

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-01006-BNB

DONALD RODERICK,

Plaintiff,

v.

STATE OF COLORADO,
COLORADO DEPARTMENT OF CORRECTIONS,
GATBEL N. CHAMJOCK, PA, and
HELENE CHRISTNER, PA,

Defendants.

ORDER TO DISMISS IN PART AND TO DRAW CASE TO A PRESIDING JUDGE

Plaintiff, Donald Roderick, is a prisoner in the custody of the Colorado Department of Corrections (DOC) at the correctional facility in Sterling, Colorado. He submitted *pro se* a Prisoner Complaint (ECF No. 1) pursuant to 42 U.S.C. § 1983 that also asserts supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over state-law claims. He asks for money damages and injunctive relief.

Mr. Roderick has been granted leave to proceed pursuant to the federal *in forma pauperis* statute, 28 U.S.C. § 1915. Subsection (e)(2)(B) of § 1915 requires a court to dismiss sua sponte an action at any time if the action is frivolous, malicious, or seeks monetary relief against a defendant who is immune from such relief. A legally frivolous claim is one in which the plaintiff asserts the violation of a legal interest that clearly does not exist or asserts facts that do not support an arguable claim. *Neitzke v. Williams*, 490 U.S. 319, 324 (1989).

Mr. Roderick is cautioned that his ability to file a civil action or appeal in federal court *in forma pauperis* pursuant to § 1915 may be barred if he has three or more actions or appeals in any federal court that were dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted. See 28 U.S.C. § 1915(g). Under § 1915(g), the Court may count dismissals entered prior to the enactment of this statute. *Green v. Nottingham*, 90 F.3d 415, 420 (10th Cir. 1996).

The Court must construe Mr. Roderick's Prisoner Complaint liberally because he is not represented by an attorney. See *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be an advocate for a *pro se* litigant. See *Hall*, 935 F.2d at 1110. For the reasons stated below, the Prisoner Complaint will be dismissed in part pursuant to 28 U.S.C. § 1915(e)(2)(B) as legally frivolous.

Plaintiff contends he suffers from a cardiac condition. As his first claim, he complains that a followup medical appointment for that condition was cancelled by the DOC's insurance provider, Physician Health Partners, and his request of January 25, 2014, for a refill of certain medication was denied until February 20, 2014, causing him to stop and restart the medication contrary to doctor's orders and placing him in jeopardy of a reoccurring cardiac arrest. On the basis of these allegations, he asserts that physician assistants, Gatbel N. Chamjock and Helene Christner, have been deliberately indifferent under the Eighth Amendment to his serious medical needs.

As his second claim, he alleges that physician assistants, Gatbel N. Chamjock and Helene Christner, have been negligent in caring out his physician's medical orders concerning his cardiac treatment and aftercare. As his third claim, he contends the

State of Colorado and the DOC have been negligent in making sure their employees provide him with a reasonable level of medical care.

Mr. Roderick may not sue the State of Colorado or the DOC. The State of Colorado and its entities are protected by Eleventh Amendment immunity. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989); *Meade v. Grubbs*, 841 F.2d 1512, 1525-26 (10th Cir. 1988). "It is well established that absent an unmistakable waiver by the state of its Eleventh Amendment immunity, or an unmistakable abrogation of such immunity by Congress, the amendment provides absolute immunity from suit in federal courts for states and their agencies." *Ramirez v. Oklahoma Dep't of Mental Health*, 41 F.3d 584, 588 (10th Cir. 1994), overruled on other grounds by *Ellis v. University of Kansas Med. Ctr.*, 163 F.3d 1186 (10th Cir. 1998). The State of Colorado has not waived its Eleventh Amendment immunity, see *Griess v. Colorado*, 841 F.2d 1042, 1044-45 (10th Cir. 1988), and congressional enactment of § 1983 did not abrogate Eleventh Amendment immunity, see *Quern v. Jordan*, 440 U.S. 332, 340-345 (1979). The Eleventh Amendment applies to all suits against the state and its agencies, regardless of the relief sought. See *Higginbotham v. Okla. Transp. Comm'n*, 328 F.3d 638, 644 (10th Cir. 2003). The third claim asserted against the State of Colorado and the DOC will be dismissed, and these Defendants will be dismissed as parties to this lawsuit.

Accordingly, it is

ORDERED that claim three asserted against the State of Colorado and the Colorado Department of Corrections is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B) as legally frivolous. It is

FURTHER ORDERED that the clerk of the Court remove the State of Colorado and Colorado Department of Corrections as parties to this lawsuit. It is

FURTHER ORDERED that remaining claims one and two and the case are drawn to a presiding judge and, if appropriate, to a magistrate judge. It is

FURTHER ORDERED that the only remaining Defendants are Gatbel N. Chamjock and Helene Christner.

DATED at Denver, Colorado, this 1st day of May, 2014.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court