FILED
United States Court of Appeals
Tenth Circuit

May 12, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ARNOLD A. CARY,

Plaintiff - Appellant,

v.

DEAN WILLIAMS, in his official capacity as the Executive Director of CDOC; RANDOLPH MAUL, in his official capacity as the Chief Medical Official of CDOC; MICHELLE BRODEUR, in her official capacity as the Director of Clinical Correctional Services of CDOC,

Defendants - Appellees.

No. 22-1404
(D.C. No. 1:22-CV-01500-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **McHUGH**, and **CARSON**, Circuit Judges.

Pro se prisoner Arnold Cary appeals the district court's dismissal of his § 1983 suit.[1] Because Mr. Cary sued the defendants in their official capacities and failed to

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

[1] Mr. Cary filed a motion for pro bono attorney representation and a motion to amend his complaint. We now deny both motions.

allege specific facts that demonstrate how a Colorado Department of Corrections policy or practice subjected him to cruel and unusual punishment under the Eighth Amendment, we affirm.

I. Background

Mr. Cary sued the defendants, who are various officials and directors at the Colorado Department of Corrections, in their official capacities. He alleged that he suffered from multiple chronic medical conditions, and that the defendants were deliberately indifferent in providing him with medical care in violation of the Eighth Amendment.

After the defendants removed this action from state court to federal, the district court ordered Mr. Cary to file an amended complaint to clarify his claim and add factual allegations about the Department policies or practices he was challenging and how they violated the Eighth Amendment. Mr. Cary filed an amended complaint, and the magistrate judge screened it pursuant to 28 U.S.C. § 1915A(a), recommending that the complaint be dismissed as legally frivolous. The magistrate judge explained that Mr. Cary "fail[ed] to identify any specific Department policy or practice that subjected him to constitutionally deficient medical care." R. at 129. The district court adopted this recommendation and dismissed the case. Mr. Cary later objected to the dismissal. The district court construed this objection as a motion for reconsideration and denied the motion. Mr. Cary appealed.

II. Discussion

The district court correctly dismissed Mr. Cary's complaint because he failed to allege facts demonstrating a Department policy or practice was the moving force behind the alleged constitutional violation.

While the district court dismissed the case on frivolousness grounds, "we may affirm on any basis supported by the record." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011). A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

> Although dismissals under Rule 12(b)(6) typically follow a motion to dismiss, giving plaintiff notice and opportunity to amend his complaint, a court may dismiss sua sponte "when it is 'patently obvious' that the plaintiff could not prevail on the facts alleged, and allowing him an opportunity to amend his complaint would be futile."

Hall v. Bellmon, 935 F.2d 1106, 1109–10 (10th Cir. 1991) (quoting *McKinney v. Oklahoma*, 925 F.2d 363, 365 (10th Cir. 1991)). "A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Id.* at 1110.

Here, that means Mr. Cary must allege facts demonstrating that a Department policy or practice violated his Eighth Amendment rights. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is . . . to be treated as a suit against the entity."); *Dodds v. Richardson*, 614 F.3d 1185, 1201 (10th Cir. 2010) (explaining that a plaintiff "seeking to impose liability on a municipality under § 1983 [must]

identify [a] municipal 'policy' or 'custom' that caused the plaintiff's injury")

(internal quotation marks omitted).

Mr. Cary included one conclusory allegation:

> By the policies and practices set forth herein, defendants subject plaintiff to a substantial risk of serious harm and untimely death from inadequate medical care. Defendants have been and are aware of all deprivations complained of herein, have adopted policies and practices that institutionalize those deprivations, and have been and are deliberately indifferent to the deprivations. Defendants' acts and omissions in failing to provide adequate medical needs of prisons [sic] illnesses, in violation of plaintiffs' rights under the Eighth Amendment.

R. at 109–110. This is insufficient. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

Mr. Cary makes four arguments for why we should reverse the district court: (1) the magistrate judge ruled that the action was frivolous without any review; (2) the district court did not independently review the record or conduct an evidentiary proceeding; (3) the district court never questioned Mr. Cary's response to the court; and (4) the district court's adoption of the magistrate judge's report and recommendation violated the Magistrate Act, Article III, and the Due Process Clause. We are unpersuaded.

First, the magistrate judge *did* review Mr. Cary's complaint and wrote a multi-page report and recommendation. Second, the district court was not required to review outside documents or hold an evidentiary hearing because this issue arose out

of the sufficiency of the complaint, and the parties had not reached discovery yet. Third, the district court reviewed the report and recommendation de novo and addressed Mr. Cary's objection, which it deemed a motion to reconsider. Finally, the district court appropriately reviewed the magistrate judge's report and recommendation de novo.

Thus, we affirm the district court.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge