FILED
United States Court of Appeals
Tenth Circuit

August 1, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FREDERICK GRAY,

Plaintiff - Appellant,

v.

PATRICIA SORRELS; DAVID MARLAR; BUDDY HONAKER; JAMES HOWARD; SUSAN SHIELDS; PATRICIA STEM; WILLIAM TAYLOR; NANCY COPPEL; AMBER ROBINSON; ALICIA SCULL; BUSTER HARRIS,

Defendants - Appellees.

No. 17-7063
(D.C. No. 6:16-CV-00145-RAW-SPS)
(E.D. Okla.)

ORDER AND JUDGMENT*

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

Pro se state prisoner Frederick Gray appeals the district court's dismissal of his amended complaint, which alleged that under 42 U.S.C. § 1983 (1) various prison-official defendants violated his Eighth Amendment rights when they delayed in providing him medical care and failed to protect him from beatings by his cellmate; (2) several

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

prison-official defendants improperly resolved his prison grievances, thus violating his First Amendment right of access to the courts and his Eighth Amendment right to medical care; and (3) certain prison-official defendants violated the Equal Protection Clause of the Fourteenth Amendment by providing medical care to white prisoners that was denied to him, an African American. The district court denied injunctive relief and dismissed the amended complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm in part, and reverse and remand in part.

I. BACKGROUND

We recite the facts as alleged in the amended complaint—the operative complaint. While incarcerated at the Oklahoma State Penitentiary in McAlester, Oklahoma, Mr. Gray suffered from severe pain and swelling in his knees. In June 2015, he sought treatment from the prison clinic but did not receive pain medication or any other treatment for the swelling for 79 days. The prison's resident physician, Defendant Dr. Marlar, examined his knees in early September 2015 and again on December 7, 2015. Mr. Gray filed several prison grievances complaining about lack of treatment and alleged they were not adequately addressed.

On June 13, 2014, Mr. Gray's cellmate was prescribed medication for his serious schizophrenic disorder. Prison officials warned Mr. Gray and his cellmate that if either of them did not take his medication, they would be separated immediately.[1] In early

[1] Mr. Gray has not identified the type of medication he was prescribed.

August 2015, the cellmate's doctor, Defendant Dr. Howard, discontinued the cellmate's medication. On August 14, 2015, following a search of their cell, the cellmate attacked Mr. Gray, injuring his neck and causing him to bleed from the mouth. In June 2016 Mr. Gray was transferred from McAlester to the Lawton Correctional Facility.

II. ELEVENTH AMENDMENT IMMUNITY

The amended complaint named the defendants in their official and individual capacities. The district court held that the defendants who were sued in their official capacities were immune from suit for money damages under the Eleventh Amendment. "We review a district court's determination of Eleventh Amendment immunity de novo." *Arbogast v. Kan., Dep't of Labor*, 789 F.3d 1174, 1181 (10th Cir. 2015). "When a state official is sued in his or her official capacity, the Eleventh Amendment bars retrospective relief, usually in the form of money damages, because any such judgment is deemed directed at the state as the real party in interest rather than the nominal officer." *Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1233 (10th Cir. 2010).[2]

Mr. Gray contends the Oklahoma Governmental Tort Claims Act (OGTCA) waives immunity for torts committed by state employees, such as these defendants. But under the OGTCA, state employees "acting within the scope of their employment, whether performing governmental or proprietary functions, shall be immune from

[2] Injunctive relief may be available against a defendant in his or her official capacity. *See Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 631 (10th Cir. 1998) ("[A] suit against a state official in his or her official capacity seeking prospective injunctive relief is not . . . a suit against the state for Eleventh Amendment Purposes."). But as explained below, Mr. Gray is not entitled to injunctive relief.

liability for torts." Okla. Stat. tit. 51, § 152.1(A). "This immunity grant allows public employees to perform their duties and make decisions on behalf of the state free from fear of suit." *Anderson v. Eichner*, 890 P.2d 1329, 1336 (Okla. 1994). Accordingly, we affirm the dismissal of the claims for money damages against the defendants in their official capacities.

III. FAILURE TO STATE A CLAIM FOR RELIEF

A. *Standards of Review*

We review de novo the district court's order granting dismissal under Rule 12(b)(6), "accept[ing] the facts alleged in the complaint as true and view[ing] them in the light most favorable to the plaintiff[]." *Lincoln v. Maketa*, 880 F.3d 533, 537 (10th Cir. 2018) (internal quotation marks omitted). To withstand dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Moreover, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not sufficient to state a claim for relief. *Id.* We scrutinize the complaint from the same perspective as the district court. *Ayala v. Joy Mfg. Co.*, 877 F.2d 846, 847 (10th Cir. 1989).

"Although a pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers, this court has repeatedly

insisted that pro se parties follow the same rules of procedure that govern other litigants." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (citation, brackets, and internal quotation marks omitted).

B. ***Analysis of the Three Claims***

1. **Deliberate Indifference to the Prisoner's Medical Needs and Safety**

Mr. Gray alleged that the defendants violated his Eighth Amendment rights when they (1) delayed in providing him medical treatment and (2) failed to protect him from violence from his cellmate.

a. Legal background

"[D]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (citation and internal quotation marks omitted). Prison personnel "may thus be liable under § 1983 for indifference manifested in their response to the prisoner's needs or by intentionally denying or delaying access to medical care or intentionally interfering with treatment once prescribed." *Estate of Booker v. Gomez*, 745 F.3d 405, 429 (10th Cir. 2014) (ellipses and internal quotation marks omitted). Likewise, "[a] prison official's deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 828 (1994) (internal quotation marks omitted). These claims include both an objective and a subjective component. *Estate of Booker*, 745 F.3d at 430 (internal quotation marks omitted) (medical needs); *Riddle v. Mondragon*, 83 F.3d 1197, 1204 (10th Cir. 1996) (failure to protect).

For the objective component of a failure-to-treat claim, the inquiry is whether the prisoner's "medical need is sufficiently serious[, that is,] if it is one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Estate of Booker*, 745 F.3d at 430 (ellipsis and internal quotation marks omitted). When a prisoner alleges that a delay in treatment caused him pain, if "the pain experienced during the delay is substantial, the prisoner sufficiently establishes the objective element of the deliberate indifference test." *Al-Turki v. Robinson*, 762 F.3d 1188, 1193 (10th Cir. 2014) (internal quotation marks omitted).

For the objective component of a failure-to-protect claim, the prisoner "must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Riddle*, 83 F.3d at 1204 (internal quotation marks omitted). "A prisoner has a right to be reasonably protected from constant threats of violence . . . from other inmates." *Id.* (internal quotation marks omitted).

For the subjective component for both types of claim, the prisoner must present "evidence of the prison official's culpable state of mind. He must show that the prison official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Estate of Booker*, 745 F.3d at 430 (citation and internal quotation marks omitted) (medical needs); *see Riddle*, 83 F.3d at 1204 (failure to protect). "[T]he official must have been both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must have also drawn the inference." *Requena v. Roberts*, 893 F.3d 1195, 1215 (10th Cir. 2018) (brackets, ellipsis, and internal quotation marks omitted).

In addition to the objective and subjective components of these Eighth Amendment claims, a § 1983 "plaintiff must show the defendant personally participated in the alleged violation, and conclusory allegations are not sufficient to state a constitutional violation." *Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir. 1996) (citation omitted).

b. Analysis

(1) Delay in medical treatment

The amended complaint alleged that Defendants Coppel, Marlar, Robinson, and Scull denied Mr. Gray "something for any type of relief for the severe pain [he] had been in for approximately 79 days till [he] received the generic Advil." R. at 334. This allegation against a group of defendants is too conclusory to establish personal participation on the part of any one of them. *See Jenkins*, 81 F.3d at 994.

We turn to the more specific claims of failure to provide medical care against each defendant, reciting the facts as alleged in the amended complaint. In addition, we consider Mr. Gray's affidavit, which was attached to the original complaint. *See Oxendine v. Kaplan*, 241 F.3d 1272, 1275 (10th Cir. 2001) ("[I]n deciding a motion to dismiss pursuant to Rule 12(b)(6), a court may look both to the complaint itself and to any documents attached as exhibits to the complaint."); *Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 676 n.1 (6th Cir. 2011) (basing "factual summary on plaintiffs' amended complaint and exhibits referred to therein and attached to plaintiffs' original complaint"); *Smith v. Mass. Dep't of Corr.*, 936 F.2d 1390, 1392 n.1 (1st Cir. 1991) ("We

construe the exhibits annexed to the original complaint as part of the amended complaint.").

Ms. Coppel. Ms. Coppel was a licensed practical nurse at the prison. The amended complaint alleged that Mr. Gray's knees were swollen and severely painful when Ms. Coppel examined him, and that she would not provide him with anything for the swelling or pain. Mr. Gray's affidavit further alleged that Ms. Coppel saw him in late June, 2015, but Dr. Marlar did not see him until September 2, 2015. In the interim, Ms. Coppel did not give him any pain medication and instead told him that he would have to wait for Dr. Marlar. Mr. Gray alleged that he had been in severe pain while awaiting treatment.

We conclude that Mr. Gray stated a plausible claim of the subjective component of deliberate indifference by alleging that Ms. Coppel knew of his swollen and painful knees and determined that they required treatment, yet failed to provide any pain relief for over two months. This sufficiently alleged that Ms. Coppel was both aware of facts from which the inference could be drawn that a substantial risk of serious harm existed, and that she must also have drawn the inference.

We further conclude that Mr. Gray's claim that his knees were severely swollen and caused him severe pain for over two months stated a plausible claim that the delay resulted in substantial harm, thus satisfying the objective component. *See Al-Turki*, 762 F.3d at 1193 (stating the objective element is established if the pain experienced during the delay in obtaining medical treatment is substantial). We therefore reverse the dismissal of the claim against Ms. Coppel and remand for further proceedings.

Dr. Marlar. Dr. Marlar was the prison's resident physician. The allegations against him consist of four parts. First, the amended complaint alleged that Dr. Marlar examined Mr. Gray on September 2, 2015 ("approximately 96 days" before Dr. Marlar reevaluated him on December 7, 2015, R. at 334; *see also id.* at 168 (Mr. Gray's affidavit stating he saw Dr. Marlar on September 2, 2015)). Mr. Gray concedes that he received treatment on September 7, which was shortly after Dr. Marlar's initial evaluation, so any delay in treatment by Dr. Marlar was minimal and would not amount to deliberate indifference.

Second, the amended complaint alleged that at the December 7 evaluation, Dr. Marlar "said he would prescribe something more serious for the pain," *id.*, implying that Mr. Gray had previously been given some form of pain medication. Indeed, Mr. Gray's allegation that he was denied pain medication for 79 days after June 22, 2015, indicates that he was given pain medication in early September 2015. These facts do not state a claim that Dr. Marlar was deliberately indifferent to his need for pain medication. *Cf. Gee v. Pacheco*, 627 F.3d 1178, 1192 (10th Cir. 2010) (holding that prisoner who was given pain medication for his headaches, albeit not the medication he desired, did not state an Eighth Amendment violation).

