

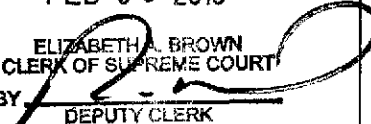
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PAUL THOMAS MCCREARY,
Appellant,
vs.
THE STATE OF NEVADA, IN
RELATION TO THE NEVADA
DEPARTMENT OF CORRECTIONS;
RENEE BAKER; SUE ROSE; HAROLD
MIKE BYRN; WILLIAM A. GITTERE;
AND TASHEENA SANDOVAL,
Respondents.

No. 73743-COA

FILED

FEB 08 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Paul Thomas McCreary appeals from a district court order granting the State's motion to dismiss. Seventh Judicial District Court, White Pine County; Gary Fairman, Judge.

Paul McCreary was an inmate in Ely State Prison when he filed a complaint alleging he was the victim of sexual misconduct perpetrated by his cellmate. McCreary sued the Nevada Department of Corrections (NDOC) and several correctional officers in their official capacities for their alleged indifference to the incident. In his complaint, McCreary sued for civil rights violations under 42 U.S.C. § 1983 (2012) while also describing the claims as violations of the Prison Rape Elimination Act (PREA), 42 U.S.C.A. §§ 15601-09 (West 2003).¹ The complaint form included a question that asked McCreary, "Have you attempted to resolve the dispute stated in this action by seeking relief from the proper administrative officials, e.g.

¹Currently, the PREA is codified at 34 U.S.C.A. §§ 30301-09 (West 2017). At the time of McCreary's complaint, the PREA was codified at 42 U.S.C.A. §§ 15601-09 (West 2003). The PREA was not substantively changed, only re-codified, and any changes do not affect this appeal.

have you exhausted available administrative grievance procedures per AR 740?" McCreary checked the "No" box, indicating he had not exhausted his available remedies. Additionally, McCreary selected the option that he was disputing the validity of a "state or federal law or regulation" as the reason why he did not exhaust his available remedies.

The State moved to dismiss, arguing (1) McCreary failed to exhaust his administrative remedies, (2) the PREA did not establish a private right of action, and (3) NDOC and the defendants named in their official capacities were immune from § 1983 claims. McCreary filed an opposition to the State's motion to dismiss but he did not expressly address the State's contention that he failed to exhaust his administrative remedies.² The district court agreed with the State in all respects and dismissed the lawsuit.

On appeal, McCreary argues that the district court erred by dismissing his complaint because (1) the district court mischaracterized his § 1983 claims as only PREA violations, and (2) his lack of administrative exhaustion was excusable, and the State failed to prove he did not meet the exception to the requirement. The State disputes these contentions and further asserts that (1) the respondents are immune from a § 1983 action, and (2) McCreary did not oppose the State's contention that he failed to exhaust his administrative remedies below, thus conceding the issue. We agree with the State that the respondents are not subject to suit in these circumstances and affirm the order of dismissal on this ground.

²McCreary did make a nonsensical statement in his opposition to the motion to dismiss suggesting there are no time limits to file sexual misconduct grievances. However, this statement was not made in connection with any of the State's arguments in its motion to dismiss and has no application to the issues raised.

An order granting an NRCP 12(b)(5) motion to dismiss is reviewed de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A decision to dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal with all alleged facts in the complaint presumed true and all inferences drawn in favor of the plaintiff. *Id.* Dismissing a complaint is appropriate “only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief.” *Id.* at 228, 181 P.3d at 672.


“To establish a claim under § 1983, the plaintiff must prove that the conduct complained of: (1) was committed by a person acting under color of state law, and (2) deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States.” *State v. Eighth Judicial Dist. Court (Anzalone)*, 118 Nev. 140, 153, 42 P.3d 233, 241 (2002). “[T]he United States Supreme Court has held that officials acting in their official capacities are not persons under . . . § 1983, and therefore, may not be sued in state courts under the federal civil rights statutes.” *Id.* at 153, 42 P.3d at 241-42. Likewise, NDOC, as an arm of the State, is not a person that can be sued under § 1983. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 605, 172 P.3d 131, 136 (2007) (holding that the State of Nevada and its entities cannot be sued under § 1983).

In its order, the district court addressed McCreary’s § 1983 constitutional deprivation claims in addition to the PREA violation claims. Further, because McCreary named the NDOC and the five individual defendants only in their official capacities, the district court correctly determined that all defendants were not “persons” under the statute and therefore were not subject to a § 1983 action. Consequently, we conclude

that the district court properly dismissed the case under NRCP 12(b)(5) for failure to state a claim.³ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, A.C.J.
Douglas


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Gary Fairman, District Judge
Law Office of Lisa Rasmussen
Attorney General/Carson City
Attorney General/Las Vegas
Legal Aid Center of Southern Nevada, Barbara E. Buckley,
Executive Director
Anne R. Traum, Coordinator, Appellate Litigation Section,
Pro Bono Committee, State Bar of Nevada
Kelly H. Dove
White Pine County Clerk

³In light of our disposition, we need not determine whether McCreary's admission in his complaint that he did not exhaust his administrative remedies provides a separate and independent ground for the district court to have granted the motion to dismiss, or if his failure to explicitly oppose the State's motion to dismiss regarding exhaustion constituted a consent to a dismissal. See 7JDCR7(6)-(7).