FILED
United States Court of Appeals
Tenth Circuit

October 10, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

EMANUEL PITTMAN,

Plaintiff - Appellant,

v.

DEAN WILLIAMS; JANE DOE, LNP,

Defendants - Appellees.

No. 22-1441
(D.C. No. 1:22-CV-02008-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT*

Before **McHUGH**, **MURPHY**, and **CARSON**, Circuit Judges.

Pro se Plaintiff Emanuel Pittman, a prisoner in the custody of the Colorado Department of Corrections ("CDOC"), filed a 42 U.S.C. § 1983 claim against Defendants Dean Williams and Jane Doe LNP alleging violations of his Eighth Amendment rights. The district court dismissed Plaintiff's Complaint under Federal Rule of Civil Procedure 8 because Plaintiff failed to plead an adequate factual basis for his Eighth Amendment claim. Our jurisdiction arises under 28 U.S.C. § 1291. We affirm the district court's dismissal of Plaintiff's claim. We also deny Plaintiff's request to proceed *in forma pauperis*.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

I.

At the times material to his claim, Plaintiff was in CDOC custody serving a term of imprisonment. CDOC officials transferred Plaintiff from the Colorado Territorial Correctional Facility ("CCF") to the Sterling Correctional Facility ("SCF"). Under CDOC policy, when officials transfer an inmate among facilities, and that transfer results in a change of custody level, the inmate cannot (absent medical clearance) possess shoes with shoestrings.

In the course of Plaintiff's transfer, CDOC staff confiscated his lace-up tennis shoes. Plaintiff objected and explained to SCF staff that he suffered from a degenerative spinal condition and required the shoes. SCF staff instructed him to file a medical kite.[1] Plaintiff provided the medical kite to officials, who he alleges, never responded. Plaintiff now alleges he suffers from swollen ankles, lower back pain, and neck pain because officials confiscated his shoes. SCF staff returned the shoes after approximately two months.

Plaintiff sued Defendants in their individual capacities for injunctive and monetary relief. A magistrate judge recommended that the district court dismiss the Complaint. The district court adopted the magistrate judge's recommendation and dismissed Plaintiff's request for injunctive relief because our precedent requires plaintiffs to sue defendants in their official capacity to seek injunctive relief. See

[1] A "medical kite" is request for health care services. Colorado Department of Corrections, https://cdoc.colorado.gov/resources/medical-and-mental-health (last visited August 1, 2023).

Brown v. Montoya, 662 F.3d 1152, 1161 n.5 (10th Cir. 2011) (citing Hafer v. Melo, 502 U.S. 21, 30, 27 (1991)). The district court dismissed Plaintiff's request for monetary relief on the grounds that Plaintiff failed to comply with Rule 8's requirement that he provide a sufficient factual basis to demonstrate a plausible claim of deliberate indifference. See Farmer v. Brennan, 511 U.S. 825, 832 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 526–27 (1984)). Plaintiff appeals.

II.

In reviewing a dismissal under Rule 12(b)(6), we must accept all the allegations in the complaint as true, see Hogan v. Winder, 762 F.3d 1096, 1104 (10th Cir. 2014) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007)), and view them in the light most favorable to the plaintiff. Clinton v. Sec. Benefit Life Ins. Co., 63 F.4th 1264, 1272 (10th Cir. 2023) (citing Mayfield v. Bethards, 826 F.3d 1252, 1255 (10th Cir. 2016); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted)). But we need not accept "[t]hreadbare recitals of the elements of a cause of action supported by mere conclusory statements." Id.

III.

Rule 8 requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). And even though we liberally construe pro se pleadings, in determining whether Plaintiff has sufficiently alleged a cause of action, we must strip away the "labels and conclusions" and "formulaic recitation of the elements" of his Eighth Amendment claim to determine if there are "enough facts to state a claim to relief that is plausible on its face." See Bell Atlantic

Corp. v. Twombly, 550 U.S. 544, 547, 555 (2007). Here, Plaintiff must establish that his complaint sufficiently alleged that defendants acted with "deliberate indifference" to a substantial risk of harm to his or her health or safety. See Farmer, 511 U.S. at 834. In the context of prisons, "deliberate indifference is a subjective standard requiring actual knowledge of a risk by the official." George ex rel. Estate of Bradshaw v. Beaver Cnty. ex rel. Beaver Cnty. Bd. of Comm'rs, 32 F.4th 1246, 1258 n.3 (10th Cir. 2022) (citing Barney v. Pulsipher, 143 F.3d 1299, 1307 n.5 (10th Cir. 1998)).

Recall that Plaintiff brought claims against two officials, Defendant Williams and Defendant Jane Doe. With respect to Defendant Doe, Plaintiff alleged that she violated his Eighth Amendment rights by not placing a medical order to retrieve his tennis shoes, though he admits that the medical kite is still pending. But the lack of medical order is the only fact Plaintiff alleges for his claim against Defendant Doe. Plaintiff fails to cite any fact suggesting that Defendant Doe acted with actual knowledge of any risk to Plaintiff. Without more, Plaintiff has not alleged sufficient facts to plausibly suggest Defendant Doe acted with deliberate indifference.

Plaintiff also does not provide a plausible factual basis to claim Defendant Williams acted with deliberate indifference and personally participated in the violation of the Eighth Amendment rights. See Foote v. Spiegel, 118 F.3d 1416, 1423 (10th Cir. 1997) ("Individual liability . . . must be based on personal involvement in the alleged constitutional violation."). Plaintiff alleged that Defendant Williams instituted the policy which led to the confiscation of Plaintiff's

shoes. However, Plaintiff must provide a sufficient factual basis to make "an affirmative link between the alleged constitutional violation and each individual defendant's participation, control, direction, or failure to supervise." See Butler v. City of Norman, 992 F.2d 1053, 1055 (10th Cir. 1993); see also Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) (noting that *respondeat superior* is not applicable to unconstitutional conduct). Though Plaintiff alleged that Defendant Williams maintains a position of authority at SCF and instituted the policy, these allegations are insufficient to plausibly claim both personal participation and deliberate indifference.

Ultimately, Plaintiff's allegations against Defendants are threadbare and conclusory. While Plaintiff has alleged some connection between Defendants Williams and Doe, the confiscation of his shoes, and the pending medical kite, he fails to allege sufficient facts supporting all the elements necessary to establish a valid claim under his Eighth Amendment theory. Forest Guardians v. Forsgren, 478 F.3d 1149, 1160 (10th Cir. 2007).

We also deny Defendant's request to proceed *in forma pauperis*. Defendant has failed to show "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). This denial requires Plaintiff to immediately pay the full fee.

For the foregoing reasons, the district court's judgment is AFFIRMED.

Entered for the Court

Joel M. Carson III
Circuit Judge