

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

December 16, 2019

Lyle W. Cayce
Clerk

No. 17-30864

OFFICER JOHN DOE, Police Officer,

Plaintiff - Appellant

v.

DERAY MCKESSON; BLACK LIVES MATTER; BLACK LIVES MATTER
NETWORK, INCORPORATED,

Defendants - Appellees

Appeal from the United States District Court
for the Middle District of Louisiana

Before JOLLY, ELROD, and WILLETT, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

We WITHDRAW the court's prior opinion of August 8, 2019, and substitute the following opinion.

During a public protest against police misconduct in Baton Rouge, Louisiana, an unidentified individual hit Officer John Doe with a heavy object, causing him serious physical injuries. Following this incident, Officer Doe brought suit against "Black Lives Matter," the group associated with the protest, and DeRay Mckesson, one of the leaders of Black Lives Matter and the organizer of the protest. Officer Doe later sought to amend his complaint to add Black Lives Matter Network, Inc. and #BlackLivesMatter as defendants.

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The district court dismissed Officer Doe’s claims on the pleadings under Federal Rule of Civil Procedure 12(b)(6), and denied his motion to amend his complaint as futile. Because we conclude that the district court erred in dismissing the case against Mckesson on the basis of the pleadings, we REMAND for further proceedings relative to Mckesson. We further hold that the district court properly dismissed the claims against Black Lives Matter. We thus REVERSE in part, AFFIRM in part, and REMAND for further proceedings consistent with this opinion.

I.

On July 9, 2016, a protest illegally blocked a public highway in front of the Baton Rouge Police Department headquarters.¹ This demonstration was one in a string of protests across the country, often associated with Black Lives Matter, concerning police practices. The Baton Rouge Police Department prepared by organizing a front line of officers in riot gear. These officers were ordered to stand in front of other officers prepared to make arrests. Officer Doe was one of the officers ordered to make arrests. DeRay Mckesson, associated with Black Lives Matter, was the prime leader and an organizer of the protest.

In the presence of Mckesson, some protesters began throwing objects at the police officers. Specifically, protestors began to throw full water bottles, which had been stolen from a nearby convenience store. The dismissed complaint further alleges that Mckesson did nothing to prevent the violence or to calm the crowd, and, indeed, alleges that Mckesson “incited the violence on behalf of [Black Lives Matter].” The complaint specifically alleges that Mckesson led the protestors to block the public highway. The police officers

¹ This case comes to us on a motion to dismiss, so we treat all well-pleaded facts as true.

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began making arrests of those blocking the highway and participating in the violence.

At some point, an unidentified individual picked up a piece of concrete or a similar rock-like object and threw it at the officers making arrests. The object struck Officer Doe's face. Officer Doe was knocked to the ground and incapacitated. Officer Doe's injuries included loss of teeth, a jaw injury, a brain injury, a head injury, lost wages, "and other compensable losses."

Following the Baton Rouge protest, Officer Doe brought suit, naming Mckesson and Black Lives Matter as defendants. According to his complaint, the defendants are liable on theories of negligence, respondeat superior, and civil conspiracy. Mckesson subsequently filed two motions: (1) a Rule 12(b)(6) motion, asserting that Officer Doe failed to state a plausible claim for relief against Mckesson; and (2) a Rule 9(a)(2) motion, asserting that Black Lives Matter is not an entity with the capacity to be sued.

Officer Doe responded by filing a motion to amend. He sought leave to amend his complaint to add factual allegations to his complaint and Black Lives Matter Network, Inc. and #BlackLivesMatter as defendants.

II.

The district court granted both of Mckesson's motions, treating the Rule 9(a)(2) motion as a Rule 12(b)(6) motion, and denied Officer Doe's motion for leave to amend, concluding that his proposed amendment would be futile. With respect to Officer Doe's claims against #BlackLivesMatter, the district court took judicial notice that it is a "hashtag" and therefore an "expression" that lacks the capacity to be sued. With respect to Officer Doe's claims against Black Lives Matter Network, Inc., the district court held that Officer Doe's allegations were insufficient to state a plausible claim for relief against this entity. Emphasizing the fact that Officer Doe attempted to add a social

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movement and a “hashtag” as defendants, the district court dismissed his case with prejudice. Officer Doe timely appealed.

III.

