FILED
United States Court of Appeals
Tenth Circuit

April 12, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ONG VUE,

Plaintiff - Appellant,

v.

JANET DOWLING, Warden; AARON PERUSKIE, Chief of Security; RANDY HARDING, Deputy Warden; CREIGHTON WHITE, Deputy Warden; ALEX ARMSTRONG, Chief of Security; BRADLEY ROGERS, DCCC STI Agent; MICHAEL WILLIAMS, Intelligence Officer,

Defendants - Appellees.

No. 22-5062
(D.C. No. 4:21-CV-00265-GKF-SH)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before **HARTZ**, **KELLY**, and **BACHARACH**, Circuit Judges.

Ong Vue, a state prisoner proceeding pro se, appeals the district court's dismissal of his civil rights claims under 42 U.S.C. § 1983 against prison officials

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* 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. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

and the denial of his motion for relief from judgment under Federal Rule of Civil Procedure 60(b). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Background

Mr. Vue is an inmate at the Dick Conner Correctional Center (DCCC) in Oklahoma, where he is serving an indeterminate life sentence for first-degree murder. In his amended complaint, Mr. Vue alleged he was wrongfully classified as a member or associate of the Sureños, a Hispanic prison gang, which lead to him being housed in administrative segregation with members of that gang. He further alleged that Sureños inmates assaulted him while he was in administrative segregation.

Mr. Vue served only two of the seven named defendants in this case: Janet Dowling, the Warden at DCCC, and Aaron Peruskie, Chief of Security. Ms. Dowling and Mr. Peruskie moved to dismiss Mr. Vue's amended complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). In ruling on that motion, the district court also engaged in a preliminary screening of Mr. Vue's pro se amended complaint under 28 U.S.C. § 1915(e)(2)(b)(ii).

A. Amended Complaint

In his amended complaint, Mr. Vue alleged that on August 28, 2020, his prison cell—Unit Q, cell 107—was designated a security threat group (STG) and he was administratively segregated from the general prison population in that cell. Several days later, Mr. Vue learned he was segregated with the Sureños in Unit Q because prison officials found a handwritten roster identifying him as a member or associate of that prison gang. When he stated he was not affiliated with the Sureños, an officer

directed him to submit a request to staff (RTS) to have his classification reviewed. Mr. Vue submitted an RTS to Security claiming he was not a member of the Sureños and that he could not be because he is Asian and his ethnicity is Hmong.

Receiving no response, Mr. Vue submitted an RTS to Mr. Peruskie on October 26, again disclaiming any affiliation with the Sureños. Mr. Peruskie responded that he "asked the Security Threat Intelligence [STI] Unit to come to DCCC and revalidate. Relief pending upon results of STI interviews." R., Vol. 1 at 163 (internal quotation marks omitted).

Sometime in October 2020, Sureños gang members from Unit Q, cell 104, tried to attack Mr. Vue with knives. The unit officer intervened and prevented him from being injured. Mr. Vue was returned to his cell in administrative segregation with the Sureños. After overhearing several officers laughing and joking about this incident, Mr. Vue concluded that his classification and administrative segregation were intentional and retaliatory.

In December 2020, Security informed Mr. Vue that he would be moved to Unit K, which Ms. Dowling had designated as segregated housing for Sureños gang members. Once again, Mr. Vue told an officer he was not a Sureños gang member. During that same month, one of Mr. Vue's Hispanic cellmates was removed from the STG list and placed in general population when he told staff he was not affiliated with the Sureños. Mr. Vue was then housed for a time with an Asian/Hmong inmate. When a Hispanic inmate was ordered to move from Unit K to Mr. Vue's cell in Unit Q, and Mr. Vue was ordered to move to Unit K, the Hispanic inmate protested

that he was a Sureños member and should remain in Unit K. Mr. Vue heard an officer call this Hispanic inmate "a piece of shit" while attempting to physically drag him into a cell. *Id.* at 164 (internal quotation marks omitted). Mr. Vue told the officer this situation was absurd because he was not a Sureños member. A few days later, he was moved to Unit K.

