STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1721

Jerry Wayne Smith,
Appellant,

vs.

Hennepin Faculty Associates, et al.,
Respondents.

Filed September 7, 2010
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 27-CV-08-31068

Jerry Wayne Smith, Hopkins, Minnesota (pro se appellant)

Richard A. Duncan, Michelle E. Weinberg, Faegre & Benson LLP, Minneapolis, Minnesota (for respondents)

Considered and decided by Ross, Presiding Judge; Kalitowski, Judge; and Wright, Judge.

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

KALITOWSKI, Judge

Pro se appellant Jerry Wayne Smith challenges the district court's order denying extension of a temporary restraining order and the district court's judgment dismissing his constitutional and disability-discrimination claims against respondents Hennepin Faculty Associates, et al. (collectively HFA). We affirm.

D E C I S I O N

Appellant Jerry Wayne Smith received ophthalmological services and contact lenses from HFA for two years. In December 2008, appellant filed a complaint alleging that HFA's refusal to provide appellant with contact lenses until it received payment from appellant's governmental insurer violated a number of appellant's constitutional rights and constituted discrimination based on disability. The district court granted appellant's request for a temporary restraining order (TRO) requiring HFA to provide appellant his contact lenses. HFA provided appellant with contact lenses pursuant to the TRO, but terminated all future services for appellant shortly thereafter. Appellant amended his complaint to include a claim that HFA retaliated against appellant for securing a court order by terminating future services, and moved the district court to extend the original TRO. The district court denied appellant's motion to extend the TRO and dismissed appellant's amended complaint under Minn. R. Civ. P. 12.02(e) for failure to state a claim.

Appellant argues that the district court erred by dismissing his amended complaint for failure to state a claim. We disagree.

This court reviews de novo a case dismissed under rule 12.02(e) for failure to state a claim. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). Specifically, we must determine whether the complaint sets forth a legally sufficient claim for relief. *Id*. We "must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Id*.

"[A] pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *N. States Power Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963). But a plaintiff must allege more than just "labels and conclusions," and must state "enough factual matter" or "factual enhancement" to show entitlement to relief. *Bahr v. Capella Univ.*, 765 N.W.2d 428, 437 (Minn. App. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965-66) (2007), *review granted* (Minn. Aug. 11, 2009); *see also Noske v. Friedberg*, 670 N.W.2d 740, 742 (Minn. 2003) (providing that the plaintiff must allege sufficient facts to make out the stated grounds for relief).

Constitutional claims

Appellant alleged in his amended complaint that HFA's refusal to provide contact lenses until receipt of insurance payment, and subsequent termination of future services to appellant following the district court's grant of a TRO, violated appellant's rights under the First, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. The district court dismissed appellant's constitutional claims under rule 12.02(e) on the ground that HFA is not a state actor.

The First, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution apply only to governmental actions, and not to actions of individuals or private entities. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936, 102 S. Ct. 2744, 2753 (1982) (providing that "most rights secured by the Constitution are protected only against infringement by governments" (quotation omitted)); *see also Rendell-Baker v.*

Kohn, 457 U.S. 830, 837, 102 S. Ct. 2764, 2769 (1982) ("[T]he Fourteenth Amendment, which prohibits the states from denying federal constitutional rights and which guarantees due process, applies to acts of the states, not to acts of private persons or entities."). Thus, a plaintiff must show that the defendant's actions constituted "state action" in order to establish a claim under these provisions.

We may find state action only if there is "such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295, 121 S. Ct. 924, 930 (2001) (quotation omitted). In determining whether action may be fairly attributable to the state, the Supreme Court has considered a number of factors, including whether the challenged activity results from the state's exercise of "coercive power," and whether the state provides "significant encouragement, either overt or covert." *Id*. at 296, 121 S. Ct. at 930 (quotations omitted). A private entity may be treated as a state actor when it is controlled by an "agency of the State" or when the government is "entwined in its management or control." *Id*. (quotations omitted).

Appellant argues that HFA, a private corporation, is a state actor because it is extensively regulated by the state and has a symbiotic relationship with the state. *See Rendell-Baker*, 457 U.S. at 841-43, 102 S. Ct. at 2771-72 (considering extensive state regulation and whether there was a "symbiotic relationship" between the school and the state in determining whether school was state actor). Specifically, appellant argues that HFA is a state actor because as a participating provider in a government insurance program, HFA is extensively regulated by the Minnesota Department of Human Services

and receives state funds in exchange for services provided to insured clients. But the receipt of Medicaid funds does not convert a private actor into a state actor. *Alexander v. Pathfinder, Inc.*, 189 F.3d 735, 740 (8th Cir. 1999). And the record indicates that the state's regulation of HFA, as a participating provider in the insurance program, did not compel or influence HFA's actions in refusing to provide appellant with contact lenses or in terminating services to appellant. *See Rendell-Baker*, 457 U.S. at 841, 102 S. Ct. at 2771 (concluding that state regulation of school did not make the school's personnel decisions state action where the decisions were "not compelled or even influenced by any state regulation"); *see also Blum v. Yaretsky*, 457 U.S. 991, 1002-12, 102 S. Ct. 2777, 2785-90 (1982) (concluding that certain nursing homes' transfers or discharges of patients were not state action, despite extensive federal and state regulations that encouraged the transfer decisions, because the decisions were made by physicians and administrators, not the state). We conclude, therefore, that the district court did not err by dismissing appellant's claims under the federal constitution because appellant failed to show that HFA is a state actor.

Appellant also alleged claims under the First, Eighth, Thirteenth, and Fourteenth Amendments to the Minnesota Constitution. The district court dismissed these claims because "the Minnesota State Constitution does not contain such amendments." Appellant contends on appeal that HFA violated his rights under Articles 1, 5, 7, 8, and 13 of the Minnesota Constitution, arguing that these claims "track[] exactly [appellant]'s claims alleged under the U.S. Constitution." Because appellant failed to present these claims to the district court, and because he fails to develop his arguments on appeal, we

decline to address them. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (providing that an appellate court will not consider matters not argued to and considered by the district court); *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (providing that issues not briefed on appeal are waived).

Discrimination based on disability

Appellant has suffered from major depression, posttraumatic stress disorder, chronic back pain, and "other ailments" since June 1994, and receives social security disability insurance benefits for these disabilities. Appellant is also "extremely myopic" and suffers from a history of retinal detachments in both eyes and a macular hole in his left eye. Appellant alleged in his amended complaint that HFA discriminated against him by refusing to provide medical services and contact lenses, based on these disabilities, in violation of the Minnesota Human Rights Act (MHRA), the Americans with Disabilities Act (ADA), and the Rehabilitation Act.

The MHRA, ADA, and Rehabilitation Act prohibit discrimination in the provision of public services based on disability. *See* Rehabilitation Act, 29 U.S.C. § 794 (2006) (prohibiting discrimination against any otherwise-qualified disabled person by any program or activity that receives federal financial assistance); ADA, 42 U.S.C. § 12182(a) (2006) (prohibiting discrimination by private entities that operate places of public accommodation, including health-care providers); MHRA, Minn. Stat. § 363A.12, subd. 1 (2008) (prohibiting discrimination based on disability in the access to any public service). Because the purpose and substance of the three statutes are similar, Minnesota courts interpret them consistently. *See, e.g.*, *Gorman v. Bartch*, 152 F.3d 907, 912 (8th

Cir. 1998) (providing that because the ADA and Rehabilitation Act are "similar in substance . . . , cases interpreting either are applicable and interchangeable." (quotation omitted)); *Kolton v. Cnty. of Anoka*, 645 N.W.2d 403, 408, 410 (Minn. 2002) (providing that caselaw under the ADA may be used to interpret the MHRA).

