

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-03084-GPG

TIMOTHY GONZALES,

Plaintiff,

v.

PHYSICIAN HEALTH PARTNERS,  
UNKNOWN LICENSED MEDICAL DOCTOR, Physician Health Partners, and  
ANTHONY A. DECESARO,

Defendants.

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ORDER TO DISMISS IN PART AND TO DRAW CASE

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Plaintiff, Timothy Gonzales, is a prisoner in the custody of the Colorado Department of Corrections (DOC) at the Bent County Correctional Facility in Las Animas, Colorado. Mr. Gonzales has filed *pro se* a Prisoner Complaint (ECF No. 1) pursuant to 42 U.S.C. § 1983 claiming his Eighth Amendment right to be free from cruel and unusual punishment has been violated. The Court must construe the Prisoner Complaint liberally because Mr. Gonzales 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 (10<sup>th</sup> Cir. 1991). If the Prisoner Complaint reasonably can be read “to state a valid claim on which the plaintiff could prevail, [the Court] should do so despite the plaintiff’s failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements.” *Hall*, 935 F.2d at 1110. However, the Court should not be an advocate for a *pro se* litigant. See *id.*

Pursuant to 28 U.S.C. § 1915A, the Court must review the Prisoner Complaint because Mr. Gonzales is a prisoner and he is seeking redress from officers or employees of a governmental entity. Section 1915A(b) requires dismissal of the Prisoner Complaint, or any portion of the Prisoner Complaint, that is frivolous. 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. See *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). For the reasons stated below, the Court will dismiss the Prisoner Complaint in part as legally frivolous pursuant to § 1915A(b).

Mr. Gonzales claims he was subjected to cruel and unusual punishment because he was denied timely surgery for a knee injury he suffered in 2011. The named Defendants are Physician Health Partners, an unidentified doctor employed by Physician Health Partners, and Anthony A. DeCesaro, the DOC step 3 grievance officer.

The Eighth Amendment claim against Mr. DeCesaro must be dismissed for lack of personal participation. “Individual liability under § 1983 must be based on personal involvement in the alleged constitutional violation.” *Footte v. Spiegel*, 118 F.3d 1416, 1423 (10<sup>th</sup> Cir. 1997). Thus, the “denial of a grievance, by itself without any connection to the violation of constitutional rights alleged by plaintiff, does not establish personal participation under § 1983.” *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10<sup>th</sup> Cir. 2009).

Mr. Gonzales alleges with respect to Mr. DeCesaro only that he denied two grievances. Although the grievances allegedly related to the medical treatment Mr. Gonzales contends he was denied, he does not allege any facts that demonstrate Mr. DeCesaro is responsible for the medical decisions he contends violate the Eighth

Amendment. Therefore, because Mr. DeCesaro's sole involvement stems from his denial of administrative grievances, he will be dismissed as a party to this action for lack of personal participation.

The Court will not address at this time the merits of the Eighth Amendment claim against the other Defendants. Instead, the action will be drawn to a presiding judge and, if applicable, to a magistrate judge. See D.C.COLO.LCivR 8.1(c). Accordingly, it is

ORDERED that Plaintiff's Eighth Amendment claim against Defendant Anthony A. DeCesaro is dismissed as legally frivolous pursuant to 28 U.S.C. § 1915A(b). It is

FURTHER ORDERED that Defendant Anthony A. DeCesaro is dismissed as a party to this action. It is

FURTHER ORDERED that this case shall be drawn to a presiding judge and, if applicable, to a magistrate judge.

DATED at Denver, Colorado, this 19<sup>th</sup> day of November, 2014.

BY THE COURT:

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