When considering a motion to dismiss under Rule 12(b)(6), we will not affirm dismissal of a claim unless the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Alexander v. Verizon Wireless Servs., L.L.C.*, 875 F.3d 243, 249 (5th Cir. 2017). “We take all factual allegations as true and construe the facts in the light most favorable to the plaintiff.” *Id.* (citing *Kelly v. Nichamoff*, 868 F.3d 371, 374 (5th Cir. 2017)). To survive, a complaint must consist of more than “labels and conclusions” or “naked assertions devoid of further factual enhancement.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (internal quotation marks and brackets omitted)). Instead, “the plaintiff must plead enough facts to nudge the claims across the line from conceivable to plausible.” *Hinojosa v. Livingston*, 807 F.3d 657, 684 (5th Cir. 2015) (internal quotation marks, brackets, and ellipses omitted) (quoting *Iqbal*, 556 U.S. at 680).²

² Federal Rule of Civil Procedure Rule 9(a)(2) states that, if a party wishes to raise an issue regarding lack of capacity to be sued, “a party must do so by a specific denial.” Rule 12(b) does not specifically authorize a motion to dismiss based on a lack of capacity. Nonetheless, we have permitted Rule 12(b) motions arguing lack of capacity. *See, e.g., Darby v. Pasadena Police Dep’t*, 939 F.2d 311 (5th Cir. 1992). Where the issue appears on the face of the complaint, other courts have done the same and treated it as a Rule 12(b)(6) motion. *See, e.g., Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294, 296 n.1 (2d Cir. 1965) (“Although the defense of lack of capacity is not expressly mentioned in [R]ule 12(b), the practice has grown up of examining it by a 12(b)(6) motion when the defect appears upon the face of the complaint.”); *Coates v. Brazoria Cty. Tex.*, 894 F. Supp. 2d 966, 968 (S.D. Tex. 2012) (“Whether a party has the capacity to sue or be sued is a legal question that may be decided at the Rule 12 stage.”); *see also* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1294 (3d ed. 2018) (“An effective denial of capacity . . . creates an issue of fact. Such a denial may be made in the responsive pleading or, if the lack of capacity . . . appears on the face of the pleadings or is discernible there from, the issue can be raised by a motion to dismiss for failure to state a claim for relief.” (footnotes omitted)). Thus, we review the district court’s dismissal for lack of capacity de novo and apply the Rule 12(b)(6) standard.

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A district court's denial of a motion to amend is generally reviewed for abuse of discretion. *Thomas v. Chevron U.S.A., Inc.*, 832 F.3d 586, 590 (5th Cir. 2016). However, where the district court's denial of leave to amend was based solely on futility, we instead apply a de novo standard of review identical in practice to the Rule 12(b)(6) standard. *Id.* When a party seeks leave from the court to amend and justice requires it, the district court should freely give it. Fed. R. Civ. P. 15(a)(2).

IV.

We start with whether we have jurisdiction to hear this case, raising sua sponte its potential absence. Neither the district court nor any party addressed this issue in prior proceedings or on appeal. Officer Doe sued Mckesson and Black Lives Matter.³ The complaint alleges that Black Lives Matter is a national unincorporated association, *Doe v. Mckesson*, 272 F. Supp. 3d 841, 849 (M.D. La. 2017), which, for diversity purposes, is a citizen of every state where a member is a citizen, *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1258 (5th Cir. 1988). Officer Doe, as the party invoking federal jurisdiction, bore the burden of establishing jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). But the complaint fails to allege with sufficiency the membership of Black Lives Matter.⁴ Such failure to establish diversity jurisdiction normally warrants remand—if there was some reason to believe that jurisdiction exists, i.e., some reason to believe both that Black Lives

³ We are addressing here Officer Doe's claims against Black Lives Matter Network, Inc., the potential unincorporated association, not against #BlackLivesMatter, the hashtag.

⁴ In his Proposed Amended Complaint, Officer Doe did allege that Black Lives Matter is a "chapter-based national unincorporated association that is organized under the laws of the State of California, though it allegedly is also a partnership that is a citizen of California and Delaware." *Doe*, 272 F. Supp. 3d at 851 (internal quotations omitted). But since an association, or a partnership for that matter, is considered a citizen of every state in which its constituent members/partners are citizens, Officer Doe still failed to allege Black Lives Matter's citizenship by omitting the citizenship of its constituent members.

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