United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 7, 2022
Lyle W. Cayce
Clerk

No. 22-50153
Summary Calendar

MICHAEL JARROW,

Plaintiff—Appellant,

versus

ASHLY NUNNERY, *Licensed Vocational Nurse*,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:21-CV-1281

Before STEWART, DUNCAN, and WILSON, *Circuit Judges.*

PER CURIAM:*

Michael Jarrow, Texas prisoner # 2181127, appeals the 28 U.S.C. § 1915(e)(2)(B)(ii) dismissal of his 42 U.S.C. § 1983 suit for failure to state a claim upon which relief may be granted. Jarrow alleged that Nurse Ashly Nunnery violated his Eighth Amendment rights by being deliberately

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

indifferent to his medical needs, specifically by not providing care after Jarrow was exposed to chemicals during a use-of-force incident.

A district court shall dismiss a prisoner's civil rights complaint if it is frivolous, malicious, or fails to state a claim upon which relief may be granted. § 1915(e)(2)(B). Because the district court dismissed Jarrow's complaint for failure to state a claim, we review the dismissal de novo as we do for a dismissal under Federal Rule of Civil Procedure 12(b)(6). *See Black v. Warren*, 134 F.3d 732, 733-34 (5th Cir. 1998). A complaint will not proceed unless it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted).

Jarrow generally argues that the district court erred in concluding that his claims for monetary damages against Nunnery in her official capacity were barred under the Eleventh Amendment. However, by stating his intention to appeal the issue without further argument, Jarrow has not briefed it properly, and we deem the issue abandoned. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

Next, Jarrow attempts to counter the district court's conclusion that his claims for damages against Nunnery in her individual capacity were barred under 42 U.S.C. § 1997e(e) because he had not alleged a physical injury by complaining that he suffered from burning eyes for over seven hours on the day of the incident. Even if we assumed that he has alleged a physical injury, Jarrow has not stated a facially plausible claim of deliberate indifference as his challenges to Nunnery's care amount to negligence, malpractice, or a disagreement with treatment, which are not actionable under the Eighth Amendment. *See Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006); *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991). Additionally, Jarrow argues that Taylor failed to adhere to prison policy when

she treated him, but that issue does not amount to a facially plausible claim of a constitutional violation. *See Myers v. Klevenhagen*, 97 F.3d 91, 94 (5th Cir. 1996).

In light of the foregoing, the district court did not err in dismissing Jarrow's § 1983 suit for failure to state a claim upon which relief may be granted. *See Iqbal*, 556 U.S. at 678. The judgment of the district court is AFFIRMED. The district court's dismissal of Jarrow's complaint counts as a strike under § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 387 (5th Cir. 1996), *abrogated in part on other grounds by Coleman v. Tollefson*, 575 U.S. 532, 534-41 (2015). In addition, Jarrow has incurred at least one other strike from a case out of the Western District of Texas. *See Jarrow v. Salazar*, No. 6:21-cv-1282 (W.D. Tex. 2022). Jarrow is CAUTIONED that if he accumulates three strikes, he will not be allowed to proceed in forma pauperis in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. *See* § 1915(g).

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

December 1, 2022

Michael Jarrow
#2181127
William P. Clements Unit
9601 Spur 591
Amarillo, TX 79107

RE: Jarrow v. Nunnery

Dear Mr. Jarrow:

The above-entitled petition for writ of certiorari was postmarked November 25, 2022 and received December 1, 2022. The papers are returned for the following reason(s):

No motion for leave to proceed in forma pauperis, signed by the petitioner or by counsel, is attached. Rules 33.2 and 39. The motion must be signed.

The notarized affidavit or declaration of indigency does not comply with Rule 39. You may use the enclosed form.

The petition fails to comply with the content requirements of Rule 14. A guide for in forma pauperis petitioners and a copy of the Rules of this Court are enclosed. The guide includes a form petition that may be used.

The appendix to the petition does not contain the following documents required by Rule 14.1(i):

The lower court opinion(s) must be appended to the petition.

It is impossible to determine the timeliness of the petition without the lower court opinions.

Please correct and resubmit as soon as possible. Unless the petition is submitted to this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

A copy of the corrected petition must be served on opposing counsel.

When making the required corrections to a petition, no change to the substance of the petition may be made.

Sincerely,
Scott S. Harris, Clerk
By:

Lisa Nesbitt
(202) 479-3038

Enclosures

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MICHAEL JARROW #2181127	§	
	§	
V.	§	**W-21-CA-1281-ADA**
	§	
ASHLY NUNNERY	§	

ORDER

Before the Court are Plaintiff's complaint (#3), memoranda (#18, 21), and more definite statement (#30). Plaintiff, proceeding pro se, has been granted leave to proceed in forma pauperis.

STATEMENT OF THE CASE

At the time he filed his complaint pursuant to 42 U.S.C. § 1983, Plaintiff was confined in the Texas Department of Criminal Justice – Correctional Institutions Division. Plaintiff alleges that on December 12, 2019, a "use of force was carried out on me." Plaintiff contends that, following the use of force, Nurse Ashly Nunnery failed to provide adequate medical care. Plaintiff claims Nunnery left him in his cell and did not "utilize any medical equipment on me." Plaintiff also contends that he was not taken to the medical clinic.

After reviewing Plaintiff's complaint, Plaintiff was ordered to file a more definite statement specifying what acts Defendant did to violate his constitutional rights and to explain his injuries and medical condition. Plaintiff elaborated on his claim, alleging that he was sprayed with chemical agents during the use of force, causing his eyes to burn.

Plaintiff claims Nunnery came to his cell door after the spraying and observed him. Plaintiff asserts, however, that she did not provide the "use of force physical" or eye examination required by TDCJ policy, failed to take him out of his cell, and failed to check his vital signs. Plaintiff also claims Nunnery failed to "sterilize my eyes" despite Plaintiff telling her that they were burning.

Plaintiff claims that he suffered from burning eyes for the remainder of the day on December 12, 2019, though it is not clear when during the day the use of force occurred, so it is unclear how long "the remainder of the day" was. Plaintiff indicates that he does not know why Nunnery failed to provide him medical care. Plaintiff sues Nurse Ashly Nunnery and seeks $90,875.95 in damages.

DISCUSSION AND ANALYSIS

A. Standard Under 28 U.S.C. § 1915(e)

An in forma pauperis proceeding may be dismissed sua sponte under 28 U.S.C. § 1915(e) if the court determines the complaint is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief against a defendant who is immune from suit. A dismissal for frivolousness or maliciousness may occur at any time, before or after service of process and before or after the defendant's answer. *Green v. McKaskle*, 788 F.2d 1116, 1119 (5th Cir. 1986).

When reviewing a plaintiff's complaint, the court must construe plaintiff's allegations as liberally as possible. *Haines v. Kerner*, 404 U.S. 519 (1972). However, the petitioner's pro se status does not offer him "an impenetrable shield, for one acting pro se has no license to harass others, clog the judicial machinery with meritless litigation

and abuse already overloaded court dockets." *Farguson v. MBank Houston, N.A.*, 808 F.2d 358, 359 (5th Cir. 1986).

B. Eleventh Amendment Immunity

Being sued in her official capacity for monetary damages, Nunnery is immune from suit under the Eleventh Amendment because such an action is the same as a suit against the sovereign. *Pennhurst State School Hosp. v. Halderman*, 465 U.S. 89 (1984). The Eleventh Amendment generally divests federal courts of jurisdiction to entertain suits directed against states. *Port Auth. Trans-Hudson v. Feeney*, 495 U.S. 299, 304 (1990). The Eleventh Amendment may not be evaded by suing state agencies or state employees in their official capacity because such an indirect pleading remains in essence a claim upon the state treasury. *Green v. State Bar of Texas*, 27 F.3d 1083,1087 (5th Cir. 1994).

