FILED
United States Court of Appeals
Tenth Circuit

April 8, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GREGORY MORRIS SANDERS,

Plaintiff - Appellant,

v.

ALAN WERNER, I.D. #4861 - CDOC via CCI @ ACF-Trans. Supervisor, in his individual and official capacity only; COLORADO DEPARTMENT OF CORRECTIONS; COLORADO CORRECTIONAL INDUSTRIES,

Defendants - Appellees.

No. 21-1096
(D.C. No. 1:19-CV-01736-KLM)
(D. Colo.)

ORDER AND JUDGMENT*

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

Gregory Sanders, pro se,[1] appeals the dismissal of his 42 U.S.C. § 1983 complaint against prison officials for alleged violations of his Eighth Amendment

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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] Because Mr. Sanders proceeds pro se, we construe his arguments liberally, but we "cannot take on the responsibility of serving as [his] attorney in constructing

rights stemming from a prison workplace accident. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND[2]

Mr. Sanders is an inmate incarcerated with the Colorado Department of Corrections. He worked at Colorado Correctional Industries at Arrowhead Transportation. He crushed two of his fingers, causing amputation and permanent disfigurement, when assisting a coworker with a stuck pull-down door and his fingers caught between a section of the door lacking a protective bumper.

Defendant Alan Werner was the Transportation Supervisor. Mr. Sanders alleged Mr. Werner was negligent in failing "to have repaired, replaced or removed the defective door from service" and that Mr. Sanders "was apprised verbally by Plaintiff Sanders on multiple occasions prior to incident injury that the subject matter door, among other tools and equipment, was not functioning properly, as the door would become stuck in places along the rails in which housed the doors rollers." R. vol. III at 69–70. Mr. Sanders also alleged that "had [he] been provided with relevant on-the-job training . . . such training would have impressed upon [him] an

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arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

[2] The facts set forth here come from Mr. Sanders's Third Amended Complaint, the well-pleaded allegations of which we take as true for purposes of analyzing a motion to dismiss. *See Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1282 (10th Cir. 2019). In his sixth issue on appeal, Mr. Sanders clarifies that his Third Amended Complaint incorporated the allegations of his prior complaints, but construing it this way does not change our analysis.

alternative safer method by which to have assisted with the stuck door." *Id.* at 70. He further alleged that, at the Arrowhead Transportation facility, there was "a subculture of masculinity," underlying Mr. Werner's

> view of those "offenders" who[] are visibly endowed with attributes of physical strength a[s] those whom he was not necessarily concerned with when they used defective equipment because they were expected to use their brute strength to overcome the limitations of the defective tools by accomplishing their tasks by relying on their prodigious strength[].

Id. at 70–71.

Mr. Sanders pled violations of both the Fourteenth and Eighth Amendments. Defendants moved to dismiss under Fed. R. Civ. P. 12(b)(6). The magistrate judge, exercising jurisdiction by consent under 28 U.S.C. § 636(c), granted the motion. The court dismissed the Fourteenth Amendment claims because Mr. Sanders's allegations were more appropriately analyzed under the specific provisions of the Eighth Amendment than the general guarantees of due process set forth in the Fourteenth Amendment. The court dismissed the Eighth Amendment claims because Mr. Sanders's allegations, at most, amounted to negligence rather than deliberate indifference rising to the level of unconstitutional cruel and unusual punishment. This appeal followed.

DISCUSSION

"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). "Conclusory allegations are not entitled to the assumption of truth. In fact, we disregard conclusory statements and look to the remaining factual allegations to see whether Plaintiff[] ha[s] stated a plausible claim." *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281 (10th Cir.) (citation and quotation marks omitted), *cert. denied*, 142 S. Ct. 477 (2021). "A plausible claim includes facts from which we may reasonably infer Defendant's liability. Plaintiffs must nudge the claim across the line from conceivable or speculative to plausible. Allegations that are merely consistent with a defendant's liability stop short of that line." *Id.* (citations and quotation marks omitted).

Mr. Sanders does not challenge the dismissal of his Fourteenth Amendment claims but he does challenge the dismissal of his Eighth Amendment claims. He raises six issues on appeal. In the first, he argues the magistrate judge lacked the authority to rule on the motion to dismiss. In the second, third, fourth, and sixth, which we consider together, he argues the court erred in construing his complaint as failing to sufficiently allege deliberate indifference to state a plausible Eighth Amendment claim. In the fifth, he argues the court should have granted him leave to amend his complaint.

