2021 WL 3704377
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United States District Court, E.D. Texas, Tyler Division.

Sean David PIKE, #52812
v.
Maxey CERLIANO, et al.

CIVIL ACTION NO. 6:20cv619
|
Signed 08/03/**2021**

Attorneys and Law Firms

Sean David Pike, Longview, TX, Pro Se.

Robert Scott Davis, Robin Hill O'Donoghue, Flowers Davis PLLC, Tyler, TX, for Maxey Cerliano, Jeff Callaway, Luke Whitehead, Tom Watson.

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

K. NICOLE MITCHELL, UNITED STATES MAGISTRATE JUDGE

***1** Plaintiff Sean David Pike, an inmate currently confined at the Gregg County Jail proceeding *pro se* and *in forma pauperis*, filed this civil rights action pursuant to 42 U.S.C. § 1983. The cause of action was referred to the undersigned United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case.

The present Report and Recommendation concerns Defendants' motion to dismiss, (Dkt. #19). For reasons explained below, the Court recommends that the motion be granted and that Plaintiff Pike's lawsuit be dismissed, with prejudice, for the failure to state a claim upon which relief may be granted.

I. Pike's Amended Complaint—Operative Pleading

Pike's amended complaint, (Dkt. # 11), is the operative pleading in this case. An amended complaint entirely supersedes and takes the place of the original complaint. *See Clark v. Tarrant Cnty., Tex.*, 798 F.2d 736, 740 (5th Cir. 1986). He names Sheriff Cerliano, Chief Callaway, Captain Whitehead, and District Attorney Watson as defendants, all of whom allegedly violated his constitutional rights while housed at the Gregg County Jail. Specifically, Pike maintains the following:

> All events happened in Gregg County Jail, placed in environment posing a substantial amount of risk or serious harm. From Aug. 27 until present continuous actions posting these risk[s.] 12-7-20 two trustees with unknown guard serving food without mask. Again 12-7-20 unsafe health and safety conditions serving food. Grievance was written 12-6-20. Officer [sic] removed me from a tank without wearing a mask. 12-3-20 I was moved to a cell that only days before was tested positive for COVID[,] I am still the only person in that tank.
>
> Grievances have been filed, along with grievance appeals. Daily we are being held in environment that a substantial amount of risk or harm exist[s] with all said officials know of and disregard these conditions. They are "aware" of all health and safety codes and could easily let all nonviolent crimes be dismissed or disposed until after the pandemic. They push back all court dates leaving us in this environment, knowing Texas prisons and jails are the hot spot for the COVID virus in all the nation.

(Dkt. #11, pg. 4-5) (amended complaint). Pike seeks a dismissal of his criminal case(s) and $100,000 for pain, suffering, and mental anguish.

II. Defendants' Motion to Dismiss

Defendants have filed a motion to dismiss, (Dkt. #19), under both 28 U.S.C. § 1915(e)(2)(B) and Rule 12(b)(6) of the Federal Rules of Civil Procedure. Defendants argue that Pike has failed to state a claim upon which relief can be granted with respect to his claims of deliberate indifference to his health and safety while housed at the Gregg County Jail. They further assert that Pike failed to allege a physical injury, which is fatal to his claims for monetary damages.

III. Pike's Responses

Pike has filed two responses to Defendants' motion to dismiss, (Dkt. ## 24, 28). In his first response, he asserts that he is suing for deliberate indifference. Pike states that "even though [he has not] contracted the virus, the facts [sic] that a substantial amount of risk exists that [he] could [contract the virus] is made aware to every official within the Gregg County Jail and Courts." He maintains that the media has made every American "and human on Earth" aware of the COVID-19 virus, which means that the Defendants knew.

***2** In his second response, Pike argues that Defendant Watson, District Attorney, can be sued because he has the ability to dismiss all nonviolent crimes but refuses to do so. As such, Defendant Watson acts with deliberate indifference to those nonviolent offenders.

IV. Legal Standards

The Fifth Circuit has observed that motions to dismiss under Rule 12(b)(6) are "viewed with disfavor and rarely granted." *See Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011). Such motions are generally evaluated on the pleadings alone. *See Jackson v. Procunier*, 789 F.2d 307, 309 (5th Cir. 1986).

Nevertheless, Federal Rule of Civil Procedure 12(b)(6) permits dismissal if a plaintiff "fails to state a claim upon which relief may be granted." A complaint fails to state a claim upon which relief may be granted where it does not allege sufficient facts which, taken as true, state a claim which is plausible on its face and thus does not raise a right to relief above the speculative level. *See Montoya v. FedEx Ground Packaging Sys. Inc.*, 614 F.3d 145, 149 (5th Cir. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A claim has factual plausibility when the pleaded factual content allows the court to draw reasonable inferences that the defendant is liable for the misconduct alleged. *See Hershey v. Energy Transfer Partners, L.P.*, 610 F.3d 239, 245 (5th Cir. 2010); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This plausibility standard is not akin to a probability standard; rather, the plausibility standard requires *more than the mere possibility* that the defendant has acted unlawfully. *Twombly*, 550 U.S. at 556 (emphasis supplied).

Although all well-pleaded facts are taken as true, the district court need not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions. *See Whatley v. Coffin*, 496 F. App'x 414, 2012 **WL** 5419531 (5th Cir. Nov. 7, 2012) (citing *Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005)). Crucially, while the federal pleading rules do not require "detailed factual allegations," the rule does "demand more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. A pleading offering "labels and conclusions" or a "formulaic recitation of the elements of a cause of action" will not suffice, nor does a complaint which provides only naked assertions that are devoid of further factual enhancement. *Id. Pro se* plaintiffs are held to a more lenient standard than are lawyers when analyzing a complaint, but *pro se* plaintiffs must still plead factual allegations which raise the right to relief above the speculative level. *Chhim v. Univ. of Tex. at Austin*, 836 F.3d 467, 469 (5th Cir. 2016).

V. Discussion and Analysis

Taking Pike's claims as true, Defendants' motion to dismiss should be granted. In short, his own words and attached exhibits reveal that he has failed to state a claim for deliberate indifference upon which relief can be granted. The Court understands that Pike is claiming that Defendants violated his constitutional rights by acting with deliberate indifference to his health and safety with respect to the COVID-19 pandemic while housed at the Gregg County Jail.

Pike is a pretrial detainee who is challenging the conditions of his confinement. *See Blake v. Tanner*, No. 3:20-CV-1250, 2020 WL 3260091, at *2 (N.D. Tex. May 20, 2020) ("Constitutional challenges by pretrial detainees may be brought under two alternative theories: as an attack on a 'condition of confinement' or as an 'episodic act or omission.' ") (quoting *Shepherd v. Dallas Cnty.*, 591 F.3d 445, 452 (5th Cir. 2009)).

***3** In evaluating a conditions of confinement claim, it is appropriate to apply the "deliberate indifference" standard articulated in *Estelle v. Gamble.* 429 U.S. 97 (1976); *see Wilson v. Seiter*, 501 U.S. 294 (1991). A prison official acts with deliberate indifference when he is both aware of facts from which an inference may be drawn that a substantial risk of serious harm exists to an inmate, and when the official in fact draws that inference. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). However, "[i]f the plaintiff has properly stated a claim as an attack on conditions of confinement, he is relieved from the burden of demonstrating ... [an] individual jail official's actual intent to punish because ... intent may be inferred from the decision to expose a detainee to an unconstitutional condition." *Shepherd*, 591 F.3d at 452.

"A condition is usually the manifestation of an explicit policy or restriction: the number of bunks per cell, mail privileges, disciplinary segregation, etc." *Id.* However, in some cases, a condition may be demonstrated through a pattern of acts or omission, but proving a pattern is a heavy burden that is rarely met. *Id.* "Further, to constitute impermissible punishment, the condition must be one that is 'arbitrary or purposeless' or, put differently, 'not reasonably related to a legitimate goal.' " *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)). Finally, even if jail officials actually knew of a substantial risk to inmate health or safety, they may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. *Farmer*, 511 U.S. at 844.

Here, in his amended complaint, Pike articulates conclusory, legal terms as well as phrases, and generalized statements concerning his conditions of confinement. He mentions how, on one occasion a jail official was serving food without a mask. On another single occasion, a jail official removed him from a tank without wearing a mask. Pike's amended complaint can be properly characterized as the following: Jail officials surely know about the COVID-19 pandemic but failed to protect his health and safety because he *could* contract COVID-19. Indeed, as mentioned, Pike admits that he has not contracted the virus —but insists that, because the COVID-19 pandemic has not subsided, a substantial risk of harm remains, (Dkt. #24, pg. 1).

However, it is well-settled that the general fear of contracting COVID-19 or that COVID-19 is spreading is insufficient to state a claim under section 1983. *See Hamby v. Warden, Estelle Unit*, 2020 WL 7081606, at *2 (S.D. Tex. Dec. 3, 2020) (citing *United States v. Koons*, 455 F.Supp.3d 285, 292 (W.D. La. 2020) (explaining that general concerns about the spread of COVID-19 or the mere fear of contracting an illness in prison are insufficient grounds for any type of redress)). The gist of Pike's amended complaint is that jail officials are aware of COVID-19— and therefore a risk of substantial harm exists—evincing that his complaint is one of general fear of contracting COVID, which fails to state a claim. The Fifth Circuit has held that "the incidence of diseases or infections, standing alone, [cannot] imply unconstitutional confinement conditions, since any densely populated residence may be subject to outbreaks." *Shepherd v. Dallas Cnty.*, 591 F.3d 445, 454 (5th Cir. 2009).

Moreover, it is also well-settled that a plaintiff in a civil rights case must demonstrate not only a constitutional violation, but also personal involvement on behalf of those alleged to have violated the plaintiff's constitutional rights. *See Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir. 1983) ("Personal involvement is an essential element of a civil rights cause of action."); *Thompson v. Crnkovich*, 2017 WL 5514519 *2 (N.D. Tex. Nov. 16, 2017) ("Without personal involvement or participation in an alleged constitutional violation, or implementation of a deficient policy, the individual should be dismissed as a defendant.").

***4** Here, Pike does not connect any named Defendant to any action or constitutional violation. As Defendants maintain, Pike does not articulate a specific claim or allegation against them. Likewise, he has not identified a specific policy or custom these Defendants have created or implemented that has resulted in a constitutional violation.

Regarding the Gregg County Jail's response to COVID-19, the Court takes judicial notice that the facility has established COVID-19 procedures. *See Kellogg v. Cerliano*, No. 6:20-CV-00170, **2021** **WL** 726431, at *1–2 (E.D. Tex. Jan. 22, **2021**). The jail's mitigation plan includes: suspending visitation, postponing non-critical outside medical appointments, increased disinfection of frequently touched surfaces, providing inmates with cleaning supplies three times a day for self-cleaning of their cells, screening staff at the start of each shift for signs of infection, screening all new inmates for signs of infection, isolating and testing symptomatic new inmates, and quarantining asymptomatic new inmates before allowing them to be placed in the general jail population. The Court finds that such responses do not amount to deliberate indifference. *See Farmer*, 511 U.S. at 825 (holding that "prison officials who actually knew of a substantial risk to inmate health and safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted.").

Finally, Pike is also suing Gregg County District Attorney Watson. Pike maintains that he acted with deliberate indifference to his health and safety by refusing to dismiss non-violent cases until after the pandemic. He, however, failed to highlight any authority indicating that a federal court can order State officials to dismiss pending state criminal actions.

To the extent that Pike is suing Defendant Watson for charging him with a crime, such claim is indisputably meritless. A criminal prosecutor enjoys absolute immunity from section 1983 damage claims for presenting the State's case. *See Graves v. Hampton*, 1 F.3d 315, 318 (5th Cir. 1993). As the Supreme Court reasoned:

> [A]cts undertaken by the prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include the professional evaluation of evidence assembled by the police and appropriate preparation for its presentation at trial ....

Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993). Here, Pike appears to be suing Defendant Watson for his role as a state prosecutor. Because Pike has provided no authority indicating that this Court can order State officials to dismiss pending state criminal matters and because Defendant Watson is immune from damages for acts performed as an advocate for the State, this claim should be dismissed.

The unique challenges presented in managing a pandemic in an institutional setting are abundantly evident. In Pike's case, however, he has not pleaded facts indicating that any named Defendant or entity has violated his constitutional rights. He has therefore failed to state a claim upon which relief can be granted. Defendants' motion to dismiss should be granted.

RECOMMENDATION

Accordingly, it is recommended that Defendants' motion to dismiss, (Dkt. #19), be granted and that Plaintiff Pike's claims be dismissed, with prejudice, for the failure to state a claim upon which relief can be granted.

***5** Within fourteen (14) days after receipt of the Magistrate Judge's Report, any party may serve and file written objections to the findings and recommendations contained in the Report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings,

conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

So ORDERED and SIGNED this 3rd day of August, 2021.

All Citations

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Attorneys and Law Firms

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ORDER

J. Campbell Barker, United States District Judge

***1** Plaintiff Sean David Pike, an inmate at Gregg County Jail proceeding pro se, filed this lawsuit against defendant Maxey Cerliano, among others, pursuant to 42 U.S.C. § 1983. This case was referred to United States Magistrate Judge K. Nicole Mitchell. The magistrate judge issued a report recommending that defendant's motion to dismiss be granted and that plaintiff's civil rights lawsuit be dismissed, with prejudice, for the failure to state a claim upon which relief may be granted. Doc. 65. Plaintiff filed timely objections. Doc. 67.

When timely objections to a magistrate judge's report and recommendation are filed, the court reviews them de novo. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1420 (5th Cir. 1996). Having reviewed the magistrate judge's report de novo, the court accepts its findings and recommendation. Defendants' motion to dismiss, (Doc. 19), is granted. Plaintiff's objections are overruled, and this civil rights action is dismissed, with prejudice, for the failure to state a claim upon which relief may be granted.

So ordered by the court on August 19, 2021.

All Citations

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