FILED
United States Court of Appeals
Tenth Circuit

August 31, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BENJAMIN W. FAWLEY,

Plaintiff - Appellant,

v.

DAVID JABLONSKI; R.C. SMITH, Warden; HAROLD CLARKE, Director, Va. D.O.C.; SUSANA MARTINEZ, Governor, State of New Mexico,

Defendants - Appellees.

No. 20-2032
(D.C. No. 2:18-CV-01139-WJ-SCY)
(D.N.M.)

ORDER AND JUDGMENT*

Before **LUCERO**, **BACHARACH**, and **MORITZ**, Circuit Judges.

The district court ordered dismissal without prejudice of Mr. Benjamin W. Fawley's civil rights action, concluding that he disobeyed a court order. Mr. Fawley appeals. But he doesn't challenge the district court's reasoning, so we affirm.

* Oral argument would not materially help us to decide this appeal. We have thus decided the appeal based on the appellate brief and the record on appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G).

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

Appendix: A

I. The district court dismissed the action without prejudice because Mr. Fawley failed to comply with a court order.

Mr. Fawley, a prisoner, sued for constitutional violations under 42 U.S.C. § 1983. The district court excused Mr. Fawley from filing obligations pending the court's screening of his claims. *See* 28 U.S.C. § 1915A. But Mr. Fawley and other prisoners then filed over 50 motions, supplements, and notices. Because of the numerous filings, the district court ordered Mr. Fawley to file a single, legible amended complaint on a court form that contained the relevant allegations.

Mr. Fawley filed an amended complaint, but he raised claims under every clause of the U.S. Constitution and submitted numerous addenda that alleged various other violations. Mr. Fawley and other prisoners then filed over 230 pages of addenda and other motions.

The district court dismissed the action without prejudice for failure to comply with the court's order to file a single amended complaint. *See* Fed. R. Civ. P. 41(b).

II. Mr. Fawley alleges district court bias, but he does not challenge the district court's reasoning for dismissing the action without prejudice.

As a *pro se* litigant, Mr. Fawley's arguments are entitled to liberal construction. *See United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009). Though we liberally construe these allegations, we can't construct

arguments for Mr. Fawley. *See id.* ("[T]his rule of liberal construction stops, however, at the point at which we begin to serve as his advocate.")

"The first task of an appellant is to explain to us why the district court's decision was wrong." *Nixon v. City & Cty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015). But Mr. Fawley has not said what's wrong with the district court's reasoning. Instead of addressing the district court's reasoning, Mr. Fawley argues the merits of his claims, alleges that a medical condition prevented him from complying with the order, and accuses the district judge of bias.

But he doesn't explain how the medical condition prevented compliance. He states that a handicap prevented him from legibly writing his documents. But his appeal brief is legibly handwritten.

He also accuses the district judge of bias. To illustrate the bias, Mr. Fawley criticizes the district judge's enforcement of the Federal Rules of Civil Procedure. But our precedent requires all litigants, even those who are pro se, to comply with the Federal Rules of Civil Procedure. *Ogden v. San Juan Cty.*, 32 F.3d 452, 455 (10th Cir. 1994). Though Mr. Fawley states that these rules are not in his prison's law library, the district judge cannot be faulted for complying with our precedent.

Mr. Fawley further urges bias based on the district court's failure to appoint counsel. But Mr. Fawley has no right to appointed counsel. *See Johnson v. Johnson*, 466 F.3d 1213, 1217 (10th Cir. 2006). And we discern

no bias in the district court's decision to require Mr. Fawley himself to file a single, legible amended complaint.

Mr. Fawley also states that the Prison Litigation Reform Act requires judges to abandon neutrality. He is presumably referring to the requirement that judges screen complaints for failure to state a valid claim and frivolousness. 28 U.S.C. §§ 1915(e)(2)(B), 1915A(b). But the Prison Litigation Reform Act is a federal law, and the district judge cannot be faulted for complying with federal law.

We thus find no error in the decision to order dismissal for failure to comply with an order.

III. We deny Mr. Fawley's petition for a writ of mandamus and two motions.

Mr. Fawley also seeks a writ of mandamus for the district court to provide a copy of its order excusing Mr. Fawley from additional filings. Mr. Fawley says that he never received the order.

A writ of mandamus is a "drastic remedy, and is to be invoked only in extraordinary circumstances." *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009) (internal quotations and citation omitted). Three requirements exist for a writ of mandamus:

1. There must be no other adequate means to attain relief.
2. The petitioner must show that his right to a writ of mandamus is "clear and indisputable."

3. The issuing court "must be satisfied that the writ is appropriate under the circumstances."

Id. at 1187. A writ of mandamus isn't appropriate because Mr. Fawley has failed to show the unavailability of other means for him to obtain the order. (Though mandamus is unwarranted, we request the court clerk to mail Mr. Fawley a copy of the order.)

Mr. Fawley has also submitted two motions:

1. "Motion to Bar Respondent Brief and or Oral Argument" and

2. "Motion to Assert Grounds for Naming Appellee(s)/Defendant(s) to Whom U.S. District Court, Dist. of N.M. Has Issue."