On December 28, Mr. Vue submitted an RTS to Ms. Dowling stating he was not a Sureños gang member. On January 4, 2021, Ms. Dowling "responded that the STG list is compiled and maintained by the Office of Inspector General. I will ask the [STI] Unit to come to DCCC and revalidate. Relief pending upon results of STI interviews." *Id.* at 165 (internal quotation marks omitted). When he had not been interviewed as of April 15, Mr. Vue submitted another RTS to Ms. Dowling reiterating his claim he was not a Sureños gang member and asking for an STI Unit interview. Ms. Dowling responded that she had addressed this request in her January 4 response.

On June 18, Bradley Rogers, the DCCC's STI Agent, informed Mr. Vue that, based on information in Mr. Vue's file, he had been assessed two points in the STI system, qualifying him as an "associate" of the Sureños gang. *Id.* at 166 (internal quotation marks omitted). Mr. Vue told Mr. Rogers that he was not a member of the Sureños gang. Hispanic inmates also told Mr. Rogers that Mr. Vue was not a member or associate of their gang. Mr. Rogers stated he would return to interview Mr. Vue and take pictures of his tattoos, but he did neither.

On June 24, Mr. Vue submitted another RTS, followed by a grievance. In response, Ms. Dowling directed Mr. Rogers to respond to Mr. Vue's latest RTS. Mr. Rogers ultimately responded on October 7, 2021, stating:

> You will be placed on the "inactive" list but your 2 points will remain as you [were] on a "Roster" with Surenos affiliation. You're labeled as an "associate" and not a member. If facility heads believe [you're] not a threat or in threat they're able to take you off admin. seg.

Id. at 167 (internal quotation marks omitted). Mr. Vue then submitted an RTS to Mr. Rogers asking for "reliable, documented information" that showed he was an associate of the Sureños gang. *Id.* (internal quotation marks omitted). Mr. Rogers responded that, due to security concerns, he could not provide Mr. Vue with the handwritten gang roster.

Mr. Vue spent a total of fourteen months in administrative segregation with the Sureños gang. He alleged in his amended complaint that defendants' conduct violated various prison policies and procedures.

B. District Court's Dismissal Analysis

The district court construed Mr. Vue's amended complaint as attempting to allege two claims based upon his classification as an associate of the Sureños gang and his housing in administrative segregation: (1) a violation of his Fourteenth-Amendment right to due process, and (2) a violation of his Eighth-Amendment right to be free from cruel and unusual punishment.

1. Due Process

Mr. Vue alleged defendants denied him due process when he was classified as an associate of the Sureños gang and placed in administrative segregation with those gang members. The district court dismissed this claim, holding Mr. Vue did not plausibly allege that defendants violated a constitutionally protected liberty interest. The court acknowledged that, while prisoners do not generally have a liberty interest in particular classifications and housing assignments, a state-created liberty interest could arise from prison regulations that either extend the duration of confinement or impose "'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" R., Vol. 1 at 277 (quoting *Sandin v. Conner*, 515 U.S. 472, 483 (1995)).

The district court concluded that the factors we identified in *Estate of DiMarco v. Wyoming Department of Corrections*, 473 F.3d 1334, 1342 (10th Cir. 2007), weighed against a finding that Mr. Vue's challenged classification and segregated housing violated a liberty interest. First, the court found there is a legitimate penological interest in keeping rival gangs separated to prevent violence. Second, Mr. Vue's classification and subsequent administrative segregation were not atypical or significant as compared to the usual terms of prison confinement. Third, the classification and administrative segregation had no effect on the duration of his incarceration. And fourth, Mr. Vue's placement in administrative segregation was not indefinite. Consequently, because Mr. Vue did not plausibly allege a state-created liberty interest in his classification and resulting housing assignment,

the district court concluded he was not entitled to any particular process with regard to either and he failed to state a claim for a due-process violation.

2. Cruel and Unusual Punishment

Mr. Vue alleged that defendants violated his right to be free from cruel and unusual punishment because the prison lacks a procedure to challenge his classification as an associate of the Sureños gang and that classification puts his life in danger. The district court dismissed this claim, holding Mr. Vue did not plausibly allege that defendants acted with a sufficiently culpable state of mind—that they disregarded a known or obvious risk that was so great it was highly probable that harm would follow.