To establish a prima facie case of discrimination based on disability, appellant must show: (1) he is a member of a protected class; (2) HFA denied services to appellant that were available to individuals outside the protected class; and (3) the discriminatory conduct was based on plaintiff's membership in the protected class. *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 1824-25 (1973) (setting forth three-part burden-shifting framework for analyzing discrimination claims and elements for establishing prima facie case); *Potter v. LaSalle Sports & Health Club*, 368 N.W.2d 413, 416 (Minn. App. 1985) (providing that Minnesota courts have adopted the *McDonnell-Douglas* framework for analyzing discrimination claims under the MHRA), *aff'd*, 384 N.W.2d 873 (Minn. 1986).

Here, appellant failed to allege any facts showing that respondent's failure to timely provide his contact lenses constituted discrimination based on appellant's disabilities. Appellant argues that he was unfairly targeted by HFA's unlawful billing policy, but fails to allege any facts that, if viewed in the light most favorable to appellant, show that HFA treated him differently than other patients because of his disabilities. Rather, appellant asserts that HFA's failure to timely provide contact lenses was pursuant to a billing policy and the submission of incorrect billing codes to the insurer. Without more, these facts are insufficient to show discrimination based on disability.

Appellant also fails to allege sufficient facts showing that HFA's termination of services to appellant constituted discriminatory retaliation under the MHRA. To establish a prima facie case of discriminatory retaliation, appellant must show that: (1) he engaged in protected conduct; (2) HFA took adverse action against him; and (3) there is a connection between the two. *See Scott v. Cnty. of Ramsey*, 180 F.3d 913, 917 (8th Cir. 1999). Appellant may satisfy the protected-conduct prong by alleging facts that support "a good-faith, reasonable belief that the conduct opposed constituted a violation of the MHRA." *See Bahr*, 765 N.W.2d at 436. Appellant failed to allege facts showing that his belief that HFA unlawfully discriminated against him was objectively reasonable. *See id.* ("An employee may not avoid scrutiny of a retaliation claim merely by claiming such a belief of a discriminatory practice, but rather, the employee must provide facts supporting the claim that her belief was objectively reasonable." (quotation omitted)). As discussed above, appellant failed to allege any facts indicating that HFA treated him differently than other patients because of his disabilities. We conclude, therefore, that appellant failed to establish a prima facie case of discriminatory retaliation. In sum, the district court did not err by dismissing appellant's discrimination claims under rule 12.02(e) for failure to state a claim.

Additional claims

Appellant alleged claims under 42 U.S.C. § 1983 (2006). To state a cause of action under section 1983, a plaintiff must allege that some person deprived him of a federal right, and that the person acted under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 1923 (1980). "The ultimate issue in determining whether

a person is subject to suit under [section] 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights fairly attributable to the State?" *Rendell-Baker*, 457 U.S. at 838, 102 S. Ct. at 2770 (quotation omitted). As discussed above, HFA's actions in withholding contact lenses and terminating services to appellant are not fairly attributable to the state. Thus, the district court properly dismissed appellant's claims under section 1983.

Appellant also alleged claims under 42 U.S.C. §§ 1985, 1986 (2006). Section 1985 prohibits conspiracies to interfere with civil rights, and section 1986 addresses failure to prevent such conspiracies. To establish a constitutional conspiracy, appellant must prove "an agreement between the conspirators, by pointing to at least some facts which would suggest that [the conspirators] reached an understanding to violate [his] rights." *See Jensen v. Henderson*, 315 F.3d 854, 862 (8th Cir. 2002). Appellant failed to allege any facts showing that HFA or its employees made an agreement to deprive appellant of any federal rights. Therefore, the district court did not err by dismissing appellant's constitutional-conspiracy claims.

Denial of appellant's motion to extend TRO

Appellant argues that the district court erred by dismissing his motion to extend the original TRO compelling HFA to provide contact lenses pending adjudication of appellant's underlying claims. Because we have decided that the district court properly dismissed appellant's claims against HFA on the merits, this issue is moot.

Affirmed.