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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0133

Robert A. Kunshier,
Appellant,

vs.

Minnesota Sex Offender Program, et al.,
Respondents.

Filed October 20, 2009
Affirmed
Collins, Judge[*]

Carlton County District Court
File No. 09-CV-07-1045

Robert A. Kunshier, 1111 Highway 73, Moose Lake, MN 55767 (pro se appellant)

Lori Swanson, Attorney General, Steven H. Alpert, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent)

Considered and decided by Chief Judge Toussaint, Presiding Judge; Stoneburner, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D   O P I N I O N

COLLINS, Judge

In this pro se appeal, appellant contends that the district court erred by dismissing his claims against respondent sex-offender program and others. Because we find no error in the district court's analyses of appellant's myriad claims, we affirm.

FACTS

Appellant Robert Kunshier was adjudicated a sexually psychopathic personality and committed for treatment at the Minnesota Sex Offender Program (MSOP) at Moose Lake. Kunshier requested the opportunity to shower before attending a July 14, 2006 hearing. He was informed that he must consent to a strip search prior to being allowed to shower. Kunshier refused to consent, and following the hearing, he was placed in protective isolation. Over the following days and weeks, Kunshier made numerous requests for a shower, clean clothes, legal materials, and access to the law library, but MSOP officials denied his requests because he refused to consent to a strip search. Kunshier sued the MSOP, the Office of the Ombudsman, the Office of Health Facility Complaints, and a number of individually named and unnamed MSOP officials, seeking injunctive relief and civil damages, claiming negligence and violations of his statutory and constitutional rights. The district court granted respondents' motion to dismiss on the pleadings for failure to state a claim on which relief can be granted. Kunshier appeals.

D E C I S I O N

"When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted, the question before this court is

whether the complaint sets forth a legally sufficient claim for relief." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). This question is reviewed de novo. *See Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984) ("[A]n appellate court need not give deference to a trial court's decision on a legal issue."). In determining whether a complaint fails to state a claim, we consider only the facts alleged in the complaint, accepting those facts as true, and construe all reasonable inferences in favor of the nonmoving party. *Hebert*, 744 N.W.2d at 229.

I.

Kunshier's complaint alleges violations of the First, Eighth, and Fourteenth Amendments to the United States Constitution. On appeal, Kunshier additionally asserts violations of the Fifth, Sixth, and Ninth Amendments to the United States Constitution. Although Kunshier cannot bring a cause of action for damages against a state or state official directly under the federal constitution, 42 U.S.C. § 1983 (2006) provides a cause of action against a state official who, acting under color of law, deprives a person of a *federal* constitutional or statutory right. *Wyatt v. Cole*, 504 U.S. 158, 161-62, 112 S. Ct. 1827, 1830 (1992). To prevail on a section 1983 claim, Kunshier must establish that (1) he was deprived of a right, privilege, or immunity secured by the Constitution or laws of the United States; and (2) the conduct complained of was committed by a person acting under the color of state law. *See* 42 U.S.C. § 1983; *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 102 S. Ct. 2764, 2769-70 (1982) (applying standard). "[N]either a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312

(1989); *see also Bird v. State*, 375 N.W.2d 36, 43 (Minn. App. 1985) (stating that "the Department of Public Safety itself is not a 'person' which may be sued under section 1983"). This holding applies to actions for monetary damages against state defendants in their official capacity. *Will*, 491 U.S. at 71 & n.10, 109 S. Ct. at 2312 & n.10. Therefore, the district court did not err by dismissing all claims for damages brought against the state or its officials acting in their official capacities, and Kunshier's only possible section 1983 claims are for violations of *federal* constitutional rights committed by state defendants, properly served, in their individual capacity.[1]

Fourth Amendment Claim

Both the United States and Minnesota constitutions protect an individual's right to be free of unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. The "overriding function" of this constitutional guarantee is to "protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834 (1966). But this constitutional guarantee does not protect against all intrusions; rather, it protects only against unreasonable intrusions or searches "which are not justified in the circumstances, or which are made in an improper manner." *Id.* at 768, 86 S. Ct. at 1834. The test of reasonableness is not capable of precise definition or mechanical application. *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 1884 (1979). A district court must balance the need for the particular search against the invasion of individual liberties by

[1] The only individually named respondents properly served are MSOP officials Jim Lind and Randy Valentine.

considering the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *Id*; *see also, e.g*., *United States v. Ramsey*, 431 U.S. 606, 618-19, 97 S. Ct. 1972, 1979-80 (1977) (applying balancing test); *United States v. Martinez-Fuerte*, 428 U.S. 543, 554-55, 96 S. Ct. 3074, 3081 (1976) (same); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79, 95 S. Ct. 2574, 2578-79 (1975) (repeating standard for balancing test); *Terry v. Ohio*, 392 U.S. 1, 8-10, 88 S. Ct. 1868, 1873-74 (1968) (same); *Katz v. United States*, 389 U.S. 347, 350-52, 88 S. Ct. 507, 510-11 (1967) (applying balancing test); *Schmerber v. California*, 384 U.S. at 768, 86 S. Ct. at 1834 (same).

Courts in the Eighth Circuit and in foreign jurisdictions have consistently held that reasonable strip searches are constitutional. *See, e.g.*, *Bell*, 411 U.S. at 558, 99 S. Ct. at 1885 (holding that detention facility's policy of conducting visual body-cavity strip searches of all pretrial detainees after contact with persons outside of prison did not violate inmates' Fourth Amendment rights); *Serna v. Goodno*, 567 F.3d 944, 952-55 (8th Cir. 2009) (holding that visual body-cavity searches performed on all patients of state mental hospital, as part of contraband investigation following discovery of contraband in common area, did not infringe Fourth Amendment rights of patient who was civilly committed involuntarily to facility as a sexually dangerous person); *Franklin v. Lockhart*, 883 F.2d 654, 656-57 (8th Cir. 1989) (holding that visual body-cavity strip searches are not unreasonable even when inmates "do not leave their cells" because the facility has a history of contraband, houses "some of the most recalcitrant inmates," and inmates leaving their cells have frequent contact with individuals outside of the facility); *Goff v.*

Nix, 803 F.2d 358, 365-66 (8th Cir. 1985) (holding that visual body-cavity strip searches required as a condition of any movement of inmates outside their living units and/or before being taken outside the prison facility did not violate inmates fourth amendment rights); *Bell*, 441 U.S. at 558, 99 S. Ct. at 1884 (allowing a visual body-cavity strip search without any showing of cause). Moreover, the Supreme Court has given great deference to institutions' decisions regarding the use of visual body-cavity strip searches. *Id.*, at 562, 99 S. Ct. at 1886 ("The wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government."); *see also, e.g.*, *Block v. Rutherford*, 468 U.S. 576, 588-91, 104 S. Ct. 3227, 3234-35 (1984) (noting limited scope of review under *Bell* in considering pretrial detainees' claims and stating that the determination of a protocol for room searches was "a matter lodged in the sound discretion of the institutional officials").

Here, it is undisputed that because Kunshier refused to consent to a strip search, he was confined to protective isolation and not permitted to shower, not given clean clothes, and denied access to the law library. It is also undisputed that the MSOP, although not a "correctional facility," is a "secure facility" designed to "provide care and treatment . . . to persons on a court-hold order . . . ," Minn. Stat. § 246B.02 (2008), and that such a facility has distinct safety and security needs. *See, e.g.*, *United States v. Mentzos*, 462 F.3d 830, 836-37 (8th Cir. 2006) (describing a patient who used telephone to secure child pornography while confined in Moose Lake); *Senty-Haugen v Goodno*, 462 F.3d 876, 883-84 (8th Cir. 2006) (noting that Moose Lake patient reacted violently when the cell phone he surreptitiously had been using was seized); *Revels v. Vincenz*, 382 F.3d 870,

874 (8th Cir. 2004) (stating that an involuntarily committed patient at a state institution is not a prisoner per se, but the same safety and security concerns arise out of the patient's detention). Because the record does not describe what the strip search entailed, it is not possible to fully analyze the *Bell* factors. But because it is Kunshier's burden to plead sufficient facts to support his cause of action, we cannot determine that the district court erred by dismissing Kunshier's claim alleging the unconstitutional strip search. We note, however, that Kunshier is a *patient* at MSOP, not an inmate, and thus the analysis of the *Bell* factors is not necessarily the same. We do not choose to speculate as to how the analysis may differ in a given case, but wish only to caution against treating such patients as inmates.

Due Process

The Due Process Clauses of the United States Constitution and the Minnesota Constitution protect against the deprivation of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV; Minn. Const. art. I, § 7. We review a procedural-due-process claim in two steps. The first question is whether an appellant has been deprived of a protected liberty or property interest. *Dover Elevator Co. v. Arkansas State Univ.*, 64 F.3d 442, 445-46 (8th Cir. 1995). Protected liberty interests arise from either the Due Process Clause itself or the laws of the states. *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904, 1908 (1989). If the appellant has a protected interest, we consider what process is due by balancing the specific interest that was affected, the likelihood that the MSOP procedures would result in an erroneous deprivation, and the MSOP interest in providing the process that it did, including the

administrative costs and burdens of providing additional process. *See Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976).

A prisoner's liberty interest is necessarily more restricted than that of ordinary citizens because "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights." *Sandin v. Connor*, 515 U.S. 472, 485, 115 S. Ct. 2293, 2301 (1995) (quotation omitted). "Discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law." *Id.* "There is . . . a de minimis level of imposition with which the Constitution is not concerned." *Bell*, 441 U.S. at 538-39 & n.21, 99 S. Ct. at 1874 & n.21[2] (stating that not every disability imposed during pretrial detention amounts to "punishment" in the constitutional sense—if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment"); *see also Sandin*, 515 U.S. at 486, 115 S. Ct. at 2301 (holding that 30 days of disciplinary segregated confinement "did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest"); *Johnson v. Hamilton*, 452 F.3d 967, 973 (8th Cir. 2006) (administrative segregation as a result of disciplinary violation not violation of due process absent showing that conditions create a particular hardship); *Phillips v. Norris*, 320 F.3d 844, 847 (8th Cir. 2003) (holding that denial of visitation, exercise privileges, and religious

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[2]Although *Bell* deals with pretrial detention, the Eight Circuit has held that civilly committed individuals are afforded the same constitutional protections as pretrial detainees. *See Andrews v. Neer*, 253 F.3d 1052, 1061 (8th Cir. 2001) (finding that civilly committed person's excessive-force claim should be evaluated under standard usually applied to excessive-force claims brought by pretrial detainees).

services while in disciplinary confinement for 37 days is not atypical and significant hardship); *Portley-El v. Brill*, 288 F.3d 1063, 1065-66 (8th Cir. 2002) (holding that 30 days in punitive segregation not atypical and significant hardship); *Freitas v. Ault*, 109 F.3d 1335, 1337-38 (8th Cir. 1997) (holding that a 10-day placement in administrative segregation—allowing for one hour per day out of cell—and 30 additional days of limited time out of cell, limited visitors, and no work or phone privileges, not atypical and significant hardship). Within these limitations, however, a prisoner is afforded due process of law before the term of his imprisonment is extended, *Carrillo v. Fabian*, 701 N.W.2d 763, 773 (Minn. 2005), and before he is subjected to restraints that "impose[ ] atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484, 115 S. Ct. at 2300; *see also Carrillo*, 701 N.W.2d at 770-71 (quoting *Sandin* language with approval).

Here, MSOP officials placed Kunshier in protective isolation and denied him access to a shower and clean clothes until he consented to a strip search. Although it is undoubtedly uncomfortable and possibly unhygienic to be deprived of a shower and clean clothes for an extended period of time, such treatment does not rise to the level of a significant hardship. Kunshier's time in protective segregation was not prohibitively long, and he continued to have access to guards, medical personnel, and prison officials. Indeed, as detailed above, courts in this jurisdiction have held administrative and punitive

segregation lasting much longer than that here as constitutional. Therefore, the district court did not err by dismissing Kunshier's due-process claim.[3]

