

NONPRECEDENTIAL DISPOSITION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 14, 2024*

Decided June 17, 2024

*Before*MICHAEL Y. SCUDDER, *Circuit Judge*AMY J. ST. EVE, *Circuit Judge*JOSHUA P. KOLAR, *Circuit Judge*

No. 23-2217

ROBERT JOSEPH DALE
CLINKENBEARD,
Plaintiff-Appellant,

v.

JAMIE AUTEN,
Defendant-Appellee.

Appeal from the United States District
Court for the Southern District of
Indiana, Terre Haute Division.

No. 2:22-cv-00277-JRS-MJD

James R. Sweeney II,
Judge.

ORDER

Robert Clinkenbeard, a federal prisoner, alleged that the pharmacist at the prison refused to give him an allergy medication in violation of his rights under the Eighth Amendment. He sought damages only, and the district court dismissed his complaint

* We have agreed to decide this 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 his claim involved an impermissible extension of the implied constitutional right to damages recognized in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). On appeal, Clinkenbeard concedes that he cannot state a *Bivens* claim, and he has no other basis to obtain the damages that he seeks; thus, we affirm.

According to Clinkenbeard, whose allegations we take as true at this stage, *Wallace v. Baldwin*, 895 F.3d 481, 483 (7th Cir. 2018), he obtained a prescription for nasal spray to treat his severe allergies. When he attempted to fill the prescription, a prison pharmacist, Jamie Auten, refused to release it to him. Without the medication, Clinkenbeard suffered severe migraines and other allergy symptoms.

Clinkenbeard sued Auten, seeking damages for her deliberate indifference to his medical needs in violation of his rights under the Eighth Amendment. The district court screened his complaint, 28 U.S.C. § 1915A, and permitted him to proceed on that claim. Clinkenbeard then amended his complaint to add allegations that Auten had singled him out for the denial of medication while other prisoners continued to receive theirs. The court struck the amended complaint as futile because his additional allegations did not state a viable *Bivens* claim.

Next, Auten moved to dismiss the original complaint for failure to state a claim. After four months passed without response from Clinkenbeard, the court granted the motion and closed the case. The court ruled that it was not authorized to fashion a *Bivens* remedy for Clinkenbeard's Eighth Amendment claim—which arose in a context meaningfully different from previous *Bivens* cases permitting damages—because alternative remedies, such as injunctive relief, were available to him. *See Egbert v. Boule*, 596 U.S. 482, 492–93 (2022). Clinkenbeard appealed.

While his appeal was pending, Clinkenbeard filed a motion to reconsider, arguing that his claim could proceed under 42 U.S.C. § 1983. The court dismissed the motion because § 1983 does not apply to federal officers like Auten.

On appeal, Clinkenbeard concedes that he cannot state a *Bivens* claim but argues that the district court should have permitted him to amend his complaint once more so that he could “re-label” his claim as arising under 42 U.S.C. § 1983. But that proposal would be futile: As the district court explained, his claim against a federal officer may not proceed under § 1983, which applies only to persons acting under color of state law. *See Ziglar v. Abbasi*, 582 U.S. 120, 130 (2017). Moreover, regardless of how Clinkenbeard

No. 23-2217

Page 3

labeled his claim, its fundamental defect is that he is seeking damages from a federal officer in a context that is not permitted by *Bivens* caselaw. *See Egbert*, 596 U.S. at 492–93.

Clinkenbeard also argues that the district court abused its discretion when it denied his two motions to recruit counsel. He first asked the court to recruit counsel for him at the outset of his case, but the court correctly declined to do so because he had not shown that he had attempted to obtain counsel on his own. *Pruitt v. Mote*, 503 F.3d 647, 654–55 (7th Cir. 2007) (en banc); *Thomas v. Anderson*, 912 F.3d 971, 978 (7th Cir. 2018). Ten days later, still before Auten had been served, Clinkenbeard submitted another motion requesting counsel, this time showing that he had tried to recruit counsel himself. But the court reasonably denied the motion because he had personal knowledge of the events in this case, and describing those events was all that was required at the beginning stage of this litigation. *See Pruitt*, 503 F.3d at 658–59.

AFFIRMED