

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-12539-A

JUAN F. PEREZ,

Plaintiff-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Defendants,

JULIE L. JONES,
in her individual capacity,
HOLMES CI WARDEN,
GREG MALLORY,
Colonel at Holmes CI,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
MICHAEL BAKER,
(CO) of Holmes C.I., et al.,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Florida

Before: TJOFLAT, WILLIAM PRYOR and BRANCH, Circuit Judges.

BY THE COURT:

Appellant, in the district court, filed a motion to proceed on appeal *in forma pauperis*. The district court denied *in forma pauperis* status, certifying that the appeal was not taken in good faith. Appellant has consented to pay the \$505.00 filing fee, using the partial payment plan described under the Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915(b). Thus, the only remaining

issue is whether the appeal is frivolous. *See* 28 U.S.C. § 1915(e)(2)(B)(i). This Court now finds that the appeal is frivolous, DENIES leave to proceed, and DISMISSES the appeal.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-12539-A

JUAN F. PEREZ,

Plaintiff-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Defendants,

JULIE L. JONES,
in her individual capacity,
HOLMES CI WARDEN,
GREG MALLORY,
Colonel at Holmes CI,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
MICHAEL BAKER,
(CO) of Holmes C.I., et al.,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Florida

Before: WILLIAM PRYOR, BRANCH and TJOFLAT, Circuit Judges.

BY THE COURT:

Juan F. Perez, a Florida prisoner, has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's November 8, 2019, order denying leave to proceed in his appeal from the dismissal of his 42 U.S.C. § 1983 civil right action. Upon review, Perez's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

C

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

JUAN F. PEREZ,

Plaintiff,

vs.

Case No. 4:17cv574-WS/CAS

JULIE L. JONES, et al.,

Defendants.

_____ /

ORDER

A Report and Recommendation was entered on May 1, 2019, recommending that this case be dismissed for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2). ECF No. 55. The pro se Plaintiff filed objections, see ECF Nos. 60-61, and requested service on several Defendants in mid-May 2019. The motion was denied, ECF No. 63, and Plaintiff was advised that there was no reason to serve Defendants unless the Report and Recommendation was rejected. On May 23, 2019, an Order was entered by Senior United States District Judge William Stafford adopting the Report and Recommendation and dismissing Plaintiff's fifth

C

amended complaint. ECF No. 64. The Clerk of Court entered judgment that same day. ECF No. 65.

On June 7, 2019, Plaintiff filed a motion for reconsideration, ECF No. 66, in which he "adopts and reaffirms the arguments" cited in his objection. ECF No. 66 at 2. The arguments raised lack merit and were already considered. Therefore, Plaintiff's motion, ECF No. 66, is denied.

Plaintiff also filed another motion requesting leave to file an amended complaint. ECF No. 67. That motion is also denied as judgment has already been entered in this case. Moreover, Plaintiff has already been given numerous opportunities to file a viable amended complaint. This motion comes too late and is moot.

Accordingly, it is **ORDERED**:

1. Plaintiff's motion for reconsideration, ECF No. 65, is **DENIED**.
2. Plaintiff's motion to file an amended complaint, ECF No. 66, is **DENIED** as moot.

DONE AND ORDERED on June 17, 2019.

S/ Charles A. Stampelos
CHARLES A. STAMPELOS
UNITED STATES MAGISTRATE JUDGE

2 C

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JUAN F. PEREZ,

Plaintiff,

v.

4:17cv574-WS/CAS

JULIE L. JONES, et al.,

Defendants.

ORDER ADOPTING THE MAGISTRATE JUDGE'S
THIRD REPORT AND RECOMMENDATION

Before the court is the magistrate judge's third report and recommendation (ECF No. 55) docketed May 1, 2019. The magistrate judge recommends that the plaintiff's fifth amended complaint be dismissed for failure to state a claim. The plaintiff has filed objections (ECF No. 61) to the report and recommendation.

Having reviewed the record, the undersigned finds that the magistrate judge's third report and recommendation is due to be adopted.

