

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FEB 24 1998

PATRICK FISHER
Clerk

EDWARD RICHARD NEWTON,

Plaintiff - Appellant,

v.

OFFICER ABEYTA, in her individual
capacity; OFFICER ORTHON, in his
individual capacity,

Defendants - Appellees.

No. 97-1372

(D.C. No. 97-D-1285)
(D. COLO.)

ORDER AND JUDGMENT*

Before BALDOCK, EBEL, and MURPHY, Circuit Judges.**

Plaintiff Edward Richard Newton, appearing pro se, appeals the district court's order dismissing his 42 U.S.C. § 1983 action as "legally frivolous and for failure to state a claim upon which relief may be granted." Specifically, Plaintiff argues that the district

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 conditions of 10th Cir. R. 36.3.

** After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

court erroneously concluded that Defendants did not subject him to cruel and unusual punishment in violation of the Eighth Amendment. Our jurisdiction arises under 28 U.S.C. § 1291. We review the district court’s dismissal de novo, Sutton v. United Air Lines, Inc., 130 F.3d 893, 896 (10th Cir. 1997), and dismiss Plaintiff’s appeal as legally frivolous.¹

Plaintiff is incarcerated at the Colorado Territorial Correctional Facility in Cañon City, Colorado. He alleges that on or about September 16, 1996, for purposes of harassing and molesting him, Defendants conducted a shakedown of his cell. Plaintiff contends that during the course of the shakedown, Defendants “deliberately walked all over [his] bed with soiled infectious shoes that they just used to walk all over the Dairy Farm.” Plaintiff claims that after sleeping on the allegedly contaminated bed, certain surgical lacerations on his body became infected and caused him unnecessary physical and emotional pain. Plaintiff contends that Defendants knew that walking on his bed could possibly cause infection. Therefore, he argues that Defendants’ actions violated his Eighth Amendment right to be free from cruel and unusual punishment and that each Defendant should be forced to pay him \$50,000 in compensatory damages and \$50,000 in punitive damages.

We have reviewed the parties’ briefs, pleadings, and the entire record before us. For substantially the same reasons set forth in its order dismissing Plaintiff’s claim, we

¹ Accordingly, Plaintiff’s motion to proceed in forma pauperis is denied.

agree with the district court that Plaintiff's claim is legally frivolous and does not state a claim upon which relief may be granted. We further conclude that this appeal is frivolous under 28 U.S.C. § 1915(g) and therefore constitutes a "prior occasion" within the meaning of that section.

APPEAL DISMISSED.

Entered for the Court,

Bobby R. Baldock
Circuit Judge