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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
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Mark Reynolds

FRANK DOMBOS,

Plaintiff-Appellant,

v. **No. A-1-CA-42321**

**WARDEN, C.N.M.C.F.
and HOPE BENAVIDEZ,**

Defendants-Appellees.

**APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY
James Lawrence Sanchez, District Court Judge**

Frank Dombos
Las Cruces, NM

Pro Se Appellant

New Mexico Corrections Department
Brenden J. Murphy, Deputy General Counsel
Santa Fe, NM

for Appellees

MEMORANDUM OPINION

HOUGHTON, Judge.

{1} Plaintiff Frank Dombos, proceeding as a self-represented litigant, appeals the district court's dismissal of his complaint against corrections officer Hope Benavidez (Benavidez) and the Warden of Central New Mexico Correctional Facility (the Warden) (collectively, Defendants). Plaintiff claims the district court erred when it determined his claims are barred by the immunity conferred on

Defendants by the New Mexico Tort Claims Act (NMTCA), NMSA 1978, §§ 41-4-1 to -30 (1976, as amended through 2020). We affirm in part and reverse in part, and remand for further proceedings consistent with this opinion.

BACKGROUND

{2} We take the following facts from Plaintiff's complaint.[1] Plaintiff has "multiple substantial impairments" stemming from an emergency surgery in 2021 to remove two blood clots in his brain. Plaintiff suffers from severe pain and headaches, and his right leg is partially paralyzed below the knee, leaving him unable to walk and wheelchair bound. On December 14, 2021, Plaintiff was transported from Lea County Correctional Facility to Central New Mexico Correctional Facility (CNMCF), where a doctor in the geriatric unit saw him multiple times. The doctor wrote Plaintiff a medical pass that permitted a caregiver to bring Plaintiff meals in the dormitory because Plaintiff's medical issues prevented him from accessing the dining facility.

{3} On April 12, 2023, Benavidez tore up Plaintiff's medical pass. Because he was no longer being delivered meals and was otherwise unable to access the dining facility, Plaintiff had to use his own money to purchase food from the commissary.

[1]As we are reviewing a district court's grant of a motion to dismiss under Rule 1-012(B)(6) NMRA, we accept the factual allegations in Plaintiff's complaint as true for the purposes of this appeal. *See Healthsource, Inc. v. X-Ray Assocs. of N.M.*, 2005-NMCA-097, ¶ 16, 138 N.M. 70, 116 P.3d 861.

Plaintiff utilized the New Mexico Corrections Department's (NMCD) grievance process to address the issue but received no response. In addition, Plaintiff twice wrote the Warden about his medical pass but he received no response.

{4} On December 13, 2023, Plaintiff filed a complaint for damages against Benavidez and the Warden in both their individual and official capacities. Plaintiff alleged claims for "gross negligence," and "supervisor liability, lack of training—failure to supervise." Plaintiff also alleged violations of his "[First] Amendment rights under both the U[nited] S[tates] and State of N[ew] M[exico] Constitutions," his right to be free from cruel and unusual punishment, the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213, and the Rehabilitation Act of 1973 (RA), 29 U.S.C. §§ 701-796. Defendants moved to dismiss Plaintiff's complaint pursuant to Rule 1-012(B)(6) NMRA, arguing the claims for gross negligence and failure to supervise did not fit into any waiver of immunity under the NMTCA. Defendants also argued that Plaintiff had not alleged viable claims under the ADA, RA, or the Eighth Amendment to the United States Constitution. Defendants did not address Plaintiff's First Amendment to the United States Constitution claim or analogue under the New Mexico Constitution.

{5} At a hearing on the motion, the district court determined that the language Plaintiff used in his complaint "speaks of what would normally be considered a tort claim case, rather than . . . a civil rights question." The district court then entered an

order dismissing Plaintiff's complaint in its entirety "on the ground that Plaintiff's claim does not fall within any exception to the governmental tort immunity applicable to Defendants under the [NMTCA]." Plaintiff timely appealed.

