

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**

**June 6, 2023**

**FOR THE TENTH CIRCUIT**

**Christopher M. Wolpert**  
**Clerk of Court**

PETTIX MCMILLAN,

Plaintiff - Appellant,

v.

BYRON ALEXANDER; KIM TILSON;  
JUSTIN KENNETT; MADISON  
POTTER; SCOTT KINCAID; ROB  
ARNOLD,

Defendants - Appellees.

No. 23-3059  
(D.C. No. 5:22-CV-03278-JWL)  
(D. Kan.)

**ORDER AND JUDGMENT\***

Before **MATHESON, BRISCOE, and EID**, Circuit Judges.

Plaintiff Pettix McMillan, a Kansas state prisoner appearing pro se, appeals the district court’s dismissal of his second amended complaint brought under 42 U.S.C. § 1983. Exercising jurisdiction under 28 U.S.C. § 1291, we AFFIRM the district court’s dismissal without prejudice for McMillan’s failure to state a claim.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

**I. BACKGROUND**

**A. Factual Background<sup>1</sup>**

McMillan is a state inmate at Lansing Correctional Facility in Lansing, Kansas. According to McMillan, he was injured while using outdoor weight-lifting equipment in the prison yard. Specifically, he alleges that a cable on an exercise machine snapped as he was using it to lift 250 pounds, which caused a weight to strike him in the head. This resulted in him passing out and receiving five stitches for a laceration on his head. McMillan writes that he almost fell off the gurney as he was transferred to the medical unit because the nurses failed to secure the straps around him. He alleges that Nurse Bera Karry and Doctor Bryan Wilson failed to numb the area around the laceration before suturing the wound. McMillan notes that the pain “was unbearable.” ROA at 207. According to McMillan, Nurse Karry immediately ordered McMillan back to his cell without further observation despite his blood pressure being high. Following the injury, McMillan states that he has suffered blackouts, loss of cognitive skills and memory, migraines, neck pain, and sensitivity to light. In addition, he writes that he experienced a second head injury when he passed out due to an “extreme reaction” to medication provided to him by prison staff. *Id.* at 204. McMillan later returned to his work detail,

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<sup>1</sup> The operative facts of this case are taken from McMillan’s second amended complaint. Although McMillan asks that we “read the 1st [and] 2nd complaints to show he did state a claim,” Aplt. Br. at 2, an “amended complaint, as the operative complaint, supersedes the original complaint’s allegations.” *May v. Segovia*, 929 F.3d 1223, 1229 (10th Cir. 2019) (emphasis removed). Thus, we focus our analysis on McMillan’s second amended complaint, just as the district court did in its dismissal order.

allegedly because Rob Arnold, a Classification Administrator/Job Coordinator, “forced [him] to return to work or face disciplinary action.” *Id.* He passed out on the job.

McMillan faults a number of other prison officials for his injuries. First, he writes that Byron Alexander, an Activities Specialist II, failed in his responsibilities of “creating and maintaining a [maintenance] schedule for all . . . weight/gym equipment” and that he “failed . . . to ensure all gym equipment was usable and safe.” *Id.* at 203, 207. Second, he writes that Justin Kennett, the corrections officer who was on guard in the prison yard at the time of the injury, failed to “maintain close supervision [on] all inmates in the yard for their safety and protection.” *Id.* at 204. Third, McMillan charges Nurse Kim Tilson, the Medical Health Care Coordinator, with “fail[ing] to act diligent[ly] to treat [his] physical injury, and to be mindful of [his] future suffering.” *Id.* at 207.

In addition, McMillan complains about the administrative process within the prison. After his injury, McMillan filed an administrative complaint using the prison’s applicable forms. He writes that Unit Team Manager Sonia Latzke forbade another official from “doing her ethical duty of telling the truth” about how McMillan was injured. *Id.* at 208. He alleges that another team unit manager, Madison Potter, “was naive and ignorant of the grievance process because she failed to investigate [McMillan’s] severe injury, and denied [his] complaint by using a procedural screen.” *Id.* at 206. According to McMillan, Scott Kincaid, a grievance officer, improperly reviewed McMillan’s medical records without having received permission from the warden to do so.

## **B. Procedural History**

McMillan filed suit under § 1983 in the United States District Court for the District of Kansas. The district court screened McMillan's first complaint pursuant to 28 U.S.C. § 1915(e)(2) and determined that he had failed to state a claim for relief. The district court allowed McMillan to file an amended complaint and instructed him to include details as to how each defendant had "direct personal participation in the acts or inactions upon which the complaint is based." *Id.* at 54. The district court provided guidance on the pleading requirements for certain constitutional violations, including those under the Eighth Amendment.

