FILED
United States Court of Appeals
Tenth Circuit

August 9, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CRAIG RALSTON,

Plaintiff - Appellant,

v.

CHAPLAIN HOSEA CANNON,

Defendant - Appellee.

LAWYERS' CIVIL RIGHTS COALITION,

Amicus Curiae.

No. 19-1146
(D.C. No. 1:14-CV-00247-SKC)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HOLMES**, **BACHARACH**, and **EID**, Circuit Judges.

Mr. Craig Ralston has filed a 42 U.S.C. § 1983 action against Hosea Cannon, chaplain for the Denver, Colorado, sheriff's department. Mr. Ralston alleges that Mr. Cannon violated his rights under the First Amendment to the United States Constitution by denying his request for a kosher diet when he was

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

held in the Denver Detention Center. The district court granted summary judgment to Mr. Cannon. It found that he was entitled to qualified immunity. The court based its decision on the first prong of the qualified-immunity analysis, concluding that Mr. Ralston failed to show a violation of a constitutional right.

Exercising jurisdiction under 28 U.S.C. § 1291, we affirm. However, we do so on an alternative ground—that is, the second prong of the qualified-immunity analysis. When Mr. Cannon denied the kosher diet request, it was not clearly established that his conduct violated the Free Exercise Clause of the First Amendment. More specifically, the law was not clearly established that, even if Mr. Cannon did not act with a discriminatory purpose, his denial of a kosher diet could effect a violation of Mr. Ralston's free-exercise rights.

I

Mr. Ralston is a Messianic Jew. In December 2013, he was arrested and booked into the Denver Detention Center. On an intake questionnaire, Mr. Ralston left blank a question about his religious affiliation. He also indicated that he did not require a special religious diet. Three days later, however, Mr. Ralston filed a grievance, stating that his faith required him to keep a kosher diet. The Denver Detention Center's chaplain, Mr. Cannon, was responsible for coordinating special diet requests from inmates. On January 2, 2014, he denied Mr. Ralston's request for a kosher diet. In a written explanation, he noted that Mr. Ralston had not indicated a religious affiliation on his intake questionnaire.

And he also stated that a rabbi had "examined our menu" and determined that "our meals are fully acceptable in the Messianic Jewish Faith." R., Vol. I, at 47 (Denver Sheriff Department Inmate Grievance Form, dated Jan. 2, 2014).

On January 28, Mr. Ralston filed both another request for a kosher diet and also a § 1983 action pro se against Mr. Cannon.[1] In his complaint, Mr. Ralston alleged "religious discrimination and/or persecution based on the denial of religious freedom, by denying a recognized religious diet" in violation of the First and Fourteenth Amendments to the United States Constitution. *Id.* at 15 (Prisoner Compl., filed Jan. 28, 2014). On February 4, 2014, Mr. Cannon approved Mr. Ralston's kosher diet request. Mr. Cannon thereafter filed a motion to dismiss the § 1983 action, asserting qualified immunity.

The district court dismissed the Fourteenth Amendment claim but not the First Amendment claim. Mr. Cannon later filed a motion for summary judgment on the First Amendment claim, again asserting qualified immunity. The district court denied it. The court found that it was "reasonable to infer" that Mr. Cannon "substantially burdened [Mr. Ralston's] sincerely-held religious beliefs" when he denied the kosher diet request. *Id.* at 196 (District Ct. Order Regarding Def.'s Mot. for Summ. J., filed Sept. 8, 2016). The court further found that "a genuine

[1] Mr. Ralston's original complaint also named as defendants the Denver sheriff and a division chief within the sheriff's department. In late February 2014, the district court dismissed the claims against the sheriff and the division chief.

issue exists as to whether [Mr. Cannon] consciously or intentionally interfered with [Mr. Ralston's] free exercise rights by denying the kosher diet request." *Id.*

Mr. Cannon appealed the qualified-immunity ruling.[2] He argued that the court erred in finding that a reasonable juror could conclude that he acted consciously or intentionally to violate Mr. Ralston's First Amendment rights. We dismissed the appeal for lack of jurisdiction after concluding that "[e]ach aspect of [Mr.] Cannon's appeal . . . amounts to a challenge to the district court's determinations of evidentiary sufficiency." *Ralston v. Cannon* ("*Ralston I*"), 884 F.3d 1060, 1062 (10th Cir. 2018).