Kunshier next asserts that respondents violated the Eighth Amendment by denying him adequate medical care. But because Kunshier is not a prisoner, this claim is not properly raised under the Eighth Amendment, and is more properly analyzed as a violation of due process. *See Senty-Haugen*, 462 F.3d at 889. To prevail on a claim of constitutionally inadequate medical care, an inmate must "demonstrate (1) that [the inmate] suffered objectively serious medical needs and (2) that the prison officials actually knew of but deliberately disregarded those needs." *Dulaney v. Carnahan*, 132 F.3d 1234, 1239 (8th Cir. 1997); *see also Senty-Haugen*, 462 F.3d at 889 (applying the deliberate disregard standard to due process claim). An objectively serious medical need is one that either has been diagnosed by a physician as requiring treatment or is so obvious that even a layperson would easily recognize the necessity for a doctor's attention. *Coleman v. Rahija*, 114 F.3d 778, 784 (8th Cir. 1997) (quotation omitted). "To establish a constitutional violation, it is not enough that a reasonable official should have known of the risk; rather, a plaintiff must demonstrate the official actually knew of

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[3]Although challenges to conditions of confinement are most often brought under the due-process clause, because Kunshier asserts that his confinement in protective isolation was improper imprisonment and arrest, it is conceivable that Kunshier is making a Fourth Amendment claim. The Fourth Amendment to the United States Constitution also protects an individual's right to be free of unreasonable searches and seizures. U.S. Const. amend. IV. However, as discussed above, treatment facilities like MSOP have certain safety and security needs that can be accomplished only when patients and inmates have known and concrete consequences for when rules are not followed. Here, it does not appear unreasonable to place and detain Kunshier in protective isolation for failing to comply with security officers' orders.

the risk and deliberately disregarded it." *Vaughn v. Greene County*, 438 F.3d 845, 850 (8th Cir. 2006) (quotation omitted).

Kunshier alleges that lack of clean clothes and a shower caused him to develop a skin infection or rash. But even assuming that this condition constituted a "serious medical need," after reporting the skin infection Kunshier received medical treatment and medication to treat the infection. Thus, Kunshier's claim fails because he cannot establish that prison officials knew of the injury and deliberately disregarded it.

Kunshier also argues that his constitutional rights of access to the courts were violated when he was denied access to the law library. Prison inmates have a constitutional right of access to the courts that derives from the right to due process of law. *Bounds v. Smith*, 430 U.S. 817, 821, 97 S. Ct. 1491, 1494 (1977). To vindicate prisoners' rights of access to courts, the state must provide either adequate prison law libraries or adequate assistance from persons trained in the law. *Id.* at 828, 97 S. Ct. at 1498. But a prisoner cannot maintain an action for denial of access to the courts unless he shows that the defendants caused him "actual injury" that "hindered his efforts to pursue a legal claim." *Lewis v. Casey*, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180 (1996); *see also Kristian v. State*, 541 N.W.2d 623, 628 (Minn. App. 1996) ("If the plaintiff does not demonstrate a detrimental impact to his ability to present his legal papers to the court, the claim must fail." (quotation omitted.)), *review denied* (Minn. Mar. 19, 1996).

It is undisputed that while in protective isolation Kunshier did not have access to the law library. But Kunshier's claim fails because he did not plead any actual harm or injury. Additionally, placing individuals in protective isolation or the equivalent as a

disciplinary measure is a practice often employed and expressly approved of by courts, and because such a practice is so frequently upheld as not an atypical and significant hardship, it would be anomalous to then hold that the restrictions imposed violate the individual's constitutional right to access to the courts. Therefore, the district court did not err by dismissing Kunshier's claim alleging denial of access to the law library.

Immunity

Although the language of section 1983 permits a plaintiff to sue "every person" who deprives the plaintiff of a federal right "under color of law," it also must be construed in light of the common-law background against which it was enacted, including common-law immunity defenses. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709, 728, 119 S. Ct. 1624, 1638, 1648 (1999). Qualified immunity protects officials so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268, 113 S. Ct. 2606, 2613 (1993) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982)). By focusing on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law," the test for qualified immunity is intended to both avoid excessively disrupting government functioning and deter unlawful conduct. *Harlow*, 457 U.S. at 818-19, 102 S. Ct. at 2738-39. Qualified immunity generally "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Burns v. Reed*, 500 U.S. 478, 494-95, 111 S. Ct. 1934, 1944 (1991) (quotation omitted).

