FILED
United States Court of Appeals
Tenth Circuit

October 2, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SCOTT HARRY,

Plaintiff - Appellant,

v.

DONALD HUDSON; JASON CLARK; KRISTINE AULEPP; ROBERT KENNEY; FOOD AND DRUG ADMINISTRATION,

Defendants - Appellees.

No. 23-3058
(D.C. No. 5:22-CV-03186-JWL)
(D. Kan.)

ORDER AND JUDGMENT*

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

Plaintiff Scott Harry, a federal prisoner appearing pro se, appeals the district court's dismissal of his civil rights action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court's order dismissing Harry's suit.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of 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. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I. BACKGROUND

A. Factual Background

The named defendants are Donald Hudson, the Warden of United States Penitentiary-Leavenworth (USP-Leavenworth); Kristine Aulepp, a doctor and health services supervisor at USP-Leavenworth; Jason Clark, a doctor who treated Harry at USP-Leavenworth; Robert Kenney, a doctor who performed a hernia repair surgery on Harry; and the Food and Drug Administration. In short, Harry alleges that due to the actions and omissions of Defendants, Harry received delayed treatment for his hernia and a botched hernia surgery during which Dr. Kenney used defective mesh to repair his hernia. Harry alleges that he continues to suffer from complications from the surgery as well as from the hernia itself.

B. Procedural History

Harry filed an initial complaint in the District of Kansas on August 31, 2022. On September 15, 2022, the district court entered a memorandum and order to show cause as to why Harry's complaint should not be dismissed for failure to state a claim. Harry then filed an amended complaint, a response to the order to show cause, and a memorandum in support of the response on October 19, 2022. On December 13, 2022, the district court entered another memorandum and order to show cause as to why the amended complaint should not be dismissed for lack of subject-matter jurisdiction and failure to state a claim. Harry filed a second amended complaint and a supplement on January 17, 2023. He attached nine exhibits to the second amended complaint, all medical records. On

February 17, 2023, the district court dismissed the action for failure to state a claim upon which relief may be granted.

Harry now appeals. His brief is an A-12 Form ("Appellant/Petitioner's Opening Brief") that references multiple attachments. The attachments are identical to his October 19, 2022 response to the order to show cause, the memorandum in support of that response, and the supplement to his second amended complaint.

I. STANDARD OF REVIEW

We review de novo the district court's dismissal of an action under 28 U.S.C. § 1915(e)(2) for failure to state a claim, applying the same standards we employ to review dismissals under Federal Rule of Civil Procedure 12(b)(6). *See Young v. Davis*, 554 F.3d 1254, 1256 (10th Cir. 2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of a cause of action's elements, supported by mere conclusory statements," are insufficient. *Id.* at 663 (citing *Twombly*, 550 U.S. at 555). In conducting our review, we accept all well-pleaded facts as true, view them in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor. *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281 (10th Cir. 2021).

We "can affirm a lower court's ruling on any grounds adequately supported by the record, even grounds not relied upon by the district court." *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 879 (10th Cir. 2017) (quoting *Elwell v. Byers*, 699 F.3d

1208, 1213 (10th Cir. 2012)) (internal quotation marks omitted). Because Harry appears pro se, we construe his filings liberally, but we do not serve as his advocate. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). We may make allowances for failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or unfamiliarity with pleading requirements, but we cannot take on the responsibility of constructing arguments and searching the record. *Id.* (citing *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)). We must, however, when reviewing a dismissal under § 1915, consider exhibits to the complaint. *Williams v. Oklahoma*, 852 F. App'x 385, 386–87 (10th Cir. 2021) (citing *Requena v. Roberts*, 893 F.3d 1195, 1205 (10th Cir. 2018)).

II. DISCUSSION

Harry appeals the district court's memorandum and order dismissing his second amended complaint for failure to state a claim. On appeal, he argues that the district court incorrectly determined that Harry failed to state a claim for supervisory liability against Warden Hudson and incorrectly determined that Harry failed to state a claim under the Eighth Amendment.

A. Claim Against Warden Hudson

In a *Bivens* claim, a government official may not be held liable under a theory of respondeat superior. *Pahls v. Thomas*, 718 F.3d 1210, 1225 (10th Cir. 2013). A constitutional violation must be traceable to an official's "own individual actions." *Id.* (citing *Iqbal*, 556 U.S. at 676). The requirement for personal involvement, however, does not foreclose supervisory liability. *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th

Cir. 2010). A plaintiff may succeed in a *Bivens* action "against a defendant-supervisor by demonstrating: (1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation." *Pahls*, 718 F.3d at 1225 (quoting *Dodds*, 614 F.3d at 1199).