We reject Mr. Sanders's first argument because he expressly consented in writing "to hav[ing] a United States magistrate judge conduct all proceedings in this civil action, including trial, and to order the entry of a final judgment." Supp. R. at

16. The consent form Mr. Sanders signed references 28 U.S.C. § 636(c), which permits a magistrate judge to exercise jurisdiction over civil matters by consent of both parties.

In his reply brief, while Mr. Sanders concedes the validity of his signature on the second page of the consent form, he argues that he had checked the box indicating non-consent to magistrate jurisdiction, and that defense counsel surreptitiously replaced that page with one falsely indicating he did consent. But immediately after the parties submitted the consent form, the court issued an "Order of Reference," which stated: "Pursuant to the consent of the parties to the jurisdiction of the magistrate judge, this case is referred to Magistrate Judge Kristen L. Mix for all purposes pursuant to 28 U.S.C. § 636(c)." R. vol. 3 at 133 (record citations omitted). Mr. Sanders did not object to this order for the remainder of the case's pendency before the district court. He has therefore forfeited any objection to the validity of his consent on appeal. *See Tele-Commc'ns, Inc. v. Comm'r*, 104 F.3d 1229, 1233 (10th Cir. 1997) ("[A]n issue must be presented to, considered and decided by the trial court before it can be raised on appeal." (internal quotation marks and brackets omitted)).[3]

[3] Mr. Sanders's misapprehension of the court's order to mean that the magistrate judge's "assignment was pending/temporary until such time that he would later elect to non-consent respecting the deadline dates for such," Aplt. Reply Br. at 5, does not excuse his forfeiture of the objection he now seeks to raise on appeal. *See Garrett*, 425 F.3d at 840 ("[P]ro se parties [must] follow the same rules of procedure that govern other litigants." (internal quotation marks omitted)).

As to Mr. Sanders's second, third, fourth, and sixth arguments, we analyze an Eighth Amendment claim alleging cruel and unusual punishment in the context of a prison work assignment like other conditions-of-confinement claims. *See Choate v. Lockhart*, 7 F.3d 1370, 1374 (8th Cir. 1993). Such claims have both a subjective and objective component: "[C]ourts considering a prisoner's claim must ask both if the officials acted with a sufficiently culpable state of mind and if the alleged wrongdoing was objectively harmful enough to establish a constitutional violation." *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (brackets and internal quotation marks omitted). An official is not liable "unless the official knows of and disregards 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 v. Brennan*, 511 U.S. 825, 837 (1994). Mere negligence is not enough: "deliberate indifference describes a state of mind more blameworthy than negligence." *Id.* at 835.

Mr. Sanders argues he sufficiently pled a claim of deliberate indifference, pointing to the seriousness of his injuries and his allegation that he had notified Mr. Werner of the condition of the sliding door on several occasions prior to the accident. But we agree with the district court that these allegations do not show Mr. Werner acted with the level of subjective culpability necessary to show an Eighth Amendment violation. At most, they "simply show that [Mr. Werner] knew that there was a sliding door that would sometimes become stuck and that would need to be forced along its rollers." R. vol. III at 176. Put differently, even if Mr. Sanders

sufficiently alleged that an official in Mr. Werner's position should have been aware of the risk posed by the sliding door and should have done more to protect inmates subject to that risk, Mr. Werner's alleged "failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot . . . be condemned as the infliction of punishment." *Farmer*, 511 U.S. at 838. The court therefore correctly dismissed Mr. Sanders's complaint for failure to plausibly state an Eighth Amendment claim.

Finally, Mr. Sanders argues the court should have allowed him to amend his complaint a fourth time. But he did not request leave to file a fourth amended complaint before the district court, and so has forfeited that argument on appeal. *See Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.*, 956 F.3d 1228, 1236 (10th Cir. 2020).

CONCLUSION

We affirm the judgment of the district court. We grant Mr. Sanders's motion for leave to proceed in forma pauperis. !

Entered for the Court

Allison H. Eid
Circuit Judge