Kunshier has shown nothing indicating that the individual officers acted in a manner that a reasonable person would have known violated the Constitution. To the contrary, as discussed above and found by the district court, Kunshier has failed to establish that the officers' conduct violated his constitutional rights. Therefore, the district court did not err by finding that the individually named respondents are entitled to qualified immunity.

II.

Kunshier also raises a variety of state constitutional and statutory claims. Because there is no Minnesota counterpart to section 1983 that allows Kunshier to bring a claim for damages, it is only necessary to address the alleged statutory violations. *See Mitchell v. Steffen*, 487 N.W.2d 896, 905-06 (Minn. App. 1992) (recognizing that Minnesota does not recognize tort for violation of due-process rights), *aff'd*, 504 N.W.2d 198 (Minn. 1993); *Bird v. State*, 375 N.W.2d 36, 40 (Minn. App. 1985) (same).

Failure to report

Kunshier asserts that "Defendants acting personally as Health Care Providers are required by law to report any and all abuses of Patients in their care . . . [And] Defendants failed to report abuse of patient . . . ." To support his claim, Kunshier contends that he is a vulnerable adult for the purpose of the vulnerable-adult act.

Kunshier does not fall within the purview of a "vulnerable adult" unless he

> possesses a physical or mental infirmity or other physical, mental, or emotional dysfunction: (i) that impairs [his] ability to provide adequately for [his] own care without assistance, including the provision of food, shelter, clothing, health care, or supervision; and (ii) because of the dysfunction or

> infirmity and the need for assistance, [he] has an impaired ability to protect [himself] from maltreatment.

Minn. Stat. § 626.5572, subd. 21 (2008).[4] It is undisputed that Kunshier has been adjudicated a sexually psychopathic personality. But his argument that he "is committed so as to have supervision, after [his] release from Prison," and is thus unable to provide for himself, is unavailing because Kunshier has not produced any evidence that establishes that he is unable to provide for himself. Kunshier also argues that he "is unable to protect [himself] from maltreatment in that State Agencies who help the other patients won't help sex offenders. There [are] laws that pertain to patients in the state of Minnesota, yet those laws are not applied to sex offenders, so [he] is unable to protect [himself] from maltreatment." But this argument is also without merit because Kunshier fails to establish that because of his infirmity or dysfunction he is unable to protect himself from maltreatment. Therefore, the district court did not err by dismissing Kunshier's "failure to report" claim.

Minnesota Commitment and Treatment Act and the Patients' Bill of Rights

Kunshier also contends that provisions of the Minnesota Commitment and Treatment Act (commitment act) and the Patients' Bill of Rights support a claim for damages. The commitment act governs the rights of patients who are civilly committed because they were determined to be sexually dangerous persons or have sexual psychopathic personalities. Minn. Stat. § 253B.185, subds. 7(a), (b) (2008). To

[4] Kunshier also relies on Minn. Stat. § 609.232, subd. 11(4) (2008) containing the same definition.

determine whether the statute provides a private cause of action, we utilize a three-factor analysis:

> (1) [W]hether the plaintiff belongs to the class for whose benefit the statute was enacted; (2) whether the legislature indicated an intent to create or deny a remedy; and (3) whether implying a remedy would be consistent with the underlying purposes of the legislative enactment.

Flour Exch. Bldg. Corp. v. State, 524 N.W.2d 496, 499 (Minn. App. 1994), *review denied* (Minn. Feb. 14, 1995). Courts may not imply a private right of action simply from legislative silence. *Id.* at 498-99. And although Kunshier's indeterminate commitment under the act demonstrates that he belongs to the class for whose benefit the statute was established, there is no statutory language indicating that the legislature intended to create a private cause of action for alleged violations of the act. Indeed, we have previously concluded that the commitment act does not provide a private cause of action. *Woodruff v. Ludeman*, No. A06-1659, 2007 WL 4390446 AT *1-2 (Minn. App. Dec. 18, 2007).

