FILED
United States Court of Appeals
Tenth Circuit

November 10, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JABARI J. JOHNSON,

Plaintiff - Appellant,

v.

STEPHANIE DALTON,

Defendant - Appellee.

No. 21-1017
(D.C. No. 1:20-CV-00435-PAB-MEH)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HOLMES**, **PHILLIPS**, and **EID**, Circuit Judges.

Jabari Johnson appeals the dismissal of his 42 U.S.C. § 1983 claim against Stephanie Dalton. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

Mr. Johnson is an inmate at the Colorado State Penitentiary in Cañon City, Colorado. Dalton is a Colorado Department of Corrections (CDOC) employee. In his complaint, Mr. Johnson alleged that for various stretches of time beginning in

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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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

August 2018, CDOC deprived him of a medically necessary wheelchair. Although his complaint described actions by multiple CDOC officials and employees, the allegations naming Dalton specified only that she wrote a medical slip "stating item[:] wheelchair, expiration date[:] none," R. at 24, and that, on November 19, 2019, she "took [Mr. Johnson's] wheelchair stating he don't get it," *id.* Mr. Johnson also alleged that on November 22, 2019, another CDOC employee returned his wheelchair to him for a court date. *See id.* at 25. Mr. Johnson sought money damages and injunctive relief.

Before serving Dalton, Mr. Johnson moved for a preliminary injunction. The magistrate judge denied the motion because Mr. Johnson did not certify he provided Dalton with notice of the motion or detail any efforts to effect service.

Counsel entered an appearance for Dalton and moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and (6). The district court, on recommendation of the magistrate judge, dismissed the claim for damages against Dalton in her official capacity because Eleventh Amendment immunity barred that claim. The court then concluded qualified immunity barred Mr. Johnson's claims against Dalton in her individual capacity because he failed to plausibly plead a deliberate indifference Eighth Amendment claim. Mr. Johnson now appeals the denial of his motion for a preliminary injunction and the dismissal of his § 1983 claim.

DISCUSSION

Because Mr. Johnson proceeds pro se, we construe his arguments liberally, but we "cannot take on the responsibility of serving as [his] attorney in constructing

arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). "Questions involving Eleventh Amendment immunity are questions of law that this court reviews de novo." *Cornforth v. Univ. of Okla. Bd. of Regents*, 263 F.3d 1129, 1131 (10th Cir. 2001) (italics omitted). "We review de novo a district court's decision on a Rule 12(b)(6) motion for dismissal for failure to state a claim. Under this standard, we must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1282 (10th Cir. 2019) (italics, citation, and internal quotation marks omitted). But, "in examining a complaint under Rule 12(b)(6), we will disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable." *Id.* (internal quotation marks omitted).

Mr. Johnson first asserts the district court erred in dismissing his official-capacity claims against Dalton, an employee of the State of Colorado. We construe these as claims against the state itself, *Hafer v. Melo*, 502 U.S. 21, 25 (1991), and states are immune from claims for money damages under the Eleventh Amendment, *see Duhne v. New Jersey*, 251 U.S. 311, 313 (1920) ("[I]t has been long since settled that the whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own state without its consent."). Mr. Johnson does not argue Colorado consented to suit or otherwise waived its Eleventh Amendment immunity, but instead states he also sought money damages against Dalton in her individual capacity and injunctive

relief in her official capacity. But this argument does not undermine the basis for the district court's dismissal of his money-damages claim against Dalton in her official capacity, so we affirm that dismissal.

Mr. Johnson next argues the district court erred in concluding Dalton was entitled to qualified immunity. To overcome Dalton's qualified immunity, Mr. Johnson bore the burden to establish "(1) the defendant's conduct violated a constitutional right and (2) the law governing the conduct was clearly established at the time of the alleged violation." *DeSpain v. Uphoff*, 264 F.3d 965, 971 (10th Cir. 2001).

A claim, such as Mr. Johnson's, alleging an Eighth Amendment violation due to deliberate indifference to serious medical needs has two components: objective and subjective. "The objective component of the test is met if the harm suffered is sufficiently serious to implicate the Cruel and Unusual Punishment Clause." *Callahan v. Poppell*, 471 F.3d 1155, 1159 (10th Cir. 2006) (internal quotation marks omitted).

Mr. Johnson alleged Dalton deprived him of his wheelchair on November 19, 2019, but that another CDOC employee returned it to him on November 22, 2019. *See* R. at 24–25, 206. While Mr. Johnson had alleged physical injury stemming from the deprivation of his wheelchair by other, sometimes unclearly specified CDOC officials before November 19, 2019, he did not allege the three-day deprivation he linked to Dalton rose to the level of unnecessary or wanton infliction of pain, so the harm did not implicate the Cruel and Unusual Punishment Clause of the Eighth

Amendment, and he did not plausibly plead the objective component of a deliberate indifference claim. *See Robbins v. Oklahoma*, 519 F.3d 1242, 1249–50 (10th Cir. 2008) ("In § 1983 cases . . . it is particularly important . . . that the complaint make clear exactly *who* is alleged to have done *what* to *whom*, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state.")

Mr. Johnson further objects to the district court's dismissal of his complaint without granting him leave to amend. But because Mr. Johnson did not object to that portion of the magistrate judge's recommendation, under this court's firm-waiver rule he has waived review of that issue on appeal. *See Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) ("The failure to timely object to a magistrate's recommendations waives appellate review of both factual and legal questions.") internal quotation marks omitted)). Mr. Johnson does not invoke any exception to the firm-waiver rule, so we decline to review this issue further.

Mr. Johnson asserts the magistrate judge erred in denying his motion for a preliminary injunction. Mr. Johnson filed the motion before service on Dalton was complete and before counsel had entered an appearance on her behalf. The magistrate judge denied the motion without prejudice because Mr. Johnson failed to comply with the local court rule requiring him to file a certificate of service and a proposed order. *See* D.C. Colo. L. Civ. R. 65.1(a), (b). Mr. Johnson does not address the basis for the magistrate judge's decision to deny his motion on appeal, so we affirm that decision.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court. We deny Mr. Johnson's motions for injunctive relief because he did not establish a likelihood of success on the merits. *See Nken v. Holder*, 556 U.S. 418, 426 (2009). We deny Mr. Johnson's motion to proceed in forma pauperis because he has not presented "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).

Entered for the Court

Jerome A. Holmes
Circuit Judge