (JA34 at ¶¶ 6-12; JA77-78.) Nurse Wilson explained that plaintiff's behavior and her own observations during this initial interaction led her to "believe that [plaintiff] was not in any type of significant distress" at the time. (JA34 at ¶¶ 9-11.) The entire interaction lasted "maybe thirty seconds." (JA78.) Indeed, Nurse Wilson testified that plaintiff was "laughing and joking and became argumentative" with her during their initial interaction. (JA34 at ¶ 8.)

Less than an hour later, plaintiff made a second emergency sick call request and Nurse Wilson had plaintiff escorted to the nurses' office for

evaluation after she completed her rounds. (JA28 at ¶ 12; JA34 at ¶¶ 12-13.) The nurses' office was located one floor below plaintiff's cell, and plaintiff was "able to walk to the nurses' office without physical assistance." (JA28 at ¶ 13; JA82-83.) After asking plaintiff about his symptoms, Nurse Wilson performed a physical examination of plaintiff to determine whether he required additional medical treatment. (JA35 at ¶¶ 17, 25.)

During her examination, Nurse Wilson felt plaintiff's abdomen, used a stethoscope to listen for sounds in his bowel, asked plaintiff where he was feeling pain, and took his blood pressure and pulse. (JA28-29 at ¶¶ 14-17, 21-23; *see also* JA86-87.) She asked when plaintiff had his last bowel movement and plaintiff responded that he had a bowel movement earlier that day. (JA28 at ¶¶ 14-15; *see also* JA90.)

Plaintiff claimed that he told Nurse Wilson that he had a history of bowel obstructions (JA110), which Nurse Wilson understood to be "a blockage of the bowel caused by a tumor, scar tissue, or something else that blocks the individual's bowel" in the intestines. (JA36 at ¶ 34.) Signs or symptoms of a bowel obstruction may include severe pain or cramping

in the abdomen, vomiting, swelling in the abdomen, loud sounds emitting from the abdomen, and constipation. (JA37 at ¶ 36.)

Thus, to evaluate a patient for a bowel obstruction, "one would [palpate] the abdomen and listen for bowel sounds," as Nurse Wilson did during her examination. (JA37 at ¶ 37.) If an examiner hears "high pitched bowel sounds," it "generally signifies the accumulation of air within the bowels that may be symptomatic of a bowel obstruction." (JA37 at ¶ 37.) The severity of an individual's blockage can vary from case to case, and signs of a bowel obstruction do not necessarily mean emergency treatment is required. For example, a person may experience a "partial" bowel obstruction, which "usually resolves on its own," or a "complete" bowel obstruction, which could require "more invasive medical treatment involving enemas of air or fluid, the use of a stent, or in some cases, surgery." (JA36-37 at ¶¶ 34-35.)

After examining plaintiff, Nurse Wilson found plaintiff "did not appear to be in any distress," that his abdomen "appeared flat and not swollen," and that his bowel sounds, blood pressure, and other vital signs were "normal." (JA35 at ¶¶ 21-24.) Plaintiff did not "display signs that he was in severe pain, did not describe any feelings of fullness or swelling

in the abdomen, did not describe any difficulty with his bowel movements or describe the type of cramping or spasms generally associated with a bowel obstruction." (JA37 at ¶ 38.) Further, plaintiff had "no accelerated heart rate or elevated blood pressure that could potentially corroborate [his] claim that he was experiencing significant pain." (JA37 at ¶ 40.) In fact, Nurse Wilson observed that plaintiff's demeanor "appeared inconsistent with subjective complaints of severe pain." (JA37 at ¶ 38.)

In light of the above, Nurse Wilson "did not observe anything that would lead [her] to believe that plaintiff was in any type of distress or was experiencing any medical emergency that warranted additional medical treatment or an outside medical trip." (JA35 at ¶ 25.) Indeed, plaintiff himself testified that Nurse Wilson was "adamant" that he "didn't look like [he] was in pain," and concluded "there's nothing wrong with [him]" at that time. (JA87-88.) Thus, plaintiff himself understood that Nurse Wilson did not believe his complaints.

Although Nurse Wilson determined that plaintiff was not experiencing a medical emergency at the time of her examination, she understood that plaintiff could "develop new or increasingly significant symptoms." (JA38 at ¶ 42.) Therefore, before returning plaintiff to his

cell, she instructed him not to eat anything to further upset his stomach, to show any vomit to nursing staff, and to use the facility's sick call process as needed should his symptoms develop or increase. (JA29 at ¶¶ 25-27.) After plaintiff returned to his cell that evening, he had no further interaction with Nurse Wilson. Although plaintiff claimed to experience worsening symptoms, he did not heed Nurse Wilson's advice and use the facility's sick call process to ensure his evaluation during the next medication and sick call rounds. (JA30 at ¶¶ 32, 34.)

3. Nurse White Performs Her Medical Rounds and Tells Plaintiff to Put in a Sick Call Request

At around 6:20 a.m. the following day, Nurse White was on duty performing her medication and sick call rounds in plaintiff's cell block. (JA30 at ¶ 33.) Because plaintiff failed to put in a sick call request after his physical examination the prior evening, he was not on Nurse White's scheduled sick call list. (JA30 at ¶ 34.) Instead, when plaintiff heard Nurse White making her rounds, he "tr[ied] to get her attention" by putting his "face up to the window" of his cell door and telling her he had an emergency and had vomited. (JA96-97.) Nurse White did not perceive

plaintiff to be in distress, and told him that he should "put in for sick call" if he needed medical assistance. (JA30 at ¶ 37; JA42 at ¶ 22.)

Nurse White was unaware that plaintiff had been physically examined for stomach pains the previous day. Indeed, and seemingly at odds with his claim that he had mentioned having vomited, plaintiff "does not dispute" that he did not speak with Nurse White about his symptoms. (*See* JA240 at ¶ 34; *see also* JA30 at ¶ 35.) Nurse White, for her part, was "not aware of anything on May 1, 2015 that would have led [her] to believe plaintiff was experiencing any symptoms associated with a bowel obstruction or any other medical condition warranting immediate medical attention," nor was she "made aware of any emergency sick call request or even regular sick call request made by Plaintiff during [her shift]." (JA42 at ¶ 22.) She believed that if plaintiff was truly having a medical problem, he would have requested sick call. (JA42 at ¶¶ 20-22.) Moreover, Nurse White "would not have been able to evaluate [plaintiff] for complaints of abdomen pain or claimed bowel obstruction as describe above during a medication or sick call run on the outside of an individual's cell." (JA43 at ¶ 26.) Accordingly, she did not examine plaintiff at that time. (JA30 at ¶ 35.) Nurse White explained that, if

plaintiff had been experiencing symptoms, putting in a sick call request would have ensured that he received the necessary medical attention in the event those symptoms had worsened. (JA41-43 at ¶¶ 18-22, 26.)

After telling plaintiff to make a sick call request, Nurse White continued providing medication and attention to the individuals on her sick call list. Plaintiff had no further interactions with Nurse White and at no time did plaintiff ask either Nurse Wilson or White for any form of pain medication. (JA30 at ¶ 38; JA116.)

4. Plaintiff's Symptoms Worsen and He is Eventually Taken to an Outside Hospital for Treatment

Several hours later, at about 3:30 p.m., plaintiff made another emergency sick call request to a nearby officer because his symptoms had worsened. (JA31 at ¶ 39.) He was evaluated by another nurse, not a party to this appeal, and then escorted to the facility's infirmary. (JA31 at ¶ 39.) After consulting with a doctor via teleconference, plaintiff was transported to an outside hospital, where he was first diagnosed with having an obstructed bowel. (JA31 at ¶¶ 39-40.)

Plaintiff had previously had bowel obstructions years prior, in 2012 and 2013, while housed at other correctional facilities. (JA27 at ¶¶ 1-4,

44.) According to plaintiff, he received nearly identical medical treatment for those obstructions as he did for the instant obstruction, including having a tube administered into his nose and receiving pain medication. (JA27, 31 at ¶¶ 1-4, 44.) Just as he had in the past, plaintiff spent five days in the hospital, and then returned to Upstate with no further complications. (JA31 at ¶¶ 43-45.)

B. Proceedings Below

On September 24, 2018, plaintiff commenced this action by filing his complaint in the United States District Court for the Northern District of New York. (JA13-19.) The amended complaint alleges that defendants Wilson and White were deliberately indifferent to plaintiff's serious medical needs by denying or delaying his evaluation and treatment for his bowel obstruction. (JA17.) After discovery, defendants moved for summary judgment, arguing that the evidence was insufficient to suggest that defendants were deliberately indifferent to plaintiff's medical needs because plaintiff failed to establish defendants were aware of any significant risk of harm to plaintiff. (JA25-226.) The magistrate judge issued a report and recommendation, recommending defendants' motion be granted in its entirety. (JA345.)

As to Nurse Wilson, the court found that no reasonable juror could conclude she acted with deliberate indifference since she "conducted a complete physical examination of [plaintiff], listened to his complaints, and provided him with guidance on how to proceed if his symptoms did not improve." (JA335-336.) The court noted that "medical personnel are vested with broad discretion to determine what method of care and treatment to provide to their patients," and plaintiff's claim against Nurse Wilson "amounts to a disagreement with Wilson's medical judgment," which does not give rise to an Eighth Amendment claim. (JA337.) Similarly, the court rejected plaintiff's argument that Nurse Wilson was deliberately indifferent by failing to review plaintiff's medical records showing his history of bowel obstructions because plaintiff offered no evidence establishing that Nurse Wilson acted intentionally. (JA337.) And the court found the record contradicted plaintiff's claims that he told Nurse Wilson he had a history of bowel obstructions and "showed" her his vomit because he testified that Wilson left his cell before he had a chance to explain what was wrong with him. (JA338-339.)

As to Nurse White, the court found that even if plaintiff yelled through his door to Nurse White, he failed to provide any evidence

demonstrating that Nurse White knew plaintiff had actually vomited or was suffering from visible distress as she passed by his cell. (JA339.) The court also rejected plaintiff's argument that Nurse White's actions were in violation of DOCCS's Health Care Services Policy No. 1.34, which provides that each facility must "develop a sick call process" and ensure that "all [incarcerated individuals] requesting unscheduled sick call will be evaluated in person by a qualified health care profession and addressed appropriately." (JA340.) First, the court determined that even if Nurse White violated that policy, that alone was insufficient to establish a constitutional violation. Second, there was no evidence that White's mere "acknowledgement of plaintiff's request for immediate medical attention" and "direction to submit a sick call slip" was meant to intentionally delay plaintiff's access to medical care or deny him treatment in violation of the cited policy. In fact, plaintiff obtained medical treatment later that day. Thus, plaintiff failed to proffer any evidence that Nurse White acted with the requisite state of mind for a deliberate indifference claim. (JA340-341.)

C. District Court's Decision

Plaintiff filed objections to the report and recommendation and defendants responded. (ECF Nos. 77-78.) Although the district court determined that most of plaintiff's objections had previously been made to the magistrate judge or were waived, and that there was no clear error in the magistrate's decision with respect to those issues, the court found that three of plaintiff's objections warranted *de novo* review. (*See* SPA18-20.) First, plaintiff objected to the magistrate judge's finding that the record contradicted his affidavit claiming he showed Nurse Wilson his vomit and made her aware of his history of bowel obstructions. (SPA20.) Second, plaintiff argued the court erred by disbelieving that he told Nurse White he "felt as though he was having an emergency and vomiting." (SPA21.) Third, plaintiff argued the magistrate judge misread the record in finding that plaintiff did not make Nurse White aware of his abdominal pain. (SPA21.)

After *de novo* review of those issues, the district court adopted the magistrate's report and recommendation in its entirety. (SPA 13-28.) As to Nurse Wilson, the district court found that the record failed to show Wilson actually saw plaintiff's vomit during their initial interaction, but

did establish that plaintiff may have mentioned he had a history of bowel obstructions. (SPA26.) Nevertheless, the district court determined that Nurse Wilson was entitled to summary judgment because she responded to plaintiff's complaints by giving him a physical examination before determining that he did not require medical treatment at that time. To the extent plaintiff disagreed with Nurse Wilson's medical assessment, that disagreement did not give rise to a claim under the Eighth Amendment. (SPA26-27.)

As to Nurse White, the district court found that although plaintiff claimed he yelled that he was having an emergency, he did not proffer evidence establishing that White actually knew that plaintiff had vomited or was in visible distress when she passed by his cell. Moreover, plaintiff's testimony showed that he never told Nurse White he was in significant pain. (SPA28.) Thus, no reasonable juror could find that Nurse White knew of but disregarded an excessive risk to plaintiff's health by telling him to use the normal sick call procedure. In light of the above, the district court granted summary judgment to the defendants.

This appeal followed.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's grant of summary judgment. *See Gonzalez v. City of Schenectady*, 728 F.3d 149, 154 (2d Cir. 2013). "Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.*; *see also* Fed. R. Civ. P. 56(c). A fact is genuinely disputed only "if 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). When deciding a motion for summary judgment, a court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *See id.* at 255.

SUMMARY OF ARGUMENT

This Court should affirm the district court's grant of summary judgment in favor of defendants. As the district court properly held, plaintiff failed to create a disputed issue of fact over whether defendants acted with the requisite state of mind to sustain a deliberate indifference claim, and there is no dispute that defendants' responses to plaintiff's complaints were constitutionally adequate. Nurse Wilson responded by

performing a physical examination of plaintiff and advising him not to eat anything and put in a sick call request should his symptoms aggravate. And plaintiff's disagreement with Wilson's medical judgment does not give rise to a constitutional claim. Nurse White, who was not authorized to evaluate plaintiff during her medical rounds, told plaintiff to put in a sick call request when he suddenly called out to her that he was sick, and there is no evidence tending to show that Nurse White was aware that plaintiff actually had a medical emergency at that time and then disregarded it. Accordingly, plaintiff's Eighth Amendment claims against both defendants fail as a matter of law.

ARGUMENT

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT DISMISSING PLAINTIFF'S EIGHTH AMENDMENT CLAIMS

The Eighth Amendment prohibits "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). An Eighth Amendment deliberate indifference claim has two elements, one objective and the other subjective. The objective element requires an incarcerated individual to show that the individual was "actually deprived of adequate medical care," and that the deprivation

was "sufficiently serious." *Salahuddin v. Goord*, 467 F.3d 263, 279-80 (2d Cir. 2006) *abrogated on other grounds by Kravitz v. Purcell*, 87 F.4th 111 (2d Cir. 2023). To do so, a plaintiff must show "that a condition of urgency, one that may produce death, degeneration, or extreme pain exists." *Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir. 2011) (quoting *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996)). Here, for purposes of their summary judgment motion, defendants assumed the objective element could be met.

The subjective element requires an incarcerated individual to show that a defendant knew of, and consciously disregarded, an excessive risk to the incarcerated individual's health. *Salahuddin*, 467 F.3d at 280. This requires showing both that the defendant was "aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed]," and that the defendant "actually drew the inference." *Tangreti v. Bachmann*, 983 F.3d 609, 619 (2d Cir. 2020) (quotation marks, citation, and brackets omitted). Here, the district court correctly determined that plaintiff failed to proffer any evidence suggesting defendants drew such an inference with respect to plaintiff's condition. Indeed, the record fails to show that defendants knew of, but disregarded, a substantial risk of

serious harm to plaintiff's health during their brief interactions with him. Accordingly, this Court should affirm.

A. The evidence in the record is insufficient to support plaintiff's claim against Nurse Wilson.

The district court properly granted summary judgment in favor of Nurse Wilson on plaintiff's deliberate indifference claim because the record failed to support the subjective element necessary for establishing such a claim. As the district court correctly found, it is undisputed that Nurse Wilson responded to plaintiff's complaints by calling him to her office and examining him. (JA35 at ¶¶ 21-26.) Based on her medical assessment of plaintiff's condition, Nurse Wilson believed that there was no substantial risk of serious harm in having plaintiff return to his cell, refrain from eating, and use the facility's sick call procedures as needed should his symptoms continue or intensify—which plaintiff failed to do.

Plaintiff argues that Nurse Wilson's examination does not preclude a finding of deliberate indifference here because her examination served no "diagnostic goal" and was a "cover" to deny plaintiff medical treatment. (Br. at 39-42.) But plaintiff points to no evidence supporting this theory. To the contrary, the record is clear that Nurse Wilson's

examination was an appropriate way to assess plaintiff's complaints and a reasonable measure to determine if plaintiff required more invasive medical treatment. Specifically, Nurse Wilson palpated plaintiff's abdomen, listened for sounds in his bowel with a stethoscope, took his blood pressure and pulse, and asked him when he had his last bowel movement. (JA28-29 at ¶¶ 14-17, 21-23; *see also* JA86-87, 90.) As Wilson explained, "high pitched bowel sounds generally signifies the accumulation of air within the bowels that may be symptomatic of a bowel obstruction," and swelling of the abdomen and constipation are also symptoms of a possible bowel obstruction. (JA37 at ¶ 37.) With respect to plaintiff's condition, however, Wilson observed that plaintiff's abdomen "appeared flat and not swollen," his bowel sounds, blood pressure, and other vital signs were "normal," and plaintiff had recently had a bowel movement. (*See* JA35 at ¶¶ 21-24; JA90.) Thus, even if plaintiff complained of *some* symptoms associated with a bowel obstruction (*see* Br. at 41), Nurse Wilson's examination satisfied her that he was not experiencing a medical emergency. Nothing in the record suggests this decision was "intentionally wrong," or made for improper motives. *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998).

Similarly, even if there were issues of fact as to whether Wilson knew plaintiff had a history of bowel obstructions, had vomited, or had displayed other "indicia" of a potential bowel obstruction (*see* Br. at 27-38, 43-46), no rational juror could find that Nurse Wilson possessed a "sufficiently culpable state of mind" or believed "a substantial risk of serious harm exist[ed]." *Tangreti*, 983 F.3d at 619. Indeed, Nurse Wilson provided unrefuted testimony that even if she did know of plaintiff's prior bowel obstructions, that "would not have affected the results of [her] evaluation of the plaintiff" because she "did not observe any signs or symptoms that would have been consistent with a condition needing additional medical attention for a bowel obstruction." (JA38 at ¶ 41.) Moreover, Nurse Wilson explained that not *all* bowel obstructions require invasive medical treatment; some can "resolve on their own." (JA36-37 at ¶ 35.) Consistent with this testimony, plaintiff himself testified that Nurse Wilson genuinely believed there was "nothing wrong" with him at the time. (JA87-88; JA231.) And any unprofessional remarks purportedly made during Nurse Wilson's evaluation (*see* Br. at 41), though rude, only further support that belief. Thus, plaintiff's argument amounts to, at most, a disagreement about Nurse Wilson's medical judgment in not

sending him to a hospital, or a claim that Wilson acted negligently by failing to diagnose him with a bowel obstruction at the initial appearance of symptoms, neither of which can "engender a constitutional claim." *Chance*, 143 F.3d at 703; *see also 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.")

To the extent plaintiff relies on this Court's decision in *Hathaway v. Coughlin*, 37 F.3d 63 (2d Cir. 1994), his reliance is misplaced. (Br. at 39.) Nurse Wilson's treatment of plaintiff does not remotely resemble the treatment displayed in *Hathaway*. In *Hathaway*, this Court held that a jury could infer deliberate indifference to the plaintiff's serious medical needs from the defendant's failure (1) to disclose medical information relevant to the plaintiff's medical decisions and course of treatment, and (2) to refer the plaintiff for re-evaluation for surgery for *more than two years* despite knowing that his course of treatment did not alleviate the plaintiff's suffering. *Id.* at 68-69. Here, plaintiff proffers no evidence that Nurse Wilson failed to disclose any relevant medical information to him or significantly delayed his treatment despite knowing her current plan

of treatment was ineffective. To the contrary, Nurse Wilson specifically advised plaintiff that he should seek further medical assistance if his symptoms progressed, and she did not see or treat him at any point thereafter. (JA90.) Although plaintiff initially failed to seek further medical attention as his symptoms worsened, after he sought treatment, he was evaluated again and promptly sent to the hospital.

B. The evidence in the record is insufficient to support plaintiff's claim against Nurse White.

The district court properly held that the record is insufficient to support a deliberate indifference claim against Nurse White. Like Nurse Wilson, plaintiff failed to establish that Nurse White acted with a culpable state of mind necessary to support such a claim. Indeed, there is no evidence suggesting that Nurse White was aware of any significant risk to plaintiff's health and then recklessly ignored it. *See Salahuddin*, 467 F.3d at 280.

First, plaintiff proffered no evidence establishing that Nurse White was aware of plaintiff's prior stomach complaints or medical history when she started her medical rounds the following morning. As far as she knew, plaintiff had not put in a sick call request, and thus, she had no

reason to believe he was sick or experiencing continuing or worsening symptoms at the start of her shift. (JA41 at ¶¶ 18-19.) Plaintiff's argument that such knowledge could be inferred simply because a prison may have a "routinized exchange of patient information between staff from shift to shift" (Br. at 50), is unsupported by the record, and thus, cannot be used to create an issue of fact as to Nurse White's knowledge. That is especially so where Nurse White provided sworn testimony that she was not made aware "by plaintiff *or anyone else* of *any information or complaints* that led [her] to believe that plaintiff was experiencing a medical emergency." (JA41 at ¶ 18) (emphasis added).

Second, although plaintiff claims he told Nurse White that he had vomited and believed he was having an emergency (Br. at 48), that alone is insufficient to suggest Nurse White was aware of a substantial risk to plaintiff's health. To the contrary, Nurse White provided unrefuted testimony that "an individual would certainly not be hospitalized and otherwise treated for a bowel obstruction every time the individual vomited or complained of stomach pain—even with a prior history of obstructions." (JA43 at ¶ 25.) Moreover, in Nurse White's medical opinion not all bowel obstructions "require any medical attention whatsoever and

will resolve on their own." (JA43 at ¶ 24.) Thus, to determine whether invasive medical treatment is necessary, medical staff must perform a physical examination of the individual. (JA42-43 at ¶ 23.) Because Nurse White was not authorized to "evaluate the plaintiff for complaints of abdomen pain or claimed bowel obstructions" during her medical rounds (JA44 at ¶ 26), and because she had no indication that plaintiff had previously been examined, she told plaintiff to request sick call to make sure he could be evaluated for his complaints. Thus, even if plaintiff had told Nurse White that he had vomited or had a prior history of bowel movements, that alone fails to suggest Nurse White believed "a substantial risk of serious harm exist[ed]." *Tangreti*, 983 F.3d at 619.

Third, plaintiff misunderstands the district court's opinion concerning Nurse White's awareness of plaintiff's condition and her supposed violation of DOCCS's sick call policy. The district court did not impose a "visible distress" requirement for Eighth Amendment claims. (Br. at 48-49.) Rather, the district court simply found that there was no evidence that Nurse White knew of a substantial risk of harm to plaintiff's health based solely on his testimony that he said he was having an emergency. It is well-settled that a prison official cannot be liable under the Eighth

Amendment unless the official is both "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and *he must also draw the inference*." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (emphasis added). "[A]n official's failure to alleviate a significant risk that he *should* have perceived but *did not*" does not meet this standard. *Id.* at 838. Here, as explained above, no reasonable juror could find that Nurse White perceived any significant risk to plaintiff's health during the brief moment plaintiff yelled at her during her medical rounds.

Similarly, and contrary to plaintiff's argument (Br. at 52-53), the district court did not actually find that Nurse White violated DOCCS's Health Care Services Policy. Rather, the magistrate judge explained that a failure to "strictly adhere" to that policy *alone* would not amount to an Eighth Amendment claim. However, the court went on to find that DOCCS's policy provides only that "all [incarcerated individuals] requesting unscheduled sick call will be evaluated in person by a qualified health care profession and addressed appropriately." (JA340 & n.9.) To that end, the court properly found that White's mere "acknowledgement of plaintiff's request for immediate medical attention"

and "direction to submit a sick call slip" does "not equate to" an intentional delay or complete denial of his treatment in violation of that policy or the constitution. Indeed, it was just the opposite: because Nurse White "would not have been able to evaluate the plaintiff" for his complaints during her medical rounds (JA43 at ¶ 26), her advice to plaintiff to request sick call was meant to ensure he received prompt evaluation and treatment if he truly needed it. And there is no dispute that plaintiff received such treatment after making a request only hours later.

Thus, Nurse Wilson's recommendation that plaintiff follow the ordinary sick call procedures is further evidence that she did not believe that there was a substantial risk to plaintiff's health at that time. And even if this Court thinks that recommendation was medically unsound, it does not engender a constitutional claim in the absence of *any* evidence that White believed there was a substantial risk of serious harm to plaintiff's health and disregarded it. *See Salahuddin*, 467 F.3d at 280-81 ("[R]ecklessness entails more than mere negligence; the risk of harm must be substantial and the official's actions more than merely negligent."). In short, plaintiff fails to raise a genuine dispute of material

fact as to whether White knew of and disregarded a risk to plaintiff's health or safety.

CONCLUSION

This Court should affirm the order of the district court.

Dated: Albany, New York
July 8, 2024

Respectfully submitted,

LETITIA JAMES
Attorney General of the State of New York
Attorney for Appellees

By: /s/ Sean P. Mix
SEAN P. MIX
Assistant Solicitor General

The Capitol
Albany, New York 12224
(518) 776-2010

BARBARA D. UNDERWOOD
Solicitor General
JEFFREY W. LANG
Deputy Solicitor General
SEAN P. MIX
Assistant Solicitor General of Counsel

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, Sean P. Mix, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,666 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Sean P. Mix
SEAN P. MIX