FILED
United States Court of Appeals
Tenth Circuit

October 26, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MATTHEW ERNEST ASTORGA,

Plaintiff - Appellant,

v.

ANDREW DEDEKE; MELISSA WARDROP,

Defendants - Appellees.

No. 21-3124
(D.C. No. 5:21-CV-03108-SAC)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BRISCOE**, and **PHILLIPS**, Circuit Judges.**

Matthew Ernest Astorga is a Kansas state prisoner at Leavenworth County Jail. Proceeding pro se,[1] he appeals the district court's dismissal of his 42 U.S.C. § 1983

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially help determine this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

[1] Because Astorga is proceeding pro se, we liberally construe his pleadings. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citation omitted). While we can allow for the "plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements," we cannot assume the role of advocate on his behalf. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

claims against Leavenworth County Sheriff—Andrew Dedeke—and a Leavenworth County Jail nurse—Melissa Wardrop. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

The district court screened Astorga's complaint under 28 U.S.C. § 1915A. In its order dismissing Astorga's claims, the district court concluded that Astorga had failed to state any claims for relief. That order also directed Astorga to amend his complaint or show cause as to why his case should not be dismissed. Astorga chose to amend, but the district court determined that the complaint remained deficient. So it dismissed his case. Astorga then filed a "Motion to Reopen," which the district court construed as a motion to amend the judgment under Federal Rule of Civil Procedure 59(e). The district court also denied that motion. Astorga then appealed.

DISCUSSION

A. Segregation

Astorga alleges that he has been segregated from Leavenworth County Jail's general population for three years "due to past behavior." R. at 32. The conditions of his segregation, he argues, violate the Eighth Amendment because he has been denied "mental health." R. at 39. We agree with the district court that Astorga's allegations are too vague to sustain a claim for cruel and unusual punishment.

"To succeed on an Eighth Amendment claim, a plaintiff must allege facts demonstrating that the 'deprivation is sufficiently serious' and that prison officials acted with 'deliberate indifference to inmate health or safety.'" *Fogle v. Pierson*, 435

F.3d 1252, 1260 (10th Cir. 2006) (quoting *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 809 (10th Cir. 1999)). Astorga fails to allege with any specificity how his segregation endangered his health or safety. *See Schmitt v. Rice*, 421 F. App'x 858, 861 (10th Cir. 2011).

The closest Astorga comes to stating an Eighth Amendment claim is to allege that someone left his cell door open, enabling another inmate to enter and assault him. True, prison officials have a duty to protect prisoners from violence at the hands of other prisoners. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). But even if we construed this allegation as a failure-to-protect claim, it would still fail.

To state this claim, a plaintiff must allege: (1) "that the conditions of his incarceration present an objective substantial risk of serious harm" and (2) that "prison officials had subjective knowledge of the risk of harm." *Requena v. Roberts*, 893 F.3d 1195, 1214 (10th Cir. 2018). We need not consider the objective prong since Astorga has failed to allege that either Sheriff Dedeke or Nurse Wardrop knew that an assault might occur if his cell door was left open.[2]

As a result, we affirm the district court's dismissal of this claim.

[2] Astorga's claim would also fail because he has not alleged that Sheriff Dedeke or Nurse Wardrop were involved in leaving his cell door open. *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009) ("Individual liability under § 1983 must be based on personal involvement in the alleged constitutional violation.").

B. Mental-Health Care

Next, Astorga alleges a claim for inadequate medical care.[3] To state this claim, a plaintiff must allege that the prison official acted with deliberate indifference to a prisoner's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Deliberate indifference has both an objective and subjective prong. *Al-Turki v. Robinson*, 762 F.3d 1188, 1192 (10th Cir. 2014). To satisfy the objective prong, a prisoner must allege a medical condition that qualifies as sufficiently serious to meet the Cruel and Unusual Punishment Clause. *Id.* The subjective prong examines the defendant's state of mind to determine whether "the official knew of and disregarded an excessive risk to inmate health or safety." *Id.* (cleaned up).

Astorga ties two allegations to this claim—neither sufficiently allege that Sheriff Dedeke or Nurse Wardrop knew of and disregarded an excessive risk to his health. First, Astorga alleges that his current thyroid medication was making him sick. But without more, such as what symptoms he exhibited, Astorga has not plausibly alleged how Sheriff Dedeke or Wardrop were aware of or disregarded an "excessive risk" to his health. Second, Astorga insists that he has not received his lab results about his thyroid condition. But allegations of "inadvertent failure to provide adequate medical care" or "negligent diagnosis" cannot sustain an Eighth Amendment claim. *Clemmons v. Bohannon*, 956 F.2d 1523, 1526 (10th Cir. 1992).

[3] Astorga seems to assert this claim under the Fourteenth Amendment's Due Process Clause. But we construe this claim under the Eighth Amendment because Astorga is in prison, not in pretrial detention. *See Est. of Booker v. Gomez*, 745 F.3d 405, 429 (10th Cir. 2014).

So we affirm the dismissal of Astorga's inadequate-medical-care claim.

C. Opening of Legal Mail

Astorga also alleges that his "legal mail [is] being opened." R. at 40. This allegation fails to rise to the level of a constitutional violation. "[I]solated incidents of opening constitutionally protected legal mail without any evidence of improper motive or resulting interference with plaintiff's right to counsel or access to the courts do not support a civil rights claim." *Berger v. White*, 12 F. App'x 768, 771 (10th Cir. 2001) (internal quotations omitted). And here, Astorga alleges neither an improper motive nor an interference with his right to counsel or access to the courts.

D. Other Pending Requests

Astorga asked the district court to require Leavenworth Jail officials to turn over information about previous "grievances" he has filed, which he insists will prove his claims. The district court denied Astorga's requests, explaining that he did not need this information to state his claims for relief.

Astorga now renews his request in two separate "Motions to Produce." Agreeing with the district court's assessment, we also deny his motions. *See Gee v. Pacheco*, 627 F.3d 1178, 1185 (10th Cir. 2010) ("[P]risoners claiming constitutional violations by officers within the prison will rarely suffer from information asymmetry . . . [because they] ordinarily know what has happened to them[.]").

Astorga also argues that the district court improperly denied his requests for assistance of counsel. We review such denials for abuse of discretion. *Rachel v. Troutt*, 820 F.3d 390, 397 (10th Cir. 2016). The district court properly considered the

necessary factors in assessing whether Astorga should be granted an attorney, so its denial was not an abuse of discretion. *Id.*

Finally, 28 U.S.C. § 1915(g) prohibits prisoners from bringing civil actions or appeals under *in forma pauperis* status if the prisoner has, on three or more occasions, brought an action or appeal that was dismissed because it was "frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." Because the district court dismissed his complaint for failure to state a claim, Astorga was assessed his first strike under § 1915(g). We now impose a second strike for, again, failing to state a claim.[4] *Childs v. Miller*, 713 F.3d 1262, 1266 (10th Cir. 2013). We urge Astorga to carefully consider his future lawsuits and appeals, so if more meritorious issues arise, his *in forma pauperis* status will not bar him from seeking relief in federal court.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's dismissal.

Entered for the Court

Gregory A. Phillips
Circuit Judge

[4] On appeal, Astorga moved to proceed *in forma pauperis*. We grant his motion because we believe Astorga has sufficiently demonstrated that he lacks money to prepay the filing fee and brings the appeal in good faith, "even though his underlying appeal points are not reasonably debatable." *Hayes v. Bear*, 739 F. App'x 930, 931–32 (10th Cir. 2018). Still, we affirm the district court's dismissal for failure to state a claim.