

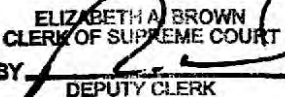
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PERCY LAVAE BACON,
Appellant,
vs.
BRIAN WILLIAMS, WARDEN,
Respondent.

No. 77135-COA

FILED

SEP 27 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Percy Lavae Bacon appeals from a district court order dismissing a civil rights complaint.¹ Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Bacon filed a civil rights complaint against respondent warden Brian Williams alleging violations of the First, Eighth, and Fourteenth Amendments, relating to medical treatment he sought, side effects from medication he was prescribed, and alleged retaliatory delay of medical treatment. Williams filed a motion to dismiss arguing the claims failed because there was no allegation of personal participation by him. His

¹Not all defendants named below made appearances in the district court and our review of the record does not show that they were served. Such defendants never became parties to the case, and thus, they are not proper parties to this appeal. *See Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 448, 874 P.2d 729, 735 (1994) (explaining that a person who is not served with process and does not make an appearance in the district court is not a party to that action). We therefore direct the clerk of the court to amend the caption of this case to conform to the caption on this order. On appeal, Bacon argues that he served all defendants, but there is only one proof of service contained in the record and it does not support his contention that these other defendants were served.

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motion also noted that neither the State nor the Nevada Department of Corrections (NDOC) were proper parties for purposes of 42 U.S.C. § 1983 claims.² The district court granted the motion over Bacon's opposition and also denied Bacon's request to amend the complaint. Bacon then filed a motion for reconsideration, which was denied. This appeal followed.

An order granting an NRCP 12(b)(5) motion to dismiss is reviewed de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A decision to dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal with all alleged facts in the complaint presumed true and all inferences drawn in favor of the plaintiff. *Id.* Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672.

Our review of the complaint indicates that it does not contain any specific allegations of personal participation by Williams in any of the alleged violations of Bacon's rights, which is necessary to state a section 1983 claim. *See Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002) (stating that "to be liable under section 1983 there must be a showing of personal participation in the alleged rights deprivation"). Notably, other than being listed as a defendant in the caption and the jurisdiction section of the complaint, there is no specific mention of Williams anywhere else in the

²To the extent that Bacon argued below that he also brought state tort claims and therefore the State and NDOC were proper parties, he failed to raise this issue or otherwise argue their dismissal was improper in his opening brief; thus, that issue is waived. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (stating that issues not raised in appellant's opening brief are waived).

complaint. Bacon's attempt below to provide sufficient facts in his opposition, by arguing that Williams denied his grievance, is unavailing because the denial of a grievance is not sufficient to establish personal participation.³ See *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) ("[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."); *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009) (concluding that the denial of grievances alone is insufficient to establish personal participation); *Lomholt v. Holder*, 287 F.3d 683, 684 (8th Cir. 2002) (holding that the denial of a prisoner's grievance does not state a substantive constitutional claim); *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988), *cert. denied*, 488 U.S. 898 (1988) (stating "[t]here is no legitimate claim of entitlement to a grievance procedure"). Therefore, dismissal was proper. See *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

Bacon also argues that the district court erred in refusing to allow him to amend the complaint.⁴ The denial of a motion to amend is reviewed for an abuse of discretion. See *Kantor v. Kantor*, 116 Nev. 886,

³While Bacon makes additional factual allegations in his opening brief, likely in an attempt to properly allege personal participation, these allegations were not contained in the complaint or otherwise argued in the district court and therefore will not be considered on appeal. See *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.").

⁴Although the district court did not directly address the motion to amend, its dismissal of the complaint without granting leave to amend effectively denied that motion. See *Bd. of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286, 289, 994 P.2d 1149, 1150 (2000) (concluding that a district court's failure to rule on a request constituted denial of that request).

891, 8 P.3d 825, 828 (2000). And here, we cannot say the district court abused its discretion in denying Bacon's request to amend when he never provided the court with a proposed amended complaint alleging sufficient facts to state a section 1983 claim. *See id.*; EDCR 2.30(a) ("A copy of a proposed amended pleading must be attached to any motion to amend the pleading."); *see also John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 756, 219 P.3d 1276, 1283 (2009) (providing that states, in handling federal claims, may apply their own procedural rules), *superseded by* 2013 Nev. Stat., ch. 176, § 3, at 623–24 *on other grounds*, as recognized in *Shapiro v. Welt*, 133 Nev. 35, 37, 389 P.3d 262, 266 (2017).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Adriana Escobar, District Judge
Percy Lavae Bacon
Attorney General/Las Vegas
Eighth District Court Clerk