Third, the amended complaint alleged that on December 7, Dr. Marlar advised Mr. Gray that he would prescribe a knee brace "so the [meniscus] tendon could heal properly," R. at 334, but at a reevaluation of Mr. Gray's knees on January 8, 2016, Dr. Marlar said he could not provide a knee brace due to a spending freeze. Dr. Marlar's

inability to provide a knee brace due to a prison spending freeze does not demonstrate deliberate indifference on his part.[3]

Fourth, the amended complaint asserted that Mr. Gray suffered a whiplash neck injury on August 14, 2015, when his cellmate battered him. In his affidavit, Mr. Gray alleged that despite Dr. Marlar's statement in early September 2015 that he would order an x-ray of Mr. Gray's neck, the x-ray was not taken until November 19, 2015, more than three months after the injury and almost two and one-half months after Dr. Marlar said he would order it. Mr. Gray's affidavit further alleged that Dr. Marlar said he would order something for his neck pain, as well as a muscle relaxer, but he did not receive anything for his neck pain until January 8, 2016, and the muscle relaxer was never prescribed, so his "neck is stiff and pops when moved." *Id.* at 169.

We conclude that Mr. Gray has plausibly alleged a deliberate indifference claim against Dr. Marlar based on his neck injury. For the subjective component, Mr. Gray alleged that Dr. Marlar knew he had sustained a severe neck injury and ordered an x-ray, but failed to obtain the x-ray for two and one-half months. In addition, Mr. Gray alleged he received no pain medication for his neck until January 8, 2016, and no muscle relaxer.[4] Mr. Gray also satisfied the objective component by alleging that he had severe

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[3] Although Mr. Gray asserted that Defendant Honaker was deliberately indifferent to his serious medical need for a knee brace by imposing a spending freeze, this allegation does not state a claim for deliberate indifference. It does not satisfy the subjective component because it does not allege that Mr. Honaker imposed a spending freeze despite his knowledge that doing so presented a substantial risk of serious harm.

[4] We recognize that the pain medication Mr. Gray received for his knees might also have served to alleviate his neck pain, but we must accept the facts alleged in the complaint as true. *Lincoln*, 880 F.3d at 537.

neck pain from August 14, 2015 until January 8, 2016, and that his neck continued to be stiff and pop when moved. We therefore reverse the dismissal of the claim against Dr. Marlar relating to Mr. Gray's neck injury and remand for further proceedings.

Ms. Robinson. Ms. Robinson was a licensed practical nurse at the prison. Mr. Gray's deliberate-indifference claims against Ms. Robinson based on lack of medical treatment are limited to alleging that she was an assistant to Dr. Marlar and that she and Dr. Marlar "did an initial evaluation." *Id.* at 334. These facts fail to state a plausible claim for either the objective or the subjective component of deliberate indifference.

Finally, the amended complaint alleged that Defendants Ms. Sorrels and Mr. Honaker were liable as the supervisors of those who denied medical treatment to Mr. Gray. But "supervisor status by itself is insufficient to support liability." *Mitchell*, 80 F.3d at 1441.

(2) Failure to protect

The amended complaint alleged that Dr. Howard was responsible for prescribing psychotropic medications for Mr. Gray's cellmate's schizophrenic disorder and that he ceased prescribing the medications when Mr. Gray and the cellmate were housed together. This allegation does not state Dr. Howard knew that stopping the medications would cause the cellmate to become violent. The amended complaint therefore did not allege facts indicating that Dr. Howard acted or failed to act despite his knowledge of a substantial risk of serious harm. *See Estate of Booker*, 745 F.3d at 430.

The amended complaint alleged that Defendants Robinson, Howard, Scull, Harris, Stem, and Shields knew Mr. Gray's cellmate had a propensity for violence, but they

claimed there was no open cell available where he could be relocated. Not only did the amended complaint fail to allege that any of these defendants were responsible for cell assignments, but this group allegation is too conclusory to establish their personal participation in any alleged violation. *See Jenkins*, 81 F.3d at 994.

The amended complaint also alleged that Defendants Robinson, Scull, and Shields sent emails to Dr. Howard concerning Mr. Gray's cellmate's need for antipsychotic medication. But it did not allege the specific content of emails, nor did it allege facts that met either the objective component—Mr. Gray was incarcerated under conditions posing a substantial risk of serious harm—or the subjective component—the prison officials acted or failed to act despite knowing of a substantial risk of serious harm. *See Riddle*, 83 F.3d at 1204.

The amended complaint further alleged that Defendant Sergeant Harris, a correctional officer at the prison who supervised other prison personnel, "failed to allow" Officer Holden, a corrections officer assigned to the mental health unit, to take Mr. Gray to the prison medical department. R. at 338.[5] As a result, the injuries the cellmate inflicted on Mr. Gray were not discovered until he had a neck x-ray in November 2015. These allegations were insufficient to meet the subjective component because they did not assert any facts showing that Sgt. Harris knew that Mr. Gray had been attacked by his

[5] Although Mr. Gray attempts to pursue claims against Officer Holden in his appellate briefs, Officer Holden was not named in the amended complaint, so he is not a party to this appeal. *See, e.g.*, *McGowan v. United States*, 825 F.3d 118, 123 n.2 (2d Cir. 2016) (stating certain defendants "were not named in the Amended Complaint and also are not parties to this appeal").

cellmate or that he had suffered any injury, let alone a serious injury. To the extent Mr. Gray alleges Sgt. Harris is liable due to his position as Officer Holden's supervisor, or that he violated Mr. Gray's Fourth Amendment rights by failing to adequately supervise the officers who searched his cell, "supervisor status by itself is insufficient to support liability," *Mitchell v. Maynard*, 80 F.3d 1433, 1441 (10th Cir. 1996).[6]

The amended complaint also alleged that Sgt. Harris's failure to have Mr. Gray taken to the medical department violated a cell-altercation protocol. But violation of a prison regulation does not state a constitutional violation unless the prison official's conduct "failed to conform to the constitutional standard." *Porro v. Barnes*, 624 F.3d 1322, 1329 (10th Cir. 2010) (internal quotation marks omitted) (holding prisoner must establish that violation of a prison policy necessarily stated a constitutional violation). The amended complaint did not allege that the failure to comply with the prison protocol violated Mr. Gray's Eighth Amendment rights.