DISCUSSION

I. Standard of Review

{6} We review de novo a district court's order granting a motion to dismiss for failure to state a claim under Rule 1-012(B)(6). *Nash v. Bd. of Cnty. Comm'rs of Catron Cnty.*, 2021-NMSC-005, ¶ 20, 480 P.3d 842. "Only when there is a total failure to allege some matter which is essential to the relief sought should such a motion be granted." *Las Luminarias of N.M. Council of the Blind v. Isengard*, 1978-NMCA-117, ¶ 3, 92 N.M. 297, 587 P.2d 444. A motion to dismiss "is infrequently granted because its purpose is to test the law of the claim, not the facts that support it." *Env't Improvement Div. of N.M. Health & Env't Dep't v. Aguayo*, 1983-NMSC-027, ¶ 10, 99 N.M. 497, 660 P.2d 587. We accept the complaint's factual allegations as true and "resolve all doubts in favor of the complaint's sufficiency." *See N.M. Pub. Schs. Ins. Auth. v. Arthur J. Gallagher & Co.*, 2008-NMSC-067, ¶ 11, 145 N.M. 316, 198 P.3d 342.

{7} New Mexico's notice pleading standard governs our review of the sufficiency of allegations made in a complaint. *See Valles v. Silverman*, 2004-NMCA-019, ¶ 18, 135 N.M. 91, 84 P.3d 1056. A complaint must contain "a short and plain statement

of the claim[s] showing that the pleader is entitled to relief." Rule 1-008(A)(2) NMRA. A complaint will satisfy the notice pleading standard as long as it includes "sufficient detail so that the parties and the court will have a fair idea of the action about which the party is complaining and can see the basis for relief." *Schmitz v. Smentowski*, 1990-NMSC-002, ¶ 9, 109 N.M. 386, 785 P.2d 726. We apply this liberal standard "to keep the path to justice clear for all who would use it, regardless of their familiarity with the law." *Zamora v. St. Vincent Hosp.*, 2014-NMSC-035, ¶ 12, 335 P.3d 1243; *see* Rule 1-008(F). This same pleading standard applies equally to a plaintiff proceeding as a self-represented litigant. *See Cheng v. Rabey*, 2023-NMCA-013, ¶ 24, 525 P.3d 405. With this standard in mind, we turn to the allegations in Plaintiff's complaint.

II. Plaintiff Has Not Stated Viable Tort Claims Against Defendants

{8} Plaintiff brings claims for "gross negligence" against both Benavidez and the Warden, and "supervisor liability" against the Warden.

{9} Defendants argue these claims fail because they do not fall within any of the waivers of tort immunity set forth in the NMTCA. Plaintiff does not argue his complaint satisfies any of the waivers, and explicitly disavowed any reliance on the NMTCA in the district court. Instead, Plaintiff argues on appeal, as he did below, that the district court erred by dismissing his tort claims because Defendants are not entitled to immunity when named in their individual capacities.

{10} A lawsuit brought against a public employee in their official capacity is "'another way of pleading an action against an entity of which an officer is an agent.'" *Ford v. N.M. Dep't of Pub. Safety*, 1994-NMCA-154, ¶ 18, 119 N.M. 405, 891 P.2d 546 (quoting *Hafer v. Melo*, 502 U.S. 21, 25 (1991)). In contrast, when a lawsuit is brought against a public employee in their individual capacity, "the defendant is the individual, not the office." *Id.* ¶ 19. However, whether a public employee is immunized by the NMTCA does not turn on the capacity in which they are sued, but rather whether they were "acting within the scope of duty." *See* § 41-4-4(A); *see also Vigil v. State Auditor's Off.*, 2005-NMCA-096, ¶¶ 8, 12, 138 N.M. 63, 116 P.3d 854 (analyzing immunity under the scope of duty framework and stating that it is "inappropriate" to name public employees in their official and individual capacities when bringing a NMTCA claim).