In Harry's supplement to his second amended complaint, he alleged the following:

> Warden Donald Hudson knew or should have known that the protocols and policies in place that the USP Leavenworth Medical department were made for the protection of the inmates and should have enforced same via his chosen Health Services Supervisor and he appears to be responsible for his bad selection to handle the medical affairs of the Institution.

ROA, Vol. I, p. 98.

> Warden Hudson created or implemented policies that cause the plaintiff harm or that he was aware and knew or should have been aware and disregarded an excessive risk to the Plaintiff's health or safety or that he directly and personally participated in constitutional violation via failed medical policies approved by him.

ROA, Vol. I, p. 99.

Harry appeared to allege both that Warden Hudson (1) failed to enforce policies that protected prisoners' health and (2) "created or implemented" and approved policies that caused Harry harm. As to the former, Harry's allegation is insufficient in that it stops short of averring that the policies *caused* Harry's claimed constitutional harm, i.e., the inadequate treatment for his hernia. *See Pahls*, 718 F.3d at 1225. The latter is insufficient because it fails to explain how Warden Hudson was aware of and disregarded Harry's health via the policies and, as such, comprises mere conclusory statements that

fail to offer sufficient factual support. *See Iqbal*, 556 U.S. at 663 (citing *Twombly*, 550 U.S. at 555). Because of these shortcomings, we affirm the district court's conclusion that Harry failed to state a claim against Warden Hudson based on supervisory responsibility.

B. Claim under the Eighth Amendment

The Eighth Amendment protects individuals from the infliction of cruel and unusual punishments. U.S. Const. amend. XVIII. A prisoner alleging medical mistreatment does not state a claim under the Eighth Amendment by claiming mere negligence. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The prisoner must "allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id.* Such deliberate indifference cannot exist when a prisoner's allegations include a "series of sick calls, examinations, diagnoses, and medication." *Smart v. Villar*, 547 F.2d 112, 114 (10th Cir. 1976).

Harry attached nine exhibits to his second amended complaint that detailed his clinical encounters between June 2019 and June 2020. He was provided medication and supplies on multiple occasions, surgery consultation, surgery, follow-up consultations, and consultations for medical conditions other than his hernia. In the second amended complaint, Harry alleged that he still had blood in his urine and a large lump in his testicle, and he explained that he could feel the mesh used to repair his hernia moving, "which drop[ped] him to his knees." ROA, Vol. I, p. 75. These were his symptoms at the time of the filing of the second amended complaint and in his current prison, FCI Edgefield.

As for the allegations based on his experiences at USP-Leavenworth, Harry alleged that his hernia grew because of the wait time for surgery; that Defendants were negligent because the mesh used to repair his hernia was defective; that he experienced pain and suffering, physical discomfort, and emotional distress after notifying Defendants of his hernia symptoms; and that he established deliberate indifference based on his "constant request for medical care and the put off attitude and failure of medical staff to address the pain," ROA, Vol. I, p. 99.

In contrast to his allegations that his complaints were ignored, the treatment history reflected in the exhibits to Harry's operative complaint demonstrates a "series of sick calls, examinations, diagnoses, and medication" that refute Harry's claim that Defendants were deliberately indifferent to his serious medical needs. *See Smart*, 547 F.2d at 114. We are "not bound to accept as true those allegations in the complaint that inaccurately describe exhibits attached to the complaint." *Leonard v. Lincoln Cnty. Bd. of Comm'rs*, 790 F. App'x 891, 893 (10th Cir. 2019) (citing *Olpin v. Ideal Nat'l Ins. Co.*, 419 F.2d 1250, 1255 (10th Cir. 1969)). Finally, as to Harry's claim based on the use of the mesh, these allegations are insufficient to state a claim under the Eighth Amendment because they are at most mere negligence. *Estelle*, 429 U.S. at 106. We conclude that the district court correctly determined that Harry failed to state a claim under the Eighth Amendment.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's dismissal of Harry's complaint. We **DENY** Harry's motion to appeal *in forma pauperis* due to his failure to provide the court with a certified trust account statement.

Entered for the Court

Mary Beck Briscoe
Circuit Judge