The court reasoned that Mr. Vue's inclusion on a roster of Sureños gang members undermined any inference that defendants were subjectively aware that placing him in administrative segregation with members of that gang would pose a risk to his safety. Regarding Mr. Vue's allegation he was attacked by Sureños gang members, the court noted that prison guards intervened and protected him from physical harm. Moreover, Mr. Vue suffered no serious physical injury (aside from pepper spray to his face resulting from the guards' intervention on his behalf when he was assaulted) during the fourteen months he spent in administrative segregation with Sureños gang members.

3. Dismissal With Prejudice

The district court dismissed Mr. Vue's amended complaint with prejudice, concluding that amendment would be futile.

C. Rule 60(b) Motion

Mr. Vue argued in his Rule 60(b) motion that the district court failed to consider allegations in the amended complaint regarding discriminatory and disparate treatment in the prison based upon his non-white status. In particular, he contended the court did not credit the following allegations:

- Prison officials placed him in a "dangerous position" by making him "defend [the] erroneous [Sureños associate] label to validated members, rival gang members, [and] other racial groups." R., Vol. 2 at 8 (internal quotation marks omitted).
- Mr. Vue "was housed with another Hmong (Asian) person" before being moved to Unit K, which was reserved for the Sureños gang, while at the same time a Hispanic inmate was moved away from the Sureños unit. *Id.* at 9 (internal quotation marks omitted).
- An "officer called [a] Hispanic [inmate] a 'piece of shit' and attempted to physically drag the Hispanic [inmate], who was prone on the floor, into the cell by the restraints." *Id.* (internal quotation marks omitted).

Mr. Vue also argued the court failed to liberally construe the pro se amended complaint by ignoring the allegations he made in other filings.

The district court denied Mr. Vue's motion. First, the court concluded it had properly declined to consider allegations outside the amended complaint in determining whether the amended complaint should be dismissed for failure to state a

claim. Second, the court stated it had liberally construed the amended complaint when it determined that Mr. Vue failed to state any plausible claims.

In applying the plausibility standard, the district court said it had focused on Mr. Vue's factual allegations and had disregarded legal conclusions and bare assertions amounting to formulaic recitations of the elements of a constitutional discrimination claim. In doing so, the court held that Mr. Vue's amended complaint clearly identified only two claims—a denial of due process under the Fourteenth Amendment and deliberate indifference under the Eighth Amendment—both of which were premised on his classification as a Sureños associate and his resulting placement in administrative segregation. In contrast, the court concluded that Mr. Vue's "scattered references to the prison officials' allegedly 'discriminatory practices' . . . [were] not entitled to the assumption of truth because they merely referred to elements of a discrimination claim." R., Vol. 2 at 36 (internal quotation marks omitted).

II. Discussion

We review de novo the district court's dismissal of Mr. Vue's amended complaint for failure to state a claim under Rule 12(b)(6) and § 1915(e)(2)(B)(ii). *See Kay v. Bemis*, 500 F.3d 1214, 1217-18 (10th Cir. 2007). We consider whether the well-pleaded allegations in a complaint plausibly support a legal claim for relief above the speculative level. *See id.* at 1218. We review for an abuse of discretion the district court's denial of Mr. Vue's Rule 60(b) motion. *See Manning v. Astrue*,

510 F.3d 1246, 1249 (10th Cir. 2007). Because Mr. Vue is proceeding pro se, we liberally construe the amended complaint. *See Kay*, 500 F.3d at 1218.

A. Due Process

Under the Fourteenth Amendment, a state may not deprive a person of his life, liberty, or property without due process of law. *See DiMarco*, 473 F.3d at 1339. "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." *Id.* (internal quotation marks omitted). But "[i]n the penological context, not every deprivation of liberty at the hands of prison officials has constitutional dimension. This is so because incarcerated persons retain only a narrow range of protected liberty interests." *Rezaq v. Nalley*, 677 F.3d 1001, 1011 (10th Cir. 2012) (internal quotation marks omitted). Therefore, although "a protected liberty interest may arise from prison placement decisions and conditions of confinement," *DiMarco*, 473 F.3d at 1340, such a right is created only when prison conditions "impose atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," *id.* at 1339 (brackets and internal quotation marks omitted).

We have identified four non-dispositive factors relevant to determining when a prison condition imposes atypical and significant hardship: (1) the existence of a legitimate penological interest, (2) the extremity of the condition, (3) the possible effect on the duration of confinement, and (4) the indeterminate nature of the condition. *See id.* at 1342. In making this assessment, we "must be mindful of the

primary management role of prison officials who should be free from second-guessing or micro-management from the federal courts." *Id.* The district court held that each of the *DiMarco* factors weighed against finding a state-created liberty interest in Mr. Vue's classification as a Sureños associate and his placement in administrative segregation with Sureños gang members.

1. Lack of Process Under Prison Regulations

Much of Mr. Vue's argument focuses on defendants' failure to follow prison policies with respect to certain processes related to classification and housing. He asserts that, according to policy, he should have received a hearing and review, if not before his classification as a Sureños associate, then at least after he informed prison officials of his claim that he was not affiliated with that gang.

Prior to *Sandin v. Conner*, 515 U.S. 472, 480 (1995), courts looked for mandatory language in prison regulations to determine when the state had created a protected liberty interest. But the Supreme Court ultimately found this approach unworkable. *See id.* at 482-83. Thus, post-*Sandin*, the due process inquiry focuses on the nature of the conditions of confinement, rather than the prison's regulatory language, because "[t]he regulations themselves do not create an enforceable procedural right." *DiMarco*, 473 F.3d at 1341. Consequently, Mr. Vue's allegation that he was denied all process due under the prison's regulations is not in itself sufficient to state a plausible due-process claim.

2. *DiMarco* Factors

Mr. Vue also contends that the district court erred in applying the *DiMarco* factors.

a. Legitimate Penological Interest

In *DiMarco*, 473 F.3d at 1342, we cited "safety" as a legitimate penological interest. Although Mr. Vue concedes there is a penological interest in separating different gangs to prevent violence, he appears to argue that safety interest ceased to be legitimate once he asserted that his classification as a Sureños associate was erroneous. But the question is general rather than specific. The issue is not whether "segregated confinement is essential in every case. Instead, it is sufficient to show a reasonable relationship between isolation and the asserted penological interests." *Rezaq*, 677 F.3d at 1014. And in assessing this factor, we do not second-guess the prison officials' conclusion, as alleged in the amended complaint, that Mr. Vue was a Sureños associate because his name was included on a Sureños gang roster. *See DiMarco*, 473 F.3d at 1342 ("[A]ny assessment must be mindful of the primary management role of prison officials who should be free from second-guessing or micro-management from the federal courts."). We conclude there was a reasonable relationship between Mr. Vue's classification and resulting administrative segregation and the prison's asserted safety interest. Therefore, this factor weighs against finding a state-created liberty interest.

b. Extremity of Conditions

"Housing determinations and classification decisions . . . are commonplace judgments in the day-to-day management of prisons." *Franklin v. District of Columbia*, 163 F.3d 625, 634-35 (D.C. Cir. 1998) (internal quotation marks omitted). And we have recognized "that nondisciplinary administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration." *Rezaq*, 677 F.3d at 1012 (internal quotation marks omitted). Mr. Vue asserts that his administrative segregation was so extreme as to be punitive. In the amended complaint, he alleged he was confined to a shared cell for twenty-four hours a day and permitted to shower every three days, and that he was not allowed to work in the law library or participate in recreational activities off of his unit. These factual allegations do not demonstrate that the conditions of Mr. Vue's administrative segregation were extreme rather than "comparable to those routinely imposed in the administrative segregation setting," *id.* at 1015. We held in *DiMarco* that a prison "has no constitutional duty to equalize . . . amenities in every detail. Nor does a prisoner have a right to access every type of program available to other inmates, ranging from work to recreation." 473 F.3d at 1343. This factor weighs against finding a state-created liberty interest.

c. Effect on Duration of Incarceration

Mr. Vue does not contend that he alleged any facts in the amended complaint indicating that his classification or administrative segregation has the potential to

extend the length of his incarceration under his indefinite life sentence. This factor therefore weighs against finding a state-created liberty interest.

d. Indefinite Duration

Finally, Mr. Vue challenges the district court's conclusion that, because it ended after fourteen months, his placement in administrative segregation was not indefinite. On this point we agree with Mr. Vue. His administrative segregation was not imposed for a defined period. *See, e.g.*, *Sandin*, 515 U.S. at 475 (challenging sentence to 30 days' disciplinary segregation). But even when not imposed for a definite term, "[t]he availability of periodic reviews . . . suggests that the confinement was not indefinite." *Rezaq*, 677 F.3d at 1016; *see also DiMarco*, 473 F.3d at 1343 (holding administrative segregation was not indefinite because it was subject to "regular reevaluations throughout [the] confinement" every 90 days). Here, however, the amended complaint alleged that Mr. Vue's placement was reviewed, if at all, only at the point he was returned to the general population after fourteen months.