C. No Physical Injury

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(e), bars recovery of damages absent a showing that the plaintiff suffered a physical injury while in custody. The Fifth Circuit has held that allegations of "mental anguish, emotional distress, psychological harm, and insomnia" are barred by § 1997e(e). *See Geiger v. Jowers*, 404 F.3d 371, 374 (5th Cir. 2005). The effects of chemical spray, while unpleasant, do not rise above a de minimis injury. *See e.g., Martinez v. Day*, 639 F. App'x 278, 279-80 (5th Cir. 2016) (unpublished) (affirming grant of summary judgment wherein plaintiff was tased and pepper sprayed, as "[p]laintiffs failed to adduce any evidence showing that they suffered any cognizable injuries"); *Bradshaw v. Unknown Lieutenant*, 48 F. App'x

106 (5th Cir. 2002) (unpublished) (affirming district court's dismissal as frivolous an excessive force claim wherein prisoner complained of "burning eyes, and skin for approximately 24 hours, twitching of his eyes, blurred vision, irritations of his nose and throat, blistering of his skin, rapid heartbeat, mental anguish, shock and fear as a result of the use of mace," finding that the prisoner "has not shown that he suffered more than a de minimus injury."). Plaintiff only alleges burning eyes lasting less than a day. Therefore, his claims for damages against Nunnery are barred.

D. Eighth Amendment

Even if Plaintiff's burning eyes are considered a sufficient physical injury to overcome the PLRA bar, he fails to state facts that arise to the level of a constitutional claim. Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. *Baker v. McCollan*, 443 U.S. 137 (1979). As the United States Fifth Circuit Court of Appeals has observed, "'[I]t is fundamental to our federal jurisprudence that state law tort claims are not actionable under federal law; a plaintiff under section 1983 must show deprivation of a federal right.'" *Price v. Roark*, 256 F.3d 364, 370 (5th Cir. 2001) (quoting *Nesmith v. Taylor*, 715 F.2d 194, 196 (5th Cir. 1983)). The Eighth Amendment prohibits cruel and unusual punishment. Prison officials must provide humane conditions of confinement, ensure that inmates receive adequate food, clothing, shelter, and medical care, and take reasonable measures to guarantee the safety of the inmates. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Conditions that result in "unquestioned and serious deprivations of basic human needs" or "deprive inmates of

the minimal civilized measure of life's necessities" violate the Eighth Amendment. *Hudson v. McMillian*, 503 U.S. 1, 8–10 (1992); *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Such a violation occurs when a prison official is deliberately indifferent to an inmate's health and safety. *Farmer*, 511 U.S. at 834. "Deliberate indifference is an extremely high standard to meet." *Domino v. Texas Dept. of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001). To act with deliberate indifference, a prison official must both know of and disregard 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. *Farmer*, 511 U.S. at 837.

To establish deliberate indifference regarding his medical care, Plaintiff must show "that a prison official 'refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.'" *Easter v. Powell*, 467 F.3d 459, 464 (5th Cir. 2006) (quoting *Domino*, 239 F.3d at 756). A serious medical need is one for which treatment has been recommended or the need is so apparent that even a lay person would recognize that care is required. *Gobert v. Caldwell*, 463 F.3d 339, 345 (5th Cir. 2006). Not every medical issue or injury to an inmate is a serious medical issue. *See Farmer*, 511 U.S. at 834. While prisoners are entitled to adequate medical care, they are not entitled to the "best medical care money can buy." *Mayweather v. Foti*, 958 F.2d 91, 91 (5th Cir. 1992). Claims of inadvertent failure to provide medical care or negligent diagnosis are insufficient to state a claim of inadequate medical care. *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). Similarly, unsuccessful medical treatment or

disagreement between an inmate and his doctor concerning the manner of treatment does not give rise to a cause of action. *Banuelos v. McFarland*, 41 F.3d 232, 235 (5th Cir. 1995); *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991). In short, a claim of medical malpractice does not amount to a constitutional violation merely because the plaintiff is a prisoner. *Id.* at 106.

