FILED
United States Court of Appeals
Tenth Circuit

May 21, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BONIFACE W. WABUYABO,

Plaintiff - Appellant,

v.

CORRECT CARE SOLUTIONS,

Defendant - Appellee.

No. 18-3017
(D.C. No. 5:17-CV-03173-SAC)
(D. Kan.)

ORDER AND JUDGMENT*

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

Boniface Wabuyabo, a Kansas state inmate appearing pro se,[1] appeals the district court's dismissal of his 42 U.S.C. § 1983 amended complaint concerning his medical treatment by Correct Care Solutions ("CCS"). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

Mr. Wabuyabo, an inmate at Johnson County Adult Detention Center ("JCADC"), filed a pro se complaint against CCS, the health care provider at JCADC. In his

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* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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] Because Mr. Wabuyabo proceeds pro se, we construe his filings liberally, *see Garza v. Davis*, 596 F.3d 1198, 1201 n.2 (10th Cir. 2010), but we do not craft arguments or otherwise advocate for him, *see Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

complaint, he described a "different case" against Rose Aliuba and the Kansas Department of Children and Families ("DCF"). ROA at 8. The district court instructed Mr. Wabuyabo to file a new complaint because he improperly joined unrelated claims against different defendants.

Mr. Wabuyabo filed an amended complaint. He alleged that, after falling from his top bunk at JCADC, he received an x-ray and a CT scan but no treatment to relieve his pain. He further alleged CCS concealed his health information and "abused and neglected [his] rights to seek medical help." *Id.* at 19. Mr. Wabuyabo claimed his "life is still endangered and still under painful conditions." *Id.* He also attached a letter repeating his allegations against Ms. Aliuba and the DCF.

The district court screened the complaint under 28 U.S.C. § 1915A to determine whether it was "frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted." *Id.* at 26. It assumed Mr. Wabuyabo was attempting to allege a violation of his Eighth Amendment right against cruel and unusual punishment, and appeared to assume that CCS was a contractor acting under color of state law. The court said Mr. Wabuyabo needed to allege facts to show the "existence of a . . . policy or custom" and "that there is a direct causal link between the policy or custom and the injury alleged." *Id.* at 29 (quoting *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993)).

The district court found Mr. Wabuyabo had failed "to allege facts plausibly identifying an official custom or policy that violated his constitutional rights against cruel and unusual punishment," and directed him to "show cause why his amended complaint

should not be summarily dismissed as stating no claim for relief against defendant CCS." *Id.* at 30. The court did not consider the attached letter as part of the amended complaint.

In response, Mr. Wabuyabo said CCS had committed cruel and unusual punishment "because they identified the problem and vowed not to handle it." *Id.* at 37. He also alleged CCS had "abused [and] neglected" him and "contributed to a worsening health condition." *Id.* at 46. He said he feared retaliation from the CCS staff. *Id.* at 47.

The district court said Mr. Wabuyabo still had not alleged a policy or custom or "describe[d] an intentional or reckless indifference to [Mr. Wabuyabo's] condition." *Id.* at 53-54. Instead, he described "a disagreement over the course of treatment prescribed and how such treatment is delivered," which was "insufficient to state an Eighth Amendment claim." *Id.* at 53. The court concluded the "amended complaint should be dismissed without prejudice for failure to state a claim." *Id.* at 54. It granted leave to appeal *in forma pauperis* ("*ifp*"). Mr. Wabuyabo timely appealed.

II. DISCUSSION

Under 28 U.S.C. § 1915A, "[t]he court shall review . . . a complaint in a civil action in which a prisoner seeks redress from a government entity," and dismiss the complaint before service on the defendant if it "is frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915A. We review a dismissal for failure to state a claim de novo. *Young v. Davis*, 554 F.3d 1254, 1256 (10th Cir. 2009).

To determine whether a complaint has failed to state a claim, "[w]e review the complaint for plausibility; that is, to determine whether the complaint includes

enough facts to state a claim to relief that is plausible on its face." *Id.* (quotations omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

Under § 1983, the plaintiff must show (1) the deprivation of a federally protected right by (2) an actor acting under color of state law. *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1155 (10th Cir. 2016). We will assume that CCS was acting under color of state law when it provided medical services to Mr. Wabuyabo. *See Craft v. Middleton*, 524 F. App'x 395, 397 n.3 (10th Cir. 2013) (unpublished) (assuming for sake of analysis that defendants were state actors). As the district court noted, to state a claim against CCS, Mr. Wabuyabo must identify an official policy or custom that led to the alleged constitutional violation. *See Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1216 (10th Cir. 2003) (extending the rule in *Monell v. New York City Department of Social Services.*, 436 U.S. 658 (1978), to private entities acting under color of state law).

