

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

February 21, 2020

Christopher M. Wolpert
Clerk of Court

JAMES RICKY EZELL, III,

Plaintiff – Appellant,

v.

DAMON HININGER, CEO of Core Civic;
JAMES YATES, Warden, Davis
Correctional Facility; DEPUTY WARDEN
GENTRY, Deputy Warden; (FNU)
PEREZ, Deputy Warden, Davis
Correctional Facility; TERRY
UNDERWOOD, Grievance Coordinator,
Davis Correctional Facility; JESSICA
PATTERSON, Law Library Supervisor,
Davis Correctional Facility; TIFFANY
ADE, Echo Maximum Unit Manager,
Davis Correctional Facility; S. PFAFF;
CARLA HOOVER, a/k/a Carl Hoover;
SCOTT CROW, Interim Director,
Oklahoma Department of Corrections;
MARK KNUTSON, Designee, Oklahoma
Department of Corrections; DAVID A.
CINCOTTA, General Counsel, Oklahoma
Department of Corrections; JASON
BRYANT, Warden, Joseph Harp
Correctional Center; R. HODGSON,
Captain, James Crabtree Correctional
Center; LT. AUSTIN PARKS, Lt., James
Crabtree Correctional Center; SERGEANT
WALKER, Correctional Officer, James
Crabtree Correctional Center; JAMES
NALL, Captain, James Crabtree
Correctional Center; MS. PIRECE,
Correctional Officer; MR. VANCE,
Correctional Officer; MR. BULLOCK,
Correctional Officer; MR. KEYS,
Correctional Officer; MR. ADKINS,

No. 20-7007
(D.C. No. 6:19-CV-00302-JHP-SPS)
(E.D. Okla.)

APPENDIX C.

Correctional Officer; ANDREW SMITH,

Defendants – Appellees.

ORDER

Before **BRISCOE**, **MORITZ**, and **CARSON**, Circuit Judges.

Pro se plaintiff James Ezell, III, appeals the district court's February 7, 2020 order denying his second motion for appointed counsel. Mr. Ezell previously appealed the district court's order denying his first motion for appointed counsel, which was dismissed for lack of appellate jurisdiction. *Ezell v. Yates*, No. 19-7065 (10th Cir. Jan. 7, 2020). Little has changed with respect to the district court proceedings since Mr. Ezell's first appeal was dismissed. The district court case remains ongoing, and no final judgment has been entered. *See* 28 U.S.C. § 1291; Fed. R. Civ. P. 58. Our precedent holding that orders denying appointed counsel in civil cases are not immediately appealable remains good law. *Cotner v. Mason*, 657 F.2d 1390, 1392 (10th Cir. 1981) (per curiam). Accordingly, and for the same reasons that Case No. 19-7065 was dismissed, this appeal is dismissed for lack of appellate jurisdiction.

Entered for the Court
CHRISTOPHER M. WOLPERT, Clerk



by: Lara Smith
Counsel to the Clerk

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

JAMES EZELL, III,)
)
 Plaintiff,)
)
 v.) No. CIV 19-302-JHP-SPS
)
 DAMON HININGER, et al.,)
)
 Defendants.)

OPINION AND ORDER DENYING
SECOND MOTION FOR APPOINTMENT OF COUNSEL

Plaintiff has filed a motion for reconsideration of his previously-denied motion for appointment of counsel (Dkts. 32, 77). The Court construes the present motion as a second motion for appointment of counsel.

Plaintiff alleges the law library supervisor has denied him access to the prison law library and has written a misconduct against him for filing a Request to Staff. Plaintiff further asserts the defendants' threats and retaliation have interfered with his ability to investigate crucial facts and to litigate the complex legal matters in his case.

It is undisputed that access to the courts and the means to effectuate such access are fundamental constitutional rights. *Bounds v. Smith*, 430 U.S. 817, 828 (1977). There is, however, no constitutional right to appointment of counsel in a civil case. *Durre v. Dempsey*, 869 F.2d 543, 547 (10th Cir. 1989); *Carper v. DeLand*, 54 F.3d 613, 616 (10th Cir. 1995). The decision whether to appoint counsel in a civil matter lies within the discretion of the district court. *Williams v. Meese*, 926 F.2d 994, 996 (10th Cir. 1991). "The burden is on the applicant to convince the court that there is sufficient merit

to his claim to warrant the appointment of counsel.” *Steffey v. Orman*, 461 F.3d 1218, 1223 (10th Cir. 2006) (quoting *Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1115 (10th Cir. 2004)). It is not enough “that having counsel appointed would [assist the prisoner] in presenting his strongest possible case, [as] the same could be said in any case.” *Steffey*, 461 F.3d at 1223 (quoting *Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995)).

The Court again has carefully reviewed the merits of Plaintiff’s claims, the nature of factual issues raised in his allegations, and his ability to investigate crucial facts. *McCarthy v. Weinberg*, 753 F.2d 836, 838 (10th Cir. 1985) (citing *Maclin v. Freake*, 650 F.2d 885, 887-88 (7th Cir. 1981)). The Court concludes the issues are not complex, and Plaintiff appears capable of adequately presenting facts and arguments.

ACCORDINGLY, Plaintiff’s second motion for appointment of counsel (Dkt. 77) is DENIED.

IT IS SO ORDERED this 7th day of February 2020.



James H. Payne
United States District Judge
Eastern District of Oklahoma

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES EZELL, III,

Plaintiff - Appellant,

v.

JAMES YATES, Warden, Davis
Correctional Facility; DEPUTY WARDEN
GENTRY, Deputy Warden; (FNU)
PEREZ, Deputy Warden, Davis
Correctional Facility; TERRY
UNDERWOOD, Grievance Coordinator,
Davis Correctional Facility; JESSICA
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Davis Correctional Facility; TIFFANY
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Davis Correctional Facility; S. PFAFF;
CARLA HOOVER, AKA Carl Hoover;
SCOTT CROW, Interim Director,
Oklahoma Department of Corrections;
MARK KNUTSON, Designee, Oklahoma
Department of Corrections; DAVID A.
CINCOTTA, General Counsel, Oklahoma
Department of Corrections,

Defendants - Appellees,

and

DAMON HININGER, CEO of Core Civic;
JASON BRYANT, Warden, Joseph Harp
Correctional Center; R. HODGSON,
Captain, James Crabtree Correctional
Center; AUSTIN PARKS, Lt., James
Crabtree Correctional Center; SERGEANT
WALKER, Correctional Officer, James
Crabtree Correctional Center; JAMES
NALL, Captain, James Crabtree

January 7, 2020

Christopher M. Wolpert
Clerk of Court

No. 19-7065
(D.C. No. 6:19-CV-00302-JHP-SPS)
(E.D. Okla.)

APPENDIX A .

Correctional Center,
Defendants.

ORDER

Before **LUCERO, HARTZ, and McHUGH**, Circuit Judges.

We raise *sua sponte* the question of whether this court has jurisdiction to consider this appeal. James Ezell, III, proceeding pro se, filed a notice of appeal of the district court's November 14, 2019 order denying his motion for appointment of counsel.

Mr. Ezell's responses to this court's show cause order do not establish that the November 14, 2019 order is appealable at this time. Generally, this court's jurisdiction is limited to review of final decisions. 28 U.S.C. § 1291; see also Utah v. Norton, 396 F.3d 1281, 1286 (10th Cir. 2005) (describing final decisions as those that end the litigation on the merits and leave nothing for the court to do but execute the judgment); Cotner v. Mason, 657 F.2d 1390, 1392 (10th Cir. 1981) (per curiam) ("An order denying a motion for appointment of counsel in a civil case thus plainly falls within the large class of orders that are indeed reviewable after final judgment. . . .") (internal quotation marks and citation omitted). Review of the district court docket reflects that the district court has not yet entered a final decision.

Because this court does not have jurisdiction over the November 14, 2019 order at this time, the appeal is dismissed, and all other relief requested is denied.

DISMISSED.

Entered for the Court
CHRISTOPHER M. WOLPERT, Clerk

by: Lindy Lucero Schaible
Counsel to the Clerk

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

JAMES EZELL, III,)
v.)
Plaintiff,)
Defendants.)
No. CIV 19-302-JHP-SPS

ORDER

Plaintiff is a pro se state prisoner in the custody of the Oklahoma Department of Corrections who is incarcerated at Davis Correctional Facility in Holdenville, Oklahoma. On September 9, 2019, he filed this civil rights complaint pursuant to 42 U.S.C. § 1983, seeking relief for alleged constitutional violations at his present facility and at James Crabtree Correctional Center in Helena, Oklahoma (Dkt. 1).

On November 7, 2019, Plaintiff filed a motion to amend the complaint (Dkt. 27). The Court denied the motion on the same date, because it did not comply with Local Civil Rule 9.2(c) (Dkt. 28). Plaintiff was advised that the motion did not clearly set forth the reasons for requesting permission to file an amended complaint, and he had failed to submit a proposed amended complaint with the motion. *Id.*

On November 7, 2019, Plaintiff submitted an improper proposed amended complaint. Because the proposed amended complaint apparently was intended as a supplement to the original complaint, the Court will not consider it. To amend the

original complaint, Plaintiff must submit a proper motion to file an amended complaint setting forth the reasons for amending the original complaint, along with a proposed amended complaint that complies with the following instructions.

