DIVISION ONE
FILED: 01/20/2011
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOHN P. BAKER, Plaintiff/Appellant, v. RICHARD PRATT; THOMAS SCHAFF; C.O. III KOKEMOR, Defendants/Appellees.	No. 1 CA-CV 10-0169 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-029273

The Honorable Edward O. Burke, Judge

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

John P. Baker, Florence
In *Propria Persona*

Terry Goddard, Attorney General, Phoenix
By A. J. Rogers, Assistant Attorney General
Attorneys for Defendants/Appellees

J O H N S E N, Judge

¶1 John P. Baker, an inmate in the Arizona Department of Corrections ("ADOC"), appeals from the superior court's

dismissal of his complaint. For the reasons that follow, we affirm in part, reverse in part and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 On November 14, 2008, Baker filed a complaint against various ADOC employees and Janice K. Brewer in her capacity as then-Secretary of State. After the superior court issued a notice of intent to dismiss for lack of service, Baker moved for an extension of time to serve the defendants. The court granted Baker's motion, giving him until June 30, 2009, to complete service. On July 1, 2009, Baker filed a second motion to extend time for service. On August 19, 2009, court administration placed the case on the inactive calendar.

¶3 On September 8, 2009, Brewer moved to dismiss based on abatement and failure to state a claim; the court granted that motion on October 13. Meanwhile, Baker effected service on Richard Pratt and Dr. E. Vinluan on September 16. Baker served two more defendants, J. Kokemor and Thomas Schaff, on October 8 and November 6, 2009, respectively. On October 13, Baker moved to continue the case on the inactive calendar and on November 9, the court issued a minute entry granting that motion. The court's order stated: "IT IS ORDERED continuing this case on the **Inactive Calendar** until **June 1, 2010**, at which time

Plaintiff will have had 1½ years to accomplish service of process."

¶4 On November 27, Pratt, Schaff and Kokemor moved to dismiss the complaint "in its entirety." After considering Baker's response, the court granted the motion.

¶5 Baker timely appealed.[1] We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003)."[2]

DISCUSSION

A. Standard of Review.

¶6 We review the grant of a motion to dismiss for failure to state a claim *de novo*. *Jeter v. Mayo Clinic Ariz.,* 211 Ariz. 386, 391, ¶ 18, 121 P.3d 1256, 1261 (App. 2005). We accept as true all well-pled factual allegations and will affirm the dismissal only if Baker "would not be entitled to relief under any interpretation of the facts susceptible of proof." *Fid. Sec. Life Ins. Co. v. State*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998).

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[1] Baker's notice of appeal was premature, but the superior court later entered a final appealable judgment. *See Barassi v. Matison,* 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981).

[2] Baker contends the answering brief was untimely because it was filed more than 40 days after his opening brief. *See* ARCAP 15(a). Nevertheless, because appellees requested and received an extension of time to file their answering brief and filed within the extended period, their brief was timely.

B. Dismissal of the State-Law Claims.[3]

¶7 Arizona law precludes convicted felons from suing for damages or equitable relief against the State, its officers or employees "unless the complaint alleges specific facts from which the court may conclude that the plaintiff suffered serious physical injury or the claim is authorized by a federal statute." A.R.S. § 31-201.01(L) (1996). "Serious physical injury" is defined as "an impairment of physical condition that creates a substantial risk of death or that causes serious disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ." A.R.S. § 31-201.01(N)(2).

