

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

January 25, 2018

**Elisabeth A. Shumaker
Clerk of Court**

GARY FLUTE, SR.,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA; MR. R.
HUSEBY, official & individual capacities;
MR. HUFNAGLE, official & individual
capacities; MR. D. TAYLOR, official &
individual capacities; MS. M. HOFFER,
official & individual capacities; MS.
DEBORAH DENHAM, official &
individual capacities,

Defendants - Appellees.

No. 17-1401
(D.C. No. 1:17-CV-01717-LTB)
(D. Colo.)

ORDER AND JUDGMENT*

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

Proceeding pro se,¹ federal prisoner Gary Flute Sr. brought this action under
Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388

* 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.

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).

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(1971). After a magistrate judge identified various deficiencies in his initial complaint, Flute filed an amended one. The district court then screened Flute's amended complaint under 28 U.S.C. § 1915A(a) and sua sponte dismissed it as legally 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 yet 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 of Boulder*, 592 F. App'x 710, 712 (10th Cir. 2014) (unpublished). We need not resolve that question here; for the reasons discussed below, Flute's arguments fail under either standard.

Flute first argues that the magistrate judge erred in denying his request for counsel. But Flute neither acknowledges that the district court denied his request as premature nor challenges that characterization on appeal. Thus, he has waived any challenge to that ruling. *See Nixon v. City & Cty. of Denver*, 784 F.3d 1364, 1366

² The district court dismissed Flute's amended complaint—which alleges claims arising from a March 2015 incident report and subsequent disciplinary proceedings—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 an August 2015 prison-job reassignment. *See Flute v. United States*, No. 1:17-cv-01688-LTB, slip op. at 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-01717-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. 17-1397 (10th Cir. Jan. 25, 2018).

(10th Cir. 2015) (“The first task of an appellant is to explain to us why the district court’s decision was wrong.”).

True, Flute suggests that he later renewed his request for counsel when he asked for extension of time to file his amended complaint. But he fails to provide a precise record citation to support that assertion. *See* Fed. R. App. P. 28(a)(8)(A) (requiring argument section of appellant’s opening brief to contain “appellant’s contentions and the reasons for them, with citations to the . . . parts of the record on which the appellant relies”); 10th Cir. R. 28.2(C)(2) (“For each issue raised on appeal, all briefs must cite the precise reference in the record where the issue was raised and ruled on.”). And our independent review of the record yields no such request. Instead, it appears that Flute merely cited the magistrate judge’s initial refusal to appoint counsel as a reason he needed additional time to prepare his amended complaint. The magistrate judge apparently read Flute’s request for an extension the same way we do; in denying Flute’s motion, the magistrate judge didn’t address whether Flute was entitled to the appointment of counsel at that point. Thus, we won’t address this question either. *See 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).

Next, Flute argues that the district court’s sua sponte decision to dismiss his complaint violates the rule that courts must confine themselves to “the role of neutral arbiter of [those] matters the parties present.” *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). But *Greenlaw*’s actual holding—that an appellate court can’t “alter

a judgment to benefit a nonappealing party,” *id.* at 244—doesn’t apply to, let alone preclude, the district court’s actions here. On the contrary, the district court was required by statute to screen Flute’s complaint and, if it determined that his claims were frivolous, to dismiss it. *See* § 1915A(a), (b)(1).³ Thus, we reject this argument.

Finally, Flute asserts that the district court erred in overlooking his First Amendment claim. At the outset, we note that Flute fails to provide any record citations that might demonstrate he actually raised such a claim. We could decline to reach this argument on that basis alone. *See* Fed. R. App. P. 28(a)(8)(A); *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).

Alternatively, even if we exercised our discretion to consider this waived argument, we would reject it on the merits. Flute’s amended complaint does repeatedly reference (albeit without any elaboration or explanation) the First Amendment. But to the extent Flute’s naked references to the First Amendment were sufficient to put the district court on notice that he was raising one or more First Amendment claims, those claims were premised on the same events that formed the basis of what the district court instead construed as a due-process claim. And because those events transpired more than two years before Flute filed his complaint, the district court reasoned, any constitutional claims arising from them were time-barred.

³ Flute appears to be operating under the impression that the district court dismissed his complaint under § 1915. But the district court instead dismissed his complaint under a separate statute: § 1915A. Thus, Flute’s assertion that the district court erred in “dispos[ing] of [his complaint] within the [§ 1915] framework,” Aplt. Br. 5, necessarily fails.

Flute makes no effort to challenge this ruling on appeal. Thus, he fails to demonstrate the alleged error prejudiced him. *See Shinseki v. Sanders*, 556 U.S. 396, 410 (2009) (explaining that “party seeking reversal normally must explain why the erroneous ruling caused harm”). Whether the district court construed his claims as arising under the Due Process Clause or the First Amendment is immaterial—either way, the district court found Flute’s constitutional claims time-barred. And that ruling stands unchallenged on appeal. *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.”). Accordingly, any error in failing to recognize that Flute was asserting one or more First Amendment claims was harmless. *See* 28 U.S.C. § 2111 (requiring us to disregard errors that “do not affect the substantial rights of the parties”).

As a final matter, we must determine whether Flute may proceed in forma pauperis (IFP) on appeal. Section 1915(g) generally bars a prisoner from proceeding IFP if he or she has, on at least three “prior occasions,” filed an action or appeal “that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted.” And when Flute filed his notice of appeal in this case, he had at least two strikes for purposes of § 1915(g). *See Flute v. United States*, No. 1:17-cv-01688-LTB, slip op. at 6 (D. Colo. Oct. 13, 2017) (dismissing Flute’s complaint as legally frivolous under § 1915A); *Flute v. Ruehling*, No. 08-cv-484-MJR, 2009 WL 728570, at *3 (S.D. Ill. Mar. 18, 2009) (dismissing Flute’s complaint under § 1915A and assessing strike); *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”).

Neither this court nor the Supreme Court has yet resolved whether the district court’s order dismissing Flute’s complaint in this action constitutes a third strike that would prohibit Flute from proceeding IFP in this appeal. *See Coleman v. Tollefson*, 135 S. Ct. 1759, 1765 (2015) (holding that prisoner who has accumulated at least three strikes generally can’t proceed IFP “while his [or her] appeal of one such dismissal is pending,” but declining to resolve whether prisoner can proceed IFP “with respect to an appeal from a *third* qualifying dismissal”). We decline to resolve that open question here. Even assuming we would answer it in a manner favorable to Flute, we would nevertheless deny his IFP motion because he fails to demonstrate “the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal.” *DeBardleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991). Thus, we deny Flute’s IFP motion, remind him that he must immediately pay any remaining filing fees, dismiss the appeal as frivolous under § 1915(e)(2)(B)(i), and note that Flute now has at least three strikes for purposes of § 1915(g). *See Hafed*, 635 F.3d at 1175; *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*, 135 S. Ct. 1759.

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-01717-GPG

GARY FLUTE, SR.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

MR. R. HUSEBY (First Name Unknown to Plaintiff), Official & Individual Capacities,

MR. HUFNAGLE (First Name Unknown to Plaintiff), Official & Individual Capacities,

MR. D. TAYLOR (First Name Unknown to Plaintiff), Official & Individual Capacities,

MS. M. HOFFER (First Name Unknown to Plaintiff), Official & Individual Capacities, and

MS. DEBORAH DENHAM, 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

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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 eleven claims for relief. The claims all relate to prison disciplinary proceedings and the imposition of sanctions following an incident report issued in March 2015 for possession of anything unauthorized. Mr. Flute does not specifically identify the unauthorized material. However, he describes it as material barred by the Ensign Amendment, which prohibits the BOP from distributing or making available to prisoners "any commercially published information or material that is sexually explicit or features nudity." 28 U.S.C. § 530C(b)(6); see *Jordan v. Sosa*, 654 F.3d 1012, 1016-17 (10th Cir. 2011) (discussing the Ensign Amendment and BOP regulations and program statements regarding sexually explicit publications). Mr. Flute specifically contends in the amended Prisoner Complaint that the incident report for possession of anything unauthorized falsely indicates his cell was searched when only a locker was

searched; he was served with a copy of the incident report on March 13, 2015, even though the incident report indicates it was served on March 8, 2015; the unit discipline committee ("UDC") hearing held on March 16, 2015, was too late and the sanctions imposed were effective immediately without opportunity to appeal; and a second UDC hearing following remand from the BOP regional director was improper and irregular. 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 TORT action" (ECF No. 10 at 21) 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. In fact, he fails to identify in his claims the specific rights allegedly violated by each Defendant. To the extent Mr. Flute claims his constitutional rights have been violated, the Court construes the amended Prisoner Complaint liberally as asserting due process claims challenging the disciplinary proceedings.

The liberally construed due process claims lack merit for several reasons. First, Mr. Flute fails to allege facts that demonstrate he was deprived of a constitutionally protected liberty interest. In the context of prison disciplinary proceedings, it is well settled that a federal prisoner has a liberty interest in earned good time credits. See *Howard v. U.S. Bureau of Prisons*, 487 F.3d 808, 811 (10th Cir. 2007). However, Mr. Flute does not allege that he was denied earned good time credits. Furthermore, it does not appear that Mr. Flute was denied earned good time credits because BOP regulations do not authorize loss of good conduct sentence credit as a sanction by the UDC. See 28 C.F.R. § 541.7(f).

Second, even if the Court assumes Mr. Flute somehow was deprived of a

constitutionally protected liberty interest, he fails to allege facts that demonstrate he was deprived of any procedural protections required under the Due Process Clause. "Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). Instead, due process is satisfied if Mr. Flute received advance written notice of the charges, an opportunity to call witnesses and present documentary evidence, and a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action. See *Wolff v. McDonnell*, 418 U.S. 539, 563-67 (1974).

Mr. Flute does not allege facts that demonstrate he was denied any of the procedures required under *Wolff*. He does allege that BOP regulations were violated. However, even if BOP regulations were violated, "a failure to adhere to administrative regulations does not equate to a constitutional violation." *Hovater v. Robinson*, 1 F.3d 1063, 1068 n.4 (10th Cir. 1993); see also *Dedrick v. Daniels*, 386 F. App'x 810, 811 (10th Cir. 2010) ("*Wolff* requires that the accused in a prison-disciplinary action be given written notice of the charges no less than 24 hours before a hearing on those charges. It sets no time limit for providing notice of charges after an incident.").

Third, Mr. Flute's constitutional claims premised on disciplinary proceedings that occurred more than two years before the instant action was filed are barred by the applicable statute of limitations. A *Bivens* action is subject to the statute of limitations in the general personal injury statute of the state where the action arose. See *Industrial Constructors Corp. v. U.S. Bur. of Reclamation*, 15 F.3d 963, 968 (10th Cir. 1994). In Colorado, the relevant statute of limitations is two years. See *Blake v. Dickason*, 997

F.2d 749, 750 (10th Cir. 1993).

To the extent Mr. Flute's claims in the amended Prisoner Complaint can be construed as seeking review under the APA, the claims lack merit because the APA does not apply to prison disciplinary proceedings. See *Lane v. Maye*, 671 F. App'x 721, 723 (10th Cir. 2016).

Finally, 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. 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