On the other hand, we do not assess indeterminacy in a vacuum; we consider it in tandem with duration. *See Rezaq*, 677 F.3d at 1016. Like Mr. Vue, the prisoner in *DiMarco* spent 14 months in administrative segregation. *See* 473 F.3d at 1343. And we have held that significantly longer periods of administrative segregation did not create a liberty interest. *See id.* at 1340-41 & n.5 (noting cases involving 1,000 or more days in such confinement).

But even if the durational indefiniteness of Mr. Vue's administrative segregation could be said to weigh in favor of finding a liberty interest, we "are not bound to give more or less weight to any given factor." *Rezaq*, 677 F.3d at 1012. The *DiMarco* factors do not "serve as a constitutional touchstone," nor do they "establish a rigid framework for determining whether a liberty interest exists." *Id.* at 1012 & n.5. Because the other factors—a legitimate penological interest, a lack of extreme conditions, and no effect on the length of Mr. Vue's incarceration—all weigh against finding a state-created liberty interest, we place the weight of our analysis on those factors. Just as extreme conditions in administrative segregation would not alone constitute an atypical and significant hardship, *see id.* at 1013, neither does the indefinite duration of Mr. Vue's administrative segregation under the circumstances alleged in this case.

We therefore conclude based on the totality of the circumstances that Mr. Vue did not have a state-created liberty interest in avoiding the challenged classification and confinement. Consequently, the district court did not err in dismissing Mr. Vue's due-process claim for failure to state a claim.

B. Cruel and Unusual Punishment

Mr. Vue alleged that defendants put his life in danger by classifying him as a Sureños associate when he had no affiliation with that prison gang. "Prison officials have a duty to protect prisoners from violence at the hands of other prisoners." *Verdecia v. Adams*, 327 F.3d 1171, 1175 (10th Cir. 2003) (ellipsis and internal quotation marks omitted). But to succeed on an Eighth-Amendment claim, a prisoner

must demonstrate both an objective element—"that he is incarcerated under conditions posing a substantial risk of serious harm"—and a subjective element—"that the prison official was deliberately indifferent to his safety." *Id.* (internal quotation marks omitted).

The district court dismissed Mr. Vue's Eighth-Amendment claim because he did not plausibly allege that defendants acted with a sufficiently culpable state of mind. Under the subjective prong, the prison official "must both be 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." *Id.* (internal quotation marks omitted). Thus, deliberate indifference is "equal to recklessness, in which a person disregards a risk of harm of which he is aware." *Id.* (internal quotation marks omitted).

Mr. Vue argues the following factual allegations in the amended complaint demonstrate that defendants were aware of but disregarded the substantial risk of serious harm to him:

- There was a previous state-wide lockdown of Oklahoma prisons due to gang violence and racial conflicts.
- Mr. Vue was assaulted by Sureños gang members after he denied being a member of that gang.
- An officer called a Sureños gang member a "piece of shit" while trying to move him into Mr. Vue's cell in Unit Q.
- Mr. Vue was placed in administrative segregation in Unit K with Sureños gang members after he repeatedly denied membership or

association with that gang and after he was assaulted by members of that gang.

- The handwritten gang roster is not a reliable basis on which to conclude Mr. Vue is associated with the Sureños gang because it shows only his housing assignment with Hispanic inmates.
- Mr. Vue's prison records should show that, in 1999, STI assessed him as, and he admitted to being, a member of an Asian gang.

