

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

August 28, 2019

Lyle W. Cayce
Clerk

No. 18-40827
Summary Calendar

DONALD WAYNE HEROD,

Plaintiff-Appellant

v.

UNIVERSITY OF TEXAS MEDICAL BRANCH; WARDEN BELL; RICK
THALER,

Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 9:14-CV-69

Before DAVIS, SMITH and DUNCAN, Circuit Judges.

PER CURIAM:*

Proceeding pro se, Donald Wayne Herod, Texas prisoner # 1538539, appeals the dismissal of his 42 U.S.C. § 1983 complaint pursuant to 28 U.S.C. § 1915A(b)(1) for failure to state a claim upon which relief may be granted. We review such a ruling de novo. *Geiger v. Jowers*, 404 F.3d 371, 373 (5th Cir. 2005). A civil rights complaint will not proceed unless it “contain[s] sufficient

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). We will “not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.” *Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010) (internal quotation marks and citation omitted).

Herod’s complaint focuses on his broken shoulders, which were discovered after he was airlifted in December 2012 from the Eastham Unit to a free-world hospital while unconscious. He maintains that the Warden of the Eastham Unit covered up the incident, given that no reports were available to show the cause of his injuries and given that the Warden was required to authorize his airlift to the hospital. Herod also asserts that the Director of the Texas Department of Criminal Justice-Institutional Division is responsible for overseeing all prison functions but made no comment on the incident. He is unable to show that he is entitled to relief because he has not shown that either of these defendants participated personally to cause his injuries or that they implemented policies giving rise to harm. *See Porter v. Epps*, 659 F.3d 440, 446 (5th Cir. 2011). To the extent that Herod is arguing that these defendants should be responsible for the acts of their subordinates, supervisory officials are not subject to respondeat superior liability under § 1983. *See Cozzo v. Tangipahoa Parish Council- President Gov’t*, 279 F.3d 273, 276 (5th Cir. 2002).

To the extent that Herod seeks to challenge the actions of Patricia Rye, the nurse who conducted a remote triage while he was in the prison infirmary, he has not shown that her actions in determining that his state of consciousness warranted immediate care evinced deliberate indifference to his serious medical needs. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Reeves v. Collins*, 27 F.3d 174, 176-77 (5th Cir. 1994). To the extent that he is challenging the actions of the doctors at the free-world hospital for the delay

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in diagnosing his broken shoulders, he has not established that the delay resulted in “*substantial harm.*” *Easter v. Powell*, 467 F.3d 459, 463 (5th Cir. 2006) (internal quotation marks and citation omitted). Although it appears that Herod may be challenging the doctors’ refusal to treat his injuries immediately, his disagreement with their medical assessment does not give rise to a cause of action under § 1983. *See Gibbs v. Grimmette*, 254 F.3d 545, 549 (5th Cir. 2001). Finally, Herod’s assertions that he was likely injured during his transportation from his cell to the infirmary or from the infirmary to the hospital does not warrant relief, as his allegations of harm constitute no more than negligence. *See Hernandez ex rel. Hernandez v. Texas Dep’t of Protective & Regulatory Servs.*, 380 F.3d 872, 882 (5th Cir. 2004).

Also, Herod contends that the defendants failed to comply with various orders of the district court. There is no indication that the defendants failed to provide a copy of “pertinent” rules or regulations. Additionally, although the district court authorized the defendants to interview witnesses with knowledge of the relevant facts, Herod concedes that he has no knowledge of what happened to him because he was unconscious at that time. He notes that there were a number of other prisoners in the area when he became ill; however, Herod presented evidence reflecting that his injuries did not occur while he was in his cell, and there is no indication that the other inmates would have been aware of the relevant facts that led to his broken shoulders. Although Herod complains that the defendants did not provide any reports relating to his transportation from his cell to the infirmary and from the infirmary to the hospital and the staff involved, prison staff provided information indicating that no such reports had been “prepared” and thus there was nothing to present.

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In sum, Herod has not shown that he is entitled to relief. *See, e.g., Geiger*, 404 F.3d at 373. Accordingly the judgment of the district court is AFFIRMED. Herod's motion for appointment of counsel is DENIED.

Our affirmance of the district court's dismissal counts as one strike under 28 U.S.C. § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 387-88 (5th Cir. 1996), *abrogated on other grounds by Coleman v. Tollefson*, 135 S. Ct. 1759, 1762-63 (2015). Herod is WARNED that is he accumulates three strikes, he will not be allowed to proceed in forma pauperis in any civil action or appeal unless he is under imminent danger of serious physical injury. *See* § 1915(g).