Accordingly, it is ORDERED:

1. The magistrate judge's third report and recommendation (ECF No. 55) is

hereby ADOPTED and incorporated by reference in this order.

2. The plaintiff's fifth amended complaint (ECF No. 53) and this action are DISMISSED for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

3. The clerk shall enter judgment stating: "All claims are dismissed."

4. The clerk shall note on the docket that this case was dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

DONE AND ORDERED this 23rd day of May, 2019.

s/ William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

JUAN F. PEREZ,

Plaintiff,

vs.

Case No. 4:17cv574-WS/CAS

JULIE L. JONES, et al.,

Defendants.

_____ /

THIRD REPORT AND RECOMMENDATION

After reviewing Plaintiff's initial complaint, ECF No. 1, a Report and Recommendation was entered, ECF No. 6, noting that Plaintiff's initial complaint was brought against the Florida Department of Corrections for monetary damages. The Report and Recommendation explained that neither the State nor its agencies or officials acting in their official capacities could be sued for monetary damages and it was recommended that this case be dismissed. ECF No. 6. Thereafter, the pro se Plaintiff was given leave to amend his complaint, see ECF No. 11, and the initial Report and Recommendation, ECF No. 6, was vacated. ECF No. 14.

The case moved forward with Plaintiff eventually filing a fourth amended, ECF No. 27, and service was directed. In that version of his complaint, Plaintiff sued five named Defendants in both their official and individual capacities. *Id.* at 1, 3. After attempting to unravel issues with service of process and a deceased Defendant, another Report and Recommendation was entered in this case on March 25, 2019, ECF No. 43, once again based on Eleventh Amendment immunity. There, it was explained once again that under well-established principles of law, a § 1983 complaint may not be brought against state officials in their official capacities for monetary damages. *Id.* at 4 (citing Kentucky v. Graham, 473 U.S. 159, 169, 105 S.Ct. 3099, 3107, 87 L.Ed.2d 114 (1985)). That Report and Recommendation also noted that, even though Plaintiff was only seeking monetary damages, any request for injunctive relief (if one had been made) could not be granted because Plaintiff was no longer housed at Holmes Correctional Institution. See ECF No. 43 at 6.

Four days later, Plaintiff filed a motion requesting leave to file an amended complaint. ECF No. 44.¹ Plaintiff also submitted a proposed fifth

¹ Plaintiff's motion was given to prison officials for mailing on March 29, 2019. ECF No. 44 at 3. It is possible, but not likely that Plaintiff had received the March 25, 2019, Report and Recommendation, ECF No. 43, prior to submitting that motion.

6. Plaintiff alleges that no correctional officers were present at the time in the pavilion area, but as he turned the corner of the pavilion, he encountered Defendants Baker and Brown. *Id.* at 6-7. They responded and provided assistance to Plaintiff.

Plaintiff alleges that security is inadequate in “blind spot” areas and that officials knew of a “high risk” of inmate violence at Holmes Correctional Institution and other prisons. *Id.* at 7. He alleges that not only were no officers present, they were no mirrors or cameras in place to monitor that “blind spot.” *Id.* at 9. Plaintiff also contends that as Secretary of the Florida Department of Corrections, Defendant Julie Jones is responsible for inmate safety. *Id.* at 7. He claims that Defendants Summers (the warden) and Malloy (colonel of security) were responsible for implementing the Secretary’s safety procedures. *Id.* Finally, Plaintiff claims that Defendants Baker and Brown must carry out those procedures on the prison compound. *Id.* He alleges that Defendants Baker and Brown were “negligent in their duties and conduct” which resulted in Plaintiff’s harm. Plaintiff alternatively alleges that Defendants were either negligent in providing for his safety, or deliberately indifferent, *Id.* at 9, and he states

Amendment bars a damages action against a State in federal court.”).

That “bar remains in effect when State officials are sued for damages in their official capacity.” Kentucky, 473 U.S. at 169, 105 S. Ct. at 3107; see also Odebrecht Const., Inc. v. Secretary, Fla. Dep’t of Transp., 715 F.3d 1268, 1289 (11th Cir. 2013) (same).

