

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-02220-GPG

ERNIE L. CALBART,

Plaintiff,

v.

RICK RAEMISCH, Department of Corrections Director, In Her Official and Individual
Capacities,
PHYSICIAN HEALTH PARTNERS, and
TRISHA KAUTZ, N.P., In Her Official and Individual Capacities,

Defendants.

ORDER TO DISMISS IN PART AND TO DRAW CASE

Plaintiff, Ernie L. Calbart, is in the custody of the Colorado Department of Corrections (CDOC) at the Correctional Facility in Sterling, Colorado. Mr. Calbart has filed a Prisoner Complaint, pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 1983, claiming that he is being denied adequate medical care, in violation of the Constitution.

On October 20, 2015, Magistrate Judge Gordon P. Gallagher reviewed the Complaint and determined that it was deficient because the § 1983 claim against the CDOC was barred by the Eleventh Amendment; Plaintiff failed to state an arguable claim for relief against Defendant Physician Health Partners (PHP); and, Mr. Calbart did not allege specific facts to show an arguable violation of his Eighth Amendment rights by Defendant Kautz. (ECF No. 5). Consequently, Magistrate Judge Gallagher directed Mr. Calbart to file an Amended Complaint, on the court-approved Prisoner Complaint form, within 30 days. (*Id.*).

After requesting and obtaining an extension of time, Mr. Calbart filed his Amended Complaint on December 9, 2015. (ECF No. 12).

Mr. Calbart has been granted leave to proceed pursuant to the *in forma pauperis* statute, 28 U.S.C. § 1915. Pursuant to § 1915(e)(2)(B)(i), the Court must dismiss the action if Plaintiff's claims are frivolous or malicious. 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, 327-28 (1989). Subsection (e)(2)(B)(iii) of § 1915 requires a court to dismiss at any time an action that seeks monetary relief against a defendant who is immune from such relief.

The Court must construe the Complaint liberally because Mr. Calbart 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 act as an advocate for *pro se* litigants. See *Hall*, 935 F.2d at 1110. The Court has reviewed the complaint and has determined that it is deficient. For the reasons discussed below, this action will be dismissed, in part, and the remainder drawn to a presiding judge.

I. The Amended Complaint

Plaintiff alleges in the Amended Complaint that he received "Zimmer Next Gen. Knee Implants" on August 23, 2012 and July 1, 2013, while he was in the custody of the CDOC. (ECF No. 12 at 3). In May 2015, Mr. Calbart learned that the knee implants had been recalled by the manufacturer. After Plaintiff informed the medical department about the recall, x-rays were taken of his knees in July 2015, which revealed that the implant in his right knee is loose. Thereafter, Defendant Kautz, a nurse practitioner,

submitted a request to Defendant Physician Health Partners (PHP) for Mr. Calbart to be referred to an outside orthopedic specialist for evaluation. PHP denied the request. Plaintiff states that the loose implant has caused him to fall down three times and that he is unable to bear weight on his leg. He contends that neither the CDOC, nor PHP, is providing him appropriate medical care. Plaintiff further alleges that Defendant Kautz “took away” his ice permit to alleviate the swelling in his knee, and removed his cane and walker, causing him to fall several times and injure himself “badly.” (*Id.* at 3). Mr. Calbart states that Defendant Kautz “remove[d] his ADA accommodation” knowing that he is disabled in both knees, his left hip and his left ankle, and cannot walk without the assistance of a cane or walker. (*Id.* at 5). He alleges that he is being treated with pain medication only. Mr. Calbart claims that the Defendants have acted with deliberate indifference to his serious medical needs. He requests injunctive and monetary relief.

II. Analysis

A. Eleventh Amendment

The § 1983 claims for damages against Defendants Raemisch and Kautz, in their official capacities, are construed as claims asserted against the State of Colorado, see *Hafer v. Melo*, 502 U.S. 21, 25 (1991), and are barred by the Eleventh Amendment. See *Kentucky v. Graham*, 473 U.S. 159, 169-70 (1985). However, to the extent the Amended Complaint asserts a cognizable claim for relief under § 1983, Plaintiff is not precluded from seeking prospective injunctive relief against the individual Defendants in their official capacities. See *Ex Parte Young*, 209 U.S. 123 (1908); see also *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 631 (10th Cir.1998) (“[A] suit against a state official in his or her official capacity seeking prospective injunctive relief is not . . . against the state for

Eleventh Amendment purposes.”).

B. Defendant PHP

Mr. Calbart fails to state an arguable claim for relief against Defendant PHP.¹ . “The established principles of municipal liability have been found to apply to § 1983 claims brought against private corporations like [proposed] Defendant PHP.” *Ortiz v. Falk*, No. 13-cv-00612-PAB-MJW, 2014 WL 984933, at *10 (D. Colo. March 13, 2014) (quoting *Rhodes v. Physician Health Partners (PHP)*, No. 09-cv-482-REB-KLM, 2010 WL 728213, at *5 (D. Colo. Feb. 24, 2010)). Mr. Calbart was warned in the October 20 Order that, “ according to the principles of municipal liability, a private actor such as PHP ‘cannot be held liable solely because it employs a tortfeasor-or, in other words . . . cannot be held liable under § 1983 on a respondeat superior theory.’” *Id.* (quoting *Monell v. Dep’t of Social Servs.*, 436 U.S. 658, 691 (1978)). Instead, Plaintiff must allege facts to show that Defendant PHP directly caused the constitutional violation by instituting an official policy or custom that was the “moving force” behind the constitutional violation. *Monell*, 436 U.S. at 694-95; *see also Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1216 & n. 13 (10th Cir.2003) (listing cases finding that the *Monell* doctrine extends to private defendants sued pursuant to § 1983). Plaintiff cannot state a claim for relief under § 1983 merely by pointing to isolated incidents. *See Monell*, 436 U.S. at 694.

In the Complaint, Mr. Calbart does not allege that a policy or custom of PHP caused the alleged deprivation of adequate medical care. Instead, he asserts only that PHP denied a Sterling Correctional Facility medical provider’s request for authorization

¹PHP, a private entity, which does business under the name “Correctional Health Partners,” contracts with the CDOC to manage the referral and approval of medical care by outside specialists, somewhat in the nature of managed health care outside the prison environment. *See Self v. Milyard*, No. 11-cv-00813-RBJ-CBS, 2012 WL 3704958, at *3 (D. Colo. July 31, 2012).

for Plaintiff to see an outside orthopedic specialist for evaluation. As such, the Court finds that Defendant PHP is an improper party to this action and will be dismissed.

C. Personal Participation of Defendant Raemisch

Mr. Calbart fails to allege specific facts to show Defendant Raemisch's personal participation in the alleged Eighth Amendment violations.

Personal participation is an essential element in a civil rights action. *See Bennett v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). There must be an affirmative link between the alleged constitutional violation and each defendant's participation, control or direction, or failure to supervise. *See Butler v. City of Norman*, 992 F.2d 1053, 1055 (10th Cir. 1993); *see also Dodds v. Richardson*, 614 F.3d 1185, 1200-1201 (10th Cir. 2010) ("[D]efendant-supervisors may be liable under § 1983 where an 'affirmative' link exists between the unconstitutional acts by their subordinates and their 'adoption of any plan or policy. . .—express or otherwise—showing their authorization or approval of such 'misconduct.'" (quoting *Rizzo v. Goode*, 423 U.S. 362, 371 (1976))). A supervisor defendant is not subject to liability under § 1983 on a theory of respondeat superior. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

Mr. Calbart indicates in the Amended Complaint that he is suing Defendant Raemisch because of his supervisor authority, as Executive Director of the CDOC. Plaintiff alleges that Defendant Raemisch knew about the recalled knee implants because of Plaintiff's grievance filings, but failed to take any remedial action. (ECF No. 12 at 2). However, Plaintiff's allegations are insufficient to show that Defendant Raemisch was personally involved in decisions concerning Plaintiff's medical care, or the confiscation of his cane and walker. Furthermore, 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 (10th Cir. 2009); see also *Whittington v. Ortiz*, No. 07-1425, 307 F. App'x. 179, 193 (10th Cir. Jan. 13, 2009) (unpublished) (stating that "the denial of the grievances alone is insufficient to establish personal participation in the alleged constitutional violations.") (internal quotation marks and citation omitted); *Davis v. Ark. Valley Corr. Facility*, No. 02-1486, 99 F. App'x. 838, 843 (10th Cir. May 20, 2004) (unpublished) (sending "correspondence [to high-ranking prison official] outlining [a] complaint . . . without more, does not sufficiently implicate the [supervisory official] under § 1983"). Accordingly, Defendant Raemisch is an improper party to this action and will be dismissed.

The Court will not address at this time the merits of the Eighth Amendment claim against Defendant Trisha Kautz, for confiscating Plaintiff's cane and walker. 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 the claims asserted against Defendants Rick Raemisch and Trisha Kautz, sued in their official capacities for monetary relief, are DISMISSED WITHOUT PREJUDICE as barred by Eleventh Amendment immunity. It is

FURTHER ORDERED that the Eighth Amendment claim against Defendant Rick Raemisch, in his individual capacity, is DISMISSED for failure to allege his personal participation in a deprivation of Plaintiff's constitutional rights. It is

FURTHER ORDERED that the Eighth Amendment claim against Defendant Physician Health Partners is dismissed for failure to state an arguable claim against the Defendant under § 1983. It is

FURTHER ORDERED that Plaintiff's Eighth Amendment claim against Defendant Kautz , in her individual capacity, shall be drawn to a presiding judge and, if appropriate, to a magistrate judge, pursuant to D.C.COLO.LCivR 40.1(a).

DATED December 16, 2015, at Denver, Colorado.

BY THE COURT:

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