{11} A public employee acts within their scope of duty when performing duties they are "requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance." Section 41-4-3(G). This standard extends "beyond officially authorized or requested acts" to reach "employees who abuse their officially authorized duties, even to the extent of some tortious and criminal activity." *Celaya v. Hall*, 2004-NMSC-005, ¶¶ 24-25, 135 N.M. 115, 85 P.3d 239. A public employee is typically acting within the scope of their duty if, at the time of the alleged tort, they were "providing some benefit to the public body or

[were] otherwise facilitating its functioning or furthering its goals." *Wright v. Seventh Jud. Dist. Ct. of N.M.*, 2024-NMCA-059, ¶ 11, 553 P.3d 521.

{12} Here, Plaintiff failed to allege that either Benavidez or the Warden was acting outside the scope of their duties. Instead, Plaintiff alleges that Defendants carried out their official duties at CNMCF in a manner that was unlawful or otherwise violated his rights. Plaintiff does not allege that either the Warden or Benavidez carried out any of these acts as "private citizen[s]." *See Vigil*, 2005-NMCA-096, ¶ 8. Thus, Defendants are entitled to the immunity afforded by the NMTCA for Plaintiff's tort claims.

{13} Plaintiff does not argue that his claims satisfy any of the statutory waivers of immunity. *See Kreutzer v. Aldo Leopold High Sch.*, 2018-NMCA-005, ¶ 43, 409 P.3d 930 ("Under the [NM]TCA, the rule is immunity; waiver is the exception." (internal quotation marks and citation omitted)). Our appellate courts will not "guess at what a party's arguments might be" or "develop the arguments [ourselves], effectively performing the parties' work for them." *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 (alteration, internal quotation marks, and citation omitted). We therefore affirm the district court's dismissal of Plaintiff's tort claims against Defendants as barred by the NMTCA.

III. Plaintiff's Other Claims

{14} Plaintiff argues the district court dismissed his complaint without considering his claims for "First Amendment violations," cruel and unusual punishment, violations of the ADA, and violations of the RA. Defendants contend that Petitioner's claims were too vague to state a claim for which relief could be granted and therefore, urges this Court to affirm the dismissal of these claims under the "right for any reason" doctrine.

{15} An appellate court may affirm a trial court's ruling on a ground that was not relied on below if reliance on the new ground would not be unfair to the appellant. *See Eldin v. Farmers All. Mut. Ins. Co.*, 1994-NMCA-172, ¶ 21, 119 N.M. 370, 890 P.2d 823. It is generally "unfair to an appellant to affirm on a fact-dependent ground not raised below." *State v. Marquez*, 2023-NMSC-029, ¶ 32, 539 P.3d 303 (internal quotation marks and citation omitted). "Accordingly, appellate courts usually apply the right for any reason basis of affirmance to strictly legal questions." *Id.* (alteration, internal quotation marks, and citation omitted). Whether Plaintiff satisfied our notice pleading standard is a strictly legal question. *See Wills v. Bd. of Regents of Univ. of N.M.*, 2015-NMCA-105, ¶ 12, 357 P.3d 453. Thus, it is not unfair to appellant to affirm the district court's dismissal if we determine Plaintiff's asserted claims are "legally deficient." *See Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150 N.M. 97, 257 P.3d 917. We address each claim in turn.

A. Plaintiff's First Amendment and Article II, Section 17 Claims

{16} In Plaintiff's complaint, he alleges that he suffered a violation of his "[First] Amendment [r]ights under both the U[nited] S[tates] and . . . N[ew] M[exico] Constitutions" related to his filing of grievances. Plaintiff does not argue that a claim under New Mexico's First Amendment analogue, Article II, Section 17 of the New Mexico Constitution, is or should be analyzed differently from one brought under the First Amendment of the United States Constitution, and we therefore rely on federal precedent in analyzing his claims. *See N.M. State Land Off. v. Siddens & Dodson, LLP*, 2026-NMCA-013, ¶ 34, 584 P.3d 1060; *see also State v. Gomez*, 1997-NMSC-006, ¶¶ 22-23, 122 N.M. 777, 932 P.2d 1 (noting that parties must argue that an analogous provision of our state constitution should be interpreted differently than its federal counterpart to preserve the issue). To state a claim for First Amendment retaliation, a plaintiff must allege:

> (1) that the plaintiff was engaged in constitutionally protected activity;
>
> (2) that the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and
>
> (3) that the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct.

Shero v. City of Grove, Okla., 510 F.3d 1196, 1203 (10th Cir. 2007).

{17} Plaintiff's complaint identifies a constitutionally protected activity: the filing of prison grievances. *See Requena v. Roberts*, 893 F.3d 1195, 1211 (10th Cir. 2018)

("The filing of prison grievances is constitutionally protected activity."). However, Plaintiff's complaint does not allege that Benavidez or the Warden took any retaliatory actions "that would chill a person of ordinary firmness from continuing to engage in that activity." *See Shero*, 510 F.3d at 1203. Instead, Plaintiff simply alleges no one responded to his grievances. Plaintiff argues in his reply brief that he was transferred out of the geriatric unit at CNMCF in retaliation for using the grievance process. However, no such allegation appears in Plaintiff's complaint, and "we do not consider arguments raised in a reply brief for the first time." *Guest v. Berardinelli*, 2008-NMCA-144, ¶ 36, 145 N.M. 186, 195 P.3d 353. Thus, we affirm the district court's dismissal of Plaintiff's First Amendment and Article II, Section 17 claims.

{18} As part of this claim, Plaintiff alleges Defendants violated NMCD policy by failing to respond to his grievances. Plaintiff suggests on appeal that this policy violation is a separate claim. However, Plaintiff has not pointed this Court to any authority supporting a right of action against NMCD for damages based on violations of its policies. Therefore, we assume no such authority exists, *see Curry v. Great Nw. Ins. Co.*, 2014-NMCA-031, ¶ 28, 320 P.3d 482, and affirm the district court's dismissal of any such claim.

B. Plaintiff's Eighth Amendment Claims

{19} Plaintiff alleges that Benavidez violated his right to be free from cruel and unusual punishment, and that the Warden failed to establish policies, or train and supervise employees, to ensure "violations of constitutional rights do not occur." Plaintiff cites exclusively to federal law to support his allegations, and we therefore understand him to allege a claim arising under 42 U.S.C. § 1983 (Section 1983) for violations of his rights protected by the Eighth Amendment to the United States Constitution. *See Estelle v. Gamble*, 429 U.S. 97, 102 (1976)

1. Official Capacity Claims

{20} Plaintiff's complaint names Defendants in both their individual and official capacities. A suit brought against a state actor in their official capacity is a suit against the "entity of which an officer is an agent." *Hafer*, 502 U.S. at 25 (internal quotation marks and citation omitted). Because Plaintiff alleges that a state correctional facility employs Defendants, Plaintiff's official-capacity claims against them are claims against NMCD. Section 1983 creates a right of action against "persons" who deprive others of "any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. "A claim against an agency of the state constitutes a suit against the state; the state is not a 'person' within the contemplation of 42 U.S.C. Section 1983." *Dunn v. State ex rel. N.M. Tax'n & Revenue Dep't*, 1993-NMCA-059, ¶ 20, 116 N.M. 1, 859 P.2d 469 (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64, 70 (1989)). NMCD is an agency of the State of New Mexico.

See NMSA 1978, § 9-3-3 (2005). NMCD therefore cannot be sued under Section 1983. *See Dunn*, 1993-NMCA-059, ¶ 20. Thus, Plaintiff does not plead a valid Eighth Amendment official-capacity claim against Defendants.

2. Individual Capacity Claims

{21} In support of his claims under Section 1983 against Defendants in their individual capacities, Plaintiff alleges that Benavidez personally violated his Eighth Amendment rights when Benavidez tore up his medical note, depriving Plaintiff of access to "the chow hall," and that the Warden is liable for failing to make adequate policy and for failing to properly supervise Benavidez to prevent Benavidez from violating Plaintiff's rights.