Our decision in *Ralston I* included a lengthy footnote—footnote 3—in which we discussed Mr. Ralston's reliance on our decision in *Gallagher v. Shelton*, 587 F.3d 1063 (10th Cir. 2009), "as setting the relevant parameters of a § 1983 free exercise claim." *Id.* at 1063 n.3. With reference to *Gallagher*, we stated that "there is reason to doubt whether 'conscious' interference with an individual's right to free exercise amounts to a viable § 1983 First Amendment claim for damages." *Id.* We acknowledged that *Gallagher* appeared to endorse the view that a § 1983 plaintiff only needed to show "conscious *or* intentional interference with the right to free exercise." *Id.* However, we recognized that, in *Ashcroft v. Iqbal*, the Supreme Court held that, if a plaintiff raises a claim of

[2] The Tenth Circuit appointed counsel to represent Mr. Ralston in that appeal, and he has been represented since that time by counsel.

"invidious discrimination" in violation of the First Amendment, he must "plead and prove that the defendant acted with discriminatory purpose." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)). We ultimately concluded that it was "unnecessary . . . to attempt to reconcile *Gallagher* and *Iqbal*," due to our lack of jurisdiction over Mr. Cannon's appeal. *Id.* Instead, we "le[ft] it to the district court's discretion . . . whether to take up this question on remand and revisit the propriety of summary judgment." *Id.*

On remand, the district court allowed Mr. Cannon to file a motion to reconsider the order denying him summary judgment. Mr. Cannon based his motion on our "invitation to revisit the appropriate standard applicable to [Mr. Ralston's] 42 U.S.C. § 1983 free exercise claim," citing to our footnote in *Ralston I*. R., Vol. I, at 222 (Def.'s Mot. to Reconsider the Ct.'s Order Den. Summ. J., filed Aug. 10, 2018). Mr. Cannon argued that the "standard described in *Iqbal*" applied to Mr. Ralston's claim and that, to survive summary judgment, Mr. Ralston "must establish that Chaplain Cannon's denial of [Mr. Ralston's] kosher diet request was motivated by his intent to discriminate against Mr. Ralston based on his religious beliefs." *Id.* at 225. Thus, Mr. Cannon insisted that Mr. Ralston had to show purposeful discrimination, and not merely conscious interference with his free-exercise rights, to sustain his § 1983 claim.

The district court agreed. It granted summary judgment to Mr. Cannon after finding that Mr. Ralston "failed to raise a triable issue of disputed fact over

whether [Mr.] Cannon's conduct rises to the level of a constitutional violation." *Id.* at 283 (Order Re: Mot. to Reconsider & Mot. for Summ. J., filed Mar. 12, 2019). Relying on *Iqbal*, the court concluded that, to sustain a § 1983 free-exercise claim, a plaintiff must "plead and prove that the defendant acted with a discriminatory purpose." *Id.* at 280. The court then concluded that there was "no evidence" that Mr. Cannon acted with purposeful discrimination, i.e., that he denied Mr. Ralston's kosher diet request "because of [Mr.] Ralston's religion." *Id.* at 283. Therefore, the court found that Mr. Cannon was entitled to qualified immunity because Mr. Ralston had not alleged a constitutional violation and granted summary judgment to Mr. Cannon.

Mr. Ralston then brought this timely appeal.

II

Mr. Ralston raises three arguments on appeal. First, he contends that the district court did not have jurisdiction to entertain Mr. Cannon's motion to reconsider because it was untimely. Second, he argues that the district court erred in finding that Mr. Cannon was entitled to qualified immunity. Finally, he contends that the district court erred by not allowing him to amend his complaint. We address the three arguments in turn and conclude that they are all without merit.

A

Mr. Ralston first argues that the district court did not have jurisdiction to entertain Mr. Cannon's motion to reconsider because it was untimely filed. He points to Federal Rule of Civil Procedure 59(e), which provides that a motion to alter or amend a judgment "must be filed no later than 28 days after the entry of the judgment." FED. R. CIV. P. 59(e). Mr. Ralston notes that, although we dismissed Mr. Cannon's interlocutory appeal in *Ralston I* on March 13, 2018, Mr. Cannon did not seek to file a motion to reconsider until June 19, 2018. And he eventually filed the motion on August 10, 2018. Therefore, according to Mr. Ralston, Mr. Cannon clearly failed to comply with Rule 59(e)'s 28-day time limit.

This argument is not persuasive because Rule 59(e) is inapposite as to the motion to reconsider filed by Mr. Cannon. Rule 59(e) applies to motions made *after* a final judgment. However, no final judgment had been issued in the district court case when Mr. Cannon filed his motion to reconsider; the district court only had denied Mr. Cannon summary judgment on Mr. Ralston's First Amendment claim.

"A final judgment 'is one that "ends the litigation on the merits," leaving nothing to decide.'" *United States v. Romero*, 511 F.3d 1281, 1283 (10th Cir. 2008) (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988)). The district court's denial of Mr. Cannon's motion for summary judgment was interlocutory and did not have this litigation-ending effect. More specifically, a "[d]enial of summary judgment 'is strictly a pretrial order that decides only one

thing—that the case should go to trial.'" *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1103 (10th Cir. 1998) (quoting *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573 (Fed. Cir. 1986)).

Thus, Mr. Cannon's motion to reconsider simply invoked "the district court's general discretionary authority to review and revise interlocutory rulings prior to entry of final judgment." *Fye v. Okla. Corp. Comm'n*, 516 F.3d 1217, 1223 n.2 (10th Cir. 2008) (quoting *Wagoner v. Wagoner*, 938 F.2d 1120, 1122 n.1 (10th Cir. 1991)). It was undoubtedly within the district court's "discretion to revise [its] interlocutory orders prior to entry of final judgment." *Anderson v. Deere & Co.*, 852 F.2d 1244, 1246 (10th Cir. 1988); *see also Price v. Philpot*, 420 F.3d 1158, 1167 n.9 (10th Cir. 2005) (noting that "every order short of a final decree is subject to reopening at the discretion of the district judge" (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983))). In fact, in *Ralston I*, we expressly contemplated that the district court might "revisit the propriety of summary judgment." *Ralston I*, 884 F.3d at 1063 n.3.

To be sure, as with final judgments, the district court's denial of Mr. Cannon's motion for summary judgment provided the basis for an appeal; however, that is not because that denial order ended the litigation but, rather, because it denied Mr. Cannon the protections of the qualified-immunity defense. *See, e.g.*, *Cox v. Glanz*, 800 F.3d 1231, 1242 (10th Cir. 2015) ("Federal 'appellate courts typically do not have jurisdiction to review denials of summary judgment

motions,' but '[t]he denial of qualified immunity to a public official . . . is immediately appealable . . . to the extent it involves abstract issues of law." (alteration and omissions in original) (citations omitted) (first quoting *Serna v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1150 (10th Cir. 2006), then quoting *Fancher v. Barrientos*, 723 F.3d 1191, 1198 (10th Cir. 2013))); *accord Buck v. City of Albuquerque*, 549 F.3d 1269, 1276 (10th Cir. 2008).[3]

In sum, "because a final judgment had not yet been entered . . . the district court's consideration of the motion for reconsideration . . . did not violate Rule 59." *Riggs v. Scrivner, Inc.*, 927 F.2d 1146, 1148 (10th Cir. 1991). We therefore conclude that the district court could permissibly entertain Mr. Cannon's motion to reconsider.

