FILED
United States Court of Appeals
Tenth Circuit

May 12, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ARNOLD A. CARY,

Plaintiff - Appellant,

v.

DEAN WILLIAMS, in his official capacity as the Executive Director of CDOC; RANDOLPH MAUL, in his official capacity as the Chief Medical Official of CDOC; MICHELLE BRODEUR, in her official capacity as the Director of Clinical Correctional Services of CDOC,

Defendants - Appellees.

No. 22-1404
(D.C. No. 1:22-CV-01500-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **McHUGH**, and **CARSON**, Circuit Judges.

Pro se prisoner Arnold Cary appeals the district court's dismissal of his § 1983 suit.[1] Because Mr. Cary sued the defendants in their official capacities and failed to

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Mr. Cary filed a motion for pro bono attorney representation and a motion to amend his complaint. We now deny both motions.

allege specific facts that demonstrate how a Colorado Department of Corrections policy or practice subjected him to cruel and unusual punishment under the Eighth Amendment, we affirm.

I. Background

Mr. Cary sued the defendants, who are various officials and directors at the Colorado Department of Corrections, in their official capacities. He alleged that he suffered from multiple chronic medical conditions, and that the defendants were deliberately indifferent in providing him with medical care in violation of the Eighth Amendment.

After the defendants removed this action from state court to federal, the district court ordered Mr. Cary to file an amended complaint to clarify his claim and add factual allegations about the Department policies or practices he was challenging and how they violated the Eighth Amendment. Mr. Cary filed an amended complaint, and the magistrate judge screened it pursuant to 28 U.S.C. § 1915A(a), recommending that the complaint be dismissed as legally frivolous. The magistrate judge explained that Mr. Cary "fail[ed] to identify any specific Department policy or practice that subjected him to constitutionally deficient medical care." R. at 129. The district court adopted this recommendation and dismissed the case. Mr. Cary later objected to the dismissal. The district court construed this objection as a motion for reconsideration and denied the motion. Mr. Cary appealed.

II. Discussion

The district court correctly dismissed Mr. Cary's complaint because he failed to allege facts demonstrating a Department policy or practice was the moving force behind the alleged constitutional violation.

While the district court dismissed the case on frivolousness grounds, "we may affirm on any basis supported by the record." Richison v. Ernest Grp., Inc., 634 F.3d 1123, 1130 (10th Cir. 2011). A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

> Although dismissals under Rule 12(b)(6) typically follow a motion to dismiss, giving plaintiff notice and opportunity to amend his complaint, a court may dismiss sua sponte "when it is 'patently obvious' that the plaintiff could not prevail on the facts alleged, and allowing him an opportunity to amend his complaint would be futile."

Hall v. Bellmon, 935 F.2d 1106, 1109–10 (10th Cir. 1991) (quoting McKinney v. Oklahoma, 925 F.2d 363, 365 (10th Cir. 1991)). "A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." Id. at 1110.

Here, that means Mr. Cary must allege facts demonstrating that a Department policy or practice violated his Eighth Amendment rights. Kentucky v. Graham, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is . . . to be treated as a suit against the entity."); Dodds v. Richardson, 614 F.3d 1185, 1201 (10th Cir. 2010) (explaining that a plaintiff "seeking to impose liability on a municipality under § 1983 [must]

identify [a] municipal 'policy' or 'custom' that caused the plaintiff's injury") (internal quotation marks omitted).

Mr. Cary included one conclusory allegation:

> By the policies and practices set forth herein, defendants subject plaintiff to a substantial risk of serious harm and untimely death from inadequate medical care. Defendants have been and are aware of all deprivations complained of herein, have adopted policies and practices that institutionalize those deprivations, and have been and are deliberately indifferent to the deprivations. Defendants' acts and omissions in failing to provide adequate medical needs of prisons [sic] illnesses, in violation of plaintiffs' rights under the Eighth Amendment.

R. at 109–110. This is insufficient. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

Mr. Cary makes four arguments for why we should reverse the district court: (1) the magistrate judge ruled that the action was frivolous without any review; (2) the district court did not independently review the record or conduct an evidentiary proceeding; (3) the district court never questioned Mr. Cary's response to the court; and (4) the district court's adoption of the magistrate judge's report and recommendation violated the Magistrate Act, Article III, and the Due Process Clause. We are unpersuaded.

First, the magistrate judge did review Mr. Cary's complaint and wrote a multi-page report and recommendation. Second, the district court was not required to review outside documents or hold an evidentiary hearing because this issue arose out

of the sufficiency of the complaint, and the parties had not reached discovery yet. Third, the district court reviewed the report and recommendation de novo and addressed Mr. Cary's objection, which it deemed a motion to reconsider. Finally, the district court appropriately reviewed the magistrate judge's report and recommendation de novo.

Thus, we affirm the district court.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Gordon P. Gallagher, United States Magistrate Judge

Civil Action No. 22-cv-01500-LTB-GPG

ARNOLD ANTHONY CARY,

Plaintiff,

v.

DEAN WILLIAMS, in his official capacity as the Executive Director of CDOC, RANDOLPH MAUL, in his official capacity as the Chief Medical Official of CDOC, and MICHELLA BRODEUR, in her official capacity as the Director of Clinical Correctional Services of CDOC,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter comes before the Court on the Prisoner Complaint (ECF No. 15)[1] filed *pro se* by Plaintiff, Arnold Anthony Cary, on August 10, 2022. The matter has been referred to this Magistrate Judge for recommendation (ECF No. 17.)[2]

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[1] "(ECF No. 15)" is an example of the convention I use to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). I use this convention throughout this Recommendation.

[2] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950

The Court must construe the Prisoner Complaint liberally because Mr. Cary is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110.