The remaining claims relate to Defendants Stem and Taylor. The amended complaint alleged that Dr. Stem was the prison's mental health coordinator and Mr. Taylor was a prison mental health unit manager and that, on June 13, 2014, they told Mr. Gray that he and his cellmate would be separated immediately if either of them refused to take his medication. This allegation does not assert that the prison officials

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[6] The amended complaint alleged that the search of his cell violated Mr. Gray's Fourth Amendment rights against unreasonable searches and seizures. Not only were the search team members not named as defendants, but "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." *Hudson v. Palmer*, 468 U.S. 517, 526 (1984).

knew that the cellmate had refused to take his medication and failed to act despite their knowledge of a substantial risk of serious harm. Thus, it failed to allege the subjective component of a failure-to-protect claim.

2. **Responses to Prison Grievances**

The amended complaint alleged that Ms. Sorrels, the prison health services administrator; Mr. Honaker, the prison chief medical officer; and Drs. Marlar and Shields improperly denied his prison grievances, "shuffled paperwork," and attempted to use the grievance policy to "pencil whip the process" to keep Mr. Gray from availing himself of the grievance process. R. at 341. It also alleged that Dr. Shields said Mr. Gray and his cellmate were separated due to a verbal dispute, when, in fact, they were separated because the cellmate physically battered Mr. Gray. The district court rejected Mr. Gray's allegations based on prison grievances because they were insufficient to establish the requisite personal participation for a § 1983 claim.

Mr. Gray asserted that (1) these defendants improperly tried to prevent him from availing himself of administrative remedies and improperly denied grievances requesting monetary compensation, and (2) the denial of the grievances resulted in unconstitutional delays in providing him medical care. He requested the court to "excuse any construed failure to exhaust Administrative Remedy," R. at 342.[7]

[7] The amended complaint also asserted that Mr. Gray's Eighth and Fourteenth Amendment rights were denied because his attempt to resolve his failure-to-protect claim informally "went ignored." R. at 340. This does not state a constitutional violation.

We liberally treat the first assertions as alleging that Mr. Gray was denied his First Amendment right of access to the courts based on his failure to exhaust the prison grievance process. *See Little v. Jones*, 607 F.3d 1245, 1250 (10th Cir. 2010) ("Where prison officials prevent, thwart, or hinder a prisoner's efforts to avail himself of an administrative remedy, they render that remedy 'unavailable' and a court will excuse the prisoner's failure to exhaust."); *id.* at 1249 (explaining that "a prisoner must exhaust his administrative remedies prior to filing a lawsuit regarding prison conditions in federal court"). But Mr. Gray was not foreclosed from bringing any claims for failing to exhaust the prison grievance process. Thus, his request that any failure to exhaust be excused is unnecessary. He has failed to state a First Amendment claim.

As for Mr. Gray's remaining claims that the denial of the grievances resulted in unconstitutional delays in providing him medical care, a prison official's "mere response and denial of [a] grievance [pertaining to medical treatment] are insufficient to establish the requisite personal participation under § 1983." *Requena*, 893 F.3d at 1216. Thus, these claims were properly dismissed.

3. **Equal Protection**

Mr. Gray alleged that Defendants Coppel, Robinson, and Scull violated the Equal Protection Clause when they provided pain relievers to white prisoners as soon as they complained of pain, but did not provide pain medication to him. To prove a constitutional violation, Mr. Gray must allege that he was treated differently from similarly situated individuals. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). In addition, "[p]roof of racially discriminatory intent or purpose is

required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). "It is not necessary to demonstrate that the challenged action was taken solely for discriminatory purposes; it is necessary only to prove that a discriminatory purpose was a motivating factor." *Watson v. City of Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988).

To survive a motion to dismiss, Mr. Gray had to plead "only enough facts to state a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570, and we accept the facts as true, viewing them in the light most favorable to him, *Lincoln*, 880 F.3d at 537. Mr. Gray's allegation that Defendants Coppel, Robinson, and Scull provided pain medication to white prisoners suffering from pain while denying pain medication to him, an African American prisoner suffering from pain, is sufficient to state a claim that he was treated differently from similarly situated individuals. Further, the allegations that these Defendants treated whites but did not treat African Americans is sufficient to draw the reasonable inference of discriminatory intent. We therefore conclude that Mr. Gray stated an equal-protection violation, and we remand this claim for further proceedings.

IV. PRELIMINARY INJUNCTION

Mr. Gray requested a preliminary injunction requiring Defendants Sorrels and Honaker to "squarely address" his grievances and grievance appeals. He requested that these defendants be required to resolve his grievances so that he (1) could satisfy the requirement that he exhaust his administrative remedies to ensure his First Amendment right of access to the courts and (2) receive adequate medical care. Injunctive relief is not available due to Mr. Gray's move from the prison at McAlester to the Lawton

Correctional Facility in June 2016. *See Jordan v. Sosa*, 654 F.3d 1012, 1028 n.17 (10th Cir. 2011) (stating "where a prisoner is no longer housed at the penal institution having the conditions of confinement that form the basis of his suit, declaratory relief—as well as injunctive relief—is ordinarily not available"). As discussed above, Mr. Gray was not foreclosed from bringing any claims for failing to exhaust the prison grievance process based on his placement at McAlester. Any future grievances must be addressed by prison personnel at his current placement. Similarly, a preliminary injunction requiring Defendants Sorrels and Honaker to address his grievances concerning his medical treatment would serve no function because Mr. Gray's medical treatment must be provided at his current placement. An injunction directed to Defendants Sorrels and Honaker would not afford Mr. Gray any relief. We affirm the district court on this issue.