{22} Under the Eighth Amendment, prison officials "must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). "A prison official's deliberate indifference to an inmate's serious medical needs violates the Eighth Amendment." *Sealock v. Colo.*, 218 F.3d 1205, 1209 (10th Cir. 2000). Separately, "[a] substantial deprivation of food may be sufficiently serious to state a conditions of confinement claim under the Eighth Amendment." *Thompson v. Gibson*, 289 F.3d 1218, 1222 (10th Cir. 2002). We understand Plaintiff to allege that Benavidez tearing up his medical pass impacted both his medical care and his access to food. We analyze each theory in turn.

a. Serious Medical Needs

{23} A claim for deliberate indifference to an inmate's medical needs "involves both an objective and a subjective component." *Sealock*, 218 F.3d at 1209. To satisfy the objective component, a plaintiff must allege "that the prisoner's medical need was 'sufficiently serious.'" *Est. of Beauford v. Mesa Cnty., Colo.*, 35 F.4th 1248, 1262 (10th Cir. 2022) (quoting *Farmer*, 511 U.S. at 834). "A medical need is sufficiently serious if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Sealock*, 218 F.3d at 1209 (internal quotation marks and citation omitted). This includes "'the presence of a medical condition that significantly affects an individual's daily activities.'" *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996) (quoting *McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992)).

{24} Plaintiff alleges that due to a traumatic brain injury, he is unable to walk and experiences pain and headaches that render him "unable to go to the chow hall." Because of these medical issues, a doctor in geriatrics "wrote a medical pass to allow [Plaintiff] to have [a] caregiver bring back to [his] dorm, bunk area, [his] meals." In effect, Plaintiff alleges that his medical condition prevents him from independently accessing food at the dining facility, and that the pass is part of the prescribed

medical care he received at CNMCF. Thus, Plaintiff alleges a sufficiently serious medical condition.

{25} To satisfy the subjective component, a plaintiff must plead that "the official knows of and disregards an excessive risk to inmate health or safety." *Est. of Beauford*, 35 F.4th at 1263 (internal quotation marks and citation omitted). "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [they] must also draw the inference." *Bond v. Sheriff of Ottawa Cnty.*, 173 F.4th 1265, 1291 (10th Cir. 2026) (internal quotation marks and citation omitted). A plaintiff satisfies the subjective component if the allegations support an inference "that a prison official knew of a substantial risk from the very fact that the risk was obvious." *See id.* (internal quotation marks and citation omitted). Accordingly, prison guards violate the Eighth Amendment if they "intentionally interfer[e] with [medical] treatment once prescribed." *Estelle*, 429 U.S. at 105.

{26} Plaintiff alleges that while he was housed at the geriatric unit at CNMCF and confined to a wheelchair, Benavidez "tore [his] medical pass to pieces." Plaintiff does not allege that Benavidez knew the specific nature of his medical pass. However, Benavidez's deliberate interference with Plaintiff's prescribed medical care supports an inference that Benavidez consciously disregarded an obvious and substantial risk to Plaintiff's health and safety. Therefore, Plaintiff alleges a viable

claim for deliberate indifference to his medical needs under the Eighth Amendment against Benavidez in her individual capacity.

b. Deprivation of Food

{27} A claim for inadequate conditions of confinement under the Eighth Amendment, such as inadequate food, requires a plaintiff to allege "an objective component and subjective component associated with the deficiency claimed." *See Womble v. Chrisman*, 173 F.4th 1186, 1196 (10th Cir. 2026) (internal quotation marks and citation omitted). To satisfy the objective component, the plaintiff must allege "conditions sufficiently serious so as to deprive inmates of the minimal civilized measure of life's necessities, or conditions sufficiently serious so as to constitute a substantial risk of serious harm." *Id.* (alteration, internal quotation marks, and citations omitted). To satisfy the subjective component, plaintiff must allege the prison official "act[ed] or fail[ed] to act with deliberate indifference to inmate health and safety" by alleging they "knew [the plaintiff] faced a substantial risk of harm and disregarded that risk by failing to take reasonable measures to abate it." *Id.* (internal quotation marks and citations omitted).

{28} Plaintiff alleges that Benavidez's destruction of his medical pass left him without access to the dining facility "for months." The Eighth Amendment requires states to provide inmates "nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to the health and well

being of the inmates who consume it." *Ramos v. Lamm*, 639 F.2d 559, 571 (10th Cir. 1980). Plaintiff's allegation that he was completely deprived of access to the dining facility supports a finding of a substantial deprivation of food sufficiently serious to satisfy the objective component of a conditions of confinement claim. *See Thompson*, 289 F.3d at 1222. Defendants argue Plaintiff's allegation that he bought food at the commissary during this time defeats his claim. But Defendants do not point us to law supporting the proposition that access to food only through a commissary satisfies the Eighth Amendment, and thus we assume none exists. *See Curry*, 2014-NMCA-031, ¶ 28. As to the subjective component, Plaintiff's allegation that Benavidez deliberately destroyed his medical pass supports the inference that she knew her conduct would pose a substantial risk to Plaintiff's health and safety by depriving Plaintiff access to the dining facility. Thus, Plaintiff has stated a viable claim under the Eighth Amendment against Benavidez in her individual capacity for his alternative conditions-of-confinement theory of deprivation of food.

c. Supervisory Claim

{29} Plaintiff alleges the Warden failed to supervise Benavidez and failed to create adequate policies, leading to Benavidez's destruction of his medical pass. To state a claim for supervisory liability, a plaintiff must allege "an affirmative link between the supervisor and the [constitutional] violation, which includes showing (1) personal involvement, (2) sufficient causal connection, and (3) culpable state of

mind." *Est. of George v. City of Rifle, Colo.*, 85 F.4th 1300, 1321 (10th Cir. 2023) (internal quotation marks and citation omitted). When such a claim is based on a failure to create or implement adequate policies and procedures, a plaintiff must allege that "(1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation." *Stepp v. Lockhart*, 168 F.4th 1286, 1300 (10th Cir. 2026) (internal quotation marks and citation omitted). Because the state of mind required to establish the Eighth Amendment violation at issue here is deliberate indifference, Plaintiff must allege that the Warden acted with deliberate indifference in failing to supervise Benavidez and create appropriate policies.

{30} "A local government policymaker is deliberately indifferent when he deliberately or consciously fails to act when presented with an obvious risk of constitutional harm which will almost inevitably result in constitutional injury of the type experienced by the plaintiff." *Schneider*, 717 F.3d at 769 (alteration, internal quotation marks, and citation omitted).

> In most instances, notice [of an obvious risk] can be established by proving the existence of a pattern of tortious conduct. In a narrow range of circumstances, however, deliberate indifference may be found absent a pattern of unconstitutional behavior if a violation of federal rights is a highly predictable or plainly obvious consequence of a [policymaker]'s action or inaction, such as when a [policymaker] fails to train an employee in specific skills needed to handle recurring

> situations, thus presenting an obvious potential for constitutional violations.

Barney v. Pulsipher, 143 F.3d 1299, 1307-08 (10th Cir. 1998) (internal quotation marks and citation omitted).