Plaintiff indicates that Nunnery came to his cell door after the spraying and observed him but does not appear to have believed he required medical attention. Plaintiff asserts that she did not provide the "use of force physical" or eye examination, failed to take him out of his cell, and failed to check his vital signs despite these steps being required by TDCJ policy following a use of chemical spray. Plaintiff also claims Nunnery failed to "sterilize my eyes" despite Plaintiff telling her that they were burning. Plaintiff emphasizes that Nunnery failed to use the medical supplies that TDCJ requires she have available. Plaintiff's main argument appears to be that Nunnery failed to adhere to jail policies which he contends required that he be taken for further medical evaluation. Unfortunately for Plaintiff, the mere allegation that jail policies were not followed does not state a claim. *Myers v. Klevenhagen*, 97 F.3d 91, 94 (5th Cir. 1996) (per curiam).

Furthermore, Plaintiff fails to allege a serious medical need, much less deliberate indifference to a serious medical need. Routine discomfort from exposure to chemical spray generally is not considered to constitute a "serious medical need" for constitutional purposes. *See e.g., McGuire v. Union County Jail*, Civ. Action No. 4:13CV-P28-M, 2013 U.S. Dist. LEXIS 120603, 2013 WL 4520282, at *6 (W.D. Ky. Aug. 26,

2013); *Censke v. Ekdahl*, No. 2:08-cv-283, 2009 U.S. Dist. LEXIS 41962, 2009 WL 1393320, at *8 (W.D. Mich. May 18, 2009) ("In this case, Plaintiff merely complains of burning in his nose, lungs, eyes and skin. Such allegations do not constitute a serious medical need for purposes of the Eighth Amendment."). Plaintiff admits that there was no lasting medical issue and that his discomfort ended by the next day. Thus, he has failed to show that he had a serious medical need.

Moreover, plaintiff must additionally be able to show that any alleged serious medical needs were met with deliberate indifference. Even if his burning eyes were considered a serious medical need, he fails to plead sufficient facts to show deliberate indifference. The decision whether to provide additional treatment is a classic example of a matter for medical judgment. In addition, the failure to alleviate a significant risk that the official should have perceived, but did not, is insufficient to show deliberate indifference. *Domino,* 239 F.3d at 756. "Deliberate indifference encompasses only unnecessary and wanton infliction of pain repugnant to the conscience of mankind." *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997); *see also Stewart v. Murphy*, 174 F.3d 530, 534 (5th Cir. 1999).

Here, Plaintiff indicates Nunnery observed him and failed to provide additional treatment. Plaintiff does not plead any facts showing that Nunnery perceived a significant risk and ignored it. Even if there was a significant risk that Nunnery should have perceived, there is nothing in Plaintiff's pleadings to show that she was deliberately indifferent to such a risk. At most, Plaintiff has pleaded that Nunnery did not believe Plaintiff needed additional medical treatment. Even if mistaken, such an

assessment is not deliberate indifference and does not state a claim for a constitutional violation.

CONCLUSION

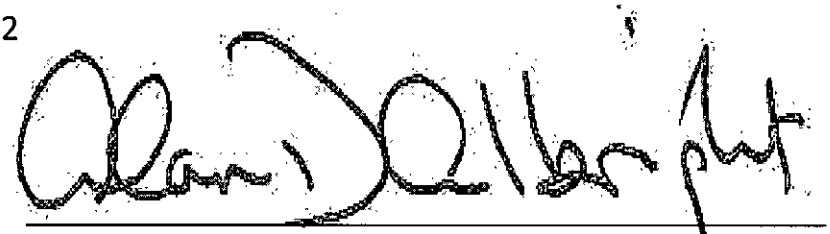
It is therefore **ORDERED** that Plaintiff's complaint is dismissed with prejudice for failure to state a claim pursuant to 28 U.S.C. § 1915(e).

It is further **ORDERED** that all other pending motions are **DISMISSED**.

It is further **ORDERED** that Plaintiff is warned that if Plaintiff files more than three actions or appeals while he is a prisoner which are dismissed as frivolous or malicious or for failure to state a claim on which relief may be granted, then he will be prohibited from bringing any other actions in forma pauperis unless he is in imminent danger of serious physical injury. 28 U.S.C. § 1915(g).

It is finally **ORDERED** that the Clerk shall e-mail a copy of this order and the final judgment to the keeper of the three-strikes list.

SIGNED on February 7, 2022



ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE