STATE OF MINNESOTA
IN COURT OF APPEALS
A10-303

Pyotr Shmelev,
Appellant,

vs.

Joan Fabian, Commissioner of Corrections,
Respondent.

Filed September 7, 2010
Affirmed
Schellhas, Judge

Ramsey County District Court
File No. 62-CV-09-917

Pyotr Shmelev, Bayport, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Angela Behrens, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Klaphake, Presiding Judge; Shumaker, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant challenges the district court's grant of summary judgment to respondent on appellant's constitutional claims arising out of his treatment as a prisoner. He also challenges the court's denial of his motion to amend his complaint to add additional defendants. We affirm.

FACTS

Pro se appellant Pyotr Shmelev filed a civil complaint in February 2009. Appellant is incarcerated by the Minnesota Department of Corrections (DOC) at DOC's Stillwater facility (MCF-STW), and respondent Joan Fabian is the Commissioner of Corrections. Appellant claimed in his complaint that respondent: (1) violated his Eighth Amendment right to be free from cruel and unusual punishment when respondent denied him access to outdoor exercise and timely medical treatment; (2) discriminated against him based on his national origin by destroying legal materials written in Russian and denying him access to educational assignments, prison jobs, and the law library; (3) violated his First Amendment rights by retaliating against him for filing a grievance; and (4) violated his right to access to the courts by restricting his access to the law library.

After respondent filed an answer, appellant moved the district court for leave to amend his complaint to add defendants and a claim for punitive damages. Respondent opposed the motion to amend and moved the court for summary judgment. The court denied appellant's motion to amend his complaint, reasoning that adding additional parties was inappropriate because the claims against the parties essentially would be the same as already asserted and those claims could not survive summary judgment, and that adding a claim for punitive damages against existing parties was inappropriate because appellant failed to show that respondent engaged in conduct that had a high probability of injury to the rights or safety of others. The court granted respondent's motion for

summary judgment, ruling that: (1) appellant did not exhaust administrative remedies; (2) appellant's Eighth Amendment claim failed because he had not shown indifference that resulted in a substantial risk of serious harm; (3) appellant's equal-protection claim failed because the restrictions of which appellant complained were rationally related to a legitimate penological interest; (4) appellant's First Amendment retaliation claim failed because appellant had not shown that his protected activity was a but-for cause of restrictions imposed on him; (5) appellant's claim based on denial of access to the courts failed because appellant had not shown that his appeal of the dismissal of his writ of habeas corpus would have been successful given greater access to legal resources; (6) appellant could not recover money damages from respondent in her official capacity; and (7) respondent had qualified immunity because appellant could not establish that respondent violated any clearly established right.

This appeal follows.

D E C I S I O N

Appellant argues that the district court erred by denying his motion to amend his complaint to add additional parties and by granting summary judgment to respondent. Appellant does not challenge the district court's denial of his motion to amend to add a claim for punitive damages.

Motion to Amend Complaint

Denial of leave to amend a complaint is reviewed for an abuse of discretion. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). The supreme court has "cautioned that the court should deny a motion to amend a complaint where the proposed

claim could not withstand summary judgment." *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 332 (Minn. 2004). The district court reasoned that the claims in appellant's proposed amended complaint could not survive summary judgment. We agree.

Appellant sought to add two additional parties in his proposed amended complaint: John King, warden at MCF-STW, and Michelle Smith, assistant warden at MCF-STW. Against King, appellant sought to assert claims of an Eighth Amendment violation and denial of access to the courts. Against Smith, appellant sought to assert an equal-protection claim, a retaliation claim, and a due-process claim. We conclude that the district court properly denied appellant's motion to amend because, as more fully addressed below, the claims based on the Eighth Amendment, denial of access to the courts, equal protection, and retaliation do not survive summary judgment. In addition, appellant's due-process claim against Smith could not survive summary judgment. Appellant claimed that Smith provided false information about appellant's disciplinary record that led to his receiving a computer restriction. But the undisputed evidence belies appellant's allegation. Terrill Florcyk, a special investigator at the DOC facility in Red Wing, stated in an affidavit that he was involved in an investigation about appellant's use of computers, and that the computer restriction was based on the results of his investigation, and not information from Smith about appellant's disciplinary record. Because this proposed claim could not survive summary judgment, the district court did not abuse its discretion by denying appellant's motion to amend his complaint to add it.

Summary Judgment

On appeal from summary judgment, this court asks (1) whether there are any genuine issues of material fact, and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990); *see also Leaf v. Freeman*, 499 N.W.2d 54, 56-57 (Minn. App. 1993) (applying this standard in a § 1983 case), *review denied* (Minn. June 28, 1993).

The reviewing court must view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio*, 504 N.W.2d at 761. A genuine issue of fact exists if reasonable persons might draw different conclusions based on the evidence. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). "Even if it appears unlikely that the non-moving party will prevail at trial, summary judgment must be denied on issues which are not shown to be sham, frivolous, or so insubstantial that it would obviously be futile to try them." *Strauss v. Thorne*, 490 N.W.2d 908, 911 (Minn. App. 1992) (quotation omitted), *review denied* (Minn. Dec. 15, 1992).