{31} Assuming without deciding that Plaintiff adequately alleges the first two elements of these supervisory claims, they nonetheless fail because Plaintiff does not allege that the Warden acted with deliberate indifference in supervising Benavidez or in discharging his policy-making role. Plaintiff does not allege that the Warden disregarded an obvious risk that Benavidez would deprive Plaintiff of his constitutional rights. Plaintiff does not allege a pattern of constitutional violations on the part of correctional officers under the Warden's supervision. Nor does Plaintiff allege that the conduct at issue here—Benavidez tearing up his medical note and thereby depriving him of access to food—was a highly predictable or plainly obvious consequence of insufficient supervision or policy-making on the part of the Warden. Absent more specific allegations, additional supervision or training does not seem necessary for a correctional officer to know that deliberately destroying an inmate's medical documents is inappropriate and potentially unconstitutional behavior. Accordingly, "this case does not fall within the narrow range of circumstances justifying a finding of deliberate indifference absent a pattern of violations." *See Barney*, 143 F.3d at 1308. Thus, we affirm the dismissal of Plaintiff's individual-capacity Section 1983 supervisory-liability claim against the Warden.

C. Plaintiff's ADA Claim

{32} Plaintiff's complaint also invokes the ADA. Title II of the ADA states, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. It is well established that Title II of the ADA applies to inmates in state prisons. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209-10 (1998). To bring a viable claim under Title II of the ADA, a plaintiff must allege:

> (1) [they are] a qualified individual with a disability;
>
> (2) [they were] either excluded from participation in or denied the benefits of some public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and
>
> (3) such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.

Crane v. Utah Dep't of Corr., 15 F.4th 1296, 1312 (10th Cir. 2021) (internal quotation marks and citation omitted). Title II has not been interpreted to create individual liability. *See Brooks v. Colo. Dep't of Corr.*, 12 F.4th 1160, 1167 (10th Cir. 2021) (recognizing dismissal of individual capacity ADA claims in *Brooks v. Colo. Dep't of Corr.*, 715 F. App'x 814, 818 (10th Cir. 2017)). Nor does Plaintiff argue for such an interpretation. Thus, we analyze Plaintiff's ADA claim as against Defendants solely in their official capacity.

{33} The ADA defines a disability, in relevant part, as "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). This definition is known as an "actual impairment." *Felkins v. City of Lakewood*, 774 F.3d 647, 650 (10th Cir. 2014). When alleging an actual impairment, an ADA "plaintiff must (1) [show they] have a recognized impairment, (2) identify one or more appropriate major life activities, and (3) show the impairment substantially limits one or more of those activities." *Carter v. Pathfinder Energy Servs., Inc.*, 662 F.3d 1134, 1142 (10th Cir. 2011) (internal quotation marks and citation omitted). Recognized impairments include "'any physiological disorder, or condition affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, or digestive.'" *Id.* (quoting 29 C.F.R. § 1630.2(h)(1) (2012). The ADA defines both "eating" and "walking" as major life activities. 42 U.S.C. § 12102(2)(A).

{34} A plaintiff may show exclusion or discrimination by a public entity under the second prong by alleging "(1) intentional discrimination (disparate treatment); (2) disparate impact; [or] (3) failure to make a reasonable accommodation." *J.V. v. Albuquerque Pub. Schs.*, 813 F.3d 1289, 1295 (10th Cir. 2016). Plaintiff did not allege intentional discrimination or disparate impact in his complaint, but instead makes a reasonable accommodation challenge. Title II "places an affirmative

obligation on public entities to reasonably accommodate qualified individuals with disabilities to allow them to participate in its programs and services." *Brooks*, 12 F.4th at 1167. Public entities must provide not merely access, but "*meaningful* access to their programs and services" *Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1195 (10th Cir. 2007) (internal quotation marks and citation omitted).

{35} Finally, to satisfy the causation standard under a reasonable accommodation theory, a plaintiff must allege that their "exclusion or denial of benefits was by reason of [their] disability." *Brooks*, 12 F.4th at 1167. However, "[a] claim for failure to make a reasonable accommodation does not require a showing of discriminatory motive." *Id.*

{36} Plaintiff alleges sufficient facts to support an ADA claim against Defendants. First, Plaintiff alleges that he is a qualified individual with a disability. Plaintiff alleges that he is wheelchair bound and is unable to walk because of his emergency 2021 brain surgery, which left his right leg paralyzed below the knee. Plaintiff also alleges that pain issues and severe headaches resulting from the brain injury and surgery left him unable to go to CNMCF's dining facility. Thus, Plaintiff alleges that he is an individual with a disability as that term is defined under the ADA.

