FILED
United States Court of Appeals
Tenth Circuit

January 25, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CRISTOPHER BUCKHAM,

Plaintiff - Appellant,

v.

WYOMING DEPARTMENT OF CORRECTIONS MEDIUM CORRECTIONAL INSTITUTION LAW LIBRARIAN, in her official capacity a/k/a Lisa Nuss; LISA NUSS, individually; WYOMING DEPARTMENT OF CORRECTIONS MEDIUM CORRECTIONAL INSTITUTION DEPUTY WARDEN, in her official capacity a/k/a Marlena McManis; MARLENA MCMANIS, individually; WYOMING DEPARTMENT OF CORRECTIONS MEDIUM CORRECTIONAL INSTITUTION WARDEN, in his official capacity, a/k/a Michael Pacheco; MICHAEL PACHECO, individually; WYOMING DEPARTMENT OF CORRECTIONS DEPTUY ADMINISTRATOR OF OPERATIONS, in his official capacity a/k/a Scott Abbott; SCOTT ABBOTT, individually; WYOMING DEPARTMENT OF CORRECTIONS MEDIUM CORRECTIONAL INSTITUTION GRIEVANCE MANAGER, in his official capacity a/k/a George Ross; GEORGE ROSS, individually,

Defendants - Appellees.

No. 23-8013
(D.C. No. 2:21-CV-00190-KHR)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **EID**, **CARSON**, and **ROSSMAN**, Circuit Judges.

Christopher Ray Buckham is an inmate at the Wyoming Department of Corrections Medium Correctional Institution. He filed a pro se complaint under 42 U.S.C. § 1983 against the following employees of the Wyoming Department of Corrections: Lisa Nuss, Marlena McManis, Michael Pacheco, Scott Abbott, and George Ross (collectively, Defendants). He alleged Defendants violated his constitutional rights by censoring his outgoing mail and destroying his property.

On cross motions for summary judgment, Mr. Buckham prevailed on some of his claims against Defendant Pacheco, and the district court awarded nominal damages. The district court dismissed all claims against the remaining defendants. The court also denied Mr. Buckham's request for punitive damages and determined all parties should bear their own costs and fees. In addition, the court had earlier denied Mr. Buckham's motion for sanctions related to an ex parte communication

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

between the court and defense counsel. Mr. Buckham now appeals those rulings, proceeding pro se.[1] Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Background

Mr. Buckham's claims relate to his request to print and mail articles that he authored about prison life. An initial batch contained seven articles titled:

- "*I Identify as a Free Person*";
- "*PTSD and PICS*";
- "*Why prison causes crime*";
- "*How do prisoners get money?*";
- "*Don't come to work in Wyoming. Don't visit Wyoming on vacation. Don't even drive through. Stay out, or we'll put you in prison*." ("*Don't come to work in Wyoming*");
- "*How do Prisoners get medical care*?" and
- "*NO doesn't mean NO in Wyoming*."

R., vol. 1 at 40-41. An additional batch contained three articles: "*Transportation*"; "*Pee-Shirts*"; and "*Presumption of Disease*." *Id.* at 54.

A dispute arose between Mr. Buckham and the prison about whether he could mail copies of the articles. As set out more fully in the district court's decision, certain defendants initially denied his requests to print and mail the articles and

[1] We liberally construe Mr. Buckham's pro se filings, but we do not act as his advocate. *See James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

directed him to delete two of the articles—*NO doesn't mean NO in Wyoming* and *Don't come to work in Wyoming*. Mr. Buckham also attempted to mail a copy of a disciplinary appeal, but his request was denied. The article titled *NO doesn't mean NO in Wyoming* and the disciplinary appeal included Mr. Buckham's allegations that a correctional officer had sexually harassed him.

After going through the prison grievance process, Mr. Buckham succeeded on final appeal to Department Director Dan Shannon in obtaining permission to print and mail all the articles except *NO doesn't mean NO in Wyoming*.[2] Director Shannon continued to deny Mr. Buckham permission to mail that article. Defendant Pacheco denied Mr. Buckham's grievances related to mailing the disciplinary appeal and the directive to delete copies of *NO doesn't mean NO in Wyoming* and *Don't come to work in Wyoming*. Director Shannon did not respond to those grievance issues, leaving Defendant Pacheco as the final decisionmaker.

