

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

OCT 25 1990

TENTH CIRCUIT

ROBERT L. HOECKER
Clerk

PETER FROST,

Plaintiff-Appellant,

v.

HIDEYA TSUDO, DAVID HERRERA,
and SHARON SEANEZ, Employees of
the U.S.A.,

Defendants-Appellees.

No. 90-1138
(D.C.No. 90-A-0645)
(D. Colorado)

ORDER AND JUDGMENT*

Before ANDERSON, BALDOCK, and EBEL, Circuit Judges.

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); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Peter Frost, an inmate at the Federal Correctional Institution ("FCI") in Littleton, Colorado, appeals from the dismissal of his pro se action alleging medical malpractice and "medical neglect" of his condition of stress-related eczema.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Mr. Frost brought his action initially in the Small Claims Court of Jefferson County, Colorado against the FCI physician, Dr. Hideya Tsudo, as well as two physician's assistants, Sharon Seanez and David Herrera. Defendants removed the action to the federal district court and substituted as defendant the United States in place of the individual defendants, on the theory that the action was properly subject to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680. The district court then dismissed the action for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) because Mr. Frost had failed to exhaust his administrative remedies as required by 28 U.S.C. § 2675(a). For Mr. Frost's guidance, the district court order helpfully explained the administrative remedies which must be exhausted and attached a copy of the applicable procedural requirements.

We affirm the dismissal of Mr. Frost's claim. While his appellate brief mentions "refusal of medical treatment" and cites Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), his complaint in small claims court only alleged medical malpractice and negligence resulting in personal injury, which would clearly be subject to the Federal Tort Claims Act. The district court correctly held that Mr. Frost's failure to exhaust his administrative remedies required dismissal of his complaint. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge