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(Table, Text in WESTLAW), Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION. (The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA 10 Rule 32.1 before citing.)

United States Court of Appeals, Tenth Circuit.

Larry Jerome MOORE, Plaintiff-Appellant,  
v.

PRISON HEALTH SERVICES, INC., a Delaware Corporation; Sharon L. Baucom; Marvin Mettscher; Louisa Osborne; Raymond Roberts; Nadine Belk; Robert Hannigan; Steve Dechant; Dale Sturgeon; Robert Dale; Elizabeth Long, in their official and individual capacities, Defendants-Appellees.

No. 98-3310.

Dec. 1, 1999.

Before BALDOCK, BARRETT, and McKAY, Circuit Judges.

#### ORDER AND JUDGMENT <sup>FN\*</sup>

FN\* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R. 36.3.BARRETT.

\*1 After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist 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.

Plaintiff, a state prisoner with an above-the-knee amputation of his left leg, brought this action under 42 U.S.C. § 1983, 42 U.S.C. § 12132 (Americans

with Disabilities Act, or ADA), 29 U.S.C. § 794 (Rehabilitation Act), and state tort law, to redress allegations of mistreatment in connection with his disability. The district court entered summary judgment in favor of defendants on the federal claims and dismissed the state claims without prejudice. See *Moore v. Prison Health Servs., Inc.*, 24 F.Supp.2d 1164 (D.Kan.1998). Plaintiff now appeals, challenging the grant of summary judgment. On de novo review, see *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1159 (10th Cir.1999), we affirm the district court for substantially the reasons stated in its memorandum and order.

The pertinent facts are set out in the district court's decision and need not be recited in detail. Plaintiff asserts that defendants violated his rights when a wheelchair provided for his use fell over or collapsed three days after it was issued to him. With respect to the statutory disability claims, the district court held plaintiff's complaints of inadequate treatment did not fall within the scope of the anti-discrimination provisions of the ADA and Rehabilitation Act. We agree. These statutes afford disabled persons legal rights regarding access to programs and activities enjoyed by all, not a general federal cause of action for challenging the medical treatment of their underlying disabilities. See *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir.1996) (ADA); *Grzan v. Charter Hosp. of N.W. Ind.*, 104 F.3d 116, 122-23 (7th Cir.1997) (Rehabilitation Act); *United States v. University Hosp.*, 729 F.2d 144, 156-60 (2d Cir.1984) (same); cf. *McNally v. Prison Health Servs.*, 46 F.Supp.2d 49, 58 (D.Me.1999) (applying distinction "between [non-actionable] claims that the medical treatment received for a disability was inadequate from [actionable] claims that a prisoner has been denied access to services or programs because he is disabled," and upholding, as example of latter, HIV patient's claim of discriminatory denial of prescription services provided to general population).

Plaintiff's broad reliance on *Gorman v. Bartch*, 152

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F.3d 907 (8th Cir.1998), which concluded that the ADA and Rehabilitation Act applied to a wheelchair-bound arrestee injured in an ill-equipped police van, is misplaced. The court was able to reach that conclusion only by first holding that "[a]rrestee transportation is a program or service" within the meaning of the disability statutes. *Id.* at 913. Whether or not we agree in principle with that holding, plaintiff has not identified any comparable program or service from which he was barred at the prison to satisfy the same statutory condition here.

\*2 Turning to plaintiff's constitutional claim, the district court properly invoked the "deliberate indifference" standard of *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), which "has two components: an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind." *Mitchell v. Maynard*, 80 F.3d 1433, 1444 (10th Cir.1996) (quotation omitted). The objective component requires an "extreme deprivation" denying a "minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation." *Hudson v. McMillian*, 503 U.S. 1, 9, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992) (quotations omitted). The test for the subjective component is whether "the official knows of and disregards an excessive risk to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

Viewed in a light most favorable to plaintiff, the record shows in pertinent part: on June 17, 1993, plaintiff was given a used wheelchair which, despite a bent left wheel, he acknowledged to be in good working condition; over the next three days, the defect in the wheel became more pronounced, making the chair harder to roll, a complaint plaintiff voiced to a few inmates and prison officers but not to any medical personnel; on June 20, the wheelchair collapsed or fell over, bruising plaintiff's hand and arm; he was promptly treated

and issued a newer wheelchair, which had been kept in reserve for emergency medical response. These facts do not support a triable claim under the constitutional standards set out above. It is doubtful that plaintiff's isolated fall and minor resultant injury constituted the extreme deprivation required by *Hudson*, but, in any event, there is no evidence that prison officials knew of and disregarded an excessive risk that such an accident would occur, as required by *Farmer*. Some inmates and officers were told the wheelchair was becoming more difficult to roll, but the record contains no mention of a risk of collapse or fall in this regard. As for the rolling difficulty itself, the relatively short period of inconvenience or discomfort involved clearly does not raise a claim of constitutional deprivation under *Hudson*. See also *Whitnack v. Douglas County*, 16 F.3d 954, 958 (8th Cir.1994) (collecting cases from this and other circuits reflecting significance of duration in Eighth Amendment analysis).

The judgment of the United States District Court for the District of Kansas is AFFIRMED.

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This case was not selected for publication in the Federal Reporter. Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)

United States Court of Appeals, Tenth Circuit.

Bilal RASHAD, Plaintiff-Appellant,

v.

Pete DOUGHTY, Medical Services Administrator, Oklahoma Department of Corrections; Judy Owens, Administrator, Medical Services, Lexington Correctional Complex, Defendants-Appellees.

No. 00-6088.

Jan. 29, 2001.

Prisoner brought action against two corrections officials, alleging that the Oklahoma Department of Corrections failed to provide adequate treatment of his post-traumatic stress disorder. The United States District Court dismissed complaint, and prisoner appealed. The Court of Appeals, Henry, Circuit Judge, held that: (1) prisoner failed to state an ADA claim, absent allegations that corrections officials discriminated against him on the basis of his disorder, and (2) prison officials' failure to provide prisoner with treatment at the facility of his choice was insufficient to state an Eighth Amendment claim.

Affirmed.

#### West Headnotes

### [1] Civil Rights 78 ⚡ 1091

#### 78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General

78k1089 Prisons

78k1091 k. Medical Care and Treatment.

Most Cited Cases

(Formerly 78k135)

While state prisons are "public entities" covered by the Americans with Disabilities Act (ADA), the failure to provide medical treatment to a disabled prisoner, while perhaps raising Eighth Amendment concerns in certain circumstances, does not constitute an ADA violation. U.S.C.A. Const. Amend. 8; Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

### [2] Civil Rights 78 ⚡ 1091

#### 78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General

78k1089 Prisons

78k1091 k. Medical Care and Treatment.

Most Cited Cases

(Formerly 78k135)

Prisoner's allegations of inadequate treatment of his post-traumatic stress disorder failed to state an Americans with Disabilities Act (ADA) claim, absent additional allegation that corrections officials discriminated against him on the basis of that disorder. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

### [3] Prisons 310 ⚡ 17(2)

#### 310 Prisons

310k17 Maintenance and Care of Prisoners

310k17(2) k. Medical and Mental Care. Most Cited Cases

### Sentencing and Punishment 350H ⚡ 1547

#### 350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(H) Conditions of Confinement

350Hk1547 k. Psychological and Psychiatric Treatment. Most Cited Cases

Prison officials' failure to provide prisoner with treatment for his post-traumatic stress disorder at the facility of his choice was insufficient to state an Eighth Amendment claim; although prisoner al-

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leged that prison officials refused to grant his request for treatment at a Veterans Administration facility, he acknowledged that mental health professionals were available to provide him with treatment within the Department of Corrections. U.S.C.A. Const.Amend. 8.

#### **[4] Sentencing and Punishment 350H ⚡1546**

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(H) Conditions of Confinement

350Hk1546 k. Medical Care and Treatment. Most Cited Cases

The Eighth Amendment protects prisoners from officials' deliberate indifference to serious medical needs. U.S.C.A. Const.Amend. 8.

#### **[5] Sentencing and Punishment 350H ⚡1532**

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(H) Conditions of Confinement

350Hk1532 k. In General. Most Cited Cases  
Eighth Amendment claims asserted against prison officials have two elements: an objective component requiring that the pain or deprivation be sufficiently serious, and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind. U.S.C.A. Const.Amend. 8.

#### **[6] Sentencing and Punishment 350H ⚡1532**

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(H) Conditions of Confinement

350Hk1532 k. In General. Most Cited Cases  
The objective component of an Eighth Amendment claim against prison officials requires an "extreme deprivation" denying a minimal civilized measure

of life's necessities. U.S.C.A. Const.Amend. 8.

#### **[7] Sentencing and Punishment 350H ⚡1533**

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(H) Conditions of Confinement

350Hk1533 k. Deliberate Indifference in General. Most Cited Cases

To be held liable for an Eighth Amendment violation, a prison official must act with deliberate indifference to the prisoner's health or safety. U.S.C.A. Const.Amend. 8.

#### **[8] Federal Civil Procedure 170A ⚡1838**

170A Federal Civil Procedure

170AXI Dismissal

170AXI(B) Involuntary Dismissal

170AXI(B)5 Proceedings

170Ak1837 Effect

170Ak1838 k. Pleading Over. Most Cited Cases

Absent any indication that further proceedings would have revealed valid claims against prison officials for failing to provide adequate treatment of prisoner's post-traumatic stress disorder, prisoner was not entitled to amend his pro se complaint.

#### **[9] Federal Civil Procedure 170A ⚡1269.1**

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(A) In General

170Ak1269 Grounds and Objections

170Ak1269.1 k. In General. Most Cited Cases

#### **Federal Civil Procedure 170A ⚡1838**

170A Federal Civil Procedure

170AXI Dismissal

170AXI(B) Involuntary Dismissal

170AXI(B)5 Proceedings

170Ak1837 Effect

170Ak1838 k. Pleading Over. Most

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## Cited Cases

Although the Court of Appeals construes pro se pleadings liberally, it need not allow the amendment of pleadings and the conducting of discovery when the plaintiff has failed to assert specific facts to support his claims.

\*560 Before BALDOCK, HENRY, and LUCERO, Circuit Judges.<sup>FN\*</sup>

FN\* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a)(2); 10th Cir.R. 34.1(G). Therefore, appellant's request for oral argument is denied, and the case is ordered submitted without oral argument.

ORDER AND JUDGMENT <sup>FN\*\*</sup>

FN\*\* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R. 36.3.HENRY, Circuit Judge.

\*\*1 Bilal Rashad, a prisoner in the custody of the Oklahoma Department of Corrections, filed this pro se action against two corrections officials, alleging that the Department failed to provide adequate treatment of his post-traumatic stress disorder. According to Mr. Rashad, this failure to provide treatment violated the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 and the Eighth Amendment. He sought an injunction directing the defendants to provide the requested treatment.

In a thorough and well-reasoned report and recommendation, the magistrate judge concluded that Mr. Rashad's complaint failed to state a claim upon

which relief could be granted. He further recommended that the dismissal count as a "prior occasion" under 28 U.S.C. § 1915(g). The district court agreed and dismissed Mr. Rashad's complaint. Upon de novo review, see *Perkins v. Kansas Dep't of Corrections*, 165 F.3d 803, 806 (10th Cir.1999), we agree with the magistrate judge and the district court.