{37} Second, Plaintiff alleges that Defendants excluded him from or denied him the benefits of the dining facility when Benavidez destroyed his medical pass. Plaintiff alleges that Benavidez's destruction of his medical pass forced him to

purchase food at the commissary because he was unable to go to "the chow hall" himself. Plaintiff was not "required to show a complete deprivation of access to food and nutrition to state a Title II reasonable accommodation claim." *See Brooks*, 12 F.4th at 1167. Rather, Plaintiff's allegation that he was left without access to the dining facility was enough. *See Robertson*, 500 F.3d at 1195. Plaintiff therefore made a sufficient allegation of exclusion and discrimination under the ADA.

{38} Third, Plaintiff alleges that he was excluded from the dining facility by reason of his disability. In effect, Plaintiff alleges that Benavidez's destruction of his meal pass left him without *any* accommodation for his disability because he was then altogether unable to access the dining facilities. Plaintiff therefore alleges sufficient facts to support a claim under the ADA for Defendants' failure to reasonably accommodate him. Accordingly, we reverse the district court's dismissal of Plaintiff's official-capacity ADA claim.

D. Plaintiff's RA Claims

{39} Finally, Plaintiff brings a claim under the RA arising from the same conduct described above. The RA prohibits "any program or activity receiving Federal financial assistance" from engaging in disability-based discrimination in the provision of services. 29 U.S.C. § 794(a). Under the RA, a "program or activity" includes "all of the operations" of a "department, agency . . . or other instrumentality of a [s]tate or of a local government." 29 U.S.C. § 794(b)(1)(A). "To establish a

prima facie claim under § 504 [of the RA], a plaintiff must demonstrate that (1) plaintiff is handicapped under the Act; (2) [they are] otherwise qualified to participate in the program; (3) the program receives federal financial assistance; and (4) the program discriminates against [the] plaintiff based upon a disability." *Havens v. Colo. Dep't of Corr.*, 897 F.3d 1250, 1262-63 (10th Cir. 2018) (internal quotation marks and citation omitted). Federal courts in the Tenth Circuit "typically evaluate claims identically under the ADA and [RA]." *Crane*, 15 F.4th at 1312. However, one "exception is the additional requirement under the [RA] that entities receive federal funding." *Id.* at 1302 n.4; *see also Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154, 159 (2017) ("Title II forbids any public entity from discriminating based on disability; Section 504 applies the same prohibition to any *federally funded* program or activity." (emphasis added) (internal quotation marks and citation omitted)). Thus, to state a viable claim for damages under the RA, a plaintiff must allege that the program at issue, i.e., the state department or agency, receives federal financial assistance. *Arbogast v. Kan., Dep't of Lab.*, 789 F.3d 1174, 1183 (10th Cir. 2015).

{40} Plaintiff did not allege that NMCD or CNMCF received federal funds. There is no reference to federal funding at all in his complaint, nor does Plaintiff address this deficiency in his briefing below or on appeal. Thus, Plaintiff has failed to allege an element essential to relief under the RA, and we therefore affirm the district

court's dismissal of his RA claims on that basis. *See Saylor v. Valles*, 2003-NMCA-037, ¶ 6, 133 N.M. 432, 63 P.3d 1152.

CONCLUSION

{41} For the reasons stated, we affirm the district court's dismissal of Plaintiff's tort claims, as well as his official-capacity Section 1983 claims and individual-capacity claims against the Warden, individual-capacity ADA claims, and RA claims. However, we reverse the district court's dismissal of Plaintiff's individual-capacity Section 1983 claim against Benavidez and official-capacity ADA claim. We remand to the district court for further proceedings.

{42} **IT IS SO ORDERED.**

KRISTOPHER N. HOUGHTON, Judge

WE CONCUR:

JACQUELINE R. MEDINA, Chief Judge

GERALD E. BACA, Judge