Mr. Buckham brought five claims in district court under § 1983. He alleged each individual defendant who denied his requests to print and mail his articles (Claims I, II and IV) and denied his requests to mail his disciplinary appeal (Claim III) unconstitutionally censored his outgoing mail in violation of the First and Fourteenth Amendments. And he alleged that each individual defendant who

[2] Mr. Buckham did not pursue relief through the grievance process with respect to the article *How do prisoners get money*. After prison officials initially refused his request to print and mail that article, he deleted it and did not seek any relief through the grievance process or the underlying complaint. *See* R., vol. 1 at 51.

directed him to delete two of his articles unconstitutionally destroyed his property in violation of the First, Fifth and Fourteenth Amendments (Claim V).

The Defendants argued the disciplinary appeal and *NO doesn't mean NO in Wyoming* were not allowed to be printed and mailed because doing so would threaten the safety and security of the correctional officer named in those documents. But the district court rejected that argument because censoring those documents did not serve a relevant security interest. It then concluded that, "[b]ecause [Mr. Buckham's] mail was censored for a reason not related to the order and security of the prison, Defendant Pacheco violated a clearly established constitutional right protected under the First Amendment as applied to the states through the Fourteenth Amendment." R., vol. 3 at 442.

The district court therefore granted summary judgment for Mr. Buckham and against Defendant Pacheco on the following claims:

- Claim II for his refusal to permit Mr. Buckham to print and mail the article *NO doesn't mean NO in Wyoming*,
- Claim III for his refusal to permit Mr. Buckham to mail a copy of the disciplinary appeal, and
- Claim V for his directive to Mr. Buckham to delete the articles *Don't come to work in Wyoming* and *NO doesn't mean NO in Wyoming* because they were considered contraband.

The district court dismissed all claims against the other defendants, denied Mr. Buckham's request for punitive damages, and directed the parties to bear their own costs. Mr. Buckham timely appealed.[3]

II. Discussion

A. *Summary Judgment*

Mr. Buckham challenges the district court's decision to grant summary judgment to Defendants Nuss, McManis, Abbott, and Ross, and partial summary judgment to Defendant Pacheco. We review de novo the district court's grant of summary judgment, applying the same legal standard as the district court. *Hooks v. Atoki*, 983 F.3d 1193, 1205 (10th Cir. 2020). "Summary judgment is appropriate 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)). "If there is no genuine issue of material fact, then the reviewing court must determine if the district court correctly applied the law." *Timmons v. White*, 314 F.3d 1229, 1232 (10th Cir. 2003).

[3] Defendants contend in a footnote in their response brief that the district court erred in finding Defendant Pacheco liable for the decision to deny Mr. Buckham permission to mail *NO doesn't mean NO in Wyoming* since he did not make the final administrative decision on that issue. But Defendants also acknowledge that Defendant Pacheco did not cross-appeal the district court's decision. We therefore lack jurisdiction to consider that issue. *See Weber v. GE Grp. Life Assurance Co.*, 541 F.3d 1002, 1008 (10th Cir. 2008) ("Absent a cross-appeal, we have no jurisdiction to consider an issue determined adversely to the appellee unless resolution of that issue would not enlarge the appellee's rights or diminish the appellant's." (citation and internal quotation marks omitted)).

The district court dismissed the claims against the above-mentioned defendants because Mr. Buckham's claims were based on non-final, interim decisions. The district court observed Mr. Buckham sought judicial relief for articles he was eventually allowed to mail (the "allowed articles") after he prevailed on appeal through the grievance process. And Mr. Buckham sought judicial relief for each level of denial or alleged censorship before the final decision. But the court explained that the claims against the officials who made the *initial* decisions could not stand; instead, only the *final* results of the grievance process were actionable.

In so concluding, the district court considered the purpose underlying the exhaustion requirement in the Prison Litigation Reform Act, which requires prisoners to exhaust all administrative remedies before bringing a § 1983 action. *See* R., vol. 3 at 427 (citing 42 U.S.C. § 1997e(a)). The court observed that "'Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits.'" *Id.* (quoting *Porter v. Nussle*, 534 U.S. 516, 524 (2002)). The court also relied on the mootness doctrine, explaining that doctrine "'focuses upon whether a definite controversy exists throughout the litigation and whether conclusive relief may still be conferred by the court despite the lapse of time and any change of circumstances that may have occurred since the commencement of the action.'" *Id.* at 428-29 (quoting *Jordan v. Sosa*, 654 F.3d 1012, 1024 (10th Cir. 2011)).

