FILED
United States Court of Appeals
Tenth Circuit

May 3, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOSEPH JOHN SHIPPS,

Plaintiff - Appellant,

v.

DAVID GROVES; ADVANCE CORRECTIONAL HEALTHCARE; MICHELLE TIPPIE; (FNU) HUFFMAN; GINA (LNU),

Defendants - Appellees.

No. 22-3200
(D.C. No. 5:21-CV-03223-SAC)
(D. Kan.)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **BALDOCK**, and **ROSSMAN**, Circuit Judges.

Joseph J. Shipps, proceeding pro se and *in forma pauperis*, appeals the district court's dismissal of his 42 U.S.C. § 1983 claim. We agree with the

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

district court that Shipps failed to state claims upon which relief could be granted. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.[1]

BACKGROUND

In August 2021, Shipps contracted COVID-19 while in pretrial detention at the Cherokee County Jail (CCJ) in Columbus, Kansas. On August 5, Shipps told CCJ medical staff that he was suffering from headaches, body aches, a loss of appetite, chest pain, and that he had a temperature of 99.3 degrees. Five days later, Shipps tested positive for COVID-19. After this diagnosis, CCJ staff segregated Shipps from the general population: at first in "booking solitary confinement" and then in a dedicated quarantine pod in the jail. Shipps returned to the medical unit two days later and asked a nurse for an x-ray and for breathing and lung treatments.[2] His requests were denied, though he ultimately received an x-ray in early September.

Shipps sued the Cherokee County Sheriff, a CCJ captain, CCJ's medical provider, and two CCJ nurses, alleging that he received constitutionally inadequate medical care for his COVID-19 infection. He also alleged

[1] While this case was on appeal, Shipps filed a "Motion for The Defendant To Justify To The Court Why They Are Continuing To Violate My Constitutional Rights And Retaliating On The Plaintiff In The Custody of They're Jail." Because this motion injects new facts and raises issues not before the district court, we decline to consider it for the first time on appeal. *United States v. Lyons*, 510 F.3d 1225, 1238 (10th Cir. 2007). We deny this motion.

[2] Shipps asserts that he has chronic obstructive pulmonary disease, a lung disease.

unconstitutional conditions of confinement based on CCJ's failure to enforce COVID-19 protective procedures. The district court concluded that Shipps's amended complaint failed to state a § 1983 claim but allowed him to file a second amended complaint. *Shipps v. Groves*, No. 21-3223-SAC, 2021 WL 6049836, at *6 (D. Kan. Dec. 21, 2021). But when Shipps's second amended complaint also failed to state a § 1983 claim, the district court dismissed the action under 28 U.S.C. § 1915(e)(2)(B). *Shipps v. Groves*, No. 21-3223-SAC, 2022 WL 4365704, at *2 (D. Kan. Sept. 21, 2022). Shipps timely appealed.

STANDARD OF REVIEW

We limit our review to Shipps's second amended complaint. *Davis v. TXO Prod. Corp.*, 929 F.2d 1515, 1517 (10th Cir. 1991) ("[I]t is well established that an amended complaint ordinarily supersedes the original and renders it of no legal effect." (citations omitted)). We review de novo dismissals for failure to state a claim under § 1915(e)(2)(B), applying the familiar Federal Rule of Civil Procedure 12(b)(6) standard. *Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007).

To survive Rule 12(b)(6), a plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151, 1158 (10th Cir. 2021) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A claim is facially plausible when the complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged." *Chilcoat v. San Juan County*, 41 F.4th 1196, 1207 (10th Cir. 2022) (ultimately quoting *Iqbal*, 556 U.S. at 678). We must also "construe th[e] allegations, and any reasonable inferences that might be drawn from them, in the light most favorable to the plaintiff." *Kay*, 500 F.3d at 1217 (quoting *Gaines v. Stenseng*, 292 F.3d 1222, 1224 (10th Cir. 2002)). And because Shipps is pro se, we liberally construe his pleadings, though he must still follow the procedural rules that govern all litigants. *Id.* at 1218 (citations omitted).

DISCUSSION

A prison official's "deliberate indifference" to a prisoner's "serious medical needs" violates the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the States by the Fourteenth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 101, 104 (1976) (citations omitted). A deliberate-indifference claim has an objective and a subjective component. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

For the objective component, the prisoner must show that the medical need is "sufficiently serious." *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999) (citing *Farmer*, 511 U.S. at 834). A medical need is sufficiently serious if the condition "has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Id.* (citation omitted). If the claim alleges inadequate or delayed medical care, the prisoner must show that the delay in

treatment resulted in "substantial harm." *Sealock v. Colorado*, 218 F.3d 1205, 1210 (10th Cir. 2000) (citation omitted). The substantial-harm requirement "may be satisfied by lifelong handicap, permanent loss, or considerable pain." *Garrett v. Stratman*, 254 F.3d 946, 950 (10th Cir. 2001) (citation omitted).

