

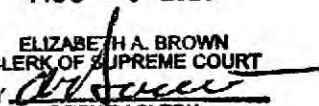
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEPHEN J. HORNER,
Appellant,
vs.
KARA JENKINS; AND LILA
VIZCARRA,
Respondents.

No. 80432-COA

FILED

AUG 28 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Stephen J. Horner appeals from a district court order dismissing a civil rights action. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Horner contends that respondents, employees of the Nevada Equal Rights Commission (NERC), violated his Fourteenth Amendment right to equal protection by dismissing his NERC complaint. In particular, Horner filed a complaint form with NERC alleging that a local place of public accommodation violated his right to equal protection when it offered a “ladies’ night,” whereby women received 50 percent off of their drink purchases, but men did not. NERC reviewed Horner’s complaint and dismissed the same, concluding that his allegations did not fall within its jurisdiction in light of NRS 651.065—which provides that “it is not unlawful and is not a ground for a civil action for any place of public accommodation to offer differential pricing, discounted pricing or special offers based on sex to promote or market the place of public accommodation.”

Horner then filed the underlying complaint against Jenkins and Vizcarra, alleging a civil rights violation pursuant to 42 U.S.C. § 1983. Respondents moved to dismiss the complaint, and Horner opposed. The

district court granted the motion finding that, although Horner asserted that he named respondents in their individual capacities as required for a 42 U.S.C. § 1983 claim, his complaint effectively named the respondents in their official capacities in light of the allegations contained in the complaint. Thus, the district court concluded, because the respondents in their official capacities are not “persons” for purposes of a 42 U.S.C. § 1983 action, Horner failed to state a claim upon which relief could be granted pursuant to NRCP 12(b)(5), and dismissal was warranted. This appeal followed.

On appeal, Horner challenges the district court’s dismissal, asserting that the district court erred in concluding that his complaint named respondents in their official capacity, rather than their individual capacity. This court reviews an order granting an NRCP 12(b)(5) motion to dismiss de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). We will affirm the decision to dismiss a complaint under NRCP 12(b)(5) when the complaint’s factual allegations do not entitle a plaintiff to relief under the claims asserted. *Id.*

Here, the face of Horner’s complaint does not expressly state whether the respondents were named in their individual or official capacities. In reviewing the complaint, the district court concluded that, in light of the allegations, Horner’s complaint should be construed as stating claims against respondents in their official capacities. Specifically, the court noted that the complaint described the respondents as “actors for the Nevada Equal Rights Commission,” “state actors,” and “clothed with the proper authority while acting under the color of Nevada State law.” Additionally, respondents’ alleged conduct was reviewing and denying Horner’s complaint form submitted to NERC, an act performed as part of their duties as NERC employees. Based on our review of the record, we

agree that the allegations in Horner's complaint indicate he sued respondents in their official capacities. See *N. Nev. Ass'n of Injured Workers v. Nev. State Indus. Ins. Sys.*, 107 Nev. 108, 115 n.13, 807 P.2d 728, 732 n.13 (1991) (explaining that the complaint's caption "should not be determinative as to whether a state official has been sued in his or her official or individual capacity," and that the court should look to the substance of the allegations to determine if the alleged conduct was within the scope of the official's capacities). And because § 1983 claims cannot be maintained against state employees in their official capacities, dismissal was proper on these grounds. See *Craig v. Donnelly*, 135 Nev. 37, 40, 439 P.3d 413, 416 (Ct. App. 2019).

However, we note that even if we construed the complaint as naming respondents in their individual capacities—as Horner asserts he intended—such that a § 1983 claim was permissible, dismissal was still warranted. To prevail on a civil rights complaint pursuant to 42 U.S.C. § 1983, a plaintiff must prove that the alleged conduct, as relevant here, "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). Additionally, § 1983 does not create substantive rights; it only provides a method for asserting a cognizable federal right. *Id.* at 153, 42 P.3d at 242.

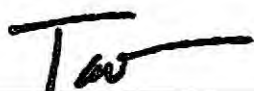
Here, Horner's complaint fails to identify the deprivation of any cognizable federal right by respondents. Although Horner generally alleges a Fourteenth Amendment violation, that is in the context of Horner's allegations regarding the place of public accommodation's conduct giving rise to his NERC complaint, not respondents' conduct. Indeed, respondents' only alleged conduct was declining to investigate Horner's complaint, and

Horner has failed to demonstrate, or even allege, that others similarly situated received different treatment by NERC. *See id.* at 153, 42 P.3d at 241; *see also Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001) (“To succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination.”). Moreover, on appeal, Horner has failed to offer any cogent arguments as to how any of respondents’ alleged conduct amount to a violation of his constitutional rights. *See Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (concluding that this court need not consider claims that are not cogently argued).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

¹Insofar as Horner raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal. We likewise take no action on Horner’s letter filed with this court on August 7, 2020.

cc: Hon. Stefany Miley, District Judge
Stephen J. Horner
Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk