

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 21, 2019

Elisabeth A. Shumaker
Clerk of Court

RUSSELL M. BOLES,

Plaintiff - Appellant,

v.

P.A. ALLEN, John or Jane Does; ANGIE,
RN; NURSE ALLA; GLORIA BARKEY;
DAVID JOHNSON,

Defendants - Appellees.

No. 18-1336
(D.C. No. 1:16-CV-03200-MSK-KMT)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON, McKAY, and BACHARACH**, Circuit Judges.

Plaintiff Russell Boles, a state prisoner representing himself pro se, appeals the district court's rulings disposing of his 42 U.S.C. § 1983 complaint.

Plaintiff initiated this action by filing a motion for an emergency injunction against various officials at the correctional center where he was then incarcerated, alleging that prison personnel had stopped providing him with necessary medications

* 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This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

and terminated the oxygen treatment he needed. A magistrate judge instructed Plaintiff to file an actual complaint and to cure certain deficiencies in his motion to proceed *in forma pauperis* under 28 U.S.C. § 1915. In accordance with this order, Plaintiff filed a new *in forma pauperis* motion under § 1915, along with the required documentation, and he filed a § 1983 complaint claiming constitutional violations based on the denial of medical care, obstruction of access to the courts, and religious discrimination. The magistrate judge granted his motion to proceed without prepayment of fees but concluded that his complaint failed to comply with Rule 8 of the Federal Rules of Civil Procedure because it did not include a short and plain statement of his claims. The magistrate judge ordered Plaintiff to file an amended complaint to remedy this deficiency, providing him with specific instructions on, for instance, the need for “[e]ach claim [to] identify a **named defendant who is listed in the caption of the complaint** that personally participated in the alleged constitutional violation.” (R. at 36.) Plaintiff filed an amended complaint, but he simultaneously filed a motion to supplement the complaint with different claims. The magistrate judge accordingly ordered Plaintiff to file another amended complaint containing all of the claims he wished to bring in this action, reminding him that he still needed to comply with the directives in the previous order. Plaintiff then filed his final amended complaint in this case, which asserted three claims: “Violation of rights protected under the 8TH Amendment of the U.S. Const.,” “Due Process and Equal Protection violations,” and “State Torts: Mal-practice, Theft, and Reckless Endangerment.” (R. at 75, 81, 82.)

The district court separated the first claim into six subclaims and dismissed five of these subclaims as legally frivolous. The second claim was dismissed “in part for failure to comply with Fed. R. Civ. P. 8 and in part as legally frivolous.” (Suppl. R. at 17.) Finally, the district court dismissed the third claim for failing to comply with the magistrate judge’s order to cure deficiencies under Rule 8. The only subclaim surviving the district court’s dismissal order was an Eighth Amendment claim against the medical personnel who were allegedly personally involved in preventing Plaintiff from obtaining necessary medications and treatments.

Following the dismissal of Plaintiff’s other claims against them, Defendants filed a motion for summary judgment as to his sole surviving claim based on mootness and the failure to exhaust administrative remedies. The district court stayed discovery and subsequently granted summary judgment based on the failure to exhaust. Plaintiff now appeals both this summary judgment decision and the earlier dismissal of his other claims.

“We review summary judgment decisions de novo, applying the same legal standard as the district court.” *Tuckel v. Grover*, 660 F.3d 1249, 1251 (10th Cir. 2011) (internal quotation marks omitted). The district court concluded that Defendants were entitled to summary judgment on the question of exhaustion because the undisputed evidence showed that Plaintiff filed only a Step One grievance regarding the contested medical treatments and did not follow the proper procedures to complete the administrative process. *See Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002) (“An inmate who begins the grievance process but

does not complete it is barred from pursuing a § 1983 claim . . . for failure to exhaust his administrative remedies.”).

