This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0127

Henry Hickman,
Appellant,

vs.

Keith M. Ellison, A.G., et al.,
Respondents.

Filed June 26, 2023
Affirmed
Frisch, Judge

Chisago County District Court
File No. 13-CV-22-409

Henry Hickman, Rush City, Minnesota (pro se appellant)

Keith Ellison, Attorney General, Anna Veit-Carter, Assistant Attorney General, St. Paul, Minnesota (for respondents)

Considered and decided by Frisch, Presiding Judge; Cochran, Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

Appellant challenges the dismissal of his complaint alleging an equal-protection violation under 42 U.S.C. § 1983 (2018) and intentional infliction of emotional distress. Because the complaint fails to state a viable claim for relief, we affirm.

FACTS

In May 2022, appellant Henry Hickman filed a complaint against respondents Corrections Officer Lindbom and Lieutenant Jensen in their official and individual capacities.[1] Hickman asserted an equal-protection claim under 42 U.S.C. § 1983 and a claim of intentional infliction of emotional distress. The complaint sets forth the following alleged facts.

In March 2022, after Hickman played cards with two other inmates of color at the Minnesota Correctional Facility-Rush City (the prison), Officer Lindbom told Hickman that he did not want to see poker chips on the table. Officer Lindbom then walked by a table where White inmates were using poker chips and did not make any comment about their use of poker chips. Hickman stated to Officer Lindbom that allowing White inmates to use poker chips but not allowing Black inmates to do so was discriminatory. Officer Lindbom thereafter threatened Hickman's employment in the prison. Hickman requested a grievance form from another officer and was denied. Later, when Hickman was in his cell, Officer Lindbom walked by and stated, "Stay in your cell pending termination." Hickman asked to see the watch commander and to speak to the Crisis Intervention Team, and both requests were denied.

[1] Hickman also named as defendants Attorney General Keith Ellison, Commissioner of Corrections Paul Schnell, and Warden Jesse Pugh. The district court dismissed Hickman's claims against these defendants for lack of notice and personal involvement, and Hickman does not challenge that ruling on appeal. The district court dismissed the claims against Lieutenant Jensen on the same basis, but we construe Hickman's arguments on appeal as challenging this ruling.

Hickman alleged that he suffered distress "due to los[s] of employment and harassment, [and] retaliatory behavior by 3 South staff." Hickman requested compensatory damages, punitive damages, litigation costs, and "a declaration that the acts described herein violate[] his rights under the constitution and laws of the United States, along with violation [sic] of Minnesota state prison policy."

Respondents moved to dismiss Hickman's complaint under Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief can be granted. Respondents argued, in relevant part, that Hickman failed to state a claim upon which relief could be granted and that Officer Lindbom is entitled to qualified and official immunity.[2] The district court granted respondents' motion to dismiss.

Hickman appeals.

DECISION

We review de novo whether a complaint sets forth a legally sufficient claim for relief. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014). We accept the factual allegations set forth in the complaint as true and construe all reasonable inferences in favor

[2] In Hickman's response to the motion to dismiss, he attempted to raise federal claims of First Amendment retaliation and a due-process violation. These claims were not included in Hickman's complaint or in any amended complaint and were therefore not properly before the district court. *See Morgan Distrib. Co. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989) ("[I]t is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss." (quotation omitted)). To the extent Hickman may be raising those claims on appeal, we decline to address them because they are forfeited. *State v. Beaulieu*, 859 N.W.2d 275, 278 (Minn. 2015) (stating that a "constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it" (quotation omitted)).

of the nonmoving party. *Id.* But we are not required to accept legal conclusions set forth in a complaint. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008). A claim survives a motion to dismiss "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Walsh*, 851 N.W.2d at 603 (quotation omitted).

Section 1983

Hickman asserts a section 1983 claim based on the alleged deprivation of his Fourteenth Amendment right to equal protection. The district court did not err in dismissing Hickman's claim because he did not plead sufficient facts to state a claim for such relief.

Section 1983 provides a civil cause of action to challenge a deprivation of constitutional rights under color of state law. 42 U.S.C. § 1983. The essential elements of a constitutional claim under section 1983 are that (1) the defendant acted under color of state law and (2) the alleged wrongful conduct deprived the plaintiff of a constitutionally protected federal right. *West v. Atkins*, 487 U.S. 42, 48 (1988); *L.L. Nelson Enters., Inc. v. County of St. Louis*, 673 F.3d 799, 805 (8th Cir. 2012).

Hickman asserts that respondents deprived him of the constitutional right to equal protection under the Fourteenth Amendment. To succeed on an equal-protection claim in a prison context, a plaintiff must show that (1) they are treated differently than a similarly situated class of inmates, (2) the different treatment burdens a fundamental right, and (3) the different treatment bears no rational relation to any legitimate penal interest. *Murphy v. Missouri Dep't of Corrections*, 372 F.3d 979, 984 (8th Cir. 2004) (citing *Weiler*

v. Purkett, 137 F.3d 1047, 1051 (8th Cir. 1998) (en banc)). A plaintiff must also show that the discrimination was intentional or purposeful. *Phillips v. Norris*, 320 F.3d 844, 848 (8th Cir. 2003). A few individual examples of unequal treatment are "insufficient to provide more than minimal support to an inference of classwide purposeful discrimination." *Weiler*, 137 F.3d at 1052 (quotation omitted).

Applying these principles, we conclude that the complaint does not set forth allegations stating a claim for relief. Hickman does not allege that differential treatment involving the use of poker chips burdened a fundamental right. Hickman does not allege that this claimed differential treatment was intentional or purposeful. And the complaint contains allegations of one isolated instance of purported differential treatment, which is insufficient as a matter of law to sustain a claim for relief.

Thus, the district court did not err in dismissing Hickman's complaint for failure to state a viable claim for relief under section 1983.

Intentional Infliction of Emotional Distress

Hickman alleged a claim for intentional infliction of emotional distress based on "ongoing mental, emotional and financial distress due to los[s] of employment and harassment, retaliatory behavior by 3 South staff" and "fear of further false accusations towards plaintiff." The district court did not err in dismissing this claim because the complaint does not state a claim for relief.

A claim for intentional infliction of emotional distress includes four required elements: (1) the conduct must be extreme and outrageous, (2) the conduct must be intentional or reckless, (3) the conduct must cause emotional distress, and (4) the emotional

distress must be severe. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983). A plaintiff has a heavy burden of production in the allegations to satisfy the fourth element. *Id.* at 439. The emotional distress must be "so severe that no reasonable man could be expected to endure it." *Id.* (quotation omitted). "General embarrassment, nervousness and depression are not in themselves a sufficient basis for a claim of intentional infliction of emotional distress." *Strauss v. Thorne*, 490 N.W.2d 908, 913 (Minn. App. 1992), *rev. denied* (Minn. Dec. 15, 1992). The purpose of this heavy burden is to limit claims for intentional infliction of emotional distress to "cases involving particularly egregious facts." *Hubbard*, 330 N.W.2d at 439.

The complaint contains no allegation of any conduct by Officer Lindbom or Lieutenant Jensen that is extreme or outrageous and no allegation of severe emotional distress. Vague allegations that defendants engaged in "harassment" or "retaliatory behavior" are insufficient to constitute the necessary extreme and outrageous conduct. *Cf. Strauss*, 490 N.W.2d at 910, 913 (concluding that physician noting on patient's medical chart that he suspected patient's wife of child abuse was not sufficiently extreme or outrageous).

Hickman also alleges that he is experiencing "ongoing mental, emotional and financial distress," but such conclusory allegations are too broad, vague, and insufficiently severe to state a claim of intentional infliction of emotional distress. *Cf. Jensen v. Walsh*, 609 N.W.2d 251, 252-53 (Minn. App. 2000) (concluding that claimed symptoms of depression, sleep difficulties, anxiety, inability to focus at work, and physical problems such as vomiting and headaches are not sufficient evidence of severe emotional distress),

rev'd on other grounds, 623 N.W.2d 247 (Minn. 2001); *Elstrom v. Indep. Sch. Dist. No*. 270, 533 N.W.2d 51, 57 (Minn. App. 1995) (concluding that "insomnia, crying spells, a fear of answering her door and telephone, and depression" did not sustain an intentional-infliction-of-emotional-distress claim), *rev. denied* (Minn. July 27, 1995). Accordingly, the district court did not err in dismissing Hickman's complaint for failure to state a viable claim for intentional infliction of emotional distress.[3]

Affirmed.

[3] On appeal, respondents also argue that Hickman's complaint should have been dismissed because Officer Lindbom is protected by official and qualified immunity. Because we conclude that Hickman's complaint fails to state a claim for relief, we do not address the issues of official and qualified immunity. *See Goeb v. Tharaldson*, 615 N.W.2d 800, 815 n.9 (Minn. 2000) ("Because the other issues raised are dispositive of this matter, we do not address this argument.").