For the subjective component, the prisoner must show that the prison official acted with a "sufficiently culpable state of mind." *Farmer*, 511 U.S. at 834 (citations omitted). A prison official acts with deliberate indifference only if he knows that the inmate is facing "a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id.* at 847. Accordingly, not every claim of inadequate prison medical treatment violates the Eighth Amendment. *Estelle* recognized that a prison official is not liable under the Eighth Amendment if his mental culpability falls short of deliberate indifference. 429 U.S. at 105–06. For example, "an inadvertent failure to provide adequate medical care" or "[a]n accident [that] may produce added anguish" does not state a cognizable claim for relief under the Eighth Amendment. *Id.*

We see five key allegations in Shipps's complaint and now discuss whether those allegations stated a claim under Rule 12(b)(6).

First, Shipps contended that the defendants failed to provide adequate medical care for his COVID-19 infection. The crux of this claim seems to be that he was initially denied an x-ray and was not given breathing and lung

treatments. But *Estelle* clarifies that a prisoner's disagreement with a prescribed course of treatment cannot support a constitutional claim:

> Respondent contends that more should have been done by way of diagnosis and treatment, and suggests a number of options that were not pursued. . . . But the question whether an X-ray or additional diagnostic techniques or forms of treatment is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice, and as such the proper forum is the state court . . . .

Id. at 107.

Second, if Shipps is challenging the delay in medical treatment that he received for his COVID-19 infection, this also fails to state a claim. Liberally construing his complaint, Shipps does allege that he suffered *some* harm because of the delay in treatment. *See Wilson v. Williams*, 961 F.3d 829, 840 (6th Cir. 2020) (noting the serious health risks posed by COVID-19). But his complaint fails to plausibly allege that any defendant was deliberately indifferent to his pressing need for medical care. In passing, Shipps ascribes ill motives to the two nurses who treated him, but he does not bolster those allegations with supporting facts. At most, the five-day delay between Shipps's illness report and his being tested for COVID-19 was "an inadvertent failure to provide adequate medical care," not deliberate indifference. *See Estelle*, 429 U.S. at 105–06.

Third, Shipps argued that the defendants were deliberately indifferent to his health and safety by "refus[ing] to take any precautions to prevent the

spread [of COVID-19] at CCJ." This argument also fails to state a claim. As noted, a plaintiff's claim must be facially plausible to survive a motion to dismiss. *Iqbal*, 556 U.S. at 678 (citation omitted). Plausibility "refer[s] to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (citation omitted). Without plausible allegations about what the defendants knew or should have known, we cannot infer that any prison official possessed the necessary mental culpability to support a deliberate-indifference claim. *Cf. Cox v. Glanz*, 800 F.3d 1231, 1253 (10th Cir. 2015).

Fourth, Shipps asserted that Sheriff Groves and Captain Tippie "refuse[d] to have [q]uarantine pods" for inmates. Yet Shipps does not contend that inmates who had tested positive for COVID-19 were denied the ability to quarantine. His own experience is instructive. When Shipps contracted COVID-19, he was segregated from the general population in "booking solitary confinement" and was then moved to a quarantine pod when one became available. Thus, even if there were not enough quarantine pods at CCJ, reasonable alternatives were available—and used—for isolating COVID-19-positive inmates. Prison officials are not liable under the Eighth Amendment when they respond reasonably to a known risk to inmate health or safety. *Farmer*, 511 U.S. at 844.

Finally, Shipps alleged that the defendants charged inmates a fee for COVID-19 tests to suppress testing, particularly for inmates transferring from the Sedgwick County Jail. But "[i]t is clearly constitutionally acceptable to charge inmates a small fee for health care" so long as "indigent inmates are guaranteed service regardless of ability to pay." *McCall v. Johnson Cnty. Sheriff's Dep't*, 71 F. App'x 30, 31 (10th Cir. 2003) (unpublished) (citing *Reynolds v. Wagner*, 128 F.3d 166, 173–74 (3d Cir. 1997) (Alito, J.)). And as the district court noted, under Kansas law, counties bear the costs of inmate medical care "when a determination has been made that the prisoner has no other resources." Kan. Stat. Ann. § 19-1910(b)(2). In any event, there is no suggestion that CCJ inmates were receiving inadequate medical care based on an inability to pay for COVID-19 tests. This is reinforced by the fact that Shipps received a free COVID-19 test.

CONCLUSION

Because Shipps failed to state a claim upon which relief could be granted, the district court did not err in dismissing his complaint. We grant Shipps's motion to proceed without prepayment of costs or fees but affirm the district court's judgment.

Entered for the Court

Gregory A. Phillips
Circuit Judge