The first two exceptions to Eleventh Amendment immunity are through waivers of sovereign immunity. See Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985); Gamble v. Florida Dep’t of Health and Rehab. Servs., 779 F.2d 1509 (11th Cir. 1986). Waiver may be either by the State or Congress may override a state’s immunity pursuant to its power under § 5 of the Fourteenth Amendment. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 119 S. Ct. 2199, 2205-06, 144 L. Ed. 2d 575 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55, 116 S. Ct. 1114, 1124, 134 L. Ed. 2d 252 (1996) (concluding “that the type of relief sought is irrelevant to whether Congress has power to abrogate States’ immunity.”). “But absent waiver or valid abrogation, federal courts may not entertain a private person’s suit against a State.” Virginia Office for Prot. & Advocacy v. Stewart, 563 U.S. 247, 254, 131 S. Ct. 1632, 1638, 179 L. Ed.

2d 675 (2011). Congress did not abrogate a state's immunity when enacting § 1983, Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139, 59 L. Ed. 2d 358 (1979); Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L. Ed. 2d 662 (1974), nor has Florida waived its immunity and consented to suit in federal court under § 1983. Gamble, 779 F.2d at 1520.

A third exception is through Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L. Ed. 714 (1908). Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 269, 117 S.Ct. 2028, 138 L. Ed. 2d 438 (1997) (reaffirming that prospective relief may be sought against a state official in federal court). Sandoval v. Hagan, 197 F.3d 484, 492 (11th Cir. 1999) (citing Summit Med. Assoc. v. Pryor, 180 F.3d 1326, 1336-38 (11th Cir. 1999)). The Ex parte Young exception holds that a state official who enforces state law which conflicts with the superior authority of the federal Constitution is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." Stewart, 563 U.S. at 254, 131 S. Ct. at 1638. Accordingly, determining whether this exception applies requires answering a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and

insufficient to preclude dismissal"). Therefore, because Plaintiff's proposed fifth amended complaint is insufficient to allege an ongoing violation of federal law in providing safety to inmates, there is no basis to seek prospective injunctive relief. The claims brought against the Defendants in their official capacities should be dismissed.

Furthermore, there is a distinction between individual capacity and official capacity claims:

Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 237-238, 94 S.Ct. 1683, 1686-1687, 40 L.Ed.2d 90 (1974). Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 2035, n. 55, 56 L.Ed.2d 611 (1978).

Kentucky, 473 U.S. at 165-66, 105 S. Ct. at 3105. To proceed with an individual capacity claim against Defendants Jones, Summers, and Malloy, Plaintiff must allege facts showing how they were personally involved, but he has not done so. Plaintiff claims that Defendant Jones is "responsible for the overall safety of all incarcerated individuals in the Department of Corrections." ECF No. 53 at 7. He claims that Defendants Malloy and Summers are responsible for implementing "training and safety measures"

53 at 6. His complaint does not suggest that he had been previously threatened or felt unsafe. Moreover, Plaintiff has not pointed to any prior incidents which would suggest that Defendants were aware of the need to monitor the area around the pavilion or that they knew of a "blind spot" which posed an excessive risk of danger. Because Plaintiff does not allege facts which demonstrate that Defendants Baker and Brown were subjectively aware of a significant risk of harm to Plaintiff from another inmate, these claims are insufficient.

Beyond the Eighth Amendment claims, Plaintiff's proposed complaint also asserts that Defendants were negligent. However, negligent conduct, even though it causes injury, is not an actionable constitutional deprivation under § 1983. County of Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998); Daniels v. Williams, 474 U.S. 327, 331, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662 (1986). Allegations that Defendants were negligent are insufficient on their face. Averhart, 590 F. App'x at 875 (stating that "negligence is insufficient to support a finding of deliberate indifference"). Thus, the fifth amended complaint, ECF No. 53, should be dismissed for failure to state a claim.