V. REMAINING ARGUMENTS

Mr. Gray contends that a magistrate judge improperly acted as counsel for the defendants when he struck two motions to dismiss as improperly filed but granted leave for defendants to reargue each motion if appropriate. This argument lacks merit. Granting leave to reargue a motion seeking a ruling adverse to the plaintiff does not demonstrate judicial bias. *See Bixler v. Foster*, 596 F.3d 751, 762 (10th Cir. 2010) ("Adverse rulings alone do not demonstrate judicial bias.").

Mr. Gray also argues in his opening brief that prison personnel, including a prison librarian, filed retaliatory misconduct charges against him to stifle his access to the court. He further contends that they tampered with his medication and engaged in collusion. But Mr. Gray did not present these claims to the district court. "[A]bsent extraordinary

circumstances, we will not consider arguments raised for the first time on appeal." *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 999 (10th Cir. 2002).

Finally, Mr. Gray argues that cumulative error requires reversal. "Cumulative-error analysis . . . aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 860 (10th Cir. 2005) (internal quotation marks omitted). Because we have not found any harmless errors, there can be no cumulative error based on the aggregate of harmless errors.

VI. CONCLUSION

We reverse the dismissal of (1) the claim against Ms. Coppel alleging she denied Mr. Gray medical treatment; (2) the claim against Dr. Marlar concerning Mr. Gray's neck injury, and (3) the equal protection claim against Ms. Coppel, Ms. Robinson, and Ms. Scull. We remand those claims for further proceedings. We affirm in all other respects the order dismissing the amended complaint and denying injunctive relief.[8]

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

[8] Mr. Gray has abandoned his motion for appointment of counsel, *see* Aplt. Reply Br. at 20, so we deny it as moot.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

FREDERICK GRAY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. CIV 16-145-RAW-SPS**
	)	
PATRICIA SORRELS, et al.,	)	
	)	
Defendants.	)	

OPINION AND ORDER

This action is before the Court on Defendants' motion to dismiss Plaintiff's amended civil rights complaint. The Court has before it for consideration Plaintiff's amended complaint (Dkt. 60), Defendants' motion (Dkt. 64), and Plaintiff's response (Dkt. 75).

Plaintiff, an inmate in the custody of the Oklahoma Department of Corrections (DOC) who is incarcerated at Davis Correctional Facility in Holdenville, Oklahoma, brings this action under the authority of 42 U.S.C. § 1983, seeking relief for alleged constitutional violations during his incarceration at Oklahoma State Penitentiary ("OSP") in McAlester, Oklahoma. The defendants are Patricia Sorrels, OSP Health Services Administrator; David Marlar, OSP Resident Physician; Buddy Honaker, DOC Medical Services Administrator; James Howard, OSP Resident Psychiatrist; Susan Shields, OSP Psychologist; Patricia Stem, DOC Eastern Regional Mental Health Coordinator; William Taylor, OSP Mental Health Unit Manager; Nancy Coppel, OSP L.P.N.; Amber Robinson, OSP L.P.N.; Alicia Scull, OSP L.P.N., and Buster Harris, OSP Correctional Officer.

Medical Claim Concerning Plaintiff's Knees

Plaintiff alleges that during the morning "pill pass" on June 22, 2015, he advised the attending nurse on duty that his knees were swollen and causing him severe pain. The nurse

observed Plaintiff's knees and advised him to submit a "sick-call" or Heath Services Form.

Plaintiff alleges he stated in his June 22, 2015, sick-call that "I need my knee (sic) looked at again. It (sic) is (sic) swollen and throbbing with pain" (Dkt. 60 at 3). Plaintiff asserts his knees still were swollen and very painful when he was triaged by Defendant Coppel. Coppel, however, did not provide Plaintiff with anything for his symptoms. He claims Coppel's deliberate indifference to his medical problems resulted in more pain and a lasting injury.

The pain was so "severe and unrelenting" that Plaintiff could not sleep well, and at times he could not get out of bed from his top bunk assignment. Therefore, he submitted the second of many sick-call slips on July 8, 2015, stating, "I was triaged for my swollen and painful knees on June 28th, 2015. I am still having the same issues. I need Tylonol (sic) for pain and something for the fluid on my knees" (Dkt. 60 at 3). The triage nurse observed his knees on July 8, 2015, and allegedly said, "You need an X-ray those look bad" (Dkt. 60 at 4). Plaintiff, however, received no pain relief.

On August 3, 2015, Plaintiff submitted his third sick-call after receiving no pain treatment in the first and second triages. His sick-call stated his swollen and painful knees still had not been examined. He again requested Tylenol, X-rays, and treatment for fluid on his knees. Because he allegedly was not triaged for the third sick-call, Plaintiff submitted a Request to Staff (RTS) to Defendant Patricia Sorrels, Health Services Supervisor, on August 10, 2015. The RTS stated he needed an X-ray, treatment, and pain relief. Plaintiff alleges he subsequently submitted numerous additional RTSs and grievances, but he did not receive the requested X-ray, pain relief, and other treatment or "amenity" to prevent further damage to his knees.

On July 5, 2016, Dr. Gonzago, the facility physician at Lawton Correctional Facility,

provided Plaintiff a prescription for Naproxin for pain relief. Plaintiff claims he mistakenly believed Naproxin was a "serious prescription pain medication," but he subsequently learned it was only a prescription for Advil. The medication did not relieve his pain, and the pain caused him uncontrollable gnashing of his teeth which resulted in chipped and broken teeth.

