

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

JERRY DEVON JOHNSON, SR.,

Plaintiff,

v.

ISAAC JOHNSTON, et al.,

Defendants.

Case No. 15-3170-SAC-DJW

NOTICE & ORDER TO SHOW CAUSE

TO PLAINTIFF JERRY DEVON JOHNSON, SR.:

Plaintiff Jerry Devon Johnson Sr. is hereby required to show good cause, in writing, to the Honorable Sam A. Crow, United States District Judge, why this action should not be dismissed for failure to exhaust his administrative remedies and/or for a lack of jurisdiction arising from Plaintiff's failure to state a constitutional claim pursuant to 42 U.S.C. § 1983.

I. Nature of the Matter before the Court

This pro se civil action was filed pursuant to 42 U.S.C. § 1983 by an inmate of the Leavenworth Detention Center.¹ In his Complaint, Plaintiff alleges constitutional violations under the Eighth and Fourteenth Amendments. Plaintiff's request for relief includes declaratory relief, money damages for pain and suffering as well as injunctive relief in the form of a court order directing defendants to facilitate the necessary surgery on his finger.

II. Screening Standards

Because Plaintiff is a prisoner, the court is required by statute to screen his Complaint and to dismiss the Complaint or any portion thereof that is frivolous, fails to state a claim on

¹ By prior order, Plaintiff was required to submit an initial partial filing fee. He has complied with that order. Accordingly, the court grants his motion to proceed without prepayment of fees.

which relief may be granted, or seeks relief from a defendant immune from such relief. 28 U.S.C. § 1915A(a) and (b); 28 U.S.C. § 1915(e)(2)(B). “To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.” *West v. Atkins*, 487 U.S. 42, 48-49 (1988) (citations omitted); *Northington v. Jackson*, 973 F.2d 1518, 1523 (10th Cir. 1992). A court liberally construes a pro se complaint and applies “less stringent standards than formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). In addition, the court accepts all well-pleaded allegations in the complaint as true. *Anderson v. Blake*, 469 F.3d 910, 913 (10th Cir. 2006). On the other hand, “when the allegations in a complaint, however true, could not raise a claim of entitlement to relief,” dismissal is appropriate. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007). Furthermore, a pro se litigant’s “conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based.” *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555 (citations omitted). The complaint’s “factual allegations must be enough to raise a right to relief above the speculative level” and “to state a claim to relief that is plausible on its face.” *Id.* at 555, 570. The Tenth Circuit Court of Appeals has explained “that, to state a claim in federal court, a complaint must explain what each defendant did to [the pro se plaintiff]; when the defendant did it; how the defendant’s action harmed (the plaintiff); and, what specific legal right the plaintiff believes the defendant violated.” *Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe County Justice Center*, 492 F.3d 1158, 1163 (10th Cir. 2007). The court “will not supply additional factual allegations to

round out a plaintiff's complaint or construct a legal theory on plaintiff's behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997).

The Tenth Circuit has pointed out that the Supreme Court's decisions in *Twombly* and *Erickson* gave rise to a new standard of review for § 1915(e)(2)(B)(ii) dismissals. See *Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007) (citations omitted); see also *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). As a result, courts "look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief." *Kay*, 500 F.3d at 1218 (quotation marks and citations omitted). Under this new standard, "a plaintiff must nudge his claims across the line from conceivable to plausible." *Smith*, 561 F.3d at 1098 (quotation marks and citation omitted). *Bloom v. McPherson*, 346 Fed. App'x. 368, 372 (10th Cir. 2009); *Robbins*, 519 F.3d at 1247-48; see *Ellibee v. Fox*, 244 Fed. App'x. 839, 843 (10th Cir. 2007). "Plausible" in this context does not mean "likely to be true," but rather refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent," then the plaintiff has not "nudged (his) claims across the line from conceivable to plausible." *Robbins*, 519 F.3d at 1247 (citing *Twombly*, at 1974).

Exhaustion of Administrative Remedies

Under 42 U.S.C. § 1997e(a), a prisoner must exhaust his administrative remedies prior to filing a lawsuit in federal court regarding prison conditions. *Id.* Section 1997e(a) expressly provides:

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Id. This exhaustion requirement "is mandatory, and the district court [is] not authorized to dispense with it." *Beaudry v. Corrections Corp. of Am.*, 331 F.3d 1164, 1167 n. 5 (10th Cir.

2003); *Little v. Jones*, 607 F.3d 1245, 1249 (10th Cir. 2010).² While failure to exhaust is an affirmative defense and a plaintiff is generally not required to plead it in the complaint, when that failure is clear from materials filed by plaintiff, the court may sua sponte require plaintiff to show that he has exhausted. See *Aquilar-Avellaveda v. Terrell*, 478 F.3d 1223, 1225 (10th Cir. 2007) (acknowledging district courts may raise exhaustion question sua sponte, consistent with 42 U.S.C. § 1997e(c)(1) and 28 U.S.C. §§ 1915 and 1915A, and dismiss prisoner complaint for failure to state a claim if it is clear from face of complaint that prisoner has not exhausted administrative remedies).

Eighth Amendment - Denial of Medical Care

The Eighth Amendment guarantees a prisoner the right to be free from cruel and unusual punishments. The United States Supreme Court has held that an inmate advancing a claim of cruel and unusual punishment based on inadequate provision of medical care must establish “deliberate indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Bozett v. County of Washington*, 282 Fed. App’x 667, 672 (10th Cir. 2008) (citing *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005)). The “deliberate indifference” standard has two components: “an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that [prison] officials act with a sufficiently culpable state of mind.” *Miller v. Glanz*, 948 F.2d 1562, 1569 (10th Cir. 1991); *Martinez v. Garden*, 430 F.3d 1302, 1304 (10th Cir. 2005). In the objective analysis, the inmate must show the presence of a “serious medical need,” that is “a serious illness or injury.” *Estelle*, 429 U.S. at 104, 105; *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). A serious medical need includes “one

² To satisfy this requirement, a prisoner must fully comply with the institution’s grievance procedures. *Jones v. Bock*, 549 U.S. 199, 218 (2007); *Woodford v. Ngo*, 548 U.S. 81, 90 (2006); *Little*, 607 F.3d at 1249 (The “inmate may only exhaust by properly following all the steps laid out in the prison system’s grievance procedures.”)(citing *Woodford*, 548 U.S. at 90 (“An inmate who begins the grievance process but does not complete it is barred from pursuing a § 1983 claim. . . .”)).

that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a layperson would easily recognize the necessity for a doctor's attention." *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980); *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999); *Martinez*, 430 F.3d at 1304 (quoting *Farmer*, 511 U.S. at 834 (quotation omitted)).

"The subjective component is met if a prison official knows of and disregards an excessive risk to inmate health or safety." *Martinez*, 430 F.3d at 1304 (citing *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000) (quotation omitted)). In measuring a prison official's state of mind, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 1305 (citing *Riddle v. Mondragon*, 83 F.3d 1197, 1204 (10th Cir. 1996) (quotation omitted)).

An inadvertent failure to provide adequate medical care or a negligent diagnosis "fail[s] to establish the requisite culpable state of mind." *Estelle*, 429 U.S. at 106 ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment."); *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). Likewise, a mere difference of opinion between the inmate and prison medical personnel regarding diagnosis or reasonable treatment does not constitute cruel and unusual punishment. *See Estelle*, 429 U.S. at 106–07; *Handy v. Price*, 996 F.2d 1064, 1067 (10th Cir. 1993) (affirming that a quarrel between a prison inmate and the doctor as to the appropriate treatment for hepatitis did not successfully raise an Eighth Amendment claim); *Ledoux v. Davies*, 961 F.2d 1536 (10th Cir. 1992) (Plaintiff's contention that he was denied treatment by a specialist is insufficient to establish a constitutional violation.); *El'Amin v. Pearce*, 750 F.2d 829, 833 (10th Cir. 1984) (A mere difference of opinion over the adequacy of medical treatment received cannot provide the basis for an Eighth Amendment claim.). Where the complaint

alleges a “series of sick calls, examinations, diagnoses, and medication,” it “cannot be said there was a ‘deliberate indifference’ to the prisoner’s complaints.” *Smart v. Villar*, 547 F.2d 112, 114 (10th Cir. 1976). As the United States Supreme Court explained:

[A]n inadvertent failure to provide adequate medical care cannot be said to constitute “an unnecessary and wanton infliction of pain” or to be “repugnant to the conscience of mankind.” Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medial mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.