Mr. Wabuyabo has not alleged facts that suggest CCS has an official policy or custom that could have caused the alleged constitutional violation. *See Dubbs*, 336 F.3d at 1216. We therefore affirm for substantially the same reasons provided by the district court.

III. CONCLUSION

We affirm the district court's dismissal of the action for failure to state a claim. We also deny as moot Mr. Wabuyabo's motion of May 7, 2018, requesting "an injunction or declaratory order for Plaintiff's treatment." Doc. 10556917 at 1.

The district court's dismissal under 28 U.S.C. § 1915A(b)(1) constituted a first "strike" under 28 U.S.C. § 1915(g). *Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1175 (10th Cir. 2011). Because this appeal also is frivolous, we impose a second "strike" under § 1915(g). *See Davis v. Kan. Dep't of Corr.*, 507 F.3d 1246, 1249 (10th Cir. 2007).

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

BONIFACE W. WABUYABO,

Plaintiff,

vs. Case No. 17-3173-SAC

CCS CORRECT CARE SOLUTIONS,

Defendants.

O R D E R

Plaintiff is an inmate at the Johnson County Adult Detention Center (JCADC). On October 2, 2017, plaintiff filed a complaint pursuant to 42 U.S.C. § 1983 and a motion for leave to proceed in forma pauperis. Doc. Nos. 1 and 2. On October 17, 2017, the court granted plaintiff time until November 17, 2017 to submit an initial partial filing fee of $18.00. Doc. No. 5. Plaintiff was warned that if he did not pay the partial fee or make an objection, leave to proceed in forma pauperis may be denied. Id.

On October 20, 2017, the court issued an order screening the original complaint. Doc. No. 6. The court determined that the original complaint improperly joined different claims against different defendants. The court directed plaintiff to file an amended complaint which corrected this problem.

Plaintiff filed an amended complaint pursuant to § 1983 on November 1, 2017. Doc. No. 7. The amended complaint alleged that he received improper medical care for a broken bone in his upper chest region. CCS Correct Care Solutions (CCS) was the only defendant named in the amended complaint. The court issued a screening order for the amended complaint on November 20, 2017. Doc. No. 8. The court held that the amended complaint failed to allege facts plausibly identifying an official custom or policy of CCS that violated his constitutional rights against cruel and unusual punishment. The court stated that, without such a policy or custom, CCS may not be held liable under § 1983. The amended complaint also asserted the denial or concealment of health information. The court held that this allegation did not describe a violation of the Constitution or of a federal statute for which plaintiff could recover under § 1983. The court gave plaintiff time until December 7, 2017 to show cause why his amended complaint should not be dismissed as failing to state a claim for relief against CCS.

Plaintiff has filed two responses which appear directed to the court's show cause order. In one of the responses (Doc. No. 10 at pp. 1-2), plaintiff states in part as follows:

> I believe Case 17-3173-SAC alleges cruel and unusual punishment by CCS because they identified the problem and vowed not to handle it. It is not my culture to be a nagging person over small things but I cannot stay watching a situation where I'm getting towards

> inability to breathe. . . . I don't think it is right to watch an inflamed breathing channel and an obviously broken part of my chest (upper zone). . . . I therefore would request for relief over Case 17-3173-SAC on the basis of their neglect and abusive atmosphere, deceit, racism, cruelty, workplace bullies, service with arrogance, misdirecting a patient, cover-up and concealing, carelessness and many more pieces of prejudice are the basis of Case 17-3173 SAC.

In the other response (Doc. No. 12 at pp. 1-2), plaintiff states in part as follows:

> The health provider willingly denied to take further steps toward my treatment. I have since then lived in pain and suffering because I have no other choice while in jail. It has continually endangered my life because I'm in constant pain[] and also experiencing blackouts & shortness of breath leading to psychological & physical torture and trauma. The health provider has abused, neglected and contributed to a worsening health condition. I therefore seek relief from all these.
>
> The doctor has already made the diagnosis but has confessed not to do nothing about it. The information of my health has been concealed and he said I will only have the information upon release. He has misdirected me to do exercises, a step that has made the situation much worse. He has noted the spot that is broken and that originates the pain. He has also spotted the inflamed area under the throat through x-rays. I believe the health provider has subjected me to a life threatening condition and I fear for my life. . . .
>
> New signs are coming up each day and I don't know who I can address or what I can do. I wrote to you about the bitterness and the hate that I can read from the staff belonging to Correct Care Solutions. The same day I wrote to you about my fear of retaliation from them, it was the same day I was blocked not to do anything over the kiosk unless I accept that compulsory condition that I will have to pay for every medical step taken. The same day all my prescriptions were stopped until I pay for them. A tendency of blocking kiosk service because of a condition from a

> health provider was a barbaric action. There were options to accept or decline but only one option to accept their money-oriented option could allow me to use the kiosk services that we use for many other reasons.
>
> I therefore do not take any medication, nor request for medical help because I can't afford paying for everything from the health provider. The medication as well was addictive but not helping nor offering any solutions.