Plaintiff complains that Defendants Marlar, Robinson, Coppel, Scull, and Sorrels were responsible for the denial of pain relief for approximately 79 days until Plaintiff received the Advil. This delay also allegedly resulted in further damage to Plaintiff's left knee. When he was reevaluated on December 7, 2015, in the hypertension chronic care clinic, Defendant Dr. Marlar prescribed something "more serious" for the pain, along with a brace to allow the meniscus tendon to heal properly. Plaintiff returned to Dr. Marlar on January 8, 2016. Dr. Marler then advised Plaintiff that there was a spending freeze, and Plaintiff could not be provided with a knee brace. Plaintiff maintains the delays and denials of treatment for his knees amounted to cruel and unusual punishment under the Eighth Amendment.

Plaintiff further alleges he is a black male, and while going through the grievance process, he discovered that three of his "Caucasian counterparts" were being seen by Defendant Nurses Coppel, Robinson, and Scull. Furthermore, the "counterparts" received pain relief the first day they complained of pain. Plaintiff asserts the denial of pain relief for him violated his right of equal protection to be free from pain and suffering. Plaintiff further claims Defendants Sorrels and Honaker have shuffled and forged paperwork to take advantage of him, because he is incarcerated and unable to seek medical treatment from a provider of his choosing.

Altercation with Cellmate and Plaintiff's Resulting Injuries

Plaintiff resumed sharing a cell with his former cellmate Gail Daetwiler on June 13, 2014. The two men previously were separated because Daetwiler refused to take his

psychotropic medications in protest of Dr. Janna Morgan's not allowing them to transfer to a lower security level as she had promised. Defendants William Taylor and Patricia Stem advised Plaintiff and Daetwiler that if either of them stopped taking his medication, they immediately would be separated again.

On or around August 4-6, 2015, Dr. James Howard discontinued Daetwiler's psychotropic prescriptions, because Daetwiler had refused to meet with Dr. Howard. When Daetwiler was advised of this change on the morning of August 10, 2015, he immediately "began to throw a tantrum." Plaintiff advised the staff that if Daetwiler's psychotropic medications were not resumed, Plaintiff and Daetwiler would need to be separated for Plaintiff's safety. Plaintiff claims that while they were waiting for Daetwiler to receive his medication, Defendants Scull and Robinson said that "Defendants Scull and Stem were sending schathing (sic) e-mails to Defendant Howard as well as Defendant Shields sending e-mails to Defendant Howard also" (Dkt. 60 at 6).

On the morning of August 14, 2015, the Certified Emergency Response Team (C.E.R.T.) arrived in Plaintiff's unit for an institution-wide search of each cell for contraband. Despite not finding any contraband, the C.E.R.T. officers allegedly trashed all ten cells on the top tier, including Plaintiff and Daetwiler's cell. Plaintiff argues this damage to the cells violated Article 2 § 30 of the Oklahoma Constitution, the Fourth and Fourteenth Amendments to the United States Constitution, and the Oklahoma Department of Corrections Operations Policy OP-040110.

Daetwiler allegedly went into another "tantrum" and began to yell at the C.E.R.T. personnel and OSP Sergeant Fry, who escorted the C.E.R.T. officers. Fry allegedly told the C.E.R.T. officers that "they only trashed [Daetwiler and Plaintiff's] cell because Plaintiff is a nigger" (Dkt. 60 at 7). Plaintiff told Sgt. Fry that Daetwiler was off his medications and

then attempted to calm down Daetwiler.

Plaintiff began cleaning their cell, but Daetwiler told him to stop so they could show the mess to the doctor. As Plaintiff continued cleaning, Daetwiler again told him to stop and then spat in Plaintiff's face and shoved him. Plaintiff informed Officer Powell that "he had been accosted and assaulted" (Dkt. 60 at 8). The officer said she would advise Sgt. Brian Holden. Powell returned later and said an inmate had hanged himself, and they would attend to Plaintiff's problem when they could. Plaintiff informed Powell that he no longer felt safe.

That afternoon Psych-Clinician Steve Long came by Plaintiff and Daetwiler's cell, and Plaintiff reported that Daetwiler had attacked him. Daetwiler denied the attack, but Long stated he would have the two men separated. After Long left, Daetwiler attacked Plaintiff from behind, while Plaintiff was waiting at the door to move out of the cell. Daetwiler repeated his attacks approximately four more times.

Daetwiler punched the back of Plaintiff's neck, and Plaintiff turned around to get Daetwiler off him. As Plaintiff packed his property, Daetwiler continued to punch him in the mouth, pushing Plaintiff's tooth into his lip and leaving Plaintiff dazed and bleeding. While Plaintiff sat on the toilet near the front of the cell, Daetwiler broke the loaner radio that was provided to Plaintiff as part of his therapy. Plaintiff was looking out the window in his cell door when Daetwiler struck him from behind again with part of the radio. Plaintiff maintains that after this altercation, he and Daetwiler were separated because of Daetwiler's attack, not because of a verbal dispute.

Plaintiff further alleges he suffered a whiplash neck injury caused by Daetwiler's punches to the back of his neck. He claims he submitted three proper sick-calls on August 15, 2015; August 22, 2015; and August 29, 2015, but he received no treatment. His injury was not discovered until his neck was X-rayed on November 17, 2015. On December 7,

2015, Plaintiff saw Dr. Marlar who diagnosed "a sprained neck 'WHIPLASH'" (Dkt. 60 at 9). Plaintiff attributes the delay in medical care to Defendant Buster Harris' failure to allow Correctional Officer Brian Holder to take Plaintiff to the OSP Medical Department as part of a cell altercation protocol.

