

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted June 15, 2023*

Decided June 22, 2023

Before

DIANE S. SYKES, *Chief Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 22-2989

TY'SHAWN KAVIONTAE GILMORE,
Plaintiff-Appellant,

Appeal from the United States District
Court for the Eastern District of Wisconsin.

v.

No. 22-C-30

BRIAN ANDERSON, et al.,
Defendants-Appellees.

William C. Griesbach,
Judge.

ORDER

Ty'Shawn Gilmore appeals the denial of multiple motions for leave to amend his complaint about the conditions of confinement at the Milwaukee County Jail. The district judge concluded that Gilmore's complaint under 42 U.S.C. § 1983, which alleged that jail officials violated his constitutional rights by keeping him in his cell for more than 40 hours at a time on several occasions, did not state a claim. The judge then determined that Gilmore's proposed amendments would be futile. We affirm.

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

Because the district judge dismissed the case at the pleading stage, we accept Gilmore's factual allegations as true, drawing reasonable inferences in his favor. *See Peterson v. Wexford Health Sources, Inc.*, 986 F.3d 746, 749 n.1, 751 (7th Cir. 2021). Four times in 2021, Gilmore was locked in his jail cell for over 40 hours without recreation time: 42.5 hours starting September 29; 40 hours starting October 9; 42.5 hours starting October 13; and 43.5 hours starting October 15. These extended periods of lockup—which were not imposed for disciplinary reasons or because of extraordinary circumstances—caused him physical discomfort, anxiety, and mental trauma.

In January 2022, Gilmore sued the jail, asserting that it was unconstitutional to keep him in his cell without releasing him for at least 1 hour of recreational time every 24 hours. The magistrate judge dismissed the complaint without prejudice at screening, *see* 28 U.S.C. § 1915A, because the jail was not a proper defendant; it is neither a “person” under § 1983 nor an entity that can be sued separately from Milwaukee County. *See Smith v. Knox Cnty. Jail*, 666 F.3d 1037, 1040 (7th Cir. 2012).

A few days later, Gilmore amended his complaint, identifying four correctional officers (two by name and two John Does) as defendants. This time, the magistrate judge determined that Gilmore stated a conditions-of-confinement claim sufficient to survive screening, and the case went to the district judge. The defendants moved to dismiss the amended complaint, partly on the ground that Gilmore did not allege that they were personally involved in keeping him from recreation time outside his cell.

Before the judge ruled on the defendants' motion, Gilmore moved for leave to amend his complaint in three ways. First, he sought to “drop[]” the individual defendants and sue just Milwaukee County because, according to Gilmore, the officers did not control when he could leave his cell, but Milwaukee County caused his rights to be violated through its policies, customs, and failure to train its employees. Second, Gilmore alleged that, two more times since his original filing, he had been kept in his cell for over 24 hours: 46 hours starting June 5, 2022, and 48 hours starting July 14, 2022. Third, Gilmore asserted that facility-wide lockdowns had caused each of the six extended lockups. His proposed second amended complaint reflected these changes.

The judge then granted the motion to dismiss the first amended complaint. He explained that the request to drop the defendants named in that pleading “moots the defendants' motion to dismiss and ends the case unless the Court grants his motion for leave to file a second amended complaint.” The judge then concluded that further amendment would be futile because the proposed second amended complaint did not

state a claim. First, the lockups that Gilmore described were not serious enough deprivations to state a plausible conditions-of-confinement claim under the Eighth or Fourteenth Amendment (it was not then clear whether Gilmore had been convicted of a crime). Second, his allegations did not allow the inference that Milwaukee County was responsible for the alleged deprivation through its policies, practices, or failure to train its employees. *See generally Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). Third, Gilmore had failed to fix the complaint “even after receiving two screening orders and a motion to dismiss specifically identifying the deficiencies in his prior complaints.” The judge therefore dismissed the first amended complaint for failure to state a claim, denied the motion for leave to file a second amended complaint, and entered final judgment for the defendants on October 5, 2022.

Within 28 days of the judgment, *see* FED. R. CIV. P. 59(e), Gilmore moved for leave to file an amended complaint, which was effectively a motion to reconsider. Gilmore repeated the allegations from his previous request to amend, adding only that he was a pretrial detainee and that there was a “direct causal link” between a “Milwaukee County Policy Statement” and a violation of his Fourteenth Amendment rights. The judge denied the motion on October 31, explaining that Gilmore’s allegations still failed to state a claim because facility-wide lockdowns were an administrative concern and Gilmore “still does not include any allegation suggesting that the denial of his recreation time was intended or acted as a punishment for something he had done.” On November 2—still within 28 days of the judgment—Gilmore simultaneously filed a notice of appeal and another motion for leave to amend his complaint, which the district judge denied a month later, on December 2, “for the same reasons it denied his first and second motions.” Because both post-judgment motions were filed within the time prescribed by Rules 4(a)(4)(A)(iv) and 4(a)(4)(A)(vi) of the Federal Rules of Appellate Procedure, the notice of appeal became effective on December 2. *See* FED. R. APP. P. 4(a)(4)(B)(i); *Cincinnati Life Ins. Co. v. Beyrer*, 722 F.3d 939, 953 (7th Cir. 2013). But the notice of appeal covered just the dismissal (including the first denial of leave to amend) and the denial of the first post-judgment motion because the notice of appeal preceded, and thus did not designate, the denial of the second post-judgment motion as an order on appeal. *See* FED. R. APP. P. 3(c)(1)(B). A second or amended notice of appeal was required for that order. *See* FED. R. APP. P. 4(a)(4)(B)(ii).

On appeal, Gilmore does not challenge the dismissal of his first amended complaint but contends that he should have been allowed to file the proposed second amended complaint. He argues that his allegations would state a plausible conditions-of-confinement claim against Milwaukee County. We review the denial of his motions for leave to amend for abuse of discretion. *See Kap Holdings, LLC v. Mar-Cone Appliance*

Parts Co., 55 F.4th 517, 528 (7th Cir. 2022). But because the district judge determined that amendment would be futile, our review includes a de novo assessment of whether the proposed second amended complaint could survive under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See id.* at 529 (citing *Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 524 (7th Cir. 2015)); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

Gilmore clarified that he was a pretrial detainee, and so his claim arises under the Due Process Clause of the Fourteenth Amendment. *See Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019). We therefore ask whether he alleged conditions that were “objectively unreasonable and ‘excessive in relation to’ any legitimate non-punitive purpose.” *Id.* (quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 398 (2015)).

He did not, despite multiple opportunities. The Due Process Clause protects pretrial detainees from the state’s exercise of power that “so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety.” *Hardeman*, 933 F.3d at 825. Leaving aside whether Gilmore sufficiently alleged a basis for municipal liability under *Monell*, he does not say what basic human needs were curtailed by spending 40 to 48 hours in his cell six times over an 11-month period. Regardless, his core allegation that he periodically spent two days in his cell, without more, does not approach the kind of objectively severe condition that supports a constitutional claim. *See, e.g., Budd v. Motley*, 711 F.3d 840, 842–843 (7th Cir. 2013); *Murphy v. Walker*, 51 F.3d 714, 720–21 (7th Cir. 1995); *see also Hardeman*, 933 F.3d at 819–21 (affirming denial of qualified immunity for defendants who shut off jail’s water for three days, causing plaintiffs to be surrounded by excrement and inducing illness). In particular, “short-term denials of exercise may be inevitable in the prison context and are not so detrimental as to constitute a constitutional deprivation.” *Delaney v. DeTella*, 256 F.3d 679, 683–84 (7th Cir. 2001) (applying objective component of Eighth Amendment analysis). Accordingly, Gilmore’s proposed complaint did not state a claim, and the district judge did not abuse his discretion by denying leave to amend on futility grounds. *See Bernacchi v. First Chi. Ins. Co.*, 52 F.4th 324, 330–31 (7th Cir. 2022).

Finally, Gilmore’s post-judgment request to amend and proposed amended complaint simply repeated the factual allegations and legal theories that the judge had ruled insufficient in Gilmore’s previous attempts. Therefore, denying the motion was not an abuse of discretion. *See Cincinnati Life Ins. Co.*, 722 F.3d at 953.

AFFIRMED