[1] With regard to Mr. Rashad's ADA claim, it is clear that prisons are "public entities" covered by Title II of the ADA. See *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 209, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998). However, contrary to Mr. Rashad's assertions, the failure to provide medical treatment to a disabled prisoner, while perhaps raising Eighth Amendment concerns in certain circumstances, does not constitute an ADA violation. See *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir.1996) (concluding that the ADA "would not be violated by a prison's simply failing to attend to the medical needs of its disabled prisoners" and that the statute "does not create a remedy for medical malpractice"); *McNally v. Prison Health Servs.*, 46 F.Supp.2d 49, 58 (D.Me.1999) (distinguishing between "claims that the medical treatment received for a disability was inadequate from claims that a prisoner has been denied access to services or programs because he is disabled," and concluding that only the latter class of claims states an ADA violation). In contrast, the allegation that a disabled prisoner has been denied services that have been provided to other prisoners may state an ADA claim. See, e.g., *McNally*, 46 F.Supp.2d at 58 (concluding that an HIV patient's claim of discriminatory denial of prescription services provided to general prison population would state an ADA claim).

[2] Here, as the magistrate judge noted, Mr. Rashad's complaint alleges inadequate treatment of his post-traumatic stress disorder but does not allege that the defendant corrections officials discriminated against him on the basis of that disorder. We therefore agree that Mr. Rashad has failed to

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state an ADA claim.

[3][4][5][6][7] As to Mr. Rashad's second claim, the magistrate judge properly noted that \*561 the Eighth Amendment protects prisoners from officials' deliberate indifference to serious medical needs. See *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Eighth Amendment claims have two elements: "an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind." *Mitchell v. Maynard*, 80 F.3d 1433, 1444 (10th Cir.1996) (internal quotation marks omitted). The objective component requires an "extreme deprivation" denying a "minimal civilized measure of life's necessities." *Hudson v. McMillian*, 503 U.S. 1, 9, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992) (internal quotation marks omitted). As to the subjective component, in order to be held liable, the defendant official must act with deliberate indifference to the prisoner's health or safety. See *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

\*\*2 " 'A complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment.' " *Green v. Branson*, 108 F.3d 1296, 1303 (10th Cir.1997) (quoting *Estelle*, 429 U.S. at 106, 97 S.Ct. 285). However, delays in providing treatment may violate the Eighth Amendment- " 'if there has been deliberate indifference which results in substantial harm.' " *Olson v. Stotts*, 9 F.3d 1475, 1477 (10th Cir.1993) (quoting *Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir.1993)). "Delays in providing medical care that courts have found to violate the Eighth Amendment have frequently involved life-threatening situations and instances in which it is apparent that delay would exacerbate the prisoner's medical problems." *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir.1999).

We agree with the magistrate judge's assessment of Mr. Rashad's Eighth Amendment claim. Although

he alleges that prison officials refused to grant his request for treatment at a Veterans Administration facility, Mr. Rashad acknowledges that mental health professionals are available to provide him with treatment within the Department of Corrections. The fact that Mr. Rashad has not been provided with treatment at the facility of his choice is insufficient to state an Eighth Amendment claim.

[8][9] In his appellate brief, Mr. Rashad contends that the magistrate judge and the district court erred in failing to allow him to amend his complaint and to conduct additional discovery. Although we construe pro se pleadings liberally, see *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir.1991), we need not allow the amendment of pleadings and the conducting of discovery when the plaintiff has failed to assert specific facts to support his claims. See *Northington v. Jackson*, 973 F.2d 1518, 1520-21 (10th Cir.1992). Here, there is no indication that further proceedings would reveal valid claims against the defendants.

### III. CONCLUSION

Accordingly, we AFFIRM the district court's dismissal of Mr. Rashad's complaint. The district court's dismissal counts as a "prior occasion" for the counting purposes of 28 U.S.C. § 1915(g). See *Jennings v. Natrona County Detention Center Medical Facility*, 175 F.3d 775, 780 (10th Cir.1999).

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