Standard of Review

Defendants have filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). In assessing a motion to dismiss, the Court must accept the factual allegations as true and consider them in the light most favorable to the plaintiff. *Tomlinson v. El Paso Corp.*, 653 F.3d 1281, 1285-86 (10th Cir. 2011) (citing *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)), *cert. denied*, 565 U.S. 1201 (2012). A request for dismissal pursuant to Fed. R. Civ. P. 12(b)(6) requires the Court to determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Although the Court is required to exercise a liberal interpretation of a plaintiff's pleadings, *Haines v. Kerner*, 404 U.S. 519 (1972), it need not assume the role of advocate for Plaintiff, and he must present more than conclusory allegations to survive a motion to dismiss for failure to state a claim, *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). "[C]onclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." *Id.* (citing cases). "[A] pro se plaintiff requires no special legal training to recount the facts surrounding his alleged injury, and he must provide such facts if the court is to determine whether he makes out a claim on which relief can be granted." *Id.*

Eleventh Amendment Immunity

Defendants allege they are immune from suit for money damages in their official capacities as employees of the Oklahoma Department of Corrections. The official capacity claims against the defendants are actually claims against the State of Oklahoma. "[T]he Eleventh Amendment bars federal court jurisdiction over a state agency for both money damages and injunctive relief, or a state official acting in her official capacity in a suit for damages." *Ellis v. Univ. of Kansas Med. Ctr.*, 163 F .3d 1186, 1196 (10th Cir. 1998). Absent a waiver by the state, or a valid congressional override, the amendment bars a damages action against a state in federal court. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985).

The Court, therefore, grants Defendants' motion to dismiss all official-capacity claims against the individual defendants. Because the Eleventh Amendment involves sovereign immunity, the official-capacity claims against the defendants are dismissed "without prejudice" rather than "with prejudice." *Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1, Logan Cty., Okla. v. Guthrie*, 654 F.3d 1058, 1069 n.9 (10th Cir. 2011).

Personal Participation

Defendants further allege Plaintiff has failed to affirmatively link them to an alleged constitutional violation. "Personal participation is an essential allegation in a § 1983 claim." *Bennett v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976) (citations omitted). *See also Mee v. Ortega*, 967 F.2d 423, 430-31 (10th Cir. 1992). Plaintiff must show that a defendant personally participated in the alleged civil rights violation. *Mitchell v. Maynard*, 80 F.3d 1433, 1441 (10th Cir. 1996). Furthermore, "denial of a grievance, by itself without any connection to the violation of constitutional rights alleged by the plaintiff, does not establish personal participation under § 1983." *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir.

2009) (citations omitted).

Supervisory status is not sufficient to support liability under § 1983. *Id. See also Polk County v. Dodson*, 454 U.S. 312, 325 (1981).

> Liability of a supervisor under § 1983 must be predicated on the supervisor's deliberate indifference, rather than mere negligence. *Woodward v. City of Worland*, 977 F.2d 1392, 1399 (10th Cir.1992). "[S]upervisory liability requires 'allegations of personal direction or of actual knowledge and acquiescence.'" *Id.* at 1400 (quoting *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990)).

Langley v. Adams County, 987 F.2d 1473, 1481 (10th Cir. 1983).

The Court finds Plaintiff has not met his burden of demonstrating personal participation by the defendants. Reciting the elements of a claim is not enough to state a claim for relief. *Twombly*, 550 U.S. at 555.

The Court further finds Plaintiff has named no individual who treated his medical needs differently from the medical needs of Caucasian prisoners. Plaintiff's sole allegation against Defendants Dr. Howard, the OSP psychiatrist, is that Howard discontinued Inmate Daetwiler's psychotropic medication. There are no allegations that Dr. Howard had any interactions with Plaintiff or made any decisions about Plaintiff's care. Similarly, Plaintiff alleges that Defendants Taylor and Stem advised only of the housing consequences for Plaintiff and Daetwiler if either prisoner failed to take his medication. Furthermore, the allegations against Defendant Shields are only conclusory statements that she failed to protect him and sent emails regarding Inmate Daetwiler's medication. Finally, Plaintiff's only allegations against Defendants Honaker and Sorrels are that they failed to respond to Requests to Staff or grievances. None of the allegations against these defendants support Plaintiff's claims that the defendants participated in any violations of the Eighth Amendment or the Equal Protection Clause.

As for the remaining defendants, Plaintiff claims L.P.N.s Coppel, Robinson, and Scull

denied him pain relief or delayed medical care. Defendant Scull also allegedly said she would send an email to one of the facility physicians about Inmate Daetwiler's medication. Plaintiff claims Defendant Dr. Marlar denied him pain relief and delayed medical care, in addition to diagnosing Plaintiff's neck injury and ordering treatment for his knee. Although the allegations against these defendants are more specific, the claims do not connect these defendants with any constitutional violations.

To establish an Eighth Amendment claim for deliberate indifference to serious medical needs or for failure to protect, Plaintiff must show the defendants were aware of a risk and disregarded the risk. *Farmer v. Brennan*, 511 U.S. 825 (1993). Plaintiff's complaint, however, fails to allege that any of the individual defendants were aware of a serious risk or a potential risk to Plaintiff.

Instead, Plaintiff is claiming the defendants, to varying degrees, were responsible for care, safety, and security. Because certain medications were not given or taken and an altercation occurred, the defendants must have been deliberately indifferent. This, however, is insufficient to establish an affirmative link between the defendants' actions or inaction and a constitutional violation.

