

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Francis William Allison v. Derek Burnette, et al.

Allison v. Burnette · No. CV-25-00653-PHX-JAT (MTM) · Decided April 10, 2026

SUMMARY

The United States District Court for the District of Arizona dismissed Francis William Allison’s First Amended Complaint under 28 U.S.C. § 1915A(b)(1) for failure to state a claim. The court held that the allegations concerning delayed hernia treatment and injuries during surgery suggested, at most, negligence or medical malpractice rather than deliberate indifference, and dismissed the action without leave to amend. The dismissal may count as a strike under 28 U.S.C. § 1915(g), although the court found that an appeal could be taken in forma pauperis.

OPINION

1 KM 2 WO 3 4 5 6 IN THE UNITED STATES DISTRICT COURT 7 FOR THE DISTRICT OF ARIZONA 8 9 Francis William Allison, No. CV-25-00653-PHX-JAT (MTM) 10 Plaintiff, 11 v. ORDER 12 Derek Burnette, et al., 13 Defendants. 14 15 Self-represented Plaintiff Francis William Allison, who is confined in the Red Rock 16 Correctional Center and proceeding in forma pauperis, filed a civil rights Complaint 17 pursuant to 42 U.S.C. § 1983.

The Court dismissed the Complaint with leave to amend. 18 Pending before the Court is Plaintiff’s First Amended Complaint (Doc. 11). The Court 19 will dismiss the First Amended Complaint and this action. 20 I. Statutory Screening of Prisoner Complaints 21 The Court is required to screen complaints brought by prisoners seeking relief 22 against a governmental entity or an officer or an employee of a governmental entity.

28 23 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff 24 has raised claims that are legally frivolous or malicious, fail to state a claim upon which 25 relief may be granted, or seek monetary relief from a defendant who is immune from such 26 relief. 28 U.S.C. § 1915A(b)(1)–(2). 27 A pleading must contain a “short and plain statement of the claim showing that the 28 pleader is entitled to relief.” Fed.

R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does 1 not demand detailed factual allegations, “it demands more than an unadorned, the- 2 defendant-unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 556 U.S. 662, 678 3 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere 4 conclusory statements, do not suffice.” Id. 5 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a 6 claim to relief that is plausible on its face.’” Id. (quoting Bell Atlantic Corp. v. Twombly, 7 550 U.S. 544, 570 (2007)).

A claim is plausible “when the plaintiff pleads factual content 8 that allows the court to draw the reasonable inference that the defendant is liable for the 9 misconduct alleged.” Id. “Determining whether a complaint states a plausible claim for 10 relief [is]... a context-specific task that requires the reviewing court to draw on its judicial 11 experience and common sense.” Id. at 679.

Thus, although a plaintiff’s specific factual 12 allegations may be consistent with a constitutional claim, a court must assess whether there 13 are other “more likely explanations” for a defendant’s conduct. Id. at 681. 14 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts 15 must “continue to construe [self-represented litigant’s] filings liberally.” *Hebbe v. Pliler*, 16 627 F.3d 338, 342 (9th Cir.

2010). A “complaint [filed by a self-represented prisoner] 17 ‘must be held to less stringent standards than formal pleadings drafted by lawyers.’” Id. 18 (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)). 19 II.

First Amended Complaint 20 In his two-count First Amended Complaint, Plaintiff sues CoreCivic medical 21 provider Dr. Derek Burnette and Mercy Gilbert Hospital surgeon Dr. Ju. Plaintiff seeks 22 monetary damages. 23 In Count One, Plaintiff claims Defendant Burnette violated his Eighth and 24 Fourteenth Amendment rights by failing to provide Plaintiff with adequate medical care.

25 Plaintiff alleges that on May 2, 2020, Defendant Burnette conducted Plaintiff’s initial 26 health check for admission at Red Rock Correctional Center. Defendant Burnette read 27 Plaintiff’s medical file and noted Plaintiff had a large testicular hernia, approximately the 28 size of a grapefruit, that had ruptured two years previously and was progressing.

The hernia 1 affected Plaintiff’s “bodily functions such as bladder, urination, digesti[on], defecating, 2 and [caused] gas problems.” Defendant Burnette told Plaintiff he would recommend 3 Plaintiff for surgery and that Plaintiff would see a surgeon “soon.” Plaintiff alleges 4 Defendant Burnette “did not take action,” and failed to submit the surgery request “for 5 consideration for approval or denial in a timely manner.” Plaintiff waited four years and 6 six months for surgery.

Because of the delay, Plaintiff had to have four surgeries “and one 7 [is] still pending.” Plaintiff asserts Defendant Burnette’s inaction constituted deliberate 8 indifference to Plaintiff’s serious medical condition and caused Plaintiff “great pain and 9 suffering [because] it’s been over 4.6 years [since] his inaction from 2020.” 10 In Count Two, Plaintiff alleges Defendant Ju violated his Fourteenth Amendment 11 rights.

Plaintiff contends that on March 2, 2023, Defendant Ju performed Plaintiff’s hernia 12 repair surgery at Mercy Gilbert hospital. During the surgery, Defendant Ju discovered an 13 umbilical hernia and a “lower GI trac[t] stomach section rupture.” Defendant Ju placed 14 Plaintiff on his side in order perform the additional surgical repairs, but did not secure 15 Plaintiff to the operating table.

As a result, Plaintiff slipped off the table; his umbilical 16 incision burst open and his stomach and intestines fell on the floor, causing Plaintiff to 17 contract sepsis; and Plaintiff suffered a “lower back disc fracture.” Plaintiff spent 18 days 18 hospitalized in the intensive care unit as a result of his injuries. 19 III. Failure to State a Claim 20 To state a § 1983 medical claim, a plaintiff must show (1) a “serious medical need” 21 by demonstrating that failure to treat the condition could result in further significant injury 22 or the unnecessary and wanton infliction of pain and (2) the defendant’s response was 23 deliberately indifferent.

Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006). 24 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d 25 1051, 1060 (9th Cir. 2004). To act with deliberate indifference, a prison official must both 26 know of and disregard an excessive risk to inmate health; “the official must both be aware 27 of facts from which the inference could be drawn that a substantial risk of serious harm 28 exists, and he must also draw the inference.” Farmer v. Brennan, 511 U.S. 825, 837 (1994).

1 Deliberate indifference in the medical context may be shown by a purposeful act or failure 2 to respond to a prisoner’s pain or possible medical need and harm caused by the 3 indifference. Jett, 439 F.3d at 1096. Deliberate indifference may also be shown when a 4 prison official intentionally denies, delays, or interferes with medical treatment or by the 5 way prison doctors respond to the prisoner’s medical needs.

Estelle v. Gamble, 429 U.S. 6 97, 104-05 (1976); Jett, 439 F.3d at 1096. 7 Deliberate indifference is a higher standard than negligence or lack of ordinary due 8 care for the prisoner’s safety. Farmer, 511 U.S. at 835. “Neither negligence nor gross 9 negligence will constitute deliberate indifference.” Clement v. Cal. Dep’t of Corr., 220 F. 10 Supp. 2d 1098, 1105 (N.D.

Cal. 2002); see also Broughton v. Cutter Labs., 622 F.2d 458, 11 460 (9th Cir. 1980) (mere claims of “indifference,” “negligence,” or “medical malpractice” 12 do not support a claim under § 1983). “A difference of opinion does not amount to 13 deliberate indifference to [a plaintiff’s] serious medical needs.” Sanchez v. Vild, 891 F.2d 14 240, 242 (9th Cir. 1989).

A mere delay in medical care, without more, is insufficient to 15 state a claim against prison officials for deliberate indifference. See Shapley v. Nev. Bd. of 16 State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985).

The indifference must be 17 substantial. The action must rise to a level of “unnecessary and wanton infliction of pain.” 18 Estelle, 429 U.S. at 105. 19 A. Count One 20 In Count One, Plaintiff alleges Defendant Burnette was deliberately indifferent to 21 Plaintiff’s serious medical needs by failing to timely schedule Plaintiff’s hernia surgical 22 consultation for more than four years.

These allegations are insufficient to state a claim 23 because Plaintiff's facts suggest, at most, that Defendant Burnette may have been negligent 24 in failing to schedule the outside surgical consultation. Plaintiff does not allege whether 25 or what medical treatment he received in the intervening four years or whether, during that 26 time, he followed-up with Defendant Burnette regarding the status of the consultation or 27 requested that Defendant Burnette schedule the consultation.

Plaintiff has therefore failed 28 to state a claim in Count One. 1 B. Count Two 2 In Count Two, Plaintiff alleges he was injured when, during the hernia repair 3 surgery, Defendant Ju failed to secure Plaintiff to the operating table and Plaintiff slid from 4 the table to the floor, resulting in Plaintiff suffering an infection and injuries to his back. 5 Plaintiff's allegations, while serious, are not sufficient to state a deliberate indifference 6 claim.

Plaintiff's allegations suggest, at most, that Defendant Ju was negligent or may have 7 committed medical malpractice. However, negligence and medical malpractice do not 8 constitute deliberate indifference. See *Broughton*, 622 F.2d at 460 (mere claims of 9 "indifference," "negligence," or "medical malpractice" do not support a claim under 10 § 1983). Plaintiff has therefore failed to state a claim in Count Two.

11 IV. Dismissal without Leave to Amend 12 Because Plaintiff has failed to state a claim in his First Amended Complaint, the 13 Court will dismiss his First Amended Complaint. Federal Rule of Civil Procedure 15(a) 14 provides that leave to amend should be freely granted "when justice so requires." Fed. R. 15 Civ. P. 15(a). "The court considers five factors in assessing the propriety of leave to 16 amend—bad faith, undue delay, prejudice to the opposing party, futility of amendment, 17 and whether the plaintiff has previously amended the complaint." *United States v. 18 Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir.

2011) (citing *Johnson v. Buckley*, 356 19 F.3d 1067, 1077 (9th Cir. 2004)). The Ninth Circuit in *Corinthian Colleges* explained that 20 leave to amend is not warranted unless the deficiencies "can be cured with additional 21 allegations that are 'consistent with the challenged pleading' and that do not contradict the 22 allegations in the original complaint," 655 F.3d at 955 (quoting *Reddy v. Litton Indus., Inc.*, 23 912 F.2d 291, 296–97 (9th Cir.

1990)). In addition, "[l]eave to amend may be denied when 24 a plaintiff has demonstrated a 'repeated failure to cure deficiencies by amendments 25 previously allowed.'" *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1183 26 (9th Cir. 2016) (quoting *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th 27 Cir. 2003)) (emphasis added); *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir.

28 2004) (a district court's discretion to deny leave to amend is "particularly broad" where the 1 | plaintiff has previously amended his complaint) (quoting *Chodos v. W. Publ'g Co.*, 292 2) F.3d

992, 1003 (9th Cir. 2002)). 3 The Court notified Plaintiff of the deficiencies of the claims he raised in the original Complaint. See *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir.

2012) (noting that a pro se 5 | plaintiff is generally entitled to notice of the deficiencies of his claims and an opportunity to amend). Plaintiff has had an opportunity to amend his claims but has alleged essentially the same facts as alleged in his original Complaint.

The Court finds that further 8 | opportunities to amend would be futile. Therefore, the Court, in its discretion, will dismiss Plaintiffs First Amended Complaint without leave to amend. 10| ITIS ORDERED: 11 (1) The First Amended Complaint (Doc. 11) is dismissed for failure to state a 12 | claim pursuant to 28 U.S.C. § 1915A(b)(1), and the Clerk of Court must enter judgment 13 | accordingly.

14 (2) The Clerk of Court must make an entry on the docket stating that the 15 | dismissal for failure to state a claim may count as a “strike” under 28 U.S.C. § 1915(g). 16 (3) The docket shall reflect that the Court, pursuant to 28 U.S.C. § 1915(a)(3) 17) and Federal Rules of Appellate Procedure 24(a)(3)(A), has considered whether an appeal 18 | of this decision would be taken in good faith and finds Plaintiff may appeal in forma 19 | pauperis.

20 Dated this 9th day of April, 2026. 21 23 24 _ James A. Teil Org Senior United States District Judge 25 26 27 28