

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 30, 2021

**Christopher M. Wolpert
Clerk of Court**

JABARI J. JOHNSON,

Plaintiff - Appellant,

v.

KARINA THOMPSON; JOANA
RODRIGUEZ,

Defendants - Appellees.

No. 20-1408

(D.C. No. 1:20-CV-00434-PAB-MEH)

(D. Colo.)

ORDER AND JUDGMENT*

Before **BACHARACH, MURPHY, and CARSON**, Circuit Judges.

In federal district court, many cases are referred to magistrate judges. When a magistrate judge decides a dispositive issue, he or she typically enters a report and recommendation and the losing party can object. 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b)(2). Upon the timely filing

* Because oral argument would not help us decide the appeal, we have decided the appeal based on the record and the parties' briefs. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

Our order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

of an objection, the district judge must use his or her independent judgment. 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b)(3). But when losing parties fail to timely object, they typically waive appellate review. *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008).

In this case, the district judge referred a motion to dismiss to the magistrate judge, who recommended dismissal of all claims. Mr. Johnson had fourteen days to object. 28 U.S.C. § 636(b). He obtained an extension of time but still failed to object to the report and recommendation. The failure to object would typically waive appellate review. *Duffield*, 545 F.3d at 1237.

The Court thus directed Mr. Johnson to show cause why the failure to object didn't waive appellate review. In response, Mr. Johnson defended the validity of his claims. Valid or not, however, the claims could be waived. So Mr. Johnson's arguments do not prevent waiver.

Though we can't act as Mr. Johnson's advocate, we recognize that he is pro se and have independently considered two possible exceptions to the waiver: (1) lack of notice and (2) interests of justice. *Duffield*, 545 F.3d at 1237. But these exceptions don't apply here.

In his report and recommendation, the magistrate judge gave notice by telling Mr. Johnson that (1) he had fourteen days from service to object and (2) the failure to timely object could waive appellate review. When Mr. Johnson requested an extension, he acknowledged receipt of the report

and recommendation. So Mr. Johnson had notice and the first exception doesn't apply.

We thus consider the second exception (the interests of justice). In evaluating the interests of justice, we can consider Mr. Johnson's efforts to timely comply, his explanation for failing to comply, and the significance of the issues. *Morales-Fernandez v. INS*, 418 F.3d 1116, 1120 (10th Cir. 2005). Here, however, Mr. Johnson hasn't suggested any effort to comply or explained his failure to object to the report and recommendation.

We also consider the importance of the issues. This consideration resembles our inquiry for plain error. *Duffield v. Jackson*, 545 F.3d 1234, 1238 (10th Cir. 2008). But Mr. Johnson hasn't shown an error, much less an error that was "plain."

The district court concluded that the official-capacity claims trigger Eleventh Amendment immunity. In response, Mr. Johnson argues that the injunction claims fall outside the Eleventh Amendment. The district court rejected this argument, reasoning that Mr. Johnson had requested an injunction against the wrong parties. Even now, Mr. Johnson does not say why this reasoning is wrong.

The district court also concluded that the individual-capacity claims were time-barred. Mr. Johnson argues that the limitations period is tolled by continued unlawful conduct. The district court rejected this argument, reasoning in part that Mr. Johnson had complained of continued harm

rather than continued misconduct. Again, Mr. Johnson does not say why this reasoning is wrong.

The district court also reasoned that even if the individual-capacity claims weren't time-barred, Mr. Johnson had alleged only a disagreement with his treatment rather than deliberate indifference to his condition. Mr. Johnson does not address this reasoning.

Lastly, the district court concluded that the defendants enjoyed qualified immunity. Again, Mr. Johnson hasn't said why this conclusion is wrong.

In short, Mr. Johnson hasn't shown any errors rising to the level of plain error. So the importance of the issues would also tilt against the interests-of-justice exception.

Because the two exceptions don't apply, Mr. Johnson waived appellate review. We thus affirm the dismissal.¹

Entered for the Court

Robert E. Bacharach
Circuit Judge

¹ Though we affirm the dismissal, we grant leave to Mr. Johnson to proceed in forma pauperis. *See* 28 U.S.C. § 1915(g).