19CA0563 Sayed v CDOC 04-02-2020

COLORADO COURT OF APPEALS

DATE FILED: April 2, 2020

Court of Appeals No. 19CA0563
El Paso County District Court No. 19CV3
Honorable Thomas K. Kane, Judge

Hazhar A. Sayed,

Plaintiff-Appellant,

v.

Dean Williams, Executive Director of the Department of Corrections,

Defendant-Appellee.

JUDGMENT AFFIRMED

Division I
Opinion by JUDGE DAILEY
Navarro and Gomez, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced April 2, 2020

Hazhar A. Sayed, Pro Se

Philip J. Weiser, Attorney General, Karen E. Lorenz, Assistant Attorney General, Denver, Colorado, for Defendant-Appellee

¶ 1 In this action to compel access to sex offender treatment, plaintiff, Hazhar A. Sayed, appeals the district court's judgment dismissing his complaint against defendant, Dean Williams, Executive Director of the Colorado Department of Corrections (DOC).[1] We affirm.

I. Background

¶ 2 In 2006, Sayed was sentenced under the Colorado Sex Offender Lifetime Supervision Act of 1998 (SOLSA), §§ 18-1.3-1001 to -1012, C.R.S. 2019, to a term of twenty-four years to life imprisonment in the custody of the DOC.

¶ 3 In 2018, Sayed initiated the present action, seeking injunctive relief, nominal damages, punitive damages, and an award of costs for "violation[s] of civil rights and statutory mandates." In his complaint, he alleged that the DOC had (1) failed to enroll him in sex offender treatment as required by Colorado statute; (2) violated his right to equal protection of the law; and (3) violated both the

---

[1] Although Sayed originally sued Rick Raemisch, Dean Williams has since replaced Raemisch as the Executive Director of the DOC, and, consequently, must be automatically substituted for Raemisch as a party. *See* C.R.C.P. 43(c)(2).

Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 (2018) and the Rehabilitation Act, 29 U.S.C. § 794(a) (2018).

¶ 4 The DOC moved to dismiss Sayed's complaint (1) under C.R.C.P. 12(b)(1), for lack of subject matter jurisdiction; and (2) under C.R.C.P. 12(b)(5), for failure to state a claim upon which relief could be granted. The district court summarily granted the DOC's motion, stating only that "[t]he Motion to Dismiss is granted."

¶ 5 Sayed now appeals.

II. Analysis

¶ 6 In his opening brief, Sayed contends that the court erred in dismissing his complaint under C.R.C.P. 12(b)(5).[2] We perceive no grounds for reversal.

---

[2] To the extent that in his reply brief Sayed raised new arguments or expanded on his original arguments, we do not consider them. *See In re Marriage of Dean*, 2017 COA 51, ¶ 31 ("We do not consider the arguments mother makes for the first time in her reply brief or those that seek to expand upon the contentions she raised in her opening brief.").

A. Sayed's Appeal Focuses on Dismissal Under C.R.C.P. 12(b)(5) and Ignores the Alternative C.R.C.P. 12(b)(1) Ground for Dismissing the Case

¶ 7 In his opening brief, Sayed challenges only those parts of the court's order that encompass dismissal under C.R.C.P. 12(b)(5); he does not independently challenge the alternative ground for which dismissal was sought and presumably granted, i.e., lack of subject matter jurisdiction under C.R.C.P. 12(b)(1).[3]

¶ 8 It is incumbent on Sayed, as the appellant, to challenge on appeal all stated reasons or grounds for a district court's decision. *See IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714, 716-17 (Colo. App. 2008). Because Sayed failed to contest the lack of subject matter jurisdiction ground for dismissal in his opening brief, affirmance of the district court's order is required. *Id.*

---

[3] The closest Sayed comes to challenging the C.R.C.P. 12(b)(1) ground for dismissal is his contention that the district court improperly "converted Defendant's Motion to Dismiss to a Motion for Summary Judgment as it considered attachments to said." He did not, however, in his opening brief explain what attachments were considered by the court, or to what those attachments related. (The attachments were three grievances he filed with the DOC, the DOC's responses thereto, and an affidavit correcting a clerical error in the date of one of the DOC's responses — all of which pertained only to that part of the DOC's motion to dismiss for lack of subject matter jurisdiction.)

¶ 9 Even if Sayed could be said to have raised a challenge to dismissal on that ground, the record and the law support the district court's ruling.

