

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LEE E. DAVIDSON,
Appellant,

vs.

THE STATE OF NEVADA,
DEPARTMENT OF CORRECTIONS;
ASSOCIATE WARDEN, JEREMY BEAN
(HDSP); CASE WORKER III, DILLYN
KEITH (CARSON CITY); SHANNON
MOYLE; ASSOCIATE WARDEN,
JENNIFER NASH (HDSP); CASE
WORKER, ANTHONY RITZ (HDSP);
HAROLD WICKHAM, DIRECTOR OF
THE NDOC; AND BRIAN WILLIAMS,
WARDEN, HDSP,
Respondents.

No. 81291-COA

FILED

NOV 25 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Lee E. Davidson appeals from a district court order dismissing a complaint in a civil rights action. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Davidson, who is incarcerated, filed the underlying civil rights action against the Nevada Department of Corrections (NDOC)¹ and others,

¹We note that Davidson only asserted claims under 42 U.S.C. § 1983 and not under any state-law theory, and NDOC was therefore not a proper defendant. *See Craig v. Donnelly*, 135 Nev. 37, 40, 439 P.3d 413, 415-16 (Ct. App. 2019) (noting that states and state agencies are not “persons” subject to liability under § 1983). Likewise, to the extent Davidson asserted claims for money damages against individual state employees in their official capacities, they too were not proper defendants. *See id.* at 40, 439 P.3d at 416 (noting that actions against individual employees in their official capacities are “effectively against the state itself”); *but see N. Nev. Ass’n of Injured Workers v. Nev. State Indus. Ins. Sys.*, 107 Nev. 108, 114-16, 807

alleging violations of his due process rights under the Fifth and Fourteenth Amendments. Specifically, Davidson claimed that NDOC failed to properly apply its own regulation (AR 521.04) and NRS 209.481 when it denied his request to be placed into minimum-security custody. Respondents moved to dismiss Davidson's complaint under NRCP 12(b)(5), arguing in part that he does not have a protected liberty interest in a particular custodial classification as required to sustain a due process claim. The district court agreed and granted respondents' motion.² This appeal followed.

We review an order granting an NRCP 12(b)(5) motion to dismiss de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Our review is rigorous, with all alleged facts in the complaint presumed true and all inferences drawn in favor of the plaintiff. *Id.* Dismissal under NRCP 12(b)(5) 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.

Davidson alleged in his complaint that NDOC denied his request for transfer to minimum-security custody because it determined that he will likely not be granted parole when he first becomes eligible in 2022 and that he is therefore ineligible for minimum-security classification. Davidson contends that whether he is likely to be granted parole was not a proper factor for NDOC to consider under the relevant authorities and that it should have instead determined that Davidson met all of the threshold requirements for minimum-security custody. He concedes on appeal that

P.2d 728, 732-33 (1991) (holding that plaintiffs may sue individual employees in their official capacities under § 1983 for injunctive but not compensatory relief).

²The district court incorrectly noted that Davidson had failed to oppose respondents' motion, but it did not rely on that ground in granting the motion.

he does not have a protected liberty interest in obtaining a minimum-security classification, *see Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976) (recognizing that an inmate does not have an inherent constitutional right to a particular custodial classification); *Myron v. Terhune*, 476 F.3d 716, 718 (9th Cir. 2007) (concluding that a custodial classification in one category as opposed to another did not constitute the sort of restraint that would give rise to a protected liberty interest), but he contends that he does have such an interest in NDOC properly following its own procedures governing custodial classifications and adjudicating his request on proper grounds.³

However, even assuming that Davidson does have such an interest, and assuming all of his factual allegations are true, he has nevertheless failed to demonstrate that NDOC did not properly follow its own procedures. NRS 209.481—the statute governing NDOC’s assignment of offenders to minimum-security facilities—does not require NDOC to deem any offender eligible for minimum-security custody. Rather, it merely sets forth a list of classes of offenders that NDOC may not place into minimum-security facilities, including offenders that are “not eligible for parole or release from prison within a reasonable period,” and it provides that the director of NDOC “shall, by regulation, establish procedures for classifying and selecting qualified prisoners.” NRS 209.481(1)(a), (2). And NDOC’s own regulations provide that offenders must “[b]e within 36


³Davidson also vaguely contends on appeal that NDOC applies its own procedures in a disparate manner that violates equal protection, and also that he was denied a proper hearing and other procedural rights in connection with his request under AR 503. But he did not set forth any factual allegations in support of these points in his complaint, *see Droge v. AAAA Two Star Towing, Inc.*, 136 Nev., Adv. Op. 33, 468 P.3d 862, 878 (Ct. App. 2020) (noting that Nevada’s notice-pleading standard requires a plaintiff to set forth the facts supporting his legal theory in his complaint), and we therefore decline to consider them here.

months of *probable* release from NDOC custody” in order to qualify for minimum-security custody. AR 521.04(3)(A)(2) (emphasis added). Accordingly, even though Davidson is correct that NRS 209.481(1)(a) references an offender’s eligibility for parole and not his likelihood of obtaining it, the statute nevertheless endows NDOC with significant authority and discretion to craft its own regulations governing minimum-security classification and the qualifications therefor, and NDOC’s decision regarding Davidson’s likelihood of release fell within the discretion afforded by those regulations.⁴

Based on the foregoing, we agree with the district court that Davidson’s complaint failed to state a claim for relief under NRCP 12(b)(5), *see Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672, and we therefore

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

⁴Because NDOC’s decision comported with AR 521.04(3)(A)(2), we need not reach Davidson’s contention that AR 521.04(3)(C)(8)—which provides that NDOC may consider “[o]ther relevant factors” in addition to those specifically enumerated as “discretionary exclusions for minimum custody”—is unconstitutionally vague.

cc: Hon. Rob Bare, District Judge
Lee E. Davidson
Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk