

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

October 3, 2006

Elisabeth A. Shumaker
Clerk of Court

RALPH MERCADO,

Plaintiff-Appellant,

v.

R. WILEY, Present Warden; R. HOOD, Pass [sic] Warden; M. BARBEE, Safety Specialist; R. BAUER, Health Services Administrator; CHUCK TURNER, Pass [sic] Facilities, Manager; MARK MASER, Heating Ventilation A/C Foreman; JOHN DOE #1, Unknown Facilities Officer; J. WADAS, Correctional Officer; H. TRAPP, Pass [sic] Nurse Practitioner; R. CURRIN, Correctional Officer; R. SMITH, Educational Officer; HARRELL WATTS, Central Office Administrator; JOHN OR JANE DOE #2, Unknown,

Defendants - Appellees.

No. 06-1155
District of Colorado
(D.C. No. 05-CV-2306-ZLW)

ORDER AND JUDGMENT*

*After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). This case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and
(continued...)

Before **MURPHY, SEYMOUR, and McCONNELL**, Circuit Judges.

On November 15, 2005, Ralph Mercado, a federal prisoner proceeding pro se, filed a civil rights complaint against various prison officials under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). He alleged that he did not receive immediate medical attention for an asthma attack caused by chemical fumes emitted during a replacement of the hot water heat exchanger in his prison unit. He also alleged that two of the defendants conspired to make false statements on his medical records in response to his grievance.

The district court dismissed the action for failure to exhaust administrative remedies with regards to his conspiracy claim. Although Mr. Mercado appeals the district court's dismissal, his submissions to this Court articulate no grounds for doing so. The order of dismissal is therefore affirmed.

In conjunction with his brief on appeal, Mr. Mercado filed a "Motion for Leniency," which explained that at the time the appeal was filed, he believed that failure to appeal would result in his claims being time barred if he refiled after

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conditions of 10th Cir. R. 36.3.

exhausting administrative remedies. We do not decide whether the statute of limitations will have run if Mr. Mercado refiles his claim, as it does not have bearing on whether or not his appeal is frivolous. The motion before the court does not appear to request any relief that we have authority to grant, and is therefore denied.

Because Mr. Mercado fails to raise any nonfrivolous argument in support of his appeal, *see McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 812 (10th Cir. 1997), we deny his Motion for Leave to Proceed on Appeal Without Prepayment of Costs or Fees.

The district court's judgment is **AFFIRMED**. Appellant's "Motion for Leniency" is **DENIED**. The Plaintiff's Motion for Leave to Proceed on Appeal Without Prepayment of Costs or Fees is **DENIED**. Mr. Mercado shall remit the full amount of the filing fee to the Clerk of the District Court within thirty (30) days of this order, in accordance with his request in the Motion filed on August 21, 2006. Any other motions are **DENIED**.

Entered for the Court,

Michael W. McConnell
Circuit Judge