FILED
United States Court of Appeals
Tenth Circuit

June 6, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ELIZABETH MARIE RODRIGUEZ,

Plaintiff - Appellant,

v.

WAGONER COUNTY BOARD OF COUNTY COMMISSIONERS; CHRIS ELLIOT, individually and in his official capacity; JUDY ELLIOT, individually; SHANE SAMPSON, individually; EMILY PATRICK, individually; TODD RIGGS, individually,

Defendants - Appellees.

No. 22-7011
(D.C. No. 6:20-CV-00037-RAW)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **BALDOCK**, and **CARSON**, Circuit Judges.

This appeal grew out of an altercation between two detainees in a jail. The sheriff and other staff members intervened and ordered one of the

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* The parties don't request oral argument, and it would not help us decide the appeal. So we have decided the appeal based on the record and the parties' briefs. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

detainees, Ms. Elizabeth Rodriguez, to go into lockdown. She sued, claiming excessive force and deliberate indifference to her medical needs.

In the course of the suit, jail officials allegedly lost some recordings and a contemporaneous report about the use of force. Ms. Rodriguez sought sanctions for spoliation, and the defendants moved for summary judgment. The district court declined to sanction the defendants and granted them summary judgment.

Ms. Rodriguez appealed, and we affirm.

I. The district court didn't err in denying Ms. Rodriguez's motion for sanctions.

The issue of spoliation involves the alleged loss of jail recordings and a report about the use of force. On this issue, we consider whether the district court abused its discretion by denying sanctions. *Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1136, 1149–50 (10th Cir. 2009). Applying this standard, we conclude that the court acted within its discretion.

A. Recorded conversations involving Ms. Rodriguez's father

Ms. Rodriguez alleges that she talked frequently to her father and that authorities recorded these conversations. The defendants couldn't produce these recordings, and Ms. Rodriguez claims that they would have been material and relevant.

But she doesn't explain the materiality or relevance. We assume that the conversations involved Ms. Rodriguez's medical condition. But she

doesn't specify what was said or explain why she or her father couldn't testify about what they had said.[1]

Ms. Rodriguez also insists that her father talked to staff for the jail. But Ms. Rodriguez doesn't explain why authorities would have recorded those conversations. The jailers recorded inmate conversations, not family members' conversations with jail staff.

Ms. Rodriguez has not explained how the recordings would have been material or relevant. And for some of the conversations, a recording might not have existed. The district court thus acted within its discretion by declining to sanction the defendants.

B. The sheriff's affidavit

In opposing sanctions, the sheriff filed an affidavit, stating why he no longer had the recordings. Ms. Rodriguez argued that the district court should disregard the affidavit as a "sham." Appellees' Supp. Joint App'x vol. VI, at 1233. The district court declined to address this argument, finding it moot. Ms. Rodriguez doesn't explain why she disagrees with this ruling. Without any argument from Ms. Rodriguez on mootness, we

[1] We assume, for the sake of argument, that the statements wouldn't have constituted inadmissible hearsay. If they had constituted inadmissible hearsay, the district court couldn't have permitted introduction of the recordings. *See* Fed. R. Evid. 802.

conclude that the district court did not err in its handling of the sheriff's affidavit.

C. Ms. Patrick's alleged report about the use of force

Ms. Rodriguez also alleges that

- one of the jailers, Emily Patrick, prepared a contemporaneous report about the use of force and
- the defendants stated that they couldn't find this report.

When faced with these allegations, a sheriff's deputy directed Ms. Patrick to prepare another report, including whatever she could remember. Ms. Patrick complied, and the defendants provided the new report to Ms. Rodriguez. But the court declined to order sanctions.

In our view, the court acted within its discretion. In district court, Ms. Rodriguez appeared to assume that Ms. Patrick had prepared a contemporaneous report, and the defendants said that they weren't sure. But on appeal, Ms. Rodriguez says that Ms. Patrick had *never* prepared a contemporaneous report about the use of force. If Ms. Rodriguez is right, there was no report to withhold.

Still, we can assume for the sake of argument that Ms. Patrick had prepared a contemporaneous report. Despite this assumption, Ms. Rodriguez doesn't say how she would have been prejudiced from the substitution of a new report for the original version. Given the lack of

prejudice, the district court did not abuse its discretion by declining to impose sanctions.

II. The district court didn't err in granting the defendants' motions for summary judgment.

The district court granted summary judgment to the defendants. We uphold these rulings.