Similarly, the Patients' Bill of Rights was enacted to promote patients' interests and well-being. Minn. Stat. § 144.651, subd. 1 (2008). As stated above, we consider three factors in determining whether a statute establishes a private right of action. *Flour Exch.*, 524 N.W.2d at 499. Here again, although Kunshier's status as an indeterminately committed patient demonstrates that he belongs to the class of individuals for whose benefit the statute was established, there is no statutory language indicating that the legislature intended to create a private cause of action. *See* Minn. Stat. § 144.651 (2008). In fact, because the statute has grievance procedures to enforce its provisions and authorize the commissioner of the department of health to remedy any substantial

violations of the statute by issuing correction orders, it appears that the legislature did not intend for patients to have a private cause of action under this act. *See* Minn. Stat. §§ 144.651, subd. 20, .652, subd. 2 (2008). Several federal courts have declined to extend a private cause of action under Patients' Bill of Rights' statutes. *See Monahan v. Dorchester Counseling Ctr., Inc.*, 961 F.2d 987, 994-95 (1st Cir. 1992); *Smith v. Au Sable Valley Cmty. Mental Health Servs.*, 431 F. Supp. 2d 743, 750-51 (E.D. Mich. 2006). Moreover, we previously concluded that the Patients' Bill of Rights does not provide a private cause of action. *Woodruff* , 2007 WL 4390446, at *2.

Therefore, the district court properly found that Kunshier has no cause of action provided under either chapter 253B or chapter 144.

Tort Claims: Trespass and Emotional Disturbance

Kunshier asserts that respondents trespassed "by removing [Kunshier]'s legal material upon entering [protective isolation]" and caused "emotional disturbance by denying [him] access to a Law Library, in that [he] was unable to protect [himself]." However, Kunshier's brief does not address the district court's dismissal of his trespass claim nor the dismissal of all tort claims for improper notice under the Minnesota Tort Claims Act. Thus, neither tort claim is properly before us and there is no need to address them. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that issues not briefed on appeal are waived).

Claims against the Office of Health Facility Complaints and Office of the Ombudsman For Mental Health

Finally, Kunshier asserts that the Office of Health Facility Complaints (OHFC) and the Office of the Ombudsman for Mental Health (ombudsman) were required to report, investigate, or otherwise to prevent or protect Kunshier from the harms he suffered at the MSOP. The OHFC, a division of the Minnesota Department of Health, is statutorily authorized to investigate any "action or failure to act by a . . . health facility." Minn. Stat. §§ 144A.52, subd. 2, .53, subd. 1(c) (2008). The OHFC *may* also "[a]ssist patients or residents of health facilities or residential care homes in the enforcement of their rights under Minnesota law." Minn. Stat. § 144A.53, subd. 1(h) (2008). However, both the duty to investigate and the duty to assist are discretionary. Hence, the district court did not err by finding that the OHFC had no statutorily imposed duty to Kunshier. Similarly, because Kunshier alleged no facts in his complaint that would establish that a "special relationship" existed between himself and the OHFC so as to give rise to a fiduciary relationship, *see Swenson v. Bender*, 764 N.W.2d 596, 601-02 (Minn. App. 2009) (discussing when a fiduciary relationship can be created), the district court did not err by dismissing Kunshier's claim against the OHFC.

The ombudsman for persons receiving services or treatment for mental illness, developmental disabilities, chemical dependency, or emotional disturbance may (1) "mediate or advocate on behalf of a client"; (2) "investigate the quality of services provided to clients"; and (3) "gather information and data about and analyze, on behalf of the client, the actions of an agency, facility, or program." Minn. Stat. § 245.94, subd. 1

(b)-(d) (2008). Like the OHFC, the ombudsman's duties of investigation, reporting, and oversight are discretionary, not statutorily imposed. Moreover, again because no fiduciary relationship exists between Kunshier and the ombudsman, there can be no fiduciary duty to report. Therefore, the district court did not err by dismissing Kunshier's claim against the ombudsman.

Finally, because the ombudsman is not civilly liable for actions taken in the performance of official duties, Minn. Stat. § 245.96 (2008), the district court properly dismissed any claims against the ombudsman personally.

Affirmed.