In Doc. No. 10, plaintiff also seeks instructions from the court on what to do to meet "the desired standards."

This case is now before the court for the purpose of evaluating plaintiff's response to the court's November 20 show cause order. The court is guided by the standards for screening pro se pleadings that the court set forth in Doc. No. 8 at pp. 2-3.

In the court's show cause order, the court set forth the general standards for asserting an Eighth Amendment claim of cruel and unusual punishment. As part of this discussion, the court noted that:

> proof of inadvertence or negligence is not sufficient to establish a valid claim. Id. at 105-06. Even a negligent failure to provide adequate care does not give rise to a constitutional violation. Self v. Crum, 439 F.3d 1227, 1233 (2006). Further, the Eighth Amendment's prohibition on cruel and unusual punishment is not violated when a doctor simply resolves "the question whether additional diagnostic techniques or forms of treatment is indicated." Estelle v. Gamble, 429 U.S. 97, 107 (1976). A plaintiff must show the defendant knew plaintiff "faced a substantial risk of harm and disregarded that risk 'by failing to take reasonable measures to abate it.'" Hunt v. Uphoff, 199 F.3d 1220, 1224 (10th Cir.

> 1999)(quoting Farmer v. Brennan, 511 U.S. 825, 847 (1994)). A disagreement between an inmate and medical personnel over the course of treatment does not give rise to a deliberate indifference claim. Gee v. Pacheco, 627 F.3d 1178, 1192 (10th Cir. 2010).

Doc. No. 8, pp. 4-5. Plaintiff's allegations indicate that medical providers have performed x-rays, diagnosed plaintiff's medical issues, and prescribed medication. Plaintiff is not alleging facts which describe an intentional or reckless indifference to plaintiff's condition. Rather, plaintiff's allegations describe a disagreement over the course of treatment prescribed and how such treatment is delivered. This is insufficient to state an Eighth Amendment claim.

The court's screening order also explained that in order to state a § 1983 claim against a corporate defendant such as CCS:

> a plaintiff must allege facts showing: "(1) the existence of a ... policy or custom, and (2) that there is a direct causal link between the policy or custom and the injury alleged." Hinton v. City of Elwood, Kan., 997 F.2d 774, 782 (10th Cir. 1993); see also Smedley v. Corrections Corp. of America, 175 Fed. App'x 943, 946 (10th Cir. 2005)(applying § 1983 standards for municipal liability to a private prison corporation); Cox v. Ann, 2015 WL 859064 *16 (D.Kan. 2/27/2015)(same). A policy has been construed as a formal statement by the private corporation. See Gates v. Unified School Dist. No. 449 of Leavenworth County, Kan., 996 F.2d 1035, 1041 (10th Cir.1993). A custom is considered a persistent, well-settled practice of unconstitutional misconduct by employees that is known and approved by the corporation. Id.

Doc. No. 8, pp. 5-6. Plaintiff's allegations do not describe a formal statement by CCS or a persistent, well-settled practice

by CCS or its employees which would demonstrate a policy or custom for which CCS would be liable.

Finally, the court notes that plaintiff has not paid the partial fee of $18.00 which was due on November 17, 2017.

In conclusion, the court has provided plaintiff adequate legal guidance for bringing a claim for cruel and unusual punishment against a corporate defendant and for proceeding without initially paying the full filing fee. Plaintiff has not responded to the court's show cause order in a manner which persuades the court that plaintiff is capable of alleging a plausible claim of cruel and unusual punishment against CCS. Plaintiff also has not paid the initial partial payment necessary to proceed in forma pauperis. Therefore, the court finds that plaintiff's amended complaint should be dismissed without prejudice for failure to state a claim and that plaintiff's motion for leave to proceed in forma pauperis should be denied.

IT IS SO ORDERED.

Dated this 15th day of December, 2017, at Topeka, Kansas.

s/Sam A. Crow
Sam A. Crow, U.S. District Senior Judge

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

JUDGMENT IN A CIVIL CASE

BONIFACE W. WABUYABO,

Plaintiff,

v. **CIVIL NO. 17-3173-SAC**

CORRECT CARE SOLUTIONS,

Defendant.

( ) **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(x) **DECISION BY THE COURT.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the amended complaint is dismissed without prejudice.

Entered on the docket 12/15/17

Dated: December 15, 2017 **TIMOTHY M. O'BRIEN, CLERK**

s/S. Nielsen-Davis
Deputy Clerk