A. The standard

In this part of the appeal, we conduct de novo review, applying the same standard that applied in district court. *Brigham v. Frontier Airlines, Inc.*, 57 F.4th 1194, 1196 (10th Cir. 2023). There the court had to view the evidence and draw all reasonable inferences in favor of Ms. Rodriguez. *Id.* Summary judgment would be appropriate only in the absence of a genuine dispute of material fact. *Id.*

B. Summary judgment for the individual defendants

Ms. Rodriguez asserted claims against the sheriff, his wife, and three other jailers, complaining about the use of force and disregard of medical needs. For these claims, the defendants asserted qualified immunity.[2] The assertion of qualified immunity shifted the burden to Ms. Rodriguez to

[2] The jail administrator, Mr. Shane Sampson, asserted qualified immunity on the claim of excessive force. But Ms. Rodriguez later withdrew her claim against Mr. Sampson for indifference to medical needs.

show the violation of a clearly established constitutional right. *Shepherd v. Robbins*, 55 F.4th 810, 815 (10th Cir. 2022).

1. Excessive force

On the claim of excessive force, the parties disagree on some of the facts. But the parties agree that

- the use of force grew out of an altercation between Ms. Rodriguez and another inmate,
- jailers told Ms. Rodriguez that she would go into lockdown, and
- she refused to go into lockdown.

Ms. Rodriguez alleges two uses of force:

1. Sheriff Elliott pulled her hair and dragged her down the hall.
2. Mr. Riggs put her in a bear hug, hit her nose with the palm of his hand, and applied pressure.

The district court concluded that the defendants were entitled to qualified immunity.

Qualified immunity contains two elements:

1. The defendants violated a constitutional right.
2. That right was clearly established.

E.g., *Armijo ex rel. Armijo Sanchez v. Peterson*, 601 F.3d 1065, 1070 (10th Cir. 2010). The district court concluded that Ms. Rodriguez had failed to satisfy either element.

Given this reliance on both elements, Ms. Rodriguez had an appellate burden to show why the district court was wrong in denying the existence of a clearly established right. *See Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015) ("The first task of an appellant is to explain to us why the district court's decision was wrong."). But in her opening brief on appeal, Ms. Rodriguez addresses this prong of qualified immunity only in two sentences:

1. "To the extent the Court relied on qualified immunity, such was misplaced." Appellant's Opening Br. at 19.

2. "Here, the law regarding excessive force . . . [is] clearly established." *Id.* at 20.

Apart from these two sentences, Ms. Rodriguez gives no reason to reject the district court's analysis.

Given the defendants' invocation of qualified immunity, Ms. Rodriguez needed to show that

- a precedent or the great weight of authority had placed the constitutional issue beyond debate or
- the defendants' conduct had been so obviously unlawful that a factually similar precedent would have been unnecessary.

See Ashaheed v. Currington, 7 F.4th 1236, 1246–47 (10th Cir. 2021). But in her opening appeal brief, Ms. Rodriguez did not argue that a constitutional violation would have been obvious or apparent from case law.

In responding to the opening appeal brief, the defendants argued that Ms. Rodriguez hadn't shown the violation of a clearly established right. Ms. Rodriguez didn't reply, so we consider only whether any non-obvious flaws existed in the defendants' argument. *Hasan v. AIG Prop. Cas. Co.*, 935 F.3d 1092, 1099 (10th Cir. 2019). We see no obvious flaws in the defendants' response.

Ms. Rodriguez argues that Mr. Riggs used a bear hug, hit her nose, and applied pressure. In Ms. Rodriguez's deposition, she explains that Mr. Riggs had used the palm of his hand, applied pressure for less than a minute, and stated that he was applying pressure to calm her down. This explanation suggests that the force was minimal and designed to defuse the situation. In any event, Ms. Rodriguez doesn't cite any cases showing that the Constitution prohibited this kind of contact to calm an inmate.

Ms. Rodriguez also argues that the sheriff pulled her by the hair. Here, however, Ms. Rodriguez hasn't cited any supporting evidence or case law. Ms. Rodriguez bore the burden of citing whatever she thought would create a clearly established right. *See Thomas v. Durastanti*, 607 F.3d 655, 669 (10th Cir. 2010) ("The plaintiff bears the burden of citing to us what he thinks constitutes clearly established law."). But even if we were to overlook the lack of any pertinent citations, we'd have no obligation to

- scour the summary-judgment record for evidence that Ms. Rodriguez hadn't identified or

- construct an argument for her on the violation of a clearly established right.

See Sandoval v. City of Boulder, Colo., 388 F.3d 1312, 1320 (10th Cir. 2004).

Given the lack of any applicable citations to case law or the summary-judgment record, we see no obvious flaw in the district court's reasoning as to the defendants' conduct. Because Ms. Rodriguez has not shown an obvious flaw in the district court's reasoning, we see no error in the award of summary judgment to the defendants on the claim of excessive force.

