

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 23, 2026

Christopher M. Wolpert
Clerk of Court

CHRISTOPHER D. HARRELL,

Plaintiff - Appellant,

v.

JEREMY CLOSS, Librarian, Wyoming
Medium Correctional Institution; DAN
SHANNON, Director, Wyoming
Department of Corrections; DIANE
SCHWARTZKOPF, Mailroom Clerk,
Wyoming Medium Correctional Institution;
WYOMING DEPARTMENT OF
CORRECTIONS; CHERYL BECKER,
Case Team Leader, Wyoming Medium
Correctional Institution; MARLENA
MCMANIS, Acting Warden, Wyoming
Medium Correctional Institution; TERESA
MAINOR, Mailroom Supervisor,
Wyoming Medium Correctional Institution,

Defendants - Appellees.

No. 25-8045
(D.C. No. 2:25-CV-00028-KHR)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **MATHESON**, **McHUGH**, and **CARSON**, Circuit Judges.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Christopher D. Harrell, a Wyoming prisoner proceeding pro se, appeals from the district court's dismissal of his civil rights action for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I. BACKGROUND¹

While Harrell was incarcerated at the Wyoming Medium Correctional Institution ("WMCI"), he tried multiple times to mail a response opposing summary judgment in an unrelated state-court proceeding. The response was timely, but it was mailed approximately ten days after Harrell's initial attempt. Two WMCI mailroom employees delayed sending the response because Harrell lacked sufficient funds to cover postage. They said he needed to prove the filing deadline was imminent before they could mail the response and told him that only WMCI's educational supervisor or law librarian could verify imminent court deadlines.

Harrell then went to the library and asked WMCI librarian Jeremy Closs if the law librarian and educational supervisor were there; Closs told him they were not. Believing Closs lied, Harrell confronted him two days later, asking about his level of education and why he lied. Following the interaction, Closs issued a Conduct Violation Report ("CVR"), citing Harrell for insulting behavior. Several days later, a

¹ We accept as true the well-pleaded allegations in Harrell's complaint, but we do not consider the new factual allegations Harrell raises for the first time in his appellate brief. See *Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1286 n.1 (10th Cir. 2019) ("[W]e will not consider evidence or allegations outside the four corners of the complaint in reviewing the district court's Rule 12(b)(6) dismissal").

hearing officer conducted a disciplinary hearing on the matter.² She found Harrell guilty of the violation and denied his request for security footage, which Harrell asserted would prove Closs had lied (about the law librarian and educational supervisor not being there when he asked). WMCI's acting warden affirmed the hearing officer's decision.

Several months later, Harrell tried to print *in forma pauperis* ("IFP") forms for a separate case before this court. Closs denied Harrell's print request and said Harrell could go into voluntary indebtedness to print the forms only when the filing deadline was imminent. It seems Harrell eventually filed the IFP forms—he alleges he was "ultimately successful" in the appeal. R. at 45.

Harrell filed a civil rights suit in Wyoming state court against the Wyoming Department of Corrections ("WDOC"), the WDOC's director, and several WMCI officials and employees (collectively, "Defendants"), alleging they violated his federal and state constitutional rights. Naming Defendants in their individual and official capacities, Harrell sought monetary, declaratory, and injunctive relief. Defendants removed the action to federal court.

² Harrell alleged WDOC policy required the hearing to be "done within 7 business days" but that it was held "on the 8th day." R. at 106. The district court noted that Harrell's complaint had not raised a procedural due process claim related to this allegation, and that "Seven business days is typically nine actual days." R. at 422 n.3. Harrell's opening brief attempts to assert a procedural due process claim related to this allegation. As this claim is newly raised on appeal, we decline to consider it. *See McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 999 (10th Cir. 2002).

Harrell's complaint alleged, under 42 U.S.C. § 1983, that Defendants violated his Fifth and Fourteenth Amendment due-process rights to access the courts, and retaliated against him for protected speech in violation of the First and Fourteenth Amendments. The complaint also alleged that Defendants committed a state-law crime and violated his rights under several provisions of Wyoming's constitution.

