

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

January 25, 2018

Elisabeth A. Shumaker
Clerk of Court

GARY FLUTE, SR.,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA; MRS.
LOZANO, (first name unknown to
plaintiff), official & individual capacities;
MS. M. HOFFER, (first name unknown to
plaintiff), official & individual capacities;
MR. G. STAUT, (first name unknown to
plaintiff), official & individual capacities;
FCI-ENGLEWOOD; NORTH CENTRAL
REGIONAL OFFICE OF
ADMINISTRATIVE REMEDY
COORDINATORS, (individuals unknown
to plaintiff), official & individual
capacities; MS. DEBORAH DENHAM,
official & individual capacities; MS.
SARA M. REVELL, official & individual
capacities; MRS. LEYBA, (first name
unknown to plaintiff), official & individual
capacities

Defendants - Appellees.

No. 17-1397
(D.C. No. 1:17-CV-01688-LTB)
(D. Colo.)

ORDER AND JUDGMENT*

* After examining the appellant's brief and the appellate record, this panel has determined unanimously that oral argument wouldn't 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 isn't binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

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

Proceeding pro se,¹ federal prisoner Gary Flute Sr. brought this civil action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Flute initially alleged five claims against eight defendants. He then filed an amended complaint—this time asserting 14 claims against the same eight defendants—after a magistrate judge identified various deficiencies in his original complaint. The district court screened Flute’s amended complaint under 28 U.S.C. § 1915A(a) and dismissed it as frivolous under § 1915A(b)(1).² Flute appeals.

We review a dismissal for frivolousness under 28 U.S.C. § 1915(e)(2)(B)(i) for an abuse of discretion. *Conkle v. Potter*, 352 F.3d 1333, 1335 n.4 (10th Cir. 2003). But it doesn’t appear that we have resolved whether we review a dismissal for frivolousness under § 1915A(b)(1) under the same standard, or whether we instead exercise de novo review. *See Plunk v. Givens*, 234 F.3d 1128, 1130 (10th Cir. 2000); *Robbins v. Cty. of Boulder*, 592 F. App’x 710, 712 (10th Cir. 2014) (unpublished).

¹ We liberally construe Flute’s pro se filings. But it’s not our role to act as his advocate. *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

² The district court dismissed Flute’s amended complaint—which alleges claims arising from an August 2015 prison-job reassignment—on October 13, 2017. On the same day, the district court also dismissed Flute’s amended complaint in a separate action, which alleged claims arising from a March 2015 incident report and subsequent disciplinary proceedings. *See Flute v. United States*, 1:17-CV-01717-LTB, slip. op. at 2, 6 (D. Colo. Oct. 13, 2017). The district court resolved these cases in separate orders, *see id.*; *Flute v. United States*, No. 1:17-cv-01688-LTB (D. Colo. Oct. 13, 2017), and Flute has appealed from both. Although Flute raises many of the same arguments in both appeals, we follow the district court’s lead and resolve the cases in separate orders issued on the same day. *See Flute v. United States*, No. 17-1401 (10th Cir. Jan. 25, 2018).

We need not resolve that question here; for the reasons discussed below, Flute's arguments fail under either standard.

We turn first to two preliminary matters: Flute argues that the magistrate judge erred in (1) partially denying his motion for an extension of time to file his amended complaint and (2) refusing to appoint an attorney to represent him.

According to Flute, the magistrate judge erred by granting him a 30-day extension of time to file his amended complaint, as opposed to the 60-day extension that he requested. But even assuming this was error, Flute isn't entitled to relief unless he can show that the magistrate judge's ruling prejudiced him. *See* 28 U.S.C. § 2111 (requiring us to disregard errors that "do not affect the substantial rights of the parties"); *Shinseki v. Sanders*, 556 U.S. 396, 410 (2009) (explaining that "party seeking reversal normally must explain why the erroneous ruling caused harm").

Here, Flute alleges that "as a result" of the partial denial of his request for an extension of time, he "did not have enough time in which to prepare the instant complaint." Aplt. Br. 4. But Flute doesn't provide any specific information about what additions or revisions he might have made to his complaint if the magistrate judge had given him more time to do so. Nor does he explain how those changes would have warded off the district court's ultimate § 1915A(b)(1) dismissal.

Accordingly, we find this argument inadequately briefed and decline to consider it. *See* Fed. R. App. P. 28(a)(8)(A) (requiring appellant's brief to include "appellant's contentions and the reasons for them"); *Bronson v. Swensen*, 500 F.3d 1099, 1104

(10th Cir. 2007) (noting we routinely refuse to consider arguments that fail to meet Rule 28's requirements).

For related reasons, we decline to address Flute's argument that the magistrate judge erred in denying Flute's motion to appoint counsel. The magistrate judge denied Flute's request as premature. And Flute makes no attempt to explain why that characterization was incorrect. Flute does suggest that he later renewed his request for counsel in his subsequent motion for an extension of time. But we see no explicit request for counsel there.³ Neither, apparently, did the magistrate judge; his ruling on that motion addressed only Flute's request for an extension.

In sum, Flute provides neither (1) a basis for disturbing the magistrate judge's initial ruling denying his request for counsel as premature nor (2) a record citation establishing that this issue was subsequently "raised and ruled on." 10th Cir. R. 28.2(C)(2). Thus, we won't reverse on this basis. *See Nixon v. City & Cty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015) ("The first task of an appellant is to explain to us why the district court's decision was wrong."); *Salt Lake Tribune Publ'g Co. v. Mgmt. Planning, Inc.*, 454 F.3d 1128, 1142 (10th Cir. 2006) (declining to address issue that district court didn't rule on, even though parties fully briefed it below).

We turn next to Flute's challenges to the district court's order dismissing his complaint as frivolous. First, Flute generally asserts that the district court "incorrectly decide[d] the facts." Aplt. Br. 6. But Flute fails to identify any specific

³ Instead, it appears that Flute cited his lack of counsel as one of the reasons he needed additional time to prepare and submit his amended complaint.

factual findings or explain why they are incorrect. And even assuming the district court made erroneous factual findings, Flute fails to explain how those findings affected its ultimate ruling. Accordingly, we treat this argument as waived and decline to consider it. *See Bronson*, 500 F.3d at 1104.

Second, Flute asserts that the district court erred in failing to provide him with “any proper USM-285 forms,” Aplt. Br. 6, which are “used to request service of process,” *Kiley v. Kurtz*, 533 F. Supp. 465, 467 (D. Colo. 1982). But Flute doesn’t suggest he ever asked the district court to provide him with such forms. Nor does he explain how the district court’s alleged failure to do so prejudiced him. And we don’t see how it could have; the district court dismissed Flute’s complaint because it determined that his claims are legally frivolous, not because Flute failed to adequately serve the defendants. Thus, any failure to provide the forms doesn’t constitute a basis for reversal. *See* § 2111; *Sanders*, 556 U.S. at 410.

Third, Flute argues that the district court overlooked his claim that the defendants violated his constitutional rights by placing him “in Food Service when [he] already had a job assignment,” Aplt. Br. 2, in violation of a Federal Bureau of Prisons policy. We disagree. The district court acknowledged that this job transfer formed the basis of Flute’s claims and then proceeded to explain why the claims were nevertheless meritless. Thus, contrary to Flute’s assertions, the district court did not overlook this potential basis for relief.

Fourth, Flute argues that by sua sponte dismissing his complaint, the district court improperly advocated for the defendants in violation of *Greenlaw v. United*

States, 554 U.S. 237 (2008). Specifically, he suggests the district court ran afoul of *Greenlaw*'s pronouncement that under "our adversary system," we "assign to courts the role of neutral arbiter of matters the parties present." *Id.* at 243. Here, Flute points out, the defendants didn't "present" any arguments at all. *Id.*

But *Greenlaw*'s actual holding—that "an appellate court may not alter a judgment to benefit a nonappealing party," *id.* at 244—didn't prohibit the district court from sua sponte dismissing Flute's complaint. In fact, the district court's actions weren't just permissible; they were mandatory. *See* § 1915A(a) (requiring court to "review . . . a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity"); § 1915A(b)(1) (requiring court to dismiss if it determines "the complaint . . . is frivolous"). Accordingly, the district court's sua sponte decision to dismiss Flute's complaint is not, as he alleges, "violative of clearly established federal law under [*Greenlaw*]." *Aplt. Br.* 3.

Finally, Flute suggests that the district court erred in failing to recognize that he was asserting a First Amendment claim. We agree that Flute's amended complaint invokes the First Amendment. But we disagree that the district court failed to recognize as much; it construed Flute's First Amendment claim as a retaliation claim and then analyzed it under the three-part test we identified in *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007). Because Flute neither suggests that the district court erred in construing his First Amendment claim as a retaliation claim nor cites any error in the district court's retaliation analysis, we decline to reverse on this

basis. *See Reedy v. Werholtz*, 660 F.3d 1270, 1275 (10th Cir. 2011) (“The argument section of [appellants’] opening brief does not challenge the court’s reasoning on this point. We therefore do not address the matter.”).

In short, Flute fails to establish that the district court erred in dismissing his complaint as frivolous. He also fails to demonstrate “the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal.” *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991). Accordingly, we deny his motion to proceed in forma pauperis, *see id.*, remind Flute that he must immediately pay any remaining filing fees, and dismiss this appeal as frivolous, *see* § 1915(e)(2)(B)(i). As a result, we note that Flute now has three strikes for purposes of § 1915(g). *See Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1175 (10th Cir. 2011) (holding that dismissal under § 1915A “counts as a strike when the action was dismissed as frivolous, malicious, or for failure to state a claim”); *Flute v. Ruehling*, No. 08-cv-484-MJR, 2009 WL 728570, at *1, 3 (S.D. Ill. Mar. 18, 2009) (dismissing Flute’s complaint under § 1915A and assessing strike); *cf. Jennings v. Natrona Cty. Det. Ctr. Med. Facility*, 175 F.3d 775, 780 (10th Cir. 1999) (“If we dismiss as frivolous the appeal of an action the district court dismissed [as frivolous], both dismissals count as strikes.”), *abrogated in part on other grounds by Coleman v. Tollefson*, 135 S. Ct. 1759 (2015).

Entered for the Court

Nancy L. Moritz
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01688-GPG

GARY FLUTE SR.,

Plaintiff

v.

UNITED STATES OF AMERICA,

MRS. LOZANO (First Name Unknown to Plaintiff), Official & Individual Capacities,
MS. M. HOFFER (First Name Unknown to Plaintiff), Official & Individual Capacities,
MR. G. STAUT (First Name Unknown to Plaintiff), Official & Individual Capacities,
FCI-ENGLEWOOD AND NORTH CENTRAL REGIONAL OFFICE ADMINISTRATIVE
REMEDY COORDINATORS (Individuals Unknown to Plaintiff), Official &
Individual Capacities,

MS. DEBORAH DENHAM, Official & Individual Capacities,
MS. SARA M. REVELL, Official & Individual Capacities, and
MRS. LEYBA (First Name Unknown to Plaintiff), Official & Individual Capacities,

Defendants.

ORDER OF DISMISSAL

Plaintiff, Gary Flute, Sr., is a prisoner in the custody of the Federal Bureau of Prisons ("BOP") at the Federal Correctional Institution at Englewood, Colorado. Mr. Flute initiated this action by filing *pro se* a Prisoner Complaint (ECF No. 1) pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). On August 4, 2017, Magistrate Judge Gordon P. Gallagher ordered Mr. Flute to file an amended complaint that clarifies his claims. On October 2, 2017, Mr. Flute filed an amended Prisoner Complaint (ECF No. 10).

The Court must construe the amended Prisoner Complaint liberally because Mr. Flute 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). If the amended Prisoner Complaint reasonably can be read "to state a valid claim on which the plaintiff could prevail, [the Court] should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." *Hall*, 935 F.2d at 1110. However, the Court should not be an advocate for a *pro se* litigant. See *id.*

Pursuant to 28 U.S.C. § 1915A(a), the Court must review the amended Prisoner Complaint because Mr. Flute is a prisoner and he is seeking redress from an officer or employee of a governmental entity. Pursuant to § 1915A(b), the Court is required to dismiss the amended Prisoner Complaint if the claims asserted are legally frivolous. A legally frivolous claim is one in which the plaintiff asserts the violation of a legal interest that clearly does not exist or asserts facts that do not support an arguable claim. See *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). For the reasons stated below, the Court will dismiss the amended Prisoner Complaint as legally frivolous.

Mr. Flute asserts fourteen claims for relief. The claims all relate to a prison job reassignment in August 2015. Mr. Flute alleges he was reassigned to food services for a period of six months against his will and in violation of a BOP program statement. Nine of the claims (claims one through nine) directly challenge the reassignment to food services, although Mr. Flute does not clearly identify in each claim the specific right allegedly violated. Instead, Mr. Flute alleges in vague and conclusory fashion in each of the first nine claims that he "was irregularly placed in Food Service for (SIX MONTHS) against his will by and through retaliation, harassment, discriminatory conduct and deceit in order to effect that job transfer by the 'new' abrogation of federal law right(s)." (ECF

No. 10 at 6, 7, 8, 9, 10, 11, 12, 13, & 14.) Mr. Flute next asserts four claims (claims ten through thirteen) against individuals who allegedly denied administrative remedy requests he filed regarding the job reassignment. Finally, Mr. Flute contends in claim fourteen that the job reassignment violates his rights under the Thirteenth Amendment. As relief Mr. Flute seeks judicial review under the Administrative Procedures Act ("APA"), damages, and "AN ENJOINMENT of this action by the court in prosecuting a Federal TORT action" (ECF No. 10 at 25) under the Federal Tort Claims Act ("FTCA").

Mr. Flute fails to allege specific facts in support of his claims that demonstrate he is entitled to relief. To the extent claims one through nine are premised on a purported constitutional right to a particular prison job, the claims lack merit because inmates do not have a constitutional right to employment. See *Penrod v. Zavaras*, 94 F.3d 1399, 1407 (10th Cir. 1996). Claims ten through thirteen lack merit because there is no constitutional right to a prison grievance procedure. See *Boyd v. Werholtz*, 443 F. App'x 331 (10th Cir. 2011) (affirming dismissal under 28 U.S.C. § 1915A of inmate's claim based on alleged denial of access to prison grievance procedure); see also *Walters v. Corrs. Corp. of Am.*, 119 F. App'x 190, 191 (10th Cir. 2004) (finding that an alleged denial of access to administrative grievance procedure did not result in a constitutional violation). Claim fourteen lacks merit because "[t]he thirteenth amendment's restriction on involuntary servitude does not apply to prisoners." *Ruark v. Solano*, 928 F.2d 947, 949-50 (10th Cir. 1991), *overruled on other grounds by Lewis v. Casey*, 518 U.S. 343 (1996).

To the extent Mr. Flute's claims in the amended Prisoner Complaint can be construed as constitutional retaliation claims, the claims lack merit because Mr. Flute fails to allege specific facts that demonstrate his constitutional rights were violated. To state

a nonfrivolous retaliation claim Mr. Flute must allege facts that demonstrate: (1) he was engaged in constitutionally protected activity, (2) Defendant's actions caused him to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) Defendant's adverse action was substantially motivated as a response to Plaintiff's constitutionally protected activity. See *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007); *Allen v. Avance*, 491 F. App'x 1, 6 (10th Cir. 2012).

Despite the instructions provided by Magistrate Judge Gallagher in the order directing Mr. Flute to file an amended complaint, Mr. Flute fails to allege specific facts that demonstrate his job reassignment was substantially motivated as a response to any constitutionally protected activity.

To the extent Mr. Flute's claims in the amended Prisoner Complaint can be construed as seeking review under the APA, the claims also lack merit. Under the APA, "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702; see also 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."). The APA authorizes the Court to

- (1) compel agency action unlawfully withheld or unreasonably delayed; and

- (2) hold unlawful and set aside agency action, findings, and conclusions found to be-

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

- (B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 56 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706.

Mr. Flute fails to allege specific facts that demonstrate being assigned to a new prison job against his will is an agency action subject to judicial review under the APA or that the job reassignment somehow was unlawful. His vague and conclusory reference to a BOP program statement is not sufficient to state an arguable claim.

Similarly, Mr. Flute fails to allege specific facts to support a claim under the FTCA. The FTCA waives sovereign immunity by the federal government for injuries caused by the "negligent or wrongful act or omission" of a government employee while the employee is "acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). The FTCA is the exclusive remedy for a tort committed by a federal employee within the scope of his employment. See 28 U.S.C. § 2679. However, like his reference to the APA, Mr. Flute's vague and conclusory reference to the FTCA is not sufficient to state an arguable claim for relief.

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 does 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 the facts Mr. Flute alleges in support of his claims in the amended Prisoner Complaint do not support arguable claims for relief, the claims are legally frivolous and must be dismissed. The Court also certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith and therefore *in forma pauperis* status will be denied for the purpose of appeal. See *Coppedge v. United States*, 369 U.S. 438 (1962). If Plaintiff files a notice of appeal he also must pay the full \$505 appellate filing fee or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24. Accordingly, it is

ORDERED that the Prisoner Complaint (ECF No. 1), the amended Prisoner Complaint (ECF No. 10), and the action are dismissed as legally frivolous pursuant to § 1915A(b). It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on

appeal in the United States Court of Appeals for the Tenth Circuit.

DATED at Denver, Colorado, this 13th day of October, 2017.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court