Failure to Protect

The Court further finds Plaintiff has not stated a claim that the defendants acted with deliberate indifference or failed to protect him from harm in violation of the Eighth Amendment. Deliberate indifference for Eighth Amendment purposes requires the prison employees and officials to have known of a substantial risk to heath or safety and then to have disregarded that risk. *Farmer v. Brennan*, 511 U.S. 825 (1994). "[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to

inmate health or safety; the 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.* at 837. The plaintiff also must show that the defendants consciously disregarded an obvious danger. *See Grimsley v. MacKay*, 93 F.3d 676, 681 (10th Cir. 1996) (*e.g.*, "where prison officials disregard repeated warnings of danger to a particular prisoner and continually refuse to make the situation safer."). Plaintiff cannot establish that Defendants drew the required inference that he would be subjected to imminent and substantial harm. Therefore, he has failed to demonstrate that Defendants were deliberately indifferent to his Eighth Amendment rights.

Medical Care

The Court further finds Plaintiff has failed to show Defendants violated his Eighth Amendment rights by the delay or denial of medical care. Plaintiff alleges that on June 22, 2015, he advised the attending nurse that his swollen knees were causing him severe pain. After Plaintiff submitted a sick call slips on June 28, 2015, and July 8, 2015, Defendant Coppel saw him for the problem, but allegedly did not provide him with treatment to relieve the swelling or reduce his pain. Plaintiff submitted a Request to Staff to Defendant Sorrels on August 10, 2015, but claims he did not receive the requested X-ray or medication for his symptoms.

Plaintiff admits he was seen by medical staff, but claims he received no treatment for his symptoms until September 7, 2015, after his condition had worsened. He also admits he received a neck X-ray on November 17, 2015. On December 7, 2015, Dr. Marlar diagnosed the injury and said he would prescribe a stronger pain medication and a brace. On January 8, 2016, however, Dr. Marlar advised Plaintiff that a spending freeze precluded providing the brace. (Dkt. 60 at 9).

In *Estelle v. Gamble*, 429 U.S. 97 (1976), the Supreme Court addressed the Eighth Amendment prohibition against cruel and unusual punishment in the context of medical attention:

> [D]eliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under §1983.

Estelle v. Gamble, 429 U.S. 97, 104-05 (1976) (citations and footnotes omitted).

With this standard in mind the Court is of the view that the acts complained of do not show deliberate indifference to Plaintiff's medical needs as alleged. It is clear from the record that medical care was provided. Where there is such evidence of a "series of sick calls, examinations, diagnoses, and medication . . . it cannot be said there was a 'deliberate indifference' to the prisoner's complaints." *Smart v. Villar*, 547 F.2d 112, 114 (10th Cir. 1976). To the extent Plaintiff is complaining about the inadequacy of medical care provided, the Court finds Plaintiff is merely asserting a difference of opinion as to the kind and quality of medical treatment necessary under the circumstances. It is well settled that this type of disagreement fails to give rise to a cause of action under § 1983. *See McCracken v. Jones*, 562 F.2d 22, 24 (10th Cir. 1977), *cert. denied*, 435 U.S. 917 (1978), and cases cited therein.

To the extent Plaintiff is complaining of the delay in his treatment, "delay in medical care can only constitute an Eighth Amendment violation if there has been deliberate indifference which results in substantial harm." *Olson v. Stotts*, 9 F.3d 1475, 1477 (10th Cir. 1993) (quoting *Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993)). The allegations in Plaintiff's complaint show that he received medical care, even if it was not the care he requested. The Court finds he has not shown a violation of the Eighth Amendment with

respect to his medical treatment.

Injunctive Relief

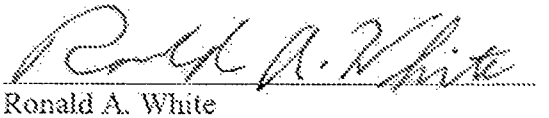
Finally, Plaintiff has requested an injunction ordering Defendants Patricia Sorrels and Buddy Honaker to "squarely address" Plaintiff's grievances and grievance appeals (Dkt. 60 at 14). To be entitled to injunctive relief the movant must establish a violation of his constitutional rights. *Rizzo v. Goode*, 423 U.S. 362, 377 (1976). Plaintiff, however, has failed to plead any facts to sustain a finding of an ongoing constitutional violation by Defendant Honaker or Defendant Sorrels. Instead, the amended complaint alleges these defendants refused to respond to his grievance documents. There are not sufficient facts to support a claim for an ongoing constitutional violation.

A district court may grant a preliminary injunction if the party seeking it shows that "four equitable factors weigh in favor of the injunction." *Westar Energy v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009). The factors are (1) a substantial likelihood of prevailing on the merits; (2) irreparable harm in the absence of the injunction; (3) proof that the threatened harm outweighs any damage the injunction may cause to the party opposing it; and (4) that the injunction, if issued, will not be adverse to the public interest. *Id.*

The Court finds Plaintiff has failed to demonstrate he is unequivocally entitled to a temporary or preliminary injunction requiring either of these defendants to act. He does not have a strong likelihood of success on the merits of this case, and he cannot show these defendants are not entitled to immunity. Furthermore, Plaintiff has not shown he is in danger of irreparable injury if the injunction is denied. Based on these considerations, an injunction cannot be granted.

ACCORDINGLY, Defendants' motion to dismiss (Dkt. 64) is GRANTED for Plaintiff's failure to state a claim under Fed. R. Civ. P. 12(b)(6). Defendants in their official capacities are DISMISSED WITHOUT PREJUDICE, Defendants in their individual capacities are DISMISSED WITH PREJUDICE, and Plaintiff's request for injunctive relief is DENIED. This dismissal shall count as a "prior occasion" or "strike," pursuant to 28 U.S.C. § 1915(g).

IT IS SO ORDERED this 27th day of September 2017.



Ronald A. White
United States District Judge
Eastern District of Oklahoma

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