No. 14-1169

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DONALD A. SMITH,
Plaintiff–Appellant,

v.

TOM DART, ET AL.,
Defendant–Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 1:13-cv-05034
The Honorable Amy J. St. Eve

REPLY BRIEF OF PLAINTIFF–APPELLANT DONALD A. SMITH

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ARGUMENT

Relying on no more than general platitudes based on off-point and outdated case law, Appellees have failed to address the arguments that Mr. Smith presents to this Court in favor of reversal: (1) the district court's failure to grant liberal construction to Mr. Smith's filings due to his pro se status; (2) the district court's erroneous dismissal of Mr. Smith's valid conditions-of-confinement claim; and (3) the district court's incorrect dismissal of Mr. Smith's work- and wage- related claims under both federal statutory law and the Constitution. Having added very little of substance to the inquiry, Appellees' brief reinforces the conclusion that this Court should reverse the erroneous dismissals below and remand for further proceedings.

I. Appellees dodge the central question surrounding the district court's ongoing obligation to liberally construe pro se filings by transforming the issue to one of discretionary dismissal under Rule 41.

Trying for a more deferential standard of review in this Court, Appellees characterize this case as a simple challenge to the district court's Rule 41 dismissal with prejudice. (Resp. Br. 18.) But this case is about a trio of errors that began far earlier in the case: an erroneous § 1915A dismissal followed by an erroneously dismissed pro se complaint followed by a failure to construe subsequent filings liberally. The ultimate result may have been an erroneous Rule 41 dismissal, but Mr. Smith challenges all of the district court's underlying missteps, each a separate ground for reversal and each subject to *de novo* review. Just like the district court below, Appellees give a cursory nod to the requirement that pro se filings are to be

liberally construed, but then effectively ignore Mr. Smith's repeated attempts to amend his complaint in a way that answered the court's concerns.

Even if this Court were to follow Appellees' suggestion to solely review the lower court's Rule 41 dismissal, it should nonetheless find reversible error. Appellees pronounce that the district court is "entitled to say, under proper circumstances, that enough is enough, and less severe sanctions than dismissal need not be imposed where the record of dilatory conduct is clear." (Resp. Br. 19) (citing *Pyramid Energy Ltd. v. Heyl & Patterson*, 869 F.2d 1058, 1061 (7th Cir. 1989)). But Appellees' argument stops there. They neither elucidate the "proper circumstances" for dismissal, nor explain via authority or otherwise what constitutes a clear record of dilatory conduct or how it exists in this case. Mr. Smith's actions below simply do not rise to the level that would justify dismissal with prejudice under this Court's precedents. *See, e.g.*, *id.* at 1060–61 (dismissal was not an abuse of discretion because the plaintiff severely delayed the case, requesting six separate extensions over the course of more than a year to simply file a pre-trial order); *Ball v. City of Chicago*, 2 F.3d 752, 760 (7th Cir. 1993) (finding clear record of delay or dilatory conduct where plaintiff's attorney failed to appear for status hearings or pretrial conference, repeatedly missed filing deadlines, did not respond to interrogatories by the deadline, and was sanctioned and warned multiple times); *Zaddack v. A.B. Dick Co.*, 773 F.2d 147, 150–51 (7th Cir. 1985) (plaintiff had gone through three sets of

attorneys, requested continuances for discovery numerous times, failed to file a court-ordered memorandum, and was late for status call).

Mr. Smith did not engage in unnecessary delay or stall tactics, and he was never contumacious. But in any event, these cases involved plaintiffs who were represented by counsel, not a pro se filer like Mr. Smith. With respect to this special class of plaintiffs, this Court has recognized that district courts:

> have a special responsibility to construe pro se complaints liberally and to allow ample opportunity for amending the complaint when it appears that by doing so the *pro se* litigant would be able to state a meritorious claim. . . . [I]t is incumbent on [the court] to take appropriate measures to permit the adjudication of pro se claims on the merits, rather than to order their dismissal on technical grounds.

Marshall v. Knight, 445 F.3d 965, 970 (7th Cir. 2006) (quoting *Donald v. Cook Cnty. Sheriff's Dep't*, 95 F.3d 548, 552 (7th Cir. 1996) (internal quotation marks omitted)). Mr. Smith should have been afforded the same liberal standards this Court has held applicable to other pro se litigants.[1]

II. Mr. Smith's conditions-of-confinement claims were sufficient to survive a motion to dismiss.

Mr. Smith sufficiently alleged that the conditions of his confinement were unconstitutional, but the district court dismissed his suit. On appeal, Mr. Smith has

[1] Appellees claim that Mr. Smith should have understood and complied with the district court's dismissal order because he is a "seasoned litigant." (Resp. Br. 22.) This is misleading—two of the three suits Appellees reference were filed *after* this suit, *see Smith v. People of Illinois*, No. 14-cv-8293; *Smith v. Madigan*, No. 14-cv-8294, and the third featured none of the back-and-forth refiling or amending that would have "seasoned" Mr. Smith, *see Smith v. Vahey, et al.*, No. 13-cv-4872. None of these suits placed Mr. Smith in a better position than any other pro se litigant to understand the district court's instructions.

indicated why dismissal was improper: this Court has indicated that pretrial detainees and prisoners are not the same and that the Fourteenth Amendment provides pretrial detainees "*at least* as much, and *probably more*, protection" than the Eighth Amendment provides convicted prisoners. *Forrest v. Prine*, 620 F.3d 739, 744 (7th Cir. 2010) (emphasis added); *see Hart v. Sheahan*, 396 F.3d 887, 892–93 (7th Cir. 2005); *Jackson v. Ill. Medi-Car, Inc.*, 300 F.3d 760, 764 (7th Cir. 2002); *see also Blackmon v. Sutton*, 734 F.3d 1237, 1241 (10th Cir. 2013) (observing that there is a categorical difference between the permissible exercise of state power over pretrial detainees and over prisoners). The district court did not acknowledge this difference and thus did not consider whether the conditions Mr. Smith alleged might fall within a gray area in which grafting the Eighth Amendment's test into the Fourteenth Amendment simply is not appropriate. (Appellant Br. 27.)

Though the circuits disagree whether the Eighth Amendment test or the Fourteenth Amendment test should govern pretrial detainees' conditions-of-confinement claims, it cannot be said that in this landscape, precedent legally foreclosed Mr. Smith's claims. *Compare Villegas v. Metro. Gov't*, 709 F.3d 563, 568 (6th Cir. 2013) (holding that the Eighth Amendment's deliberate indifference test from *Farmer v. Brennan* applies), *with Pierce v. Cnty. of Orange*, 526 F.3d 1190, 1205 (9th Cir. 2008) (rejecting the *Farmer* test and applying the standard established in *Bell v.* Wolfish, 441 U.S. 520 (1979)), *and Hart*, 396 F.3d at 892–93 (stating that the *Bell* test applies, but it overlaps with the *Farmer* test for

conditions of confinement); *cf. Kingsley v. Hendrickson*, 744 F.3d 443 (2014), *cert. granted*, No. 14-6368, 2015 WL 213653 (U.S. Jan. 16, 2015) (granting certiorari to address the proper test for pretrial detainees' excessive force claims). Because Mr. Smith's claims were at least legally plausible, the district court erred in discarding them so early in the case.

Appellees fail to grapple with this gap in the law and this difference between pretrial detainees and prisoners. They merely invoke the Eighth Amendment test and move on, choosing instead to try to dismantle Mr. Smith's complaint on a series of nitpicks that in the end do not succeed. Appellees suggest that Mr. Smith has not satisfied the technical pleading requirements as a general matter and then as to specific elements of his claims. (Resp. Br. at 11–13.) First, Appellees urge that Mr. Smith's conditions-of-confinement claims are invalid both because the "no set of facts" test requires more from a plaintiff's complaint and because *Twombly* rejects as insufficient conclusory allegations. (Resp. Br. 12) (citing *Kyle v. Morton High Sch.*, 144 F.3d 448, 455 (7th Cir. 1998); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). Putting aside that the "no set of facts" test was put to rest in *Twombly*, *see Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009), Appellees' recitation of *Twombly*'s caution against conclusory allegations does nothing for them here; they do not point to a single allegation in Mr. Smith's complaint that rises to that level. In fact, his claims are far from conclusory. As detailed in the opening brief, he provided specific

details about the abhorrent living and working conditions to which he was subjected. (Appellant Br. 13–15.)

Turning to the specific factual allegations, Appellees purportedly apply the Eighth Amendment test and then point to two specific facts that they claim are missing from Mr. Smith' complaint: (1) a specific injury allegation; and (2) facts tying Dart to the violations. (Resp. Br. 17–18.) Appellees' approach to the facts endorses the very type of pleading they have suggested would not suffice as a general matter. (Resp. Br. 12) (internal citation and quotations omitted) (complaint requires "more than an unadorned, the defendant-unlawfully harmed me accusation or a formulaic recitation of the elements of a cause of action."). Apparently, Mr. Smith's complaint was doomed by the omission of seven magic words: "my stomach hurt," and "they knew about it." Had Mr. Smith simply uttered these seven buzzwords in his complaint, it would have not only put Appellees on notice of his claims but also would have survived dismissal. (Resp. Br. 17–18) (claiming that Mr. Smith included no specific allegation that Appellees "had knowledge of the conditions of confinement at the jail" and that he didn't allege an adequate injury). But this hyper-technical recitation of buzzwords and elements harkens back to the code-pleading era left behind more than 80 years ago. Current standards simply do not require what the Appellees press here. *Cf. Iqbal*, 556 U.S. at 678–79 (noting that Rule 8 "marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era").

Even if Mr. Smith's allegations required additional scrutiny, those elements were satisfied here. First, Mr. Smith alleged actual injury—a body rash, which Appellees concede. [2] (Resp. Br. 27.) What is more, the injuries that flow from the deprivations Mr. Smith alleged are obvious, and courts have upheld § 1983 claims even without a showing of a specific injury. *See Foster v. Runnels*, 554 F.3d 807, 812-13 (9th Cir. 2009) (cutting meals as retaliation is unlawful, regardless of the extent of injury); *Bibbs v. Early*, 541 F.3d 267, 271–72 (5th Cir. 2008) (holding that prison officials may not keep prisons inordinately hot or cold, regardless of the extent to which plaintiff alleges injury); *Gillis v. Litscher*, 468 F.3d 488, 494 (7th Cir. 2006) (an inmate properly states a constitutional claim by alleging that officials withheld access to basic hygiene); *Gaston v. Coughlin*, 249 F.3d 156, 165–66 (2d Cir. 2001) (same); *DeSpain v. Uphoff*, 264 F.3d 965, 974–75 (10th Cir. 2001) (without reference to a particular injury, alleging the mere exposure to toxic waste for an extended period of time is sufficient to sustain a constitutional claim); *Lunsford v. Bennett*, 17 F.3d 1574, 1580 (7th Cir. 1994) (holding that the Constitution requires meals that "contain[] sufficient nutritional value to preserve health"); *Lewis v. Lane*, 816 F.2d 1165 (7th Cir. 1987) (same).

[2] Curiously, Appellees cite the PLRA and two PLRA cases, apparently as support for the proposition that mental or emotional injury cannot suffice. (Resp. Br. 17–18.); *see also* 42 U.S.C. § 1997e(e) (2012); *Cassidy v. Ind. Dep't of Corr.*, 199 F.3d 374, 375 (7th Cir. 2000); *Zehner v. Trigg*, 133 F.3d 459, 461 (7th Cir. 1997). But a body rash is a physical injury, as is the ingestion of toxic water and food. Regardless, this portion of the PLRA is about the availability of emotional distress and mental injury *damages* to prisoner plaintiffs who show or allege no physical injuries. § 1997e(e). It is § 1983, not § 1997, that creates the cause of action and defines its limits; this statutory damages cap is irrelevant to Mr. Smith's case.

As for Mr. Smith's purported failure to link the defendants to the poor conditions he alleged, Appellees can be held liable if evidence suggests that they facilitated, approved, condoned, or turned a blind eye to a constitutional violation. *Trentadue v. Redmon*, 619 F.3d 648, 652 (7th Cir. 2010). Mr. Smith specifically alleged that Appellees were aware of and failed to remediate these injurious conditions; his filings explicitly stated that although he had no choice but to drink toxic water, jail staff evinced their knowledge of its toxicity by always refusing to drink it themselves. (A.11; Appellant Br. 15.) These facts are sufficient to establish that jail officials knew that the water was tainted but did nothing to correct it. In any event, everyone knows that the conditions at Cook County Jail are deplorable. Appellees decry Mr. Smith's reference to the DOJ report as somehow improper,[3] but only because acknowledging that this report exists undermines their indefensible position that Mr. Smith's "allegations were still insufficient to place [Appellees] on notice of Plaintiff's actual claims." (Resp. Br. 12–13.) This Court need not take judicial notice of the contents of the report or even its very existence, though it could. *Wiesmueller*, 547 F.3d at 742. A regular dose of common sense shows that Appellees cannot credibly claim that they were unaware of the conditions of which Mr. Smith complained, no matter how much they nitpick his complaint. In short,

[3] Appellees suggest that the background information about the Cook County Jail Mr. Smith provided in his Statement of the Case runs afoul of the federal or circuit rules. (Resp. Br. 3.) Rule 28 does not forbid references to secondary sources, and this Court has explicitly approved such material to the extent that it may provide background to the relevant facts of the case. *See* Fed. R. App. P. 28; *Wiesmueller v. Kosobucki*, 547 F.3d 740, 741–42 (7th Cir. 2008).

Mr. Smith's complaint was more than sufficient to put Appellees on notice that he was complaining of inadequate nutrition, poisoned water, insect infestation, and lack of access to basic hygiene and exercise, all of which carry inherent injury and all of which they knew about.

III. The district court erred in dismissing pursuant to § 1915A Mr. Smith's work- and wage-related claims.

Mr. Smith alleged that his job in the Cook County Jail required him to work seven to eight hours per day, every day, on his feet in a hot, smelly room. Regardless whether through discovery Mr. Smith is able to adduce evidence sufficient to prove his case at trial, his allegations of approximately fifty hours of exhausting labor per week for just three dollars per day are sufficient to withstand dismissal. Yet Appellees propose that no amount of work is too great and no amount of pay is too low to provide a pretrial detainee the right to allege a valid statutory or constitutional violation.

A. Pretrial detainees are not categorically precluded from raising claims under the Fair Labor Standards Act, and Mr. Smith's particular claims are sufficient to survive dismissal.

Emphasizing that the FLSA applies only to employers in the free market, Appellees never address Mr. Smith's contention that many of the indicia of the free market that are absent in prisoner cases are *not* absent in pretrial detainee cases, particularly his own. Equating Mr. Smith's request that he not be undernourished and that he not be subjected to exhausting work in abominable conditions to a

request for "hotel accommodations," Appellees belittle Mr. Smith's concerns and misconstrue Mr. Smith's arguments on appeal.

Pretrial detainees are not categorically excluded from FLSA coverage, and this Court has never so held, despite Appellees' intimation to the contrary. (Resp. Br. 23.) Citing an unpublished Wisconsin district court decision and three of this Court's cases, Appellees conclude that "[t]his Circuit has determined that incarcerated individuals are not covered by the FLSA." (Resp. Br. 23.) But Appellees overstate the law. True, this Court has rejected claims by *prisoners* who assert that their routine work assignments fall within the ambit of the Act, but it has never addressed whether *pretrial detainees* might be able to state a claim under it. *See Bennett v. Frank*, 395 F.3d 409 (7th Cir. 2005); *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992).[4] Appellees' acknowledgement later in their brief that courts have entertained FLSA claims by prisoners further undermines their blanket pronouncement that such claims simply do not exist. (Resp. Br. 25.) *See Watson v. Graves*, 909 F.2d 1549, 1553–54 (5th Cir. 1990); *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 13–14 (2d Cir. 1984).

That incarcerated individuals can under some circumstances allege a viable FLSA claim reveals the district court's error in dismissing the claim out of hand

[4] Appellees follow up with a page-long string cite of other courts that have rejected FLSA claims by incarcerated persons. (Resp. Br. 24.) Again, with just two exceptions (both of which Mr. Smith cited in his own opening brief), all of these cases involve convicted prisoners and not pretrial detainees.

during its § 1915A review. But Mr. Smith went further and mined the existing FLSA case law to show not only that an FLSA claim is technically possible, but also why in his particular case it is plausible. As the cases show, what matters is whether the detainee has alleged an employment relationship, and that some of the indicia of the free market are present such that applying the FLSA furthers the statute's purpose. *Vanskike*, 974 F.2d at 810–11. Because the Cook County Jail was not fulfilling its custodial obligations, Mr. Smith sought work so that he could earn wages to supply his own basic needs. Earning income from his work would help him to pay for the additional food he needed in order to maintain a nutritious diet. The work he performed was extensive, and the pay he received was miniscule. Mr. Smith's request to be paid a reasonable wage for significant and arduous work is not a request that he be "entitled to 'the equivalent of hotel accommodations.'" (Resp. Br. 25) (quoting *United States v. Weathington*, 507 F.3d 1068, 1073 (7th Cir. 2007)). It is a request, instead, that he be treated like any other presumptively innocent citizen who engages in wage-earning work to secure his own basic needs.

B. Mr. Smith has lodged a sufficient constitutional claim.

Because convicted prisoners have no Thirteenth Amendment right to be free from forced labor, those who engage in work need not be paid for it; both the work and any payment they receive from it are "by grace of the state." *Vanskike*, 974 F.2d at 809. Even where the work in which prisoners engage is so arduous as to constitute punishment, the Constitution has nothing to say on the matter unless

the punishment is cruel or unusual. *See* U.S. Const. amend. VIII. In contrast, pretrial detainees *do* have a Thirteenth Amendment right to be free from forced labor, and particularly arduous work assignments can amount to punishment in violation of detainees' liberty interests. As a result, this Court and others have held that pretrial detainees may *not* be forced to do anything more than "general housekeeping," *Bijeol v. Nelson*, 579 F.2d 423, 424 (7th Cir. 1978), which is defined by the length of time and difficulty of the job, *Tourscher v. McCullough*, 184 F.3d 236, 243–44 (3d Cir. 1999). Anything more may rise to the level of a constitutional violation. *Harden v. Bodiford,* 442 F. App'x 893, 895 (4th Cir. 2011).

Mr. Smith's complaint and subsequent filings indicated that he was told that if he stopped working in the jail laundry, he would lose his benefits and be inserted into the general jail population, the dangers of which he feared. From this the inference could be made that Mr. Smith felt compelled to work, in violation of the Thirteenth Amendment. Moreover, by presenting Mr. Smith with the choice between working a backbreaking job or being exposed to a dangerous living environment, Appellees posed a "pitch-in or sit-in" scenario that also violated Mr. Smith's due process rights. Appellees miss the point when they argue, without support, that "[h]aving his housing changed to general population and losing the benefits associated with the veterans' program is hardly punishment." (Resp. Br. 28.) As Mr. Smith set forth in his opening brief, it is not the transfer to the general population that would constitute punishment; it is Appellees' use of a "pitch-in or

sit-in" policy that effectively forces detainees to participate in what they label as voluntary work. When jail officials use such tactics, they are unable to invoke the argument that a detainee's decision to participate eviscerates any compulsory-work or punishment claim. *See, e.g.*, *Martinez v. Turner*, 977 F.2d 421, 423 (8th Cir. 1992); *Chestnut v. Magnusson*, 942 F.2d 820, 823 (1st Cir. 1991).

As for the nature of the work, Mr. Smith alleged more than mere housekeeping: his job required him to process the laundry of over 12,500 inmates while working on his feet for seven to eight hours *daily* in abominable conditions. Appellees deal in irrelevant case law; of course, jails may require inmates to clean their own cells, *Hause v. Vaught*, 993 F.2d 1079 (4th Cir. 1993); may impose lockdowns without violating the Constitution, *Buthy v. Comm'r of the Office of Mental Health*, 818 F.2d 1046 (2d Cir. 1987); and do not need to provide a pretrial detainee with food "'from a menu [or] maid service,'" *id.* at 1051 (quoting *Bijeol*, 579 F.2d at 424).

Appellees are right that these cases "are not directly on point," (Resp. Br. 27), though they are wrong about why. It is not, as they claim, because the cases deal with jailhouse segregation, while Mr. Smith's claims involve the threat of transfer to the general population. (Resp. Br. 27.) Appellees' use of these cases is misguided because they do not close the factual lacuna between the "general housekeeping" type facts those cases present and Mr. Smith's wholly different claim that he was forced to work fifty-hour weeks in terrible conditions, all the while facing the specter of transfer to an unsafe environment if he were to quit. The district court

was wrong to summarily dismiss Mr. Smith's work-related claims because precedent does not foreclose them and because the facts he alleged sufficiently state a constitutional claim for relief.

Conclusion

For the foregoing reasons, Mr. Smith respectfully requests that this Court reverse the district court's dismissal order and remand this case for further proceedings.

Respectfully Submitted,

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Certificate of Compliance with Federal Rule of Appellate Procedure 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 3,741 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 12 point Century Schoolbook font with footnotes in 11 point Century Schoolbook font.

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Certificate of Service

I, the undersigned, counsel for the Plaintiff-Appellant, Donald A. Smith, hereby certify that I electronically filed the foregoing with the clerk of the Seventh Circuit Court of Appeals on February 13, 2015, which will send notification to counsel of record.

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