These allegations, individually or in combination, are not sufficient to show that defendants acted with deliberate indifference by classifying Mr. Vue as a Sureños associate and housing him with Sureños members. He did not allege any facts indicating defendants were aware that the handwritten document relied upon for that classification was not a Sureños gang roster. Thus, the fact that defendants credited that roster over Mr. Vue's denials of affiliation with the Sureños does not show they were deliberately indifferent. And housing Mr. Vue with inmates in a gang with which he was affiliated based on the Sureños roster was not inconsistent with defendants' knowledge of the previous state-wide lockdown. Nor did Mr. Vue allege facts showing defendants were aware of his 1999 assessment as a member of an Asian gang. He claimed only that the 1999 information should have been apparent from his prison record. Moreover, according to the amended complaint, Mr. Vue was housed with Sureños gang members in administrative segregation for fourteen months without being physically harmed and without incident excepting the

one assault that prison guards thwarted. Mr. Vue fails to show that the district court erred in dismissing his Eighth-Amendment claim for failure to state a claim.

C. Rule 60(b) Motion

Rule 60(b)(1) permits a court to relieve a party from a judgment based on "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). "A 'mistake' may occur if the district court made a substantive mistake of law in its order." *Manning*, 510 F.3d at 1249.

Mr. Vue argued in his motion that the district court failed to liberally construe his amended complaint and ignored his factual allegations regarding disparate treatment based upon his non-white status. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." *Requena v. Roberts*, 893 F.3d 1195, 1210 (10th Cir. 2018) (internal quotation marks omitted). To state a claim for an equal-protection violation based upon his race, Mr. Vue was required to allege facts showing defendants treated him differently than prisoners of other races, and to "sufficiently allege that defendants were motived by racial animus." *Id.* (internal quotation marks omitted).

Mr. Vue contends the court erred in concluding that his scattered allegations regarding discriminatory practices were "not entitled to the assumption of truth" because they merely referred to the elements of a constitutional discrimination claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009). He fails to demonstrate an abuse of

discretion. First, Mr. Vue does not show the district court erred in relying on *Iqbal*. He notes the Supreme Court's statement in *Iqbal* that "Respondent's account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors." *Id.* at 666. But while *some* of the factual allegations in *Iqbal* may potentially have been well-pled against some unnamed defendants, the Court still found that *other* allegations in the complaint were too conclusory, *see id.* at 680-81. And it is the latter holding the district court applied in this case.

Second, Mr. Vue fails to identify any allegation in the amended complaint that the district court mischaracterized as conclusory—or that otherwise supported a claim of discriminatory conduct amounting to a race-based equal-protection violation. Mr. Vue cites his allegations that "Defendants' practices are in violation of state statute and departmental policy, thereby . . . subjecting Plaintiff to disparate and discriminatory treatment," Aplt. Opening Br. at 32, and that "prison officials give preferential treatment to inmates affiliated with 'white' gangs," *id.* at 35 (internal quotation mark omitted). But these allegations are "too vague and conclusory to state a claim." *Requena*, 893 F.3d at 1210. Mr. Vue also points to allegations that (1) he was locked in a room with no heat and no shirt in December 2018, and (2) guards laughed and joked about him being assaulted by Sureños members. But he fails to explain how these facts demonstrate disparate treatment of similarly situated prisoners based on Mr. Vue's race. *See id.*

D. Dismissal With Prejudice

Lastly, Mr. Vue challenges the district court's dismissal of the amended complaint with prejudice because amendment would be futile. But he does not develop this argument by setting forth well-pleaded factual allegations that would state a claim for relief. Nor did he "take advantage of available opportunities to amend." *Requena*, 893 F.3d at 1208 (internal quotation marks omitted).

> If a party seeks to amend a pleading following the court's grant of a motion to dismiss, the party must first move to reopen the case under Fed. R. Civ. P. 59(e) or 60(b) and then file a motion under Fed. R. Civ. P. 15 for leave to amend which gives adequate notice of the basis for the proposed amendment.

Id. (ellipsis and internal quotation marks omitted). Mr. Vue filed a Rule 60(b) motion but he did not seek leave to amend the amended complaint, in that motion or otherwise. Even on appeal, Mr. Vue does not argue he should have been permitted the opportunity to amend. He instead contends he should be allowed to offer evidence supporting the allegations in the amended complaint that the district court held were insufficient to state a claim. *See* Aplt. Opening Br. at 34, 38. Mr. Vue fails to show the district court erred in dismissing the amended complaint with prejudice because amendment would be futile.

III. Conclusion

We affirm the district court's judgment.

Entered for the Court

Per Curiam