Although recognizing exhaustion itself was not at issue, the court reasoned "[i]f a prisoner could file a grievance, or appeal one, and obtain the relief sought then still file suit, the exhaustion requirement would serve no purpose." *Id.* at 427. And

the court further explained, "[c]hallenging the initial actions rather than the final determination that affects a prisoner's civil rights is judicially inefficient and illogical considering the . . . exhaustion requirement." *Id.* This led the district court to dismiss Mr. Buckham's claims against these defendants because either (1) Mr. Buckham, through the grievance process, was eventually granted the relief he claimed he was denied; or (2) these defendants' decisions to deny Mr. Buckham relief were eventually superseded by later denials further along in the prison grievance process. As we explain, Mr. Buckham has not shown the district court erred.

Shortly after Mr. Buckham sued in the district court, Director Shannon granted two of Mr. Buckham's grievance appeal requests and gave him permission to mail the allowed articles. According to the district court, Director Shannon's decision granting Mr. Buckham permission to mail the articles rendered moot any claims based on earlier decisions by other prison officials denying permission to mail those same articles.

Mr. Buckham admits he "was allowed to print and mail the articles after Director Shannon issued a response to [his] grievances." Aplt. Opening Br. at 26. He asserts, however, there is no evidence "suggesting that Director Shannon's decision would have been issued absent [Mr. Buckham's] filing suit." *Id*. But Mr. Buckham received the relief he requested at the conclusion of the administrative process. That Mr. Buckham was granted relief after he sued does not show the court erred. We conclude the district court properly granted summary judgment in favor of

those defendants on the claims or portions of claims where Director Shannon ultimately granted Mr. Buckham's requested relief.[4]

Mr. Buckham also contends the district court's ruling "would place accountability for [prison officials'] conduct solely on the person responding to the grievance regardless of personal participation by lower officials." Aplt. Opening Br. at 18. But Mr. Buckham's argument does not account for the district court's reasoning, which is based on the unique facts of this case. As the district court explained:

> The Court is confined to the facts of this case and cannot make a bright line rule that will cover every situation that might arise. The alleged unconstitutional actions, at a broad level, are an administrative decision refusing [Mr. Buckham's] request to print and mail certain documents to the public and an order to delete certain documents from [Mr. Buckham's] computer drive. The difference here, as opposed to other conceivable scenarios, is the damage can be completely undone through the grievance and appeal process.

R., vol. 3 at 429.

Recall, Director Shannon granted Mr. Buckham some relief at the conclusion of the grievance process, as he was permitted to mail the allowed articles. As for the claims involving documents Mr. Buckham was directed to delete or not permitted to

[4] Specifically, Director Shannon's final decision granting relief mooted the portion of Claim I against Defendant Nuss for her initial refusal to mail the allowed articles, and the portion of Claim II against Defendants McManis, Abbott, and Pacheco with respect to their earlier decisions refusing permission to mail the article *Don't come to work in Wyoming*. Likewise, Director Shannon's decision mooted Claim IV in its entirety, which was based on Defendants McManis and Pacheco's earlier decisions refusing permission to mail the allowed articles.

mail, it is the final administrative decision denying relief at the conclusion of the grievance process that is actionable. According to the district court, Defendant Pacheco was the final decisionmaker, and the district court therefore granted summary judgment against him on Claim II for his refusal to permit Mr. Buckham to print and mail the article *NO doesn't mean NO in Wyoming*, Claim III for his refusal to permit Mr. Buckham to mail a copy of the disciplinary appeal, and Claim V for his directive to Mr. Buckham to delete the articles *Don't come to work in Wyoming* and *NO doesn't mean NO in Wyoming*. The district court properly granted summary judgment to all other defendants who made earlier, non-final decisions denying permission to mail those documents and directing the deletion of those documents.[5]

B. *Punitive Damages*

Mr. Buckham contends he was entitled to a trial on his request for punitive damages, and the district court erroneously concluded otherwise. We discern no error.

"Punitive damages are available only for conduct which is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Searles v. Van Bebber*, 251 F.3d 869, 879 (10th Cir. 2001) (internal quotation marks omitted). None of the

[5] This applies to Claim I against Defendant Nuss for her denial of the request to mail an uncensored copy of *NO doesn't mean NO in Wyoming*, Claim II against McManis and Abbott for their denials of the request to mail *NO doesn't mean NO in Wyoming*, Claim III against Defendants Nuss, McManis, and Abbott for their denials of the request to mail the disciplinary appeal, and Claim V against Defendants McManis, Abbott, and Ross, for their directive to delete copies of *NO doesn't mean NO in Wyoming* and *Don't come to work in Wyoming*.

facts Mr. Buckham alleged, the district court reasoned, involved such conduct. Although Mr. Buckham asserted the Defendants' actions were "motivated by evil and anger," R., vol. 2 at 842, the court observed this allegation lacked factual support. The district court found Mr. Buckham made only a conclusory allegation in his motion for summary judgment, insufficient to support punitive damages, that "Defendants denied Buckham[] his clearly established right to communicate with the public . . . because of their animosity and bitterness of the content of Buckham's communication about them specifically and their colleagues in general." *Id.* at 842-43.

On appeal, Mr. Buckham offers examples of facts he believes support punitive damages. For example, he argues Defendants did not follow the proper procedures after declaring two of Mr. Buckham's articles were contraband. He also argues, pursuant to prison policy, Defendant Pacheco should not have been allowed to consider the grievances because he was also involved in the initial decision to declare his articles to be contraband. As an appellate court, we are a court of "review, not of first view," and we thus may not consider Mr. Buckham's evidence in support of this argument that he did not present to the district court. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). We therefore find, based on the arguments presented to the

district court, no error in the decision that Mr. Buckham's request for punitive damages was conclusory and lacked adequate factual support.[6]

Accordingly, we conclude Mr. Buckham has shown no reversible error in the district court's decision to deny his request for punitive damages.

C. *Ex Parte Communication and Substitute Proposed Amended Answer*

Mr. Buckham argues the district court erroneously concluded an ex parte communication between the court and the Defendants' attorneys was not prejudicial and erroneously denied his request for sanctions. He also argues the district court erred in granting the Defendants' motion for leave to file a substitute proposed amended answer. We review the district court's decisions on these issues for abuse of discretion.[7] *See Obeslo v. Empower Cap. Mgmt., LLC*, 85 F.4th 991, 1004 (10th Cir. 2023) (sanctions); *Minter v. Prime Equip. Co*., 451 F.3d 1196, 1204 (10th Cir. 2006) (amending pleadings). We discern none.

[6] We also note Mr. Buckham admitted in his motion for summary judgment that he "ha[d] not fully presented evidence regarding the Defendants' culpability for punitive damages in this motion." R., vol. 2 at 843.

[7] In connection with this argument, Mr. Buckham appears to be challenging the following orders: Order Granting State Defendants' Motion to Substitute Proposed Amended Answer (Doc. 50), Order Granting Defendants' Motion for Leave to Amend and Finding as Moot Plaintiff's Motion to Strike Defendants' Second Answer (Doc. 60), and Order Denying Plaintiff's Motion for Order In re *Ex Parte* Communication (Doc. 110).

We must first outline the procedural background relevant to these issues. The Defendants filed their Answer in December 2021. In February 2022, a courtroom deputy emailed defense counsel stating:

> You filed an Answer in the above matter on 12/14/2021. That Answer was filed on behalf of all the state defendants in their individual capacity, but not in their official capacities. Did you do this intentionally? The Answer just references "state defendants" so I wanted to double check that you did not intend to file this Answer on behalf of the parties in the[ir] official capacities as well because to date – no one has filed on their behalf. Please advise.

R., vol. 1 at 916. Defense counsel responded: "Thank you for bringing this to our attention. I have just filed the attached Answer of State Defendants, in Their Official Capacities, to Plaintiff's Complaint in order to clarify the record. Please do not hesitate to contact me should you have any questions or concerns." *Id.* (citation omitted).

In response to the Defendants' filing of their second Answer, Mr. Buckham filed a motion asking the court to strike the pleading because it was an amended pleading that was filed without leave of court or consent from the opposing party. Defendants responded to Mr. Buckham's motion to strike by agreeing that they should have requested leave to amend and by filing a motion for leave to amend. In the motion for leave to amend, Defendants asserted that the only change in the Amended Answer was to state that the Answer was for the Defendants in both their individual and official capacities. Defendants further asserted that "[t]he amendment is being made simply to ensure the record is clear and does not add any issues to the case." *Id.* at 679.

In response to the motion for leave to amend, Mr. Buckham challenged the Defendants' assertion that only one change was made to the Amended Answer, calling it "incorrect." *Id.* at 706. In the first Answer, the Defendants presented nine affirmative defenses, Mr. Buckham maintained, but in the proposed Amended Answer, the Defendants presented seven affirmative defenses and some defenses had been omitted but others were added. Mr. Buckham also argued the motion for leave should be denied because an "ex parte direction from the court/clerk of court" compelled the amendment, and he requested sanctions for that ex parte communication. *Id.* at 710.