McMillan filed an amended complaint. The district court again dismissed this complaint but allowed McMillan to file a second amended complaint. The district court relied on the same reasons as it did in dismissing the first complaint: "it remain[ed] unclear which factual allegations are related to which claim or claims for relief." *Id.* at 191.

McMillan filed a second amended complaint, which animates the present appeal. Therein, McMillan raises two counts, first that Defendants violated his due process rights and Kansas law by mishandling his official grievances, and second that Defendants violated the Eighth Amendment by neglecting the maintenance of the outdoor exercise equipment, requiring him to return to work, providing inadequate treatment, and inaccurately recording his medical history. The district court dismissed the second amended complaint without prejudice for failure to state a claim. The district court noted

that the second amended complaint contained the same deficiencies that caused his previous complaints to fail screening.

Following the entry of judgment, McMillan moved the district court to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). The district court denied the motion. McMillan timely appealed both the dismissal of his second amended complaint and the denial of his post-judgment motion.

## **II. STANDARD OF REVIEW**

We review de novo the district court's dismissal of an action under 28 U.S.C. § 1915(e)(2) for failure to state a claim, applying the same standards we employ to review dismissals under Federal Rule of Civil Procedure 12(b)(6). *See Young v. Davis*, 554 F.3d 1254, 1256 (10th Cir. 2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In conducting our review, we accept all well pleaded facts as true, view them in the light most favorable to the plaintiff, and draw all reasonable inferences in his favor. *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281 (10th Cir. 2021). Because McMillan appears pro se, we construe his filings liberally, but we do not serve as his advocate. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

### III. DISCUSSION

#### A. Dismissal of McMillan's Complaint

In his brief, McMillan appeals only the district court's dismissal of his claim concerning "the deprivation of prescribe[d] treatment known to be vital to the arrest and retardation of a life threatening, serious illness." Aplt. Br. at 3. The only sentence that suggests otherwise is his conclusory statement that "[a]ll grounds for relief are sound." *Id.* at 4. McMillan offers no specific arguments regarding the facts of his case or the reasoning of the district court, and we conclude that the district court did not err in dismissing his second amended complaint without prejudice.

The Eighth Amendment requires prison officials to "provide humane conditions of confinement" by "ensur[ing] that inmates receive adequate food, clothing, shelter, and medical care" and "tak[ing] reasonable measures to guarantee the safety of the inmates." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citation omitted). The government's failure to provide medical care violates the Eighth Amendment only when it demonstrates "deliberate indifference to an inmate's serious medical needs." *Est. of Beauford v. Mesa Cnty., Colo.*, 35 F.4th 1248, 1262 (10th Cir. 2022) (citation omitted). A claim of deliberate indifference contains "both an objective and a subjective component." *Id.* "[T]he focus of the objective component is the seriousness of the plaintiff's alleged harm, while the focus of the subjective component is the mental state of the defendant with respect to the risk of that harm." *Id.* (alteration in original) (citation omitted).

Based on the facts presented in his second amended complaint, McMillan has failed to satisfy the subjective requirement of a claim under the Eighth Amendment. Regarding Defendants' alleged "deprivation of prescribe[d] treatment," Aplt. Br. at 3, McMillan's allegations rise only to the level of negligence. He makes no suggestion that any defendant acted toward him with deliberate indifference. He does not state that any of the defendants were "*both . . . aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and . . . also dr[e]w the inference.*" *Est. of Beauford*, 35 F.4th at 1264 (emphasis in original) (quoting *Farmer*, 511 U.S. at 837). Perhaps Defendants should have done more to treat McMillan for his injuries, but that is not the correct inquiry under the Eighth Amendment. Accordingly, McMillan has failed to state a claim for relief.

#### **B. Denial of McMillan's Motion to Alter or Amend the Judgment**

After the district court dismissed his second amended complaint, McMillan moved for post-judgment relief pursuant to Rule 59(e). A district court may grant a Rule 59(e) motion to amend the judgment only where the moving party can establish that "the court has misapprehended the facts, a party's position, or the controlling law." *Nelson v. City of Albuquerque*, 921 F.3d 925, 929 (10th Cir. 2019) (quoting *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)). We review a district court's ruling on a Rule 59(e) motion for an abuse of discretion. *Id.*

In his Rule 59(e) motion and on appeal, McMillan makes no viable argument that the district court made an error in understanding the allegations in the second amended

complaint or the controlling law. Further, on our own de novo review, we conclude that McMillan failed to allege a plausible claim for relief. Thus, we conclude that the district court did not abuse its discretion in denying McMillan's Rule 59(e) motion.

**IV. CONCLUSION**

For the foregoing reasons, we **AFFIRM** the district court's dismissal of McMillan's second amended complaint without prejudice. Finally, we **DENY** McMillan's motion to appeal *in forma pauperis*.

Entered for the Court

Mary Beck Briscoe  
Circuit Judge