Estelle, 429 U.S. at 105–106 (footnote omitted). The prisoner’s right is to medical care—not to the type or scope of medical care he personally desires. A difference of opinion between a physician and a patient or even between two medical providers does not give rise to a constitutional right or sustain a claim under § 1983. *Coppinger v. Townsend*, 398 F.2d 392, 394 (10th Cir. 1968).

Furthermore, delay in providing medical care does not violate the Eighth Amendment, unless there has been deliberate indifference resulting in substantial harm. *Olson v. Stotts*, 9 F.3d 1475 (10th Cir. 1993). In situations where treatment was delayed rather than denied altogether, the Tenth Circuit requires a showing that the inmate suffered “substantial harm” because of the delay. *Garrett v. Stratman*, 254 F.3d 946, 950 (10th Cir. 2001); *Kikumura v. Osagie*, 461 F.3d 1269, 1292 (10th Cir. 2006). In cases involving allegations of missed diagnoses or delayed treatment, plaintiffs may establish liability by showing:

a medical professional recognizes an inability to treat the patient due to the seriousness of the condition and his corresponding lack of expertise but nevertheless declines or unnecessarily delays referral, e.g., a family doctor knows that the patient needs delicate hand surgery requiring a specialist but instead of issuing the referral performs the operation himself; (2) a medical professional fails to treat a medical condition so obvious that even a layman would recognize the condition, e.g., a gangrenous hand or a serious laceration; [or] (3) a medical professional completely denies care although presented with recognizable

symptoms which potentially create a medical emergency, e.g., a patient complains of chest pains and the prison official, knowing that medical protocol requires referral or minimal diagnostic testing to confirm the symptoms, sends the inmate back to his cell.

Boyett, 282 Fed. App'x at 673 (quoting *Self*, 439 F.3d at 1232 (citations omitted)).

III. Discussion

Exhaustion of Administrative Remedies

This action is subject to dismissal because it appears from the face of the Complaint that Plaintiff failed to fully and properly exhaust all available prison administrative remedies on each of his claims prior to filing this action in federal court. In response to the question on his form complaint as to whether or not he sought relief from administrative officials, Plaintiff marked “No.” It thus appears from Plaintiff’s own allegations that he has not exhausted administrative remedies on his claims.

Denial of Medical Care Claim

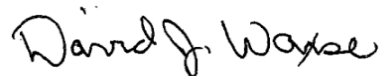
Plaintiff’s allegations of denial of medical care are subject to dismissal for failure to state a claim. Plaintiff’s allegations and exhibits plainly indicate that he has been furnished medical care during the relevant timeframe. They also indicate that his claim amounts to his difference of opinion with the diagnosis of his ailments by medical professionals and the treatments he has been provided. In essence, Plaintiff’s claim is that he believes he broke his finger while playing basketball and that this condition has not been properly diagnosed or treated by prison medical staff in all that time. He requested and appears to have received two x-rays of his finger. In one of the grievances, he claims that “all I gets are lies” from the jail doctor because “I’ve had an x-ray done they said that my finger isn’t broken.” (Doc. 1-1 at 34.) Throughout his complaint, Plaintiff appears to prefer the outside doctor’s diagnosis. But that doctor diagnosed a boutonniere deformity—not a broken finger. Therefore, Plaintiff’s own preferred doctor’s

diagnosis was not inconsistent with what the jail's medical professionals told Plaintiff. Plaintiff's allegations are nothing more than a layperson's disagreement with the medical diagnosis and treatment of his symptoms by medical professionals. Such allegations do not rise to the level of a claim of cruel and unusual punishment under the Eighth Amendment; and are, at most, grounds for a negligence or malpractice claim in state court.

IT IS THEREFORE ORDERED BY THE COURT that Plaintiff is granted thirty (30) days—on or before July 6, 2016—in which to show good cause, in writing, to the Honorable Sam A. Crow, United States Senior District Judge, why this action should not be dismissed, without prejudice, for failure to exhaust his administrative remedies and/or for a lack of jurisdiction arising from Plaintiff's failure to state a constitutional claim pursuant to 42 U.S.C. § 1983.

IT IS SO ORDERED.

Dated June 6, 2016, at Kansas City, Kansas.

A handwritten signature in black ink that reads "David J. Waxse". The signature is written in a cursive, slightly slanted style.

David J. Waxse
United States Magistrate Judge