APS-34

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 03-2200

JEFFERY DORSEY,

Appellant

v.

O'CONNER;
LINDA J. NAUROTH;
NEIL HEFFERMAN;
UNIDENTIFIED MS. NURSE;
ROBERT D. SHANNON;
JOSEPH W. CHESNEY

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 02-cv-00016)
District Judge: Honorable James M. Munley

Submitted For Possible Dismissal Under 28 U.S.C. § 1915(e)(2)(B)
October 30, 2003

Before: SLOVITER, ROTH and AMBRO, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted for possible dismissal under 28 U.S.C. §1915(e)(2)(B). On consideration whereof, it is now here

ORDERED AND ADJUDGED by this court that the appeal is dismissed under 28 U.S.C. §1915(e)(2)(B). All of the above in accordance with the opinion of this Court.

ATTEST:

Maxine N. Walker
Clerk

DATED: November 19, 2003

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UNREPORTED–NOT PRECEDENTIAL

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(Filed November 19, 2003)

OPINION

PER CURIAM

Jeffery Dorsey, pro se, appeals an order of the United States District Court for the Middle District of Pennsylvania dismissing his Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Dorsey filed a civil rights action pursuant to 42 U.S.C. § 1983 for alleged deliberate indifference to his medical needs, as well as violation of rights under the Americans with Disabilities Act ("ADA") based on the same underlying events and the defendants' failure to accommodate Dorsey's alleged disability by not allowing him to change to "lower bunk" status or a single-inmate cell.

Dorsey is a prisoner at S.C.I. Frackville. He has a foot condition, which he describes as "bad feet," that apparently is painful. Dorsey used to be housed at S.C.I. Graterford, where he had regular access to a podiatrist. The podiatrist at Graterford regularly performed debridement treatment on Dorsey's feet.

Dorsey was transferred to Frackville in July, 1996. Although he was initially treated by a podiatrist at Frackville, the podiatrist's visits ended shortly after Dorsey arrived there. Dorsey's debridement therapy has since been performed by prison medical staff. Dorsey complains that the therapy, as performed by physician's assistants and nurses on the prison medical staff, is more painful than it was at Graterford and is inadequately performed. Dorsey also claims that his assigned "top bunk" status aggravates his condition because he has to jump out of bed every day.

In 1999, Dorsey filed a complaint pursuant to 42 U.S.C. § 1983 in which he

alleged deliberate indifference to his medical needs. See E.D. Pa. Civ. No. 99-cv-0445. In that complaint, Dorsey named as defendants the Medical Department at Frackville, Physician's Assistant Michael E. Sims, Doctor O'Conner,[1] Physician's Assistant Neil Hefferman, Physician's Assistant Ms. Rita, Health Care Administrator Linda Nauroth, Superintendent Joseph Chesney and Deputy Superintendent Robert Shannon.[2] The events about which he complained in 99-cv-0445 occurred from 1996 to 1999, and included instances of alleged insufficient and painful debridement treatment. The District Court dismissed that complaint as legally frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i). Dorsey's appeal of that dismissal was dismissed for failure to prosecute.

In 2002, Dorsey filed another complaint pursuant to § 1983 in which he again claimed deliberate indifference to his medical needs because of allegedly insufficient debridement treatment by medical personnel at Frackville. In the 2002 Complaint, the defendants are O'Conner, Nauroth, Shannon, Chesney and an unidentified nurse. This Complaint details the same events as were described in the 1999 Complaint, again spanning the period from 1996 to 1999.

The only way in which the 2002 Complaint differs from the 1999 Complaint

[1] It appears from motions submitted by the party that the proper spelling is O'Connor. For purposes of consistency with the caption, we will use O'Conner.

[2] Defendants Chesney and Shannon were not listed in the caption of Dorsey's 1999 Complaint. The District Court determined, based on the substance of the Complaint, that Dorsey meant to name them as defendants.

appears to be the inclusion of a claim under the ADA. Dorsey claims that the defendants have failed to accommodate his disability by not permitting him "lower bunk" status.

In the 2002 Complaint Dorsey acknowledges that his appeal in this Court from the dismissal of the 1999 Complaint was denied for failure to prosecute in a timely manner. He explains that the 2002 Complaint is a "relitigate [C]omplaint." He states that he may not have litigated the 1999 Complaint properly. He claims, however, that there is a continuing course of conduct and that the ADA claim is a new claim deserving of review.

The 2002 Complaint was transferred to the United States District Court for the Middle District of Pennsylvania. There, Dorsey was granted permission to proceed in forma pauperis. The defendants moved to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Their motions were based on, inter alia, principles of issue preclusion and claim preclusion. The District Court dismissed Dorsey's Complaint pursuant to Rule 12(b)(6) on the basis that Dorsey failed to state a claim because his § 1983 claim was barred by issue preclusion, and his ADA claim was barred by claim preclusion. Dorsey timely appealed and has been granted in forma pauperis status. He has filed a motion to stay his appeal and a motion for appointment of counsel.

Collateral estoppel, or issue preclusion, refers to the legal concept that an issue actually decided in an earlier case cannot be raised again. See In re Continental Airlines, Inc., 279 F.3d 226, 232-33 (3d Cir. 2002). Dorsey's deliberate indifference claims in the

2002 Complaint are nearly identical to those in the 1999 Complaint. The same defendants are named.[3] He cites the same conduct as well as the same time periods. Moreover, his own comments about his failed appeal and interest in relitigating his claims properly make it clear that Dorsey seeks to put the same claims before the court. The District Court is, therefore, clearly correct that Dorsey's deliberate indifference claim is barred by issue preclusion. See Henglein v. Colt Indus. Operating Corp., 260 F.3d 201, 209 (3d Cir. 2001); Cieszkowska v. Gray Line N.Y., 295 F.3d 204, 205-06 (2d Cir. 2002).

It is not clear whether claim preclusion applies where the litigant proceeded pro se and had his or her case dismissed pursuant to § 1915(e) in the initial litigation. We need not address that issue as it pertains to Dorsey's ADA claim, however, because the claim is clearly time barred. See Soignier v. American Bd. of Plastic Surgery, 92 F.3d 547, 550-51 (7th Cir. 1996); see also Lake v. Arnold, 232 F.3d 360, 368 (3d Cir. 2000).

This Court is required to dismiss an in forma pauperis appeal if it is "frivolous." See 28 U.S.C. § 1915(e)(2)(B)(i). An appeal is frivolous where none of its points is arguable on its merits. See Neitzke v. Williams, 490 U.S. 319, 325 (1989). Because the District Court was clearly correct in its determination that Dorsey's Eighth Amendment claims are barred by principles of collateral estoppel, and his ADA claim is clearly time-barred, Dorsey has no arguable legal basis upon which to appeal the District Court's

[3] There are some who were named in the first action that are not named in the second action. There is no one who is named in the second action who was not named in the first, with the exception of an unidentified nurse who appears never to have been identified.

order. His appeal is, therefore, frivolous and will be dismissed pursuant to § 1915(e)(2)(B).