Appellant asserted four claims: (1) an Eighth Amendment violation; (2) an equal-protection violation; (3) a First Amendment claim that he was retaliated against for filing a grievance; and (4) a violation of his right to access to the courts. Each claim fails.

1. Eighth Amendment Claim

Appellant argues that his Eighth Amendment rights were violated because he did not receive appropriate medical care for a knee condition and a cough, and because he did not receive adequate outdoor exercise when the prison smelled of sewage. He argues that

there were fact issues regarding his medical care and outdoor exercise that precluded summary judgment.

"A prison official's deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 828, 114 S. Ct. 1970, 1974 (1994) (quotation omitted). In *Farmer*, the Supreme Court explained that "deliberate indifference" means "something more than mere negligence" but "something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." 511 U.S. at 835, 114 S. Ct. at 1978. Noting that deliberate indifference had been equated with recklessness by the courts of appeals, the Supreme Court concluded that to be liable under the Eighth Amendment, an official must know of and disregard an excessive risk to inmate health or safety. *Id.* at 836, 837, 114 S. Ct. at 1978, 1979. "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837, 114 S. Ct. at 1979. The Supreme Court stated that "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Id.* at 838, 114 S. Ct. at 1979.

Farmer has been read to impose a two-part requirement. *See, e.g.*, *Nelson v. Shuffman*, 603 F.3d 439, 446 (8th Cir. 2010). A prisoner must first show a deprivation of rights by being incarcerated under conditions posing a substantial risk of serious harm. *Id.* Then the prisoner must show that prison officials were deliberately indifferent to the risk by knowing of the risk and failing to respond reasonably. *Id.*

A deprivation of exercise can violate the Eighth Amendment. *See, e.g.*, *Wishon v. Gammon*, 978 F.2d 446, 449 (8th Cir. 1992) (addressing opportunities for out-of-cell exercise). In addition, some courts have held that a deprivation of *outdoor* exercise in particular can violate the Eighth Amendment. *See, e.g.*, *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987) (addressing denial of outdoor exercise and acknowledging that some courts have considered it cruel and unusual punishment "under certain circumstances," but that none "has ruled that such a denial is per se an Eighth Amendment violation"); *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979) (concluding outdoor exercise was required under the circumstances of that case); *see also Allen v. Sakai*, 48 F.3d 1082, 1084 (9th Cir. 1994) (stating that prison officials could not "legitimately claim that their duty to provide regular outdoor exercise to [the prisoner] was not clearly established"). But no precedent that binds this court has established a right to outdoor exercise in particular, and we therefore will not extend existing precedent to conclude that appellant had such a right. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (stating that the task of extending existing law does not fall to this court), *review denied* (Minn. Dec. 18, 1987).

As to medical care, deliberate indifference to serious medical needs constitutes unnecessary and wanton infliction of pain that is proscribed by the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291 (1976). But neither an "inadvertent failure to provide adequate medical care" nor negligence in diagnosing or treating a medical condition suffices to state a claim of medical mistreatment under the Eighth Amendment. *Id.* at 105-06, 97 S. Ct. at 292. "[T]o state a cognizable claim, a

prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id.* at 106, 97 S. Ct. at 292. "It is only such indifference that can offend evolving standards of decency in violation of the Eighth Amendment." *Id.* (quotation marks omitted).

The record does not establish issues of fact about whether appellant was incarcerated under conditions posing a substantial risk of serious harm or whether respondent failed to respond reasonably. Although appellant did complain of a delay in treatment, a physician's affidavit submitted by respondent stated that appellant received appropriate medical care and that his "conditions were not exacerbated due to any delay of medical treatment." Additionally, the health services administrator at the prison explained that inmates experience delays in receiving care for a variety of reasons, including that other inmates with more serious conditions need more immediate care, and that inmates can alert the prison to the need for more immediate care using kites or sick-call procedures. No evidence shows that appellant attempted to alert the prison to a worsening condition using these procedures.

Because no genuine issue of material fact exists and appellant's Eighth Amendment claim fails as a matter of law, the district court correctly granted summary judgment to respondent on this claim.

2. First Amendment Claim

Filing a prison grievance is a protected First Amendment activity. *Lewis v. Jacks*, 486 F.3d 1025, 1029 (8th Cir. 2007). To state a cognizable retaliation claim, a prisoner must show that, because of the prisoner's protected activity, prison officials retaliated

with adverse action that "would chill a person of ordinary firmness from engaging in that activity." *Id.* at 1028. A claim for retaliatory discipline requires an inmate to show that but for a retaliatory motive, the prisoner would not have received the discipline. *Haynes v. Stephenson*, 588 F.3d 1152, 1156 (8th Cir. 2009).