2. Disregard of medical needs

Ms. Rodriguez also claims that the jailers disregarded her complaints of a toothache and ear pain. On these claims, Ms. Rodriguez needed to show deliberate indifference to a serious medical need. *Lucas v. Turn Key Health Clinics, LLC*, 58 F.3d 1127, 1136 (10th Cir. 2023). This showing included a subjective element, requiring proof that the jailers knew of an excessive risk to Ms. Rodriguez's health and chose to disregard that risk. *Id.* at 1137. The district court concluded that Ms. Rodriguez had failed to satisfy that burden, and we agree.

The jailers submitted undisputed evidence of prompt treatment for Ms. Rodriguez's ear pain once she requested medical care. For example, Ms. Rodriguez testified that when she had turned in a request for medical

care for her earache, a nurse diagnosed ear wax later the same day and performed a lavage the next day. When Ms. Rodriguez said that the pain persisted, the nurse provided antibiotics, Tylenol, and Ibuprofen. Given the undisputed evidence of treatment, no factfinder could reasonably infer deliberate indifference to the ear pain.

In her appeal brief, Ms. Rodriguez also refers to an alleged toothache. In her complaint, Ms. Rodriguez had complained only about ear pain—not a toothache. She did discuss the toothache when responding to the summary-judgment motions. Even then, however, Ms. Rodriguez didn't appear to allege deliberate indifference to the toothache. To the contrary, she pointed out that authorities had taken her to a dentist to extract the tooth. (Ms. Rodriguez's father allegedly paid a $50 copay.) Given the extraction, Ms. Rodriguez didn't appear to allege deliberate indifference to her toothache. So evidence of a toothache wouldn't justify reversal of the summary-judgment ruling.

3. Other claims

Ms. Rodriguez also asserted other allegations against three of the individual defendants.

For example, she alleged that the sheriff's wife (Ms. Judy Elliott) had used excessive force, failed to intervene, and improperly imposed punishment. Ms. Elliott denied involvement, and the district court granted

summary judgment to her based on Ms. Rodriguez's failure to respond. On appeal, Ms. Rodriguez has not questioned that ruling.

Ms. Rodriguez also complained that as she was being pulled by her hair, Mr. Shane Sampson watched without intervening. Mr. Sampson denied seeing this incident, and the district court credited his denial. Ms. Rodriguez doesn't state why she disagrees with this ruling.

Ms. Rodriguez also said, in a single sentence, that Mr. Sampson put his hands on her "unreasonably and without a penological reason." Appellant's Opening Br. at 25. But Ms. Rodriguez did not develop a distinct argument about Mr. Sampson's own use of force.

Lastly, Ms. Rodriguez stated that Ms. Patrick had failed to intervene and participated in the use of force. But this statement consisted of only one sentence and didn't provide a meaningful reason to disturb the district court's ruling.

C. Summary judgment for the board and the sheriff in his official capacity

Ms. Rodriguez also asserted claims against the Board of County Commissioners and the sheriff in his official capacity. These claims were effectively asserted against the county itself. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978) (official-capacity claim against municipal officials); Okla. Stat. tit. 19 § 4 (stating that the Board of County Commissioners must be named as the defendant when the suit is

against the county itself). The county could incur liability only if a policy or custom had caused a constitutional violation. *Frey v. Town of Jackson*, 41 F.4th 1223, 1238 (10th Cir. 2022). The district court concluded that Ms. Rodriguez had not shown an improper policy or custom, and we agree.

In alleging excessive force, Ms. Rodriguez points out that the district court declined to dismiss the claim against the county, reasoning that the complaint had adequately alleged a policy or custom. But after pleading a policy or custom, Ms. Rodriguez needed to support these allegations with evidence in order to survive summary judgment. And she didn't.

She disagrees, pointing to evidence that the sheriff had delegated authority to his wife. The district court concluded that this evidence wouldn't reflect a policy or custom, and Ms. Rodriguez doesn't present a reason to question that conclusion. After all, the wife wasn't a final policymaker for the county; and the delegation of authority wouldn't involve a policy or custom.

Ms. Rodriguez also blames the county for the inattention to her toothache and ear pain, arguing that the sheriff deferred entirely to medical staff. But on the claim for disregard of medical needs, we've elsewhere concluded that Ms. Rodriguez hadn't satisfied her burden of showing a constitutional violation. Given the absence of a constitutional violation, she can't pin liability on the county for disregard of medical needs. *See Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993).

Affirmed.

Entered for the Court

Robert E. Bacharach
Circuit Judge