In his first motion, Mr. Fawley alleges that he didn't receive the respondent's amended brief. The respondent's amended brief, however, includes a certificate of service. We have no way of knowing whether (1) the respondent failed to mail the brief, (2) the postal service misdelivered the mail, or (3) prison authorities failed to give Mr. Fawley his mail. So we deny the motion to bar the respondent's brief. (But we ask the court clerk's office to send a copy of the brief to Mr. Fawley.)

Mr. Fawley's second motion largely argues the merits of his claims, and we are unable to determine what Mr. Fawley seeks from this court. We thus deny the motion.

IV. Conclusion

Because Mr. Fawley doesn't say what's wrong with the district court's reasoning, we affirm the dismissal of the complaint without prejudice. We also decline to issue a writ of mandamus and deny Mr. Fawley's two motions. But we ask the clerk to mail Mr. Fawley

- the district court order to file a single amended complaint and
- the respondent's amended brief.

Entered for the Court

Robert E. Bacharach
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

BENJAMIN W. FAWLEY,

Plaintiff,

vs. No. 18-cv-1139 WJ/SCY

DAVID JABLONSKI, *et. al,*

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Benjamin Fawley's Amended Civil Rights Complaint (Doc. 57) and various supplemental filings. Fawley is incarcerated and proceeding *pro se*. He has submitted hundreds of pages of barely-discernable filings, rather than a single, legible complaint so that the Court can screen his claims. For this reason, and having reviewed the matter under 28 U.S.C. § 1915A, the Court will dismiss the case.

BACKGROUND

Fawley initiated his civil rights proceeding in New Mexico's Fifth Judicial District Court. His original complaint alleged that former Governor Susana Martinez and other high-level state officials violated his due process and equal protection rights "98 times" between 2009 and June 2017. (Doc. 1-1 at 2). Defendant Smith removed the Complaint to Federal Court on December 6, 2018. Within five days, the Court entered an Order explaining that inmate claims against state officials are subject to *sua sponte* screening under 28 U.S.C. § 1915A. The Order stated that pending initial screening, "the parties are excused from further filing obligations.... Once screening is complete, the Court will enter a separate order either dismissing the Complaint or

setting further deadlines." (Doc. 2).

Notwithstanding the Order, Fawley and other prisoners he recruited submitted over 50 motions, supplements, and notices in this case. By an Order entered September 24, 2019, the Court warned Fawley that it "will not sort through 'a lengthy ... complaint and voluminous exhibits ... to construct plaintiff's causes of action.'" (Doc. 56 at 1) (quoting *McNamara v. Brauchler*, 570 Fed. App'x 741, 743 (10th Cir. 2014). The Court therefore ordered Fawley to file "a single, legible amended complaint on the Court's official form," which contains "all relevant allegations." (Doc. 56 at 1-2) (emphasis in original Order).

Fawley timely filed an Amended Complaint. However, like the prior pleadings, it raised claims under every clause of the U.S. Constitution and referred to various other addendums (e.g., Addendum # 2, Addendum # 7) " a complete list" of all violations. (Doc. 57 at 4-7). Thereafter, Fawley and/or his putative c tiffs filed over 230 pages of addendums and frivolous motions.

ALYSIS

Rule 41(b) of the Federal Rules of Civil Procedure authorizes the dismissal of an action "[i]f the plaintiff fails to prosecute or to comply with the [Federal Rules of Civil Procedure] or a court order." Fed. R. Civ. P. 41(b); *see also AdvantEdge Bus. Grp. v. Thomas E. Mestmaker & Assocs., Inc.*, 552 F.3d 1233, 1236 (10th Cir. 2009) ("A district court undoubtedly has discretion to sanction a party for ... failing to comply with local or federal procedural rules."). "Dismissals pursuant to Rule 41(b) may be made with or without prejudice." *Davis v. Miller*, 571 F.3d 1058, 1061 (10th Cir. 2009). If dismissal is made without prejudice, "a district court may, without abusing its discretion, enter such an order without attention to any particular procedures."

Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe Cty. Justice Center, 492 F.3d 1158, 1162 (10th Cir. 2016). Because "[d]ismissing a case with prejudice, however, is a significantly harsher remedy – the death penalty of pleading punishments – [the Tenth Circuit has] held that, for a district court to exercise soundly its discretion in imposing such a result, it must first consider certain criteria." *Id.* The criteria includes: "the degree of actual prejudice to the defendant; the amount of interference with the judicial process; the culpability of the litigant; whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and the efficacy of lesser sanctions." *Id.*

Dismissal is certainly warranted in this case. Fawley interfered with the screening process; refused to submit a single, legible amended complaint as required by the September 24, 2019 Order; and sent over 500 pages of filings. Nevertheless, a dismissal with prejudice yields no benefit because, based on the filings, there is no way to tell exactly what claims are being dismissed. The Court will therefore dismiss this case without prejudice and deny all pending motions without conducting a merits-review. Fawley is warned that if he continues submitting voluminous, abusive filings in this or any other case, the Court will impose filing restrictions.

IT IS ORDERED that this civil rights action is **DISMISSED without prejudice**.

IT IS FURTHER ORDERED that all pending motions (**Docs. 63, 64, 65, 66, 68, 69, 70, 71, and 72**) are **DENIED.**

SO ORDERED.

CHIEF UNITED STATES DISTRICT JUDGE