B

The main issue presented in this appeal is whether Mr. Cannon is entitled to qualified immunity and, thus, summary judgment. We "review summary judgment decisions de novo, applying the same legal standard as the district court." *Talley v. Time, Inc.*, 923 F.3d 878, 893 (10th Cir. 2019) (quoting *Cory v. Allstate Ins.*, 583 F.3d 1240, 1243 (10th Cir. 2009)). Summary judgment is warranted if, viewing the evidence in the light most favorable to the nonmoving

[3] Of course, we ultimately concluded in *Ralston I* that we could not properly exercise jurisdiction over the merits of Mr. Cannon's appeal because it did not present abstract issues of law for decision. *See* 884 F.3d at 1062.

party, "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." FED. R. CIV. P. 56(a).

However, in some respects, "[o]ur review of summary judgment orders in the qualified immunity context differs from that applicable to review of other summary judgment decisions." *Thomson v. Salt Lake County*, 584 F.3d 1304, 1312 (10th Cir. 2009). Specifically, when a defendant asserts a qualified-immunity defense, the plaintiff bears the burden of demonstrating "(1) the officers' alleged conduct violated a constitutional right, and (2) it was clearly established at the time of the violation, such that 'every reasonable official would have understood,' that such conduct constituted a violation of that right." *Perea v. Baca*, 817 F.3d 1198, 1202 (10th Cir. 2016) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam)).

"In our review, 'we need only find that the plaintiffs failed either requirement' to establish qualified immunity." *Est. of Reat v. Rodriguez*, 824 F.3d 960, 964 (10th Cir. 2016) (quoting *Swanson v. Town of Mountain View*, 577 F.3d 1196, 1199 (10th Cir. 2009)); *see also A.M. v. Holmes*, 830 F.3d 1123, 1134–35 (10th Cir. 2016) ("In other words, if the plaintiff fails to establish either prong of the two-pronged qualified-immunity standard, the defendant prevails on the defense."). Moreover, we are "permitted to exercise [our] sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."

Pearson v. Callahan, 555 U.S. 223, 236 (2009); *see also Est. of Reat*, 824 F.3d at 964 ("Because there are cases where we can more readily decide the law was not clearly established before reaching the more difficult question of whether there has been a constitutional violation, we may exercise discretion in deciding which prong to address first.").

Under the second prong of the qualified-immunity inquiry, a constitutional right is clearly established if "'[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would [have understood] that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (alterations in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Qualified immunity "protects all officials except those who are 'plainly incompetent or those who knowingly violate the law.'" *Apodaca v. Raemisch*, 864 F.3d 1071, 1076 (10th Cir. 2017) (quoting *White v. Pauly*, --- U.S. ----, 137 S. Ct. 548, 551 (2017) (per curiam)). Therefore, for the law to be clearly established, "existing precedent must have placed the . . . constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. We "do not require a case directly on point." *Id.* But the "dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix*, 577 U.S. at 12 (quoting *al-Kidd*, 563 U.S. at 742).

In undertaking this analysis, we "look to the relevant precedents at the time of the challenged actions and the obviousness of the violation in light of them."

Milligan-Hitt v. Bd. of Trs. of Sheridan Cnty. Sch. Dist. No. 2, 523 F.3d 1219, 1233 (10th Cir. 2008). Ordinarily, the relevant precedent for clearly-established-law purposes consists of one or more "on-point Supreme Court or published Tenth Circuit decision[s]; alternatively, 'the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.'" *Quinn v. Young*, 780 F.3d 998, 1005 (10th Cir. 2015) (quoting *Weise v. Casper*, 593 F.3d 1163, 1167 (10th Cir. 2010)); *accord A.M.*, 830 F.3d at 1135. The time period of the challenged action here—which provides the touchstone for assessing the substance of clearly established law—is from January 2, 2014 (when Mr. Cannon first denied Mr. Ralston's kosher diet request) to February 4, 2014 (when he granted it).

We hold that, during this time period, the law was not clearly established that Mr. Cannon could be held liable for violating Mr. Ralston's free-exercise rights by acting *without* a discriminatory purpose. More specifically, the law was not clearly established that Mr. Cannon could be found liable for a free-exercise violation for denying Mr. Ralston a kosher diet—absent a showing that Mr. Cannon took this action for the purpose of discriminating on account of Mr. Ralston's religion (i.e., because of his religion). The relevant precedent did not put this "constitutional question" regarding the requisite scienter, under the circumstances here, "beyond debate." *al-Kidd*, 563 U.S. at 741. And thus we cannot say that "every reasonable official" in Mr. Cannon's position would have

known that his decision to deny Mr. Ralston's request for a kosher diet—if free of discriminatory purpose—would violate the Free Exercise Clause. *Est. of Reat*, 824 F.3d at 964 (quoting *Reichle v. Howards*, 556 U.S. 658, 664 (2012)).[4]

Ralston I effectively provides the foundation for this conclusion. There, we stated "*there is reason to doubt* whether 'conscious' interference with an individual's right to free exercise amounts to a viable § 1983 First Amendment claim." *Ralston I*, 884 F.3d at 1063 n.3 (emphasis added). We noted that, in 2009, the Supreme Court held in *Iqbal* that, "[w]here the claim is invidious discrimination" in violation of the First Amendment, the Court's "decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose." *Id.* (quoting *Iqbal*, 556 U.S. at 676). And the *Iqbal* Court clarified that people may be said to act with a discriminatory purpose when

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[4] Mr. Ralston did not make an argument concerning the clearly-established-law prong of the qualified-immunity standard in his opening brief. As such, we could conclude that Mr. Ralston has waived any such argument regarding this requisite prong of the two-pronged, qualified-immunity standard. *See, e.g.*, *United States v. Black*, 369 F.3d 1171, 1176 (10th Cir. 2004) ("Failure to raise an issue in the opening appellate brief waives that issue."); *see also Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief."). Given that Mr. Ralston bears the burden of proof as to both prongs of the qualified-immunity standard, *see, e.g.*, *Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009), such a determination of waiver would strike a fatal, threshold blow to Mr. Ralston's efforts to show that the district court erred in its qualified-immunity determination. Nevertheless, we overlook this lack of preservation and proceed to the merits. *See, e.g.*, *Abernathy v. Wandes*, 713 F.3d 538, 552 (10th Cir. 2013) ("[T]he decision regarding what issues are appropriate to entertain on appeal in instances of lack of preservation is discretionary.").

they act because of the negative consequences that will be inflicted on an identifiable group—not merely in spite of those consequences. *See Iqbal*, 556 U.S. at 676–77. Thus, after *Iqbal*, *Ralston I* concluded that it was doubtful in our circuit whether having anything short of a discriminatory purpose would be sufficient to expose a defendant to § 1983 liability for a First Amendment free-exercise violation.[5]

In other words, when we decided *Ralston I* in 2018, there was serious question whether *Gallagher*'s scienter standard was in fact viable or whether it actually was invalid in light of *Iqbal*—such that purposeful discrimination was the requisite, minimum scienter for a free-exercise claim. Accordingly, in 2018, a reasonable official in Mr. Cannon's position would not have understood that denying a prisoner a kosher diet *without* a discriminatory purpose would subject him to § 1983 liability for a First Amendment free-exercise violation.

It follows ineluctably that in 2014—i.e., at the earlier date of the events at issue here—a reasonable official in Mr. Cannon's position also would not have understood that denying a kosher diet to a prisoner without discriminatory

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[5] It bears noting that, though we specifically highlighted the "conscious" portion of *Gallagher*'s conscious-or-intentional-interference standard, the shadow of "doubt" that *Ralston I* indicated *Iqbal* cast related to whether a showing of discriminatory purpose was required to establish a First Amendment free-exercise claim. *See Ralston I*, 884 F.3d at 1063 n.3. Logically, this shadow of doubt also would be cast on whether a defendant's intentional interference with free-exercise rights—not involving discriminatory purpose—would be sufficient to establish such a claim.

purpose would subject him to liability under § 1983 for a First Amendment free-exercise violation.[6] Stated otherwise, in 2014, the answer to the "constitutional question" of whether or not a plaintiff must act with purposeful discrimination to be liable for a free-exercise violation would not have been "beyond debate." *al-Kidd*, 563 U.S. at 741. And, critically, Mr. Ralston does not argue—much less identify evidence showing—Mr. Cannon acted with a discriminatory purpose. Therefore, Mr. Ralston cannot carry his burden of establishing that Mr. Cannon's conduct violated clearly established law.

Mr. Ralston proposes one way to harmonize these seemingly different standards. He suggests that the *Gallagher* standard applies to traditional free-exercise claims arising under the First Amendment—like his own—while the purposeful-discrimination standard applies only to claims of religious discrimination arising under the Equal Protection Clause of the Fourteenth

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[6] To be sure, in the two years immediately preceding 2014, panels of our court in unpublished decisions had relied on *Gallagher* for the controlling scienter standard. *See, e.g.*, *McKinley v. Maddox*, 493 F. App'x 928, 933 (10th Cir. 2012) (unpublished) (noting that a prisoner "must assert conscious or intentional interference with his free exercise rights to state a valid claim under § 1983" (quoting *Gallagher*, 587 F.3d at 1070)); *see also Watkins v. Rogers*, 525 F. App'x 756, 758–59 (10th Cir. 2013) (unpublished) (without articulating a requirement of purposeful discrimination or inquiring into its presence, appearing to rest its rejection of the prisoner's free-exercise claim on *Gallagher*'s holding that "isolated, negligent violations are insufficient to support a constitutional violation"). However, we have held that "[a]n unpublished opinion . . . provides little support for the notion that the law is clearly established." *Mecham v. Frazier*, 500 F.3d 1200, 1206 (10th Cir. 2007).

Amendment. *See, e.g.*, Aplt.'s Opening Br. at 21 ("*Gallagher*, which was decided six months after *Iqbal*, does not add an intentional invidious discrimination element to a free-exercise claim—a constitutional provision that need not include a claim of discrimination. There is no tension between *Gallagher*, which deals with claims of a substantial burden on sincerely-held religious beliefs, and *Iqbal*, which deals with discrimination based on religion.").[7]

However, we have never endorsed this constitutional distinction. And, more fundamentally, even if this distinction were a viable one at this time, it would not avail Mr. Ralston. That is because the inescapable truth is that, during the period of Mr. Cannon's allegedly unconstitutional conduct—that is, January 2, 2014, to February 4, 2014—the law was not clearly established that Mr. Cannon's conduct could effect a violation of Mr. Ralston's free-exercise rights.[8] Stated

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[7] The Lawyers' Civil Rights Coalition submitted an amicus brief that also contends that *Iqbal* is inapposite with respect to free-exercise claims like Mr. Ralston's. *See* Amicus Br. at 9 ("Read correctly, *Iqbal* has nothing to do with a prisoner being allowed or not allowed to practice his religion.").

[8] It is similarly unavailing that, after the time period at issue here, at least two panels of this court have applied *Iqbal* and its purposeful-discrimination standard in concluding that prisoners have failed to show actionable First Amendment free-exercise claims. *See Carr v. Zwally*, 760 F. App'x 550, 554–55 (10th Cir. 2019) (unpublished) (citing *Iqbal* and holding that a prisoner could not sustain a § 1983 free-exercise claim against a sheriff's deputy who threw away his Bibles because he "fail[ed] to plausibly allege that [the deputy] acted with discriminatory purpose"); *Williams v. Wilkinson*, 645 F. App'x 692, 707 (10th Cir. 2016) (unpublished) (citing *Iqbal* and concluding that a § 1983 free-exercise claim against the Director of the Oklahoma Department of Corrections "fail[ed] to state a claim as a matter of law" because—even assuming that the Director was

(continued...)

otherwise, the answer to the "constitutional question" of whether Mr. Cannon could be subject to First Amendment liability for acting *without* purposeful discrimination in denying Mr. Ralston a kosher diet was hardly "beyond debate." *al-Kidd*, 563 U.S. at 741; *accord Est. of Reat*, 824 F.3d at 965.

Accordingly, Mr. Ralston fails to carry his burden as to the second prong of the qualified-immunity standard—i.e., the clearly-established-law prong. And this failure dooms his challenge to the district court's qualified-immunity ruling.

C

Finally, Mr. Ralston argues that the district court erred in not granting him leave to amend his complaint. He insists that the court should have allowed him leave to amend his complaint after it revisited its summary judgment order and held that he "must plead and prove purposeful invidious discrimination as an element of a claim of substantial burden on sincerely-held religious beliefs." Aplt.'s Opening Br. at 25. This argument is without merit. Mr. Ralston failed to properly move for leave to amend. And the district court did not abuse its discretion in not acting *sua sponte* to grant Mr. Ralston leave to amend.

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[8](...continued)
responsible for a kosher-diet policy at issue in the suit—the plaintiff still failed to alleged that the Director's "formulation of the policy was motivated by a discriminatory intent"). Even putting aside the fact that these decisions are unpublished and, thus, non-precedential, *see supra* note 6, they come too late to influence the clearly-established-law calculus.

Mr. Ralston's counsel twice did mention the possibility of amending the complaint, but in only a fleeting fashion. First, at a hearing on the motion to reconsider, Mr. Ralston's counsel said that, *if* the court ruled "any time that somebody is asserting their rights under the free exercise clause, that they also [must] then prove discrimination, then this was not the law at the time that the initial pro se complaint was filed, and we would have a request under Rule 15 to go ahead and amend based on now a declaration of this new Rule." R., Vol. II, at 23 (Hr'g Tr., dated Feb. 20, 2019).

Second, in a written response to Mr. Cannon's motion to reconsider, Mr. Ralston's counsel argued that "the state of mind at issue in this case is one required to establish violation of the Free Exercise Clause by denial of kosher diet—not the state of mind required to establish intentional discrimination." *Id.*, Vol. I, at 239 (Craig Ralston's Resp. to Def.'s Mot. to Reconsider the Ct.'s Order Den. Summ. J., filed Oct. 4, 2018). And then, in a footnote, Mr. Ralston's counsel continued: "*If* there is any question about the nature of this claim, Mr. Ralston, who now for the first time in proceedings before this Court is represented by counsel, requests that the Court grant him leave to amend his complaint." *Id.* at 239 n.4 (emphasis added).

At no point, however, did Mr. Ralston properly seek leave to amend the complaint. In particular, he never filed a written motion to that effect. Under our precedent, it was not sufficient simply to suggest to the court that he should be

allowed to amend his complaint *if* the court ruled a particular way. Instead, a proper motion for leave to amend was necessary.[9] *See Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977, 986 (10th Cir. 2010) ("[Appellant] did not file a written motion for leave to amend; instead, in her opposition to the motion to dismiss, she merely suggested she should be allowed to amend if the court concluded her pleadings were infirm. This is insufficient."); *see also Glenn v. First Nat'l Bank in Grand Junction*, 868 F.2d 368, 370 (10th Cir. 1989) (concluding that the suggestion by appellants—made in their response to a motion to dismiss—that the district court possibly allow them to amend their complaint "d[id] not rise to the status of a motion" because it "states no grounds let alone 'particular' grounds for the request").

Therefore, the district court did not abuse its discretion in not granting Mr. Ralston leave to amend his complaint.

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[9] We note that Mr. Ralston also failed to properly move for leave to amend under the District of Colorado's local rules. *See, e.g.*, D.C. COLO. LCivR 7.1(d) ("A motion shall not be included in a response or reply to the original motion. A motion shall be filed as a *separate document*." (emphasis added)); *id.* 15.1(b) ("A party who files an opposed motion for leave to amend or supplement a pleading shall attach as an exhibit a copy of the proposed amended or supplemental pleading which strikes through . . . the text to be deleted and underlines . . . the text to be added.").

III

For the foregoing reasons, we affirm the district court's order granting summary judgment to Mr. Cannon.

ENTERED FOR THE COURT

Jerome A. Holmes
Circuit Judge