Defendants moved for dismissal, arguing Harrell failed to state a claim under Rule 12(b)(6). The district court granted the motion on the federal claims and declined to exercise supplemental jurisdiction over the state-law claims.³ Harrell later filed a motion to amend his complaint, which the district court denied as procedurally improper because it had already entered judgment and had not set aside or vacated its judgment.⁴

II. DISCUSSION

We review de novo a dismissal for failure to state a claim under Rule 12(b)(6). *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). Under this standard, we accept as true all well-pleaded factual allegations and view them in the light most

³ While Defendants' motion to dismiss was pending, Harrell moved for an injunction "to stop the Defendants from refusing to process [his] service upon Defendant Mainor." R. at 345. The district court dismissed the action in its entirety and thus found the motion moot. In doing so, the court noted that it was "not dismissing [Harrell's] claims due to insufficient service of process." *Id.* at 422 n.4. Harrell does not challenge this determination on appeal.

⁴ The day Harrell moved to amend his complaint, he also filed a motion to alter or amend the district court's judgment under Federal Rule of Civil Procedure 59(e), which the district court denied. He does not appeal the denial of that motion, so we do not address it.

favorable to the plaintiff. *Id.* “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) (internal quotation marks omitted). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

Because Harrell represents himself, we construe his filings liberally but do not act as his advocate. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

A.

Section 1983 creates civil liability for “[e]very *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State[,]” deprives someone of a federal constitutional or statutory right.” 42 U.S.C. § 1983 (emphasis added). But “a State is not a person within the meaning of § 1983,” and neither are “governmental entities that are considered ‘arms of the State.’” *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 64, 70 (1989). Wyoming law says that the WDOC is part of “Wyoming state government.” Wyo. Stat. Ann. § 9-2-2012(a). Thus, the district court correctly dismissed Harrell’s § 1983 claims against the WDOC, because, as a state agency, it is not a “person” under § 1983.

We likewise affirm the district court’s ruling that Harrell could not recover monetary damages from Defendants in their official capacities because state officials sued in their official capacities for monetary damages “are treated as extensions of the state rather than ‘persons’ subject to § 1983.” *Tufaro v. Oklahoma ex. rel. Bd. of*

Regents, 107 F.4th 1121, 1135 (10th Cir. 2024) (quoting *Will*, 491 U.S. at 71). We next address Harrell’s claims for prospective relief.

B.

The district court determined Harrell failed to state a plausible Fifth Amendment claim because Defendants are state actors, and “the Fifth Amendment applies only to action by the federal government.” R. at 415. The court also determined Harrell had not adequately pleaded Article III standing for his access-to-the-courts claims because he failed to establish any actual injury, reasoning that Harrell’s allegations of harm (from Defendants’ delay in mailing his summary judgment response and printing his IFP forms) were speculative, and he did not allege the WDOC’s policy (requiring indigent inmates to prove imminent court deadlines to print and mail documents) harmed him specifically.

Harrell has waived any challenge to the district court’s dismissal of these claims because his opening brief does not challenge the district court’s reasons for dismissing them. *See* Fed. R. App. P. 28(a)(8)(A) (stating the opening brief must identify “appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.”); *Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020) (“Issues not raised in the opening brief are deemed abandoned or waived.” (internal quotation marks omitted)).

C.

Harrell alleged that Defendants repeatedly issued unwarranted CVRs against him in retaliation for “his constant complaining in an attempt to improve the prison

system.” R. at 117. Harrell also claimed that because of his reputation for filing grievances, Closs issued the insulting-behavior CVR against him in preemptive retaliation before he could submit an institutional grievance against Closs for lying. Relatedly, he claimed, “[t]he alleged insulting behavior” was him asking Closs, “What’s your education?” and Closs issued the CVR to “silence” and “prevent” him from exercising his “rights to freedom of speech.” *Id.* at 106.

To state a First Amendment retaliation claim, Harrell needed to plausibly allege that: (1) he “was engaged in constitutionally protected activity;” (2) the defendant’s actions caused him “to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity;” and (3) “the defendant’s adverse action was substantially motivated as a response to” his “exercise of constitutionally protected conduct.” *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007).

The district court correctly determined Harrell’s allegation that Defendants retaliated against him for speaking out to improve the prison system was conclusory and not supported with sufficient facts to state a claim. *See Hall*, 935 F.2d at 1110 (“[C]onclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based.”).

As for Harrell’s claim that Closs issued the insulting-behavior CVR against him as preemptive retaliation, the district court held it was barred by *Requena v. Roberts*, 893 F.3d 1195, 1211 (10th Cir. 2018), because the hearing officer found Harrell guilty of the violation and there was evidence to support the hearing officer’s

decision. The district court also determined that even if *Requena* did not bar the claim, Harrell failed to plausibly allege that he was engaged in a constitutionally protected activity. We agree with the latter and affirm on that basis. *See Schell v. Chief Justice & Justices of Okla. Supreme Ct.*, 11 F.4th 1178, 1186 (10th Cir. 2021) (We may affirm a dismissal “on any ground supported by the record, so long as the plaintiff has had an opportunity to address the alternative ground.” (brackets and internal quotation marks omitted)).

“Government conduct that would be unacceptable, even outrageous, in another setting may be acceptable, even necessary in a prison,” and “prisoners’ rights may be restricted in ways that would raise grave First Amendment concerns outside the prison context.” *Gee v. Pacheco*, 627 F.3d 1178, 1185, 1187 (10th Cir. 2010) (internal quotation marks omitted). “Consequently, a prisoner claim will often not be plausible unless it recites facts that might well be unnecessary in other contexts.” *Id.* at 1185.

Harrell alleged that he engaged in protected activity when he accused Closs of lying and asked about his level of education. But harassing or insulting comments by inmates to prison staff is not protected speech. *See, e.g., Kervin v. Barnes*, 787 F.3d 833, 835 (7th Cir. 2015) (concluding that “backtalk by prison inmates to guards, like other speech that violates prison discipline, is not constitutionally protected”); *Cowans v. Warren*, 150 F.3d 910, 912 (8th Cir. 1998) (concluding that prisoner disciplined for “using abusive and insulting language” failed to state a claim for retaliation because he was disciplined for conduct he was not entitled to perform).

And to the extent Harrell alleged that Closs issued the CVR because Closs *anticipated* Harrell would file a grievance against him, we are not aware of any binding or persuasive authority stating that *having a reputation for* filing grievances is a constitutionally protected activity.⁵ Therefore, the district court properly dismissed Harrell’s retaliation claims.

D.

Defendants asserted qualified immunity on the individual-capacity § 1983 claims. Harrell therefore bore “a heavy two-part burden” to show that Defendants’ “actions violated a constitutional or statutory right” and “that the right was clearly established at the time of the conduct at issue.” *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014) (internal quotation marks omitted). The district court concluded Harrell failed to establish either prong. Because we have affirmed the determination that Harrell failed to plausibly plead the violation of a constitutional right, he cannot establish the first prong. We therefore need not consider whether the law was clearly established. Thus, we affirm the district court’s award of qualified immunity on Harrell’s individual-capacity § 1983 claims.

E.

After granting Defendants’ motion to dismiss, the district court entered final judgment, dismissing all claims without prejudice. Harrell later moved to amend his

⁵ “The filing of prison grievances is constitutionally protected activity.” *Requena*, 893 F.3d at 1211. But Harrell did not allege that Closs retaliated against him for filing a grievance.

complaint, and the district court denied the motion as procedurally improper because it had already entered judgment and had not set aside or vacated judgment. Harrell asserts the district court wrongly denied his motion to amend.

We review the denial of a motion to amend for abuse of discretion, reversing only if the denial “was arbitrary, capricious, whimsical, or manifestly unreasonable.” *Serna v. Denver Police Dep’t*, 58 F.4th 1167, 1172 (10th Cir. 2023) (internal quotation marks omitted).

Generally, leave to amend should be freely given when justice so requires. Fed. R. Civ. P. 15(a)(2). But “once judgment is entered, the filing of an amended complaint is not permissible until judgment is set aside or vacated pursuant to Fed. R. Civ. P. 59(e) or 60(b).” *The Tool Box, Inc. v. Ogden City Corp.*, 419 F.3d 1084, 1087 (10th Cir. 2005) (brackets and internal quotation marks omitted). And “[c]ourts have refused to allow a postjudgment amendment when . . . the moving party had an opportunity to seek the amendment before entry of judgment but waited until after judgment before requesting leave.” *Id.* at 1088.

Harrell does not argue that he was unable to amend his complaint before the district court entered judgment and, although he represents himself, we cannot craft an argument for him. *See Hall*, 935 F.2d at 1110. Thus, the district court did not abuse its discretion when it denied Harrell’s post-judgment motion to amend.

III. CONCLUSION

We affirm the district court's judgment. We grant Harrell's motion to proceed on appeal IFP without prepayment of costs and fees. He must continue making partial payments until his entire fee is paid.

Entered for the Court

Carolyn B. McHugh
Circuit Judge