¶8 Baker's complaint purported to allege medical malpractice due to medical conditions that were left untested and untreated. He contended certain defendants did not follow up on pre-cancerous polyps, which "could have been a life issue." Further, Baker alleged that certain defendants were late in following up on his thyroid condition, that if he does not receive the proper medication "he could die," and that his

[3] Baker argues the court erred by granting the motions to dismiss because the case was pending on the inactive calendar. He cites no authority for this contention, which we reject. The superior court "has broad discretion over the management of its docket." *Findlay v. Lewis,* 172 Ariz. 343, 346, 837 P.2d 145, 148 (1992). Nothing in Arizona Rule of Civil Procedure 38.1(d) precludes the filing or the granting of a Rule 12(b) motion to dismiss a case while it is on the inactive calendar. *See* Ariz. R. Civ. P. 38.1(d) (governing the inactive calendar).

condition causes breathing problems. None of these allegations alleged serious physical injury within the meaning of A.R.S. § 31-201.01(N)(2).[4]

¶9 Baker also alleged he has cataracts in both eyes, which, if not removed, will cause him to be blind. This allegation is not that Baker has suffered a serious physical injury, but that he may have an injury in the future. Moreover, Baker's allegation that he is on medication for his feet, but the pain never goes away, does not constitute "serious physical injury" within the meaning of A.R.S. § 31-201.01(N)(2).[5]

¶10 Finally, Baker does not assert his medical malpractice claim is authorized by any federal statute. Accordingly, the superior court properly dismissed this claim. *See Tripati v. State,* 199 Ariz. 222, 225, ¶ 9, 16 P.3d 783, 786 (App. 2000).

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[4] Baker contends if there were errors in his complaint, he should have been allowed to amend. *See* Ariz. R. Civ. P. 15(a). He did not seek leave to amend his complaint, however. Therefore, we will not address this argument. *See Alano Club 12, Inc. v. Hibbs,* 150 Ariz. 428, 431, 724 P.2d 47, 50 (App. 1986) ("An appellate court will not decide issues which are raised for the first time on appeal.").

[5] We do not consider Baker's argument on appeal that he suffered a heart attack because that allegation is not contained in his complaint. *See Cullen v. Auto-Owners Ins. Co.,* 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008) (superior courts are limited to considering only well-pled facts when adjudicating a Rule 12(b)(6) motion to dismiss); *Canyon Ambulatory Surg. Center v. SCF Arizona*, 225 Ariz. 414, ___, ¶ 9, 239 P.3d 733, 737 (App. 2010) ("complaint must set forth facts, that if proven, are sufficient to support a claim for relief as presented).

¶11 Baker's complaint also fails to state a claim under A.R.S. §§ 41-1493.01 (2004), -1493.02 (2004). Those statutes prohibit the government from substantially burdening a person's exercise of religion and apply to "all state and local laws and ordinances." A.R.S. §§ 41-1493.01(B), -1493.02(A). Baker only alleged a violation of these statutes in connection with two defendants' "refus[al] to assist in the matter of the Kosher diet problems" and not taking "an interest in all the violations of the Kosher diet." The complaint alleged that the Kosher diet problems arose from another defendant's failure to follow ADOC policies. Because the alleged violations are not a result of state or local laws or ordinances, dismissal of the claim was proper.

C. Dismissal of the Federal-Law Claims.

1. Religious rights.

¶12 Baker's complaint alleged his religious practices "were either stopped or hampered by some of the Defendants" in violation of the First Amendment, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1 (2006), and A.R.S. §§ 41-1493.01, -1493.02. Specifically, Baker alleged that certain defendants have "[t]amper[ed] with" his Kosher diet in a manner that requires him to eat his breakfast and lunch at the same time on weekends. He also alleged that

while prisoners who are on medical diets may bring back food to their cells, inmates who are on Kosher diets may not.

¶13 There is no right to recover damages for a constitutional violation by state officials other than through 42 U.S.C. § 1983 (2006). *Wilkie v. State,* 161 Ariz. 541, 546, 779 P.2d 1280, 1285 (App. 1989). Section 1983 imposes liability upon one who, under color of state law, deprives another of federally protected rights. 42 U.S.C. § 1983. Accordingly, such deprivation "must be caused by the exercise of some right or privilege created by the government or a rule of conduct imposed by the government." *Sutton v. Providence St. Joseph Med. Ctr.,* 192 F.3d 826, 835 (9th Cir. 1999) (quoting *Lugar v. Edmonson Oil Co.,* 457 U.S. 922, 937 (1982)).

