FILED
United States Court of Appeals
Tenth Circuit

October 8, 2021

Christopher M. Wolpert
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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RICKY L. COLE,

Plaintiff - Appellant,

v.

LOUIS DEJOY, Postmaster General of the United States Postal Service,

Defendant - Appellee.

No. 21-5026
(D.C. No. 4:17-CV-00670-JFH-CDL)
(N.D. Okla.)

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**ORDER AND JUDGMENT***

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Before **HARTZ**, **KELLY**, and **McHUGH**, Circuit Judges.

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Plaintiff Ricky Cole, a former postal employee proceeding pro se, filed suit against the postmaster general of the United States Postal Service (USPS) alleging harassment, a hostile work environment, discrimination based on age and disability, retaliation, unlawful termination, obstruction of justice, and fraud. Mr. Cole's suit followed his complaint before the Equal Employment Opportunity Commission (EEOC) claiming Defendant "discriminated against him on the bases of disability,

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

age, and reprisal." R., Vol. 1 at 9. The EEOC ruled in favor of the USPS and denied Mr. Cole's request for reconsideration, granting him the right to file suit. After he made three attempts to properly plead his case, the United States District Court for the Northern District of Oklahoma granted Mr. DeJoy's motion under Fed. R. Civ. P. 12(b)(6) to dismiss Mr. Cole's complaint, with prejudice, for failure to state a plausible claim for relief. We affirm.

We review de novo the grant of a motion to dismiss for failure to state a claim. *See Gee v. Pacheco*, 627 F.3d 1178, 1183 (10th Cir. 2010). The federal rules require that complaints set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although Rule 8 "does not require detailed factual allegations, . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). A complaint must include sufficient factual allegations to "state a claim to relief that is plausible on its face." *Id.* (internal quotation marks omitted). That is, to overcome a motion under Rule 12(b)(6), the plaintiff's allegations should "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

A pro se litigant's pleadings, however, "are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). Thus, a complaint that can reasonably be read to state a valid claim should suffice despite the plaintiff's "unfamiliarity with pleading requirements," although it is not "the proper function of

the district court to assume the role of advocate for the pro se litigant." *Id.* Also, pro se litigants should be given reasonable opportunity to correct deficient pleadings. *Id.* at 1110 n.3. Accordingly, dismissal of a pro se complaint under Rule 12(b)(6) "is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend." *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 806 (10th Cir. 1999) (applying same standard to dismissal of claim under 28 U.S.C. § 1915(e)(2)(B)(ii)).

Mr. Cole had three opportunities to submit a proper complaint. On Defendant's motion, each complaint was dismissed because it lacked factual allegations sufficient to support a plausible claim for relief. Mr. Cole's original complaint simply stated the statutory violations alleged against Defendant and included the EEOC's denial for reconsideration. Although the denial letter listed seven adverse actions raised in Mr. Cole's EEOC proceedings, neither his complaint nor the letter included any facts from which the district court could infer unlawful conduct had occurred. The district court's order dismissing Mr. Cole's complaint suggested the types of facts needed to support his claims going forward: "facts that indicate he was in a protected age group, that he was disabled, or that he engaged in any protected activity for which he was subjected to an adverse action," and facts supporting inferences of causation. R., Vol. 1 at 51. The dismissal was without prejudice and provided Mr. Cole 14 days to file an amended complaint.

Mr. Cole's amended complaint was four pages long with over 40 pages of attachments. It included some of the court's suggested material, alleging that he was

65 years old and disabled, and noting a series of adverse actions indicating that his performance had been subject to special scrutiny. Still, the district court ruled that the additions were not enough to support an inference of harassment, discrimination, or any of Mr. Cole's other claims. To illustrate why, the district court outlined the elements of each of Mr. Cole's claims and indicated which elements lacked support—even after construing his complaint liberally and incorporating some attached documents. For example, Mr. Cole alleged he was being harassed because his local postmaster began scanning Mr. Cole's packages every day to compare them to the missed-scan report. But he did not allege he was targeted for additional scanning because of his age or disability and therefore did not state a hostile-work-environment claim. Additionally, the district court twice noted that Mr. Cole's allegations needed to appear within the complaint itself and not in attached documentation. The court dismissed the amended complaint without prejudice, permitting Mr. Cole to file an amended complaint within 30 days, but advising him "that no additional amendments thereafter will be permitted." Dist. Ct. Order at 10 (Nov. 10, 2020).

Mr. Cole's second amended complaint is four pages long with over 600 pages of attachments. The first paragraph states: "The initial, never rescinded, directive requested, to the effect, 'short, simple succinct.[']  This is none of the above with my apologies. It is a data dump of the complete records of the EEOC hearing." R., Vol. 2 at 2. Although Mr. Cole's complaint provided some additional details about specific adverse actions, the district court ruled that it nevertheless failed to state a

plausible claim for relief under any of his theories. For example, Mr. Cole stressed that the postmaster looked at only Mr. Cole's errors and not "the many, many more egregious errors of others that are herein listed" (referring to the hundreds of pages attached to his complaint). R., Vol. 2 at 3. But the complaint itself told the court nothing about these individuals or the circumstances of those errors that would support an inference of discrimination or a basis for a hostile-work-environment claim. And the great many attachments did not help either because, as the district court explained, it "cannot assume the role of Cole's advocate" and "review over six hundred (600) pages of documents to frame causes of action for him." Dist. Ct. Order at 4 (Jan. 20, 2021). The district court again dismissed Mr. Cole's complaint, this time with prejudice.

On appeal Mr. Cole argues he was put in a "catch 22 situation" because his pleadings needed to be "short and succinct" but also "contain enough facts which, if taken as true would indicate that a violation of law had occurred." Aplt. Br. at 38. Mr. Cole expressed frustration that the district court insisted on "more facts"—yet submitting his "whole case in the 'data dump'" in his second amended complaint still was not enough. Aplt. Br. at 10. But Mr. Cole misconstrues the district court's orders. They did not simply ask for more facts and documentation. The district court outlined which *types* of factual allegations would elevate his pleadings from personal conclusions that the disciplinary actions against him constituted discrimination and harassment to plausible allegations that he was treated differently because of his age or disability. The district court provided Mr. Cole guidance and ample opportunity to

prepare a satisfactory complaint, yet Mr. Cole failed to allege basic facts showing he was entitled to relief.[1] Mr. Cole's brief does not indicate which parts of his complaints were responsive to the court's orders. After two inadequate revisions, it was reasonable for the district court to conclude that granting another opportunity to amend "would be futile," *Perkins*, 165 F.3d at 806, and therefore to dismiss Mr. Cole's case with prejudice.[2]

We **AFFIRM** the district court's order.

Entered for the Court

Harris L Hartz
Circuit Judge

[1] A dismissal under Rule 12(b)(6) does not require consideration of the factors set forth in *Ehrenhaus v. Reynolds*, 965 F.2d 916 (10th Cir. 1992), for assessing the propriety of a dismissal under Fed. R. Civ. P. 41(b) as a sanction. *See, e.g., Roth v. Wilder*, 420 F. App'x 804, 805 n.3 (10th Cir. 2011).

[2] In addition to challenging the district court's decision to dismiss his case, Mr. Cole argues that the court did not respond to his request for an attorney. But Mr. Cole did not clearly make a request for appointed counsel; and in the absence of any plausible allegations of discrimination, the district court would have been hard pressed to justify requesting an attorney to represent him. Also, we do not address Mr. Cole's requests for relief on claims not properly before this court, including his request for an injunction against the city of Stillwater in an unrelated matter concerning his home.