Defendants then filed a "Submission of Substitute Proposed Amended Answer." Suppl. R., vol. 2 at 6 (capitalization and boldface omitted). In the filing, Defendants explained there were "errors" in the proposed amended answer that they had attached to their motion for leave to amend. *Id.* at 7. They requested leave from the court to substitute a proposed amended answer for the earlier version, explaining that "[t]he affirmative defenses in the substitute proposed amended answer are identical to those stated in the State Defendants' original answer, which the State Defendants did not intend to change." *Id.* (citation omitted).

The district court granted Defendants' motion to substitute. The court then granted the Defendants' motion for leave to amend and denied as moot Mr. Buckham's motion to strike. In that order, the court also addressed the ex parte communication. The court explained that "the courtroom deputy reached out to defense counsel to clarify an administrative matter" and "[t]he communication did

not address substantive matters, nor did Defendants gain any procedural, substantive, or tactical advantages as a result of the communication." R., vol. 1 at 933. It then concluded that "because this communication was for administrative purposes and did not prejudice Plaintiff, it was not an improper ex parte communication." *Id.* at 934.

Mr. Buckham next filed a document titled "In re *ex parte* Communication," *id.* at 1140 (boldface omitted), in which he continued to argue he was prejudiced by the ex parte communication and again requested sanctions. The district court understood this to be a motion asking the court to reconsider its prior order and finding no basis to do so, denied it.

On appeal, Mr. Buckham contends the district court erroneously granted the Defendants' motion to substitute a proposed amended answer because he was not able to file a response to that motion. We are not persuaded. Mr. Buckham was able to file a response to the initial motion for leave to amend and the motion to file a substitute proposed amended answer was simply to correct errors in the proposed amended answer. In fact, it was Mr. Buckham's response to the motion for leave to amend that prompted Defendants to correct their errors and submit a substitute proposed amended answer that included affirmative defenses identical to those found in the original answer. Under these circumstances, Mr. Buckham cannot show the district court abused its discretion. *See United States v. Weidner*, 437 F.3d 1023, 1042 (10th Cir. 2006) (internal quotation marks omitted) ("An abuse of discretion occurs when the district court's decision is arbitrary, capricious, or whimsical, or results in a manifestly unreasonable judgment.").

As for the ex parte communication, Mr. Buckham argues on appeal that he was prejudiced by having to (1) expend hours responding to the multiple answers Defendants filed and (2) change his litigation strategy. But in finding there was no undue prejudice, the district court explained "'[c]ourts typically find prejudice only when the amendment unfairly affects a party in terms of preparing their defense to the amendment.'" R., vol. 1 at 1376 (brackets omitted) (quoting *Minter*, 451 F.3d at 1208). And the court further explained that "[h]ere, the subject matter of Defendants' Answer remained the same, the only substantive change being that the Answer was filed on behalf of Defendants in both their individual and official capacities." *Id.* Again, we discern no error.

Even without a finding of prejudice, Mr. Buckham insists sanctions were warranted. For this argument, he relies on an unpublished district court decision, *Kaufman v. Am. Fam. Mut. Ins. Co.*, No. 05-cv-02311-WDM-MEH, 2008 WL 4980360 (D. Colo. Nov. 19, 2008). In *Kaufman*, the district court found no prejudice related to an ex parte communication that defense counsel initiated with the court. *See id.* at *4. The court, however, ordered defense counsel to pay the plaintiff's reasonable attorneys' fees incurred in preparing the motion for an order prohibiting ex parte communication. *See id.*

But *Kaufman* does not help Mr. Buckham. First, "[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (internal quotation marks omitted). Second,

even were *Kaufman* binding on the district court, it is unpersuasive as applied here, where the courtroom deputy initiated the communication with defense counsel about an administrative matter. In *Kaufman*, defense counsel initiated the ex parte communication with the judge's law clerk on a substantive procedural matter. *Kaufman*, 2008 WL 4980360, at *3.

Accordingly, the district court did not abuse its discretion by finding no prejudice to Mr. Buckham on this record.

D. *Costs*

Mr. Buckham argues he was the prevailing party and thus entitled to an award of costs. But Mr. Buckham was only partially successful on his claims. Mr. Buckham lost on his claims against four of the five defendants, and he prevailed on some of his claims against Defendant Pacheco. It is within a court's "discretion to refuse to award costs to a party which was only partially successful." *Howell Petroleum Corp. v. Samson Res. Co.*, 903 F.2d 778, 783 (10th Cir. 1990). Under these circumstances, we see no abuse of discretion and will not disturb the district court's determination that the parties should bear their own costs.

III. Conclusion

We affirm the district court's judgment.

Entered for the Court

Veronica S. Rossman
Circuit Judge