The Court has reviewed the filings to date. The Court has considered the entire case file, the applicable law, and is sufficiently advised in the premises. This Magistrate Judge respectfully recommends that the Prisoner Complaint be dismissed.

I. DISCUSSION

Mr. Cary is a prisoner in the custody of the Colorado Department of Corrections ("DOC") at the Sterling Correctional Facility. Mr. Cary initiated this action by filing *pro se* a Civil Complaint (ECF No. 3) in the Logan County, Colorado, District Court. In the Civil Complaint Mr. Cary asserted an Eighth Amendment medical treatment claim pursuant to 42 U.S.C. § 1983 against Defendants in their official capacities. On June 15, 2022, Defendants removed the action to federal court. On June 30, 2022, the Court ordered Mr. Cary to file an amended complaint that clarifies the claim he is asserting and that includes factual allegations regarding the specific DOC policies or practices he is challenging and how a DOC policy or practice has subjected him to cruel and unusual punishment. As noted above, Mr. Cary filed an amended complaint on the proper Prisoner Complaint form on August 10, 2022.

The Court has authority to screen the Prisoner Complaint pursuant to 28 U.S.C.

F.2d 656, 659 (10th Cir. 1991).

§ 1915A and 42 U.S.C. § 1997e(c) and the Court must dismiss any claims in the Prisoner Complaint that are frivolous. *See* 28 U.S.C. § 1915A(b)(1); 42 U.S.C. § 1997e(c)(1). A legally frivolous claim is one in which Plaintiff asserts the violation of a legal interest that clearly does not exist or assert facts that do not support an arguable claim. *See Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989).

Mr. Cary alleges he suffers from various medical conditions and that the DOC "intentionally and systematically delays and denies necessary medical care to plaintiff's chronic illnesses, causing significant suffering and medical emergency . . .." (ECF No. 15 at p.4.) The named Defendants are DOC Executive Director Dean Williams, DOC Chief Medical Officer Randolph Maul, and DOC Director of Clinical and Correctional Services Michella Brodeur. Mr. Cary is suing Defendants only in their official capacities. He seeks declaratory and injunctive relief.

To state an arguable medical treatment claim under the Eighth Amendment Mr. Cary must allege specific facts that demonstrate deliberate indifference to his serious medical needs. *See Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976). "A claim of deliberate indifference includes both an objective and a subjective component." *Al-Turki v. Robinson*, 762 F.3d 1188, 1192 (10th Cir. 2014). "A medical need is considered sufficiently serious to satisfy the objective prong if the condition has been diagnosed by a physician as mandating treatment or is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Id.* at 1192-93 (internal quotation marks omitted). A delay in providing adequate medical care violates the Eighth Amendment only if the delay resulted in substantial harm. *See id.* at 1193. "[T]he substantial harm

caused by a delay in treatment may be a permanent physical injury, or it may be an intermediate injury, such as the pain experienced while waiting for treatment and analgesics." *Id.* (internal quotation marks omitted). Under the subjective prong, "a prison official may be held liable . . . only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

Because Mr. Cary is suing Defendants in their official capacities, he also must allege facts that demonstrate an official DOC policy or practice is the moving force behind the asserted constitutional deprivation. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985). This is because "in an official-capacity suit the entity's policy or custom must have played a role in the violation of federal law." *Id.*

Mr. Cary alleges specific facts in the Prisoner Complaint regarding various ailments and diagnoses, causes and effects of the ailments, disagreements with treatments prescribed by medical personnel, and medical billings for a hospital visit in January 2022. However, with respect to official policies and practices he alleges only the following:

> By the policies and practices set forth herein, defendants subject plaintiff to a substantial risk of serious harm and untimely death from inadequate medical care. Defendants have been and are aware of all deprivations complained of herein, have adopted policies and practices that institutionalize those deprivations, and have been and are deliberately indifferent to the deprivations, ... Defendants' acts and omissions in failing to provide adequate medical care constitute deliberate indifference to the serious medical needs of prisons [sic] illnesses, in violation of plaintiff['s] rights under the Eighth Amendment.

(ECF No. 15 at pp.7-8.)

Mr. Cary was advised in the order directing him to file an amended complaint that he must identify the specific DOC policies or practices he is challenging and he must allege specific facts that demonstrate how a DOC policy or practice has subjected him to cruel and unusual punishment. Despite this advisement, Mr. Cary fails to identify any specific DOC policy or practice that has subjected him to constitutionally deficient medical care.

The general rule that *pro se* pleadings must be construed liberally has limits and "the court cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005); *see also United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."); *Ketchum v. Cruz*, 775 F. Supp. 1399, 1403 (D. Colo. 1991) (vague and conclusory allegations that his rights have been violated do not entitle a *pro se* pleader to a day in court regardless of how liberally the pleadings are construed), *aff'd*, 961 F.2d 916 (10th Cir. 1992). "[I]n analyzing the sufficiency of the plaintiff's complaint, the court need accept as true only the plaintiff's well-pleaded factual contentions, not his conclusory allegations." *Hall*, 935 F.2d at 1110.

Because Mr. Cary fails to allege specific facts that support an arguable claim for relief under the Eighth Amendment, the Prisoner Complaint should be dismissed as legally frivolous.

II. RECOMMENDATION

For the reasons set forth herein, this Magistrate Judge respectfully

RECOMMENDS that the Prisoner Complaint (ECF No. 15) and the action be dismissed as legally frivolous pursuant to 28 U.S.C. § 1915A(b)(1) and 42 U.S.C. § 1997e(c)(1).

DATED September 14, 2022.

BY THE COURT:

Gordon P. Gallagher
United States Magistrate Judge