¶ 10 "Where parties are required to follow administrative procedures, the courts do not have subject matter jurisdiction to hear any dispute between them until they have exhausted those remedies . . . ." *New Design Constr. Co. v. Hamon Contractors, Inc.*, 215 P.3d 1172, 1178 (Colo. App. 2008); *see also City & Cty. of Denver v. United Air Lines, Inc.*, 8 P.3d 1206, 1212 (Colo. 2000) ("If complete, adequate, and speedy administrative remedies are available, a party must pursue these remedies before filing suit in district court."); *Egle v. City & Cty. of Denver*, 93 P.3d 609, 612 (Colo. App. 2004) ("When administrative remedies are provided by statute or ordinance, the procedure outlined in the statute or ordinance must be followed if the contested matter is within the jurisdiction of the administrative authority.").

¶ 11 Whether a party has exhausted available administrative remedies, and, consequently, whether a district court has subject matter jurisdiction over a particular dispute, are questions of law

subject to de novo review. *New Design Constr. Co.*, 215 P.3d at 1178.

¶ 12 Pursuant to the Colorado Prison Litigation Reform Act (CPLRA), §§ 13-17.5-101 to -108, C.R.S. 2019, inmates are required to exhaust all available administrative remedies in a timely fashion before bringing a civil action. § 13-17.5-102.3, C.R.S. 2019. To properly exhaust remedies, an inmate must complete the administrative review process with the applicable procedural rules that are defined by the prison grievance process itself. *See Jones v. Bock*, 549 U.S. 199, 200 (2007) (examining the requirement of inmates to follow procedural rules under the federal Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. § 1997e(a) (2018)); *see Glover v. State*, 129 P.3d 1083, 1085 (Colo. App. 2005) (applying the rules of the PLRA to the CPLRA because the CPLRA is substantially similar to the PLRA).

¶ 13 The DOC's grievance process consists of three levels of review. DOC Admin. Reg. 850-04(I). "Offenders who wish to proceed to the next step in the grievance process must submit their written grievance within five calendar days of receiving the written response to the previous step." DOC Admin. Reg. 850-04(IV)(F)(1)(d).

¶ 14 Sayed attached three grievances and the DOC's responses to his complaint,[4] asserting, simply, that he had "exhausted all administrative remedies."

¶ 15 However, the DOC pointed out that Sayed had not complied with the DOC grievance process: his third grievance (the last step of the process) was belatedly filed. Sayed was required to submit a third grievance within five days of receiving the response to his second grievance. The DOC's response to the second grievance is dated August 22, 2018; according to an affidavit attached to the DOC's reply to Sayed's response to the motion to dismiss, the response contained a clerical error, inasmuch as the date should have been August 22, 2017. Measured by either date, Sayed's submission of his third grievance on October 31, 2018, was well beyond the five-day period for continuing the grievance process.

¶ 16 Sayed *did not* dispute the untimeliness of his third grievance. Because Sayed did not properly complete the grievance process, he did not exhaust his administrative remedies. Consequently, the

---

[4] These could be considered by the court without converting the motion to dismiss into a motion for summary judgment. *See Yadon v. Lowry*, 126 P.3d 332, 335-36 (Colo. App. 2005).

district court did not have subject matter jurisdiction over Sayed's claims and the complaint was properly dismissed under C.R.C.P. 12(b)(1).

B. Alternatively, Sayed's Complaint Was Properly Dismissed Under C.R.C.P. 12(b)(5)

¶ 17 Sayed contends that the district court erred in dismissing his complaint on C.R.C.P. 12(b)(5) grounds (1) without issuing written findings and (2) by misinterpreting or misapplying substantive law (i.e., Colorado statutes, equal protection principles, the ADA, and the Rehabilitation Act). We are not persuaded.

1. No Written Findings Were Required

¶ 18 "Findings of fact and conclusions of law are unnecessary on decisions on motions under Rule 12 or 56 or any other motion except as provided in these rules or other law." C.R.C.P. 52. Because the court "dismissed plaintiffs' complaint pursuant to C.R.C.P. 12(b)(5) for failure to state a claim[,] . . . it was not required to make specific findings of fact and conclusions of law for the record." *Henderson v. Romer*, 910 P.2d 48, 54 (Colo. App. 1995), *aff'd sub nom. Henderson v. Gunther*, 931 P.2d 1150 (Colo. 1997).

2. *Substantive Issues*

¶ 19 We review de novo the district court's ruling on a C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011).

¶ 20 A claim may be dismissed under C.R.C.P. 12(b)(5) if the substantive law does not support it, *W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008), or if the plaintiff's factual allegations do not, as a matter of law, support a claim for relief, *Ritter*, 255 P.3d at 1088.

a. Colorado Statutory and Regulatory Law

¶ 21 On appeal, Sayed asserts that he is being denied his statutory right to participate in sex offender treatment, *see* § 18-1.3-1004(3), C.R.S. 2019 ("Each sex offender . . . shall be required as a part of the sentence to undergo treatment to the extent appropriate pursuant to section 16-11.7-105, C.R.S."), within the period prescribed by DOC regulations for receipt of such treatment. *See* DOC Admin. Reg. 700-19(IV)(E) (offenders that are within four years of their parole eligibility date are prioritized to receive treatment).

¶ 22 Sayed asserts that he is entitled to enroll in sex offender treatment because, he says, he is within four years of his parole eligibility date. He asserts he is within four years of his parole eligibility date because his parole eligibility date is calculable under section 17-22.5-403(1), C.R.S. 2019. That provision says that individuals convicted of certain felonies are eligible for parole after serving fifty percent of their sentence. Fifty percent of Sayed's minimum twenty-four-year term would thus be twelve years. If measured from his 2006 sentencing date, Sayed would be eligible for parole in 2018 and have priority under the DOC regulations for receiving sex offender treatment.

¶ 23 The problem with Sayed's analysis is that it is grounded in the wrong statute.

¶ 24 Section 17-22.5-403(1) was enacted in 1990.[5] It addresses parole eligibility for offenders generally and provides, in pertinent part, that persons sentenced for class 2-6 felonies "shall be eligible for parole after such person has served fifty percent of the sentence

---

[5] *See* Ch. 120, sec. 19, § 17-22.5-403, 1990 Colo. Sess. Laws 947.

imposed upon such person, less any time authorized for earned time granted."

¶ 25 In contrast, section 18-1.3-1006(1)(a), C.R.S. 2019, enacted eight years later in 1998, specifically addresses sex offender parole and release from incarceration.[6] It provides that "[o]n completion of the minimum period of incarceration specified in a sex offender's indeterminate sentence, less any earned time credited . . . , the parole board shall schedule a hearing to determine whether the sex offender may be released on parole."

¶ 26 Colorado law is well settled that section 18-1.3-1006(1)(a) applies in determining the parole eligibility date of sex offenders like Sayed who have received indeterminate sentences. *See Vensor v. People*, 151 P.3d 1274, 1276 (Colo. 2007) ("On completion of the minimum period of incarceration specified in the sex offender's indeterminate sentence, less any credits earned by him, [SOLSA] assigns discretion to the parole board to release him . . . ."); *People v. Oglethorpe*, 87 P.3d 129, 134 (Colo. App. 2003); *People v. Strean*,

---

[6] The statute as originally enacted in 1998 was codified at section 16-13-806. It was relocated in 2002 to its present site. *See* Ch. 303, sec. 1, § 16-13-806, 1998 Colo. Sess. Laws 1282-84; Ch. 318, sec. 2, § 18-1.3-1006, 2002 Colo. Sess. Laws 1438.

74 P.3d 387, 393 (Colo. App. 2002); *see also Firth v. Shoemaker*, 496 F. App'x 778, 781 n.2 (10th Cir. 2012) (noting that inmate "was eligible for a parole hearing when he completed his six-year minimum sentence, less earned time" and citing section 18-1.3-1006(1)(a)).

¶ 27 Applying section 18-1.3-1006(1)(a), we conclude that Sayed will not be parole eligible until he completes the minimum twenty-four-year term of his sentence (less any earned time credits he has been awarded). Measured from his 2006 sentencing, he would be eligible for parole in 2030, or earlier depending upon whether he has received any earned time credits. Sayed will become prioritized to enroll in sex offender treatment programs only four years before he becomes eligible for parole. Regardless of the exact dates involved, it is clear that, at this point, Sayed is not near the time when he would be entitled to be "prioritized" for receipt of sex offender treatment.

¶ 28 Consequently, Sayed has not stated a Colorado statutory claim upon which relief can be granted.

b. Equal Protection

¶ 29 Sayed contends that he stated an equal protection claim, inasmuch as he alleged that he is being denied sex offender treatment because he is not a U.S. citizen and cannot sufficiently read or write English.

¶ 30 The doctrine of equal protection provides that those who are similarly situated must be similarly treated. U.S. Const. amend. XIV; Colo. Const. art. II, § 25; *People v. Black*, 915 P.2d 1257, 1260 (Colo. 1996). Therefore, at a threshold level, Sayed must allege that he was treated differently than others in a similar situation. *Black*, 915 P.2d at 1260. Without this allegation, Sayed's complaint must be dismissed for failure to state a claim upon which relief can be granted.

¶ 31 In his complaint, Sayed alleged that he was similarly situated to inmates who were currently within their eligibility period and were enrolled in treatment programs. As the DOC argued in the district court, Sayed did "not identify any other specific inmates, or state how they were similarly situated to him, or state what more favorable treatment they received." Sayed's assertion of a similar situation is based on his incorrect analysis of parole eligibility

calculations, explained in Part II.B.2.a, above. Consequently, Sayed is *not* similarly situated to those who are already in the treatment programs because Sayed is *not* currently eligible for parole, nor is he within four years of it.

¶ 32 Without more, Sayed's complaint fails to allege any factual circumstance supporting an equal protection claim.

c. ADA and Rehabilitation Act Claims

¶ 33 Sayed claims he has been discriminated against because of his alleged disabilities in violation of both the ADA and the Rehabilitation Act.

¶ 34 The ADA and the Rehabilitation Act foster similar goals. To state a claim under the ADA, a plaintiff must allege (1) he is a qualified individual with a disability; (2) he was excluded from participation in or denied the benefits of a public entity's services, programs, or activities; and (3) such exclusion, denial of benefits, or discrimination was by reason of a disability. *Robertson v. Las Animas Cty. Sheriff's Dep't*, 500 F.3d 1185, 1193 (10th Cir. 2007). To state a claim under the Rehabilitation Act, a plaintiff must allege the same elements. *See Cash v. Smith*, 231 F.3d 1301, 1305 (11th Cir. 2000).

¶ 35 Under either Act, Sayed must allege that he had a qualified disability. Without this allegation, Sayed's complaint must be dismissed for failure to state a claim upon which relief can be granted.

¶ 36 As noted above, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Warne v. Hall*, 2016 CO 50, ¶ 1 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

¶ 37 A claim has facial plausibility when its factual allegations "raise a right to relief above the speculative level," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), by allowing a "court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 556 U.S. at 678. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Twombly*, 550 U.S. at 556. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'" *Id.* at 557 (citation omitted).

¶ 38 In deciding whether a plaintiff has set forth a "plausible" claim, the court must accept, as true, the factual allegations in the complaint. *Iqbal*, 556 U.S. at 678. That requirement, however, "is inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action." *Id.* In reviewing a complaint, then, a court should disregard conclusory allegations and "assume the[] veracity" of any "well-pleaded factual allegations" to "determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679; *see Peña v. Am. Family Mut. Ins. Co.*, 2018 COA 56, ¶ 15 ("Although we view the factual allegations in the complaint as true and in the light most favorable to the plaintiff, 'we are not required to accept as true legal conclusions that are couched as factual allegations[.]'" (quoting *Fry v. Lee*, 2013 COA 100, ¶ 17)) (citation omitted).

¶ 39 In his complaint, Sayed alleged that he "has a learning disability" as he is not a U.S. citizen and cannot properly read or write English[7] and that he "may also" have "physical learning

---

[7] In a different case, a division of this court rejected Sayed's argument that a lack of proficiency in English qualifies as a disability under the ADA or Rehabilitation Act. *Sayed v. Colo. Dep't*

disabilities, but to date there has been no diagnosis o [sic] attempt to diagnose him concerning said[.]" Although he states in conclusory terms that "he has been discriminated" against because of his disabilities, he alleges no facts to support his claim in either his complaint or his opening brief. For example, he does not allege that he was told by DOC personnel that he was denied sex offender treatment because of his alleged disabilities.

¶ 40 Because Sayed alleged no facts in support his federal discrimination claims, the district court properly dismissed those claims.

III. Disposition

¶ 41 The judgment dismissing the complaint is affirmed.

JUDGE NAVARRO and JUDGE GOMEZ concur.

---

of Corr., (Colo. App. No. 14CA0683, July 2, 2015); *see Buck v. Thomas M. Cooley Law Sch.*, 725 N.W.2d 485, 489 (Mich. Ct. App. 2006) (holding that English as a second language does not constitute a learning disability under similarly worded antidiscrimination statutes); *see also Steward v. New Chrysler*, 415 F. App'x 632, 641 (6th Cir. 2011) (Michigan's antidiscrimination statutes "'substantially mirror' the ADA, and claims under both statutes are generally analyzed identically.") (citation omitted).

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: August 17, 2020
Certiorari to the Court of Appeals, 2019CA563 District Court, El Paso County, 2019CV03	
Petitioner: Hazhar A. Sayed, **v.** **Respondent:** Dean Williams.	Supreme Court Case No: 2020SC315
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 17, 2020.

PLAINTIFF'S EXHIBIT B