¶14 Baker did not allege any ADOC policy prohibiting the free exercise of his religion. Indeed, Baker asserted one of the defendants deprived him of his First Amendment rights by failing to follow ADOC policy. Because the complaint did not allege any defendant acted under color of state law in depriving Baker of his right to free exercise of religion, it stated no First Amendment violation.

¶15 The RLUIPA, 42 U.S.C. § 2000cc-1(a), prohibits government from imposing a substantial burden on "the religious exercise of a person residing in or confined to an institution." A cause of action under the RLUIPA exists against "a

government," defined as "(i) a State, county, municipality, or other governmental entity created under the authority of a State; (ii) a branch, department, agency, instrumentality, or official of an entity listed in [clause (i)]; and (iii) any other person acting under color of state law." *Harris v. Schriro*, 652 F. Supp. 2d 1024, 1029 (D. Ariz. 2009) (quoting 42 U.S.C. § 2000cc-5 (2006)). Many circuit courts have held that individuals may not be sued for damages under the RLUIPA. *Id.*; *accord Rupe v. Cate,* 688 F. Supp. 2d 1035, 1044-46 (E.D. Cal. 2010); *Shilling v. Crawford*, 536 F. Supp. 2d 1227, 1234-35 (D. Nev. 2008).

¶16 Baker's complaint did not allege that any defendant violated the RLUIPA by acting under color of state law. Moreover, his one mention of RLUIPA is vague and conclusory, and therefore, does not state a claim. *See Ivey v. Bd. of Regents of Univ. of Alaska,* 673 F.2d 266, 268 (9th Cir. 1982) ("Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss.").

2. *Ex post facto* and double-punishment claims.

¶17 Baker's complaint also alleged that a classification policy enacted in October 2005 violates the *Ex Post Facto* Clause of the United States Constitution because it takes into account prior disciplinary infractions when classifying inmates. *See*

U.S. Const. art. 1, § 9. He also argues the policy violates A.R.S. § 13-116 (2010).[6]

¶18 A law violates the *Ex Post Facto* Clause when it "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. 386, 390 (1798). Section 13-116 prohibits double punishment for the same criminal act.

¶19 This claim by Baker fails because it did not identify any specific prison policy. *See Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008) (when considering a motion to dismiss, courts consider only the well-pled facts). Moreover, inmates have no constitutional right to a particular security classification. *Meachum v. Fano,* 427 U.S. 215, 224-25 (1976). Indeed, "[w]ide discretion is vested in correctional authorities in matters of internal [prison] administration." *Cardwell v. Hogan,* 23 Ariz. App. 475, 476, 534 P.2d 283-84 (1975). Likewise, no due-process violation occurs when an inmate loses privileges as a result of a move to a different unit. *See Meachum,* 427 U.S. at 224-25.

[6] Absent material revisions following the relevant date, we cite a statute's current version.

3. Access to courts.

¶20 Baker's complaint also alleged that certain defendants did not process inmates' grievances properly, resulting in a denial of access to courts.

¶21 A claim of denial of access to courts must allege actual injury. *Lewis v. Casey,* 518 U.S. 343, 349, 351 (1996). Actual injury is defined as a "specific instance in which an inmate was actually denied access to the courts." *Sands v. Lewis,* 886 F.2d 1166, 1171 (9th Cir. 1989) (quoting *Hudson v. Robinson*, 678 F.2d 462, 466 (3d Cir. 1982) (internal quotations omitted)). Baker did not allege any specific instance in which he was denied access to a court, nor did he allege any other actual injury arising from defendants' alleged failure to process or timely process grievances.

4. Equal protection.

¶22 Baker's complaint alleged certain defendants violated equal protection by treating Hispanic inmates "much better than whites." The only different treatment the complaint alleged, however, is that "Hispanic inmates' cell doors are left open much more than whites." The complaint also failed to allege Baker suffered any injuries as a result of being treated differently. *See, e.g., Sears v. Hull,* 192 Ariz. 65, 70, ¶ 23, 961 P.2d 1013, 1018 (1998) ("plaintiff must allege injury resulting from the putatively illegal conduct."). Nor did the

complaint allege that any defendant "acted with an intent or purpose to discriminate against [Baker] based upon membership in a protected class." *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).

5. Deliberate indifference to medical needs.

¶23 Finally, Baker's complaint alleged certain defendants violated his Eighth Amendment rights by being deliberately indifferent to his medical needs.

¶24 Deliberate indifference to medical needs violates the Eighth Amendment right to be free from cruel and unusual punishment. *Weatherford ex rel. Michael L. v. State,* 206 Ariz. 529, 533-34, ¶ 13, 81 P.3d 320, 324-25 (2003) (citing *Estelle v. Gamble*, 429 U.S. 97 (1976)). "To state a claim for violation of the eighth amendment, a plaintiff need not show bodily injury to collect damages." *Wilkie,* 161 Ariz. at 544, 779 P.2d at 1283; *but see Estelle*, 429 U.S. at 106 (acts alleged must be sufficiently harmful); and *Shapley v. Nev. Bd. of State Prison Comm'rs,* 766 F.2d 404, 407 (9th Cir. 1985) (a delay in medical care, without more, is insufficient to state a claim for deliberate medical indifference). "[A] constitutional claim may be stated even if a prisoner is subject only to a health hazard, a threat of physical harm or has experienced discomfort associated with any physical pain or mental anguish, even in the

absence of any serious bodily injury to the plaintiff." *Wilkie,* 161 Ariz. at 545, 779 P.2d at 1284.

¶25 Baker's complaint alleged Vinluan and Pratt denied him "hearing aids, yearly physicals, timely renewals of medications, blood tests . . . and other medical services." As a result of the denial of hearing aids, Baker alleged he is subject to prison disciplinary action because he cannot always hear instructions. Baker's complaint also alleged that Vinluan and another defendant, who was not served, did not follow up on tests concerning Baker's cancerous growths and "were lax in their follow-up" concerning his thyroid condition. He also alleged they did not properly monitor his thyroid condition and problems with his feet. Accepting these facts as true, under *Wilkie,* these claims are sufficient to state a claim for relief.

D. Dismissal for Failure to Effect Timely Service.

¶26 On appeal, Baker challenges the superior court's dismissal of certain defendants for failure to effect timely service. As we have held that only the Eighth Amendment claim for deliberate indifference to medical needs states a claim for relief, we will address service only as it pertains to the two served defendants against whom this claim was alleged, Vinluan and Pratt. We review the trial court's dismissal for abuse of discretion. *Corbett v. ManorCare of Am., Inc.,* 213 Ariz. 618, 623, ¶¶ 8-9, 146 P.3d 1027, 1032 (App. 2006).

¶27 As noted, the first extension of time for service of the complaint expired on June 30, 2009. On July 1, 2009, Baker moved for another extension of time, and while that motion was pending, he effected service on Pratt and Vinluan on September 16, 2009. Although the court did not expressly rule on Baker's motion for an extension of service time, by minute entry on November 9, the court at least impliedly extended the time for service to June 1, 2010. Accordingly, we hold that the complaint was not subject to dismissal against Vinluan and Pratt for failure to effect timely service.

CONCLUSION

¶28 For the foregoing reasons, we affirm the judgment of the superior court except insofar as it dismissed the claim alleging deliberate indifference to medical needs by Vinluan and Pratt, and remand for further proceedings.

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
DONN KESSLER, Presiding Judge

/s/
SHELDON H. WEISBERG, Judge