Appellant argues that he received a computer restriction after he filed a grievance, and that the grievance caused the restriction. He stated in his affidavit that his cell was searched, materials were confiscated, and he was found guilty of rules violations. He also stated that while most of the confiscated property was returned to him, he ended up pursuing a grievance against one prison official over the destruction of some of the confiscated property. The computer restriction came two days after appellant filed an appeal of denial of his grievance and caused him to be removed from his work assignment. Appellant stated that he was told the prison official against whom he pursued the grievance had initiated the termination from appellant's work assignment. But, according to Florcyk, it was he who investigated appellant's computer use and provided the information from the investigation to MCF-STW, and MCF-STW then determined that appellant should be restricted from having work or education assignments that would allow him access to a computer. Florcyk stated that appellant's complaints about staff played no role in Florcyk's investigation. In addition, Angela Heagle, a caseworker manager, stated an affidavit that MCF-STW deemed appellant a security risk based on his computer knowledge and past misuse of computers while incarcerated. Heagle stated that the computer restriction was unrelated to any complaints

about staff and was based on his computer background and history of problems in facilities when he had access to computers.

We conclude that no genuine issue of fact exists regarding whether the computer restriction resulted from appellant's grievance. Even taking appellant's assertion that an officer terminated his computer-assignment access shortly after he filed a grievance against that officer as true, appellant has presented no evidence to contradict Florcyk's and Heagle's statements that the restriction was not related to the grievance. The district court therefore properly granted summary judgment to respondent on appellant's First Amendment claim.

3. Equal-Protection Claim

Appellant argues that the district court incorrectly applied rational-basis review to his equal-protection claim rather than strict scrutiny. We agree with appellant on this point. Strict scrutiny applies to classifications based on national origin. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254 (1985).

But a threshold question in an equal-protection claim is whether the plaintiff has established that he or she was treated differently than others who are similarly situated. *Keevan v. Smith*, 100 F.3d 644, 647-48 (8th Cir. 1996). To survive summary judgment, a prisoner claiming unequal treatment must "identify the characteristics of the class he claims to be similarly situated to and present some evidence that other groups within the class were not also restricted in similar ways." *Murphy v. Mo. Dep't of Corrs.*, 372 F.3d 979, 984 (8th Cir. 2004).

Because appellant submitted no evidence showing differential treatment of similarly situated groups, summary judgment was properly granted on appellant's equal-protection claim. *See Myers by Myers v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990) (stating that this court will affirm summary judgment "if it can be sustained on any grounds"), *review denied* (Minn. Feb. 4, 1991).

4. Denial of Access to the Courts

Appellant argues that he was restricted from library research computers and that, given proper access, he would have phrased one argument differently in his appeal from dismissal of a writ of habeas corpus. The decision in that appeal is *Shmelev v. Fabian*, No. A08-1121, 2009 WL 1374805 (Minn. App. May 19, 2009) (*Shmelev I*). *Shmelev I* concerned appellant's writ of habeas corpus following a prison disciplinary proceeding that resulted in extended incarceration. 2009 WL 1374805, at *1. We reversed in part and remanded, but rejected an argument that appellant was denied the right to cross-examine a witness. *Id.* at *1, 7. Appellant now argues that given proper access to the law library computers, he would have argued in *Shmelev I* that the manner of taking the witness's testimony was unfair. Appellant complains that in July 2008, two weeks after he filed a notice of appeal in *Shmelev I*, the prison warden banned him from law library computers. To read a case or statute, appellant therefore had to request a printout of it, and he claims that he was limited to 50 pages per week and had to wait up to ten days for delivery.

A prisoner has a right to access to the courts, and to show a violation of the right related to a prison library or legal assistance, the prisoner must show that the alleged

shortcomings "hindered his efforts to pursue a legal claim." *Lewis v. Casey*, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180 (1996). In *Lewis*, the Supreme Court gave as an example of hindrance a complaint being dismissed for failure to satisfy a technical requirement of which the prisoner could not have known due to deficiencies in the prison's legal-assistance facilities. *Id.* Another example given in *Lewis* was a prisoner who had "suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint." *Id.* But no freestanding right to a law library or legal assistance exists, and a theoretical deficiency in library or assistance is therefore not enough. *Id.* The touchstone is the capability of filing nonfrivolous legal claims, not "the capability of turning pages in a law library." *Id.* at 356-57, 116 S. Ct. at 2182.

Appellant fails to show that he had a nonfrivolous claim that was hindered by the computer restriction. Although appellant has asserted that he would have made a different argument in *Shmelev I*, he has presented no argument or authority demonstrating that the argument he would have made would have been meritorious. Generally, assignments of error based on mere assertion and not supported by argument or authority are treated as waived, *State v. Ouelette*, 740 N.W.2d 355, 361 (Minn. App. 2007), *review denied* (Minn. Dec. 19, 2007), and we conclude that to meet his burden to show hindrance of a nonfrivolous claim, appellant must do more than simply identify what argument he would have made in a prior proceeding. The district court therefore was correct to grant summary judgment to respondent on this claim. *See Myers*, 463 N.W.2d at 775.

Because none of appellant's claims survives summary judgment, we affirm. We therefore need not reach appellant's arguments on exhaustion of remedies and immunity.

Affirmed.