Amended Complaint

Within fourteen (14) days of the entry of this Order, Plaintiff must file a proposed amended complaint on this Court's form. The amended complaint must set forth the full name of each person he is suing under 42 U.S.C. § 1983. *See Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1237 (10th Cir. 1999) (holding that “a cause of action under § 1983 requires a deprivation of a civil right by a ‘person’ acting under color of state law”). Further, the names in the caption of the amended complaint must be identical to those contained in the body of the amended complaint, pursuant to Fed. R. Civ. P. 10(a).

Plaintiff must provide a short and plain statement of when and how each named defendant violated his constitutional rights and showing Plaintiff is entitled to relief from each named defendant. *See* Fed. R. Civ. P. 8(a). He also shall identify a specific constitutional basis for each claim. *See id.* He is admonished that simply alleging that a defendant is an employee or supervisor of a state agency is inadequate to state a claim. Plaintiff must go further and state how the named defendant's personal participation violated his constitutional rights. **The “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). The Court only will consider claims “based

upon the violation of a plaintiff's personal rights, and not the rights of someone else." *Archuleta v. McShan*, 897 F.2d 495, 497 (10th Cir. 1990).

The amended complaint must include all claims and supporting material to be considered by the Court. *See* Local Civil Rule 9.2(c). It must be complete in itself, including exhibits, and may not reference or attempt to incorporate material from the original complaint or exhibits. *Id.* An amended complaint supersedes the original complaint and renders the original complaint of no legal effect. *See Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991); *Gilles v. United States*, 906 F.2d 1386, 1389 (10th Cir. 1990). *See also* Local Civil Rule 9.2(c). Pursuant to Local Civil Rule 5.2(a), the amended complaint must be clearly legible, and only one side of the paper may be used.

The Court Clerk is directed to return Plaintiff's improper proposed amended complaint and to send Plaintiff the proper form for filing an amended complaint. If Plaintiff fails to file an amended complaint in accordance with this Order, this action shall be dismissed without further notice.

Motion for Appointment of Counsel

Plaintiff also has filed a motion for appointment of counsel, alleging he "can barely write or spell," he does not know the law, and there is no legal assistance at his facility (Dkt. 31). Even if he is illiterate, courts have consistently held that a prisoner's illiteracy is insufficient to merit appointment of counsel. *See Finley v. Kerby*, 996 F.2d 310, No. 92-2150, 1993 WL 230116, at *2 (10th Cir. 1993) (unpublished) (affirming denial of appointment of counsel due to illiteracy); *Green v. United States*, Civil Action

No. 11-59-HRW, 2013 WL 209019, at *2 (E.D. Ky. Jan. 17, 2013), *aff'd* No. 13-5173 (6th Cir. Oct. 25, 2013) (denying request for appointed counsel due to illiteracy).

In addition, Plaintiff bears the burden of convincing the Court that his claim has sufficient merit to warrant such appointment. *McCarthy v. Weinberg*, 753 F.2d 836, 838 (10th Cir. 1985) (citing *United States v. Masters*, 484 F.2d 1251, 1253 (10th Cir. 1973)). The Court has carefully reviewed the merits of Plaintiff's claims, the nature of factual issues raised in his allegations, and his ability to investigate crucial facts. *McCarthy*, 753 F.2d at 838 (citing *Maclin v. Freake*, 650 F.2d 885, 887-88 (7th Cir. 1981)). After considering Plaintiff's ability to present his claims and the complexity of the legal issues raised by the claims, the Court finds that appointment of counsel is not warranted. *See Williams v. Meese*, 926 F.2d 994, 996 (10th Cir. 1991); *see also Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995). Therefore, Plaintiff's motion for appointment of counsel (Dkt. 31) is DENIED.

ACCORDINGLY,

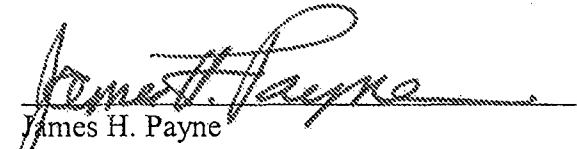
1. Plaintiff is directed to file within fourteen (14) days a motion to amend the complaint, setting forth the reasons for requesting permission to file an amended complaint, along with the proposed amended complaint on the Court's form, as directed in this Order.
2. The Court Clerk is directed to return unfiled Plaintiff's improper proposed amended complaint.
3. The Court Clerk is directed to send Plaintiff a copy of the form for filing an

amended civil rights complaint in this Court.

4. Plaintiff's motion for appointment of counsel (Dkt. 31) is DENIED.

5. Failure to comply with this Order will result in dismissal of this action without further notice.

IT IS SO ORDERED this 14th day of November 2019.



James H. Payne
United States District Judge
Eastern District of Oklahoma