According to the prison grievance regulations, both the initial Step One grievance and the further Step Two and Step Three grievances must be filed with the inmate’s “case manager and/or CPO, or other DOC employees designated by the administrative head, who will forward the grievance to the grievance coordinator for processing.” (R. at 160.) The regulations further explain: “In the event the action grieved occurred at another facility/location, the initially assigned grievance coordinator will . . . re-assign the grievance to the grievance coordinator where the event occurred, so that the grievance can be assigned to appropriate responder in the location where the event occurred.” (*Id.*) Plaintiff does not contend that he filed a Step Two grievance with any of the individuals described in the administrative regulations; rather, he asserts that because he was transferred to a different facility while his Step One grievance was pending, he attempted to comply with the administrative process by mailing his Step Two and Step Three grievances to the medical administrator at his former facility. He also argues that his belief that he could satisfy the administrative process in this fashion creates a dispute of fact as to whether he actually exhausted his administrative remedies.

We are not persuaded by these arguments. The Prison Litigation Reform Act does not allow for a “doctrine of substantial compliance,” nor does it “enable judges, by creative interpretation of the exhaustion doctrine, to prescribe or oversee prison grievance systems.” *Jernigan*, 304 F.3d at 1032 (internal quotation marks and

brackets omitted). Plaintiff may not “rely on his own contrary interpretations of the process to claim exhaustion,” *Thomas v. Parker*, 609 F.3d 1114, 1119 (10th Cir. 2010), especially where his contrary interpretation finds no basis in the language of the pertinent administrative regulations. *See Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (“[P]roper exhaustion . . . means using all steps that the agency holds out, and doing so *properly*.” (internal quotation marks omitted)).

Plaintiff further contends that he did not need to file a Step Two or Step Three grievance because the response to his Step One grievance stated that relief had been granted, even though he did not in fact receive the relief he desired. However, in order for exhaustion to serve its goals of “eliminat[ing] unwarranted federal-court interference with the administration of prisons” and “afford[ing] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case,” “the prison grievance system [must be] given a fair opportunity to consider the grievance.” *Kikumura v. Osagie*, 461 F.3d 1269, 1283 (10th Cir. 2006) (quoting *Woodford*, 548 U.S. at 93–94). Thus, a prisoner who is dissatisfied with the response to his grievance, regardless of how the response is labeled, must continue to pursue the proper administrative procedures to seek the relief he desires, “provid[ing] the prison with a fair opportunity to resolve [his] complaint,” *id.* at 1286, in order to properly exhaust his claims. Plaintiff failed to do so here.

Plaintiff raises additional arguments regarding the exhaustion requirement, but we find none of these arguments to be persuasive. Because the undisputed evidence in the record shows that Plaintiff did not follow the proper procedures to complete

the administrative grievance process, we affirm the district court's entry of summary judgment in favor of Defendants on Plaintiff's Eighth Amendment claim.

Plaintiff further argues that the district court erred in granting summary judgment before discovery occurred. We note that Plaintiff's requested discovery related entirely to the merits of his claim and would not have been relevant to the preliminary issue of exhaustion, and we see no abuse of discretion in the district court's decision to stay discovery pending its decision on this issue. *See Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1310 (10th Cir. 2010) ("Discovery and scheduling are matters within the district court's broad discretion."). Nor was Plaintiff entitled to discovery after the district court concluded that he had not properly exhausted his remaining claim for relief, which required dismissal of the action under 42 U.S.C. § 1997e(a).

We turn then to the district court's dismissal of Plaintiff's other claims for relief. We review de novo the district court's dismissal of certain parts of Plaintiff's complaint as legally frivolous, *see Milligan v. Archuleta*, 659 F.3d 1294, 1296 (10th Cir. 2011), while we review only for an abuse of discretion the court's dismissal of other claims for failing to comply with the Federal Rules of Civil Procedure and/or the magistrate judge's order to cure deficiencies in the complaint, *see Olsen v. Mapes*, 333 F.3d 1199, 1204 (10th Cir. 2003).

We first consider the parts of Plaintiff's complaint that were dismissed as legally frivolous. We begin with Plaintiff's due-process claim based on a nurse's alleged theft of his personal medical property. The district court correctly explained

that an individual state employee's unauthorized deprivation of property under color of state law does not give rise to a § 1983 claim where the plaintiff has an adequate state remedy. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984). On appeal, Plaintiff contends that he may not have an adequate state remedy because state costs for serving process are too high for indigent prisoners to cover. However, Plaintiff never raised this argument in the district court, but rather argued only that he has "not had much luck with" attempting to sue state actors in state court in the past. (R. at 91.) Plaintiff's newly raised argument has thus been forfeited by his failure to raise it below, and, in light of the fact that he has neither argued nor demonstrated plain error on appeal, we see no error in the dismissal of this claim. However, we disagree with the district court's characterization of this claim as frivolous, and we affirm instead on the basis that Plaintiff failed to state a valid claim for relief. *See Neitzke v. Williams*, 490 U.S. 319, 327–30 (1989) (discussing differences between frivolousness and failure to state a claim); *see also* 28 U.S.C. § 1915A(b)(1) (providing that a complaint or any portion of the complaint shall be dismissed if it "is frivolous, malicious, or fails to state a claim upon which relief may be granted").

Likewise, we affirm the district court's dismissal of Plaintiff's claims against the medical administrator and warden of the prison on the alternative ground of failure to state a claim upon which relief may be granted. We agree with the district court that Plaintiff's allegations relating to these administrators are insufficient to demonstrate the type of personal involvement and causal connection necessary to establish liability under § 1983. *See Dodds v. Richardson*, 614 F.3d 1185, 1195–96

(10th Cir. 2010). Nevertheless, although we ultimately conclude that these claims fail to state a valid claim for relief, they are not so “indisputably meritless” that they can correctly be characterized as frivolous. *Neitzke*, 490 U.S. at 327.

Having carefully reviewed the record and the arguments on appeal, we reach the same conclusion with respect to all other parts of the complaint that were similarly dismissed as legally frivolous. For substantially the same reasons given by the district court, we affirm the dismissal of these claims on the alternative basis of failure to state a claim upon which relief may be granted.

Finally, we are not persuaded that the district court abused its discretion by dismissing part of the second claim and all of the third claim for failing to comply with the magistrate judge’s order to cure Rule 8 deficiencies in the complaint. Plaintiff contends that he made a reasonable effort to comply with this order and that the district court only thought his complaint was inadequate because the court gave it a “mere cursory reading.” (Appellant’s Opening Br. at 17.) We have carefully reviewed the amended complaint in conjunction with the magistrate judge’s order to cure deficiencies. We note that the magistrate judge gave specific instructions to Plaintiff on what he needed to do to comply with Rule 8, specifically instructing him, among other things, on the need for each claim to identify a named defendant who personally participated in the alleged constitutional violation, and to “show in each identified claim how a named individual was responsible for the deprivation of a federal right.” (R. at 36.) Despite these specific instructions, the third claim of the amended complaint never mentions a single individual by name, but simply makes

general assertions regarding the legal standards for malpractice and reckless endangerment.¹ The part of the second claim dismissed under this standard likewise clearly fails to comply with the magistrate judge's instructions. We thus affirm the dismissal of these claims under our abuse-of-discretion standard.

The district court's dismissal and summary judgment orders are accordingly **AFFIRMED**. We **GRANT** Plaintiff's motion to proceed *in forma pauperis* on appeal and remind him of his obligation to continue making partial payments until his appellate filing fee has been paid in full.

Entered for the Court

Monroe G. McKay
Circuit Judge

¹ In his appellate reply brief, Plaintiff suggests that he thought he could comply with the magistrate judge's order by "incorporat[ing]" into each claim "information contained in previously stated claims." (Appellant's Reply Br. at 2.) Even assuming that this argument was not waived by Plaintiff's failure to raise it earlier, we find it to be unpersuasive. The magistrate judge clearly instructed Plaintiff on the need for each claim to identify a named defendant and explain how this named defendant was responsible for the claimed violation of Plaintiff's rights, and Plaintiff's complaint falls far short of meeting this requirement.