

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

GREGORY CHARLES LOUFER,

Plaintiff,

v.

CASE NO. 18-3144-SAC

BILL CARR, et al.,

Defendants.

MEMORANDUM AND ORDER
AND ORDER TO SHOW CAUSE

Plaintiff Gregory Charles Loufer 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 due to the deficiencies in Plaintiff's Complaint that are discussed herein. Plaintiff is also given an opportunity to file a proper amended complaint to cure the deficiencies.

I. Nature of the Matter before the Court

Plaintiff brings this *pro se* civil rights action pursuant to 42 U.S.C. § 1983. The Court granted Plaintiff leave to proceed *in forma pauperis*. (Doc. 3.) The Court assessed a \$1.00 initial partial filing fee, calculated under 28 U.S.C. § 1915(b)(1). Plaintiff filed a response (Doc. 7) indicating he does not have funds available to pay the initial partial fee. The Court will treat the response as a request to waive the initial partial filing fee and will grant the request.

Plaintiff is incarcerated at the Ford County Detention Center in Dodge City, Kansas ("FCDC"). Plaintiff alleges that since November 25, 2017, his right to religious freedom has been impeded or used as a punishment. Plaintiff alleges that the menu is not proper, the procedure is incorrect, and he is being denied beverages due to his religious diet. Plaintiff also

alleges that access to the law library is limited to fifteen minutes twice a week. Plaintiff also claims that the only way to send legal mail is to an attorney of record, “effectively making an indigent individual unable to file a lawsuit.” Plaintiff is seeking \$1,000,000 in actual damages and \$5,000,000 in punitive damages.

II. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised claims that are legally frivolous or malicious, that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1)–(2).

“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 (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).

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*, 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 a plaintiff’s behalf.” *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997) (citation omitted).

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 (citation omitted). Under this new standard, “a plaintiff must ‘nudge his claims across the line from conceivable to plausible.’” *Smith*, 561 F.3d at 1098 (citation omitted). “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 v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (citing *Twombly*, 127 S. Ct. at 1974).

III. Discussion

A. Personal Participation

An essential element of a civil rights claim against an individual is that person’s direct personal participation in the acts or inactions upon which the complaint is based. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Trujillo*, 465 F.3d at 1227; *Foote v. Spiegel*, 118 F.3d 1416, 1423–24 (10th Cir. 1997). Conclusory allegations of involvement are not sufficient. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). As a result, a plaintiff is required to name each defendant not only in the caption of the complaint, but again in the body of the complaint and to include in the body a description of the acts taken by each defendant that violated plaintiff’s federal constitutional rights.

Plaintiff fails to allege personal participation by any of the defendants in any purported constitutional violations. Plaintiff has not identified particular acts or omissions by each defendant. Plaintiff must explain what each defendant did to him, when the defendant did it, how the defendant’s actions harmed him, and what specific legal right he believes the defendant violated. *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1163 (10th Cir. 2007). Because he has failed to do this, Plaintiff has failed to state a cause of action under § 1983 against the defendants.

B. First Amendment – Religious Freedom

Plaintiff alleges that the menu is not proper, the procedure is incorrect, and he is being denied beverages due to his religious diet. However, Plaintiff fails to allege any facts in support of his claims.

“Under the First and Fourteenth Amendments, inmates are entitled to the reasonable opportunity to pursue their sincerely-held religious beliefs.” *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009)(citation omitted); see *McKinley v. Maddox*, 493 F. App’x 928, 932 (10th Cir. 2012). In order to state a constitutional denial of free exercise of religion claim, a prisoner must allege that defendants “substantially burdened his sincerely-held religious beliefs.” *Gallagher*, 587 F.3d at 1069. In addition, he “must assert conscious or intentional interference with his free exercise rights to state a valid claim under § 1983.” *Id.* at 1070. “If the prisoner satisfies this initial step, defendants ‘may identify the legitimate penological interests that justified the impinging conduct,’ and ‘[t]he burden then returns to the prisoner to show that these articulated concerns were irrational.’” *McKinley*, 493 F. App’x at 932 (citation omitted). The court then balances factors set forth by the Supreme Court “to determine the reasonableness” of the conduct. *Id.*

The Tenth Circuit has identified “three broad ways government action may impose a substantial burden on religious exercise:”

(1) requir[ing] participation in an activity prohibited by a sincerely held religious belief, or (2) prevent[ing] participation in conduct motivated by a sincerely held religious belief, or (3) plac[ing] substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief, such as where the government presents the plaintiff with a Hobson’s choice—an illusory choice where the only realistically possible course of action trenches on an adherent’s sincerely held religious belief.

Strope v. Cummings, 381 F. App’x 878, 881 (10th Cir. 2010, unpublished) (quoting *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315)(10th Cir. 2010)). In *Strope*, the Tenth Circuit reasoned as follows:

Illustrating the distinction between substantial burden and inconvenience, we held (1) the flat denial of a halal diet with approved meats was actionable, *id.* at 1316–20, but (2) an incident (the panel concurrence notes “sporadic incidents”) in

which a prisoner's meal was rendered inedible by service of prohibited items contaminating his tray was not actionable, *id.* at 1320–21; *id.* at 1325; *see also Gallagher*, 587 F.3d at 1070 (holding isolated violation of kosher restrictions did not support Free Exercise claim). We “assume[d] that as the frequency of presenting unacceptable foods increases, at some point the situation would rise to the level of a substantial burden,” but that level had clearly not been reached.

Id. (citing *Abdulhaseeb*, 600 F.3d at 1321). In sum, mere inconvenience, negligence, and isolated or sporadic incidents are not sufficient to show a substantial burden.

Plaintiff's First Amendment claim of denial of the right to freely practice his religion is subject to dismissal for failure to allege adequate facts in support. Plaintiff does not allege specifically what diet he requested, nor does he indicate who he made the request to, who denied his request, or how many requests he made. Plaintiff's denial of religious freedom claim may be dismissed on this basis, unless he alleges sufficient additional facts in an amended complaint.

C. Denial of Access to the Courts

Plaintiff alleges that the lack of library time and the difficulty filing a lawsuit have impeded his access to the courts. It is well-established that a prison inmate has a constitutional right of access to the courts. However, it is equally well-settled that in order “[t]o present a viable claim for denial of access to courts, . . . an inmate must allege and prove prejudice arising from the defendants' actions.” *Peterson v. Shanks*, 149 F.3d 1140, 1145 (10th Cir. 1998) (citations omitted); *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (“The requirement that an inmate . . . show actual injury derives ultimately from the doctrine of standing.”).

An inmate may satisfy the actual-injury requirement by demonstrating that the alleged acts or shortcomings of defendants “hindered his efforts to pursue” a non-frivolous legal claim. *Lewis*, 518 U.S. at 351-53; *see also Burnett v. Jones*, 437 F. App'x 736, 744 (10th Cir. 2011) (“To state a claim for violation of the constitutional right to access the courts, a prisoner ‘must demonstrate actual injury . . .—that is, that the prisoner was frustrated or impeded in his efforts

to pursue a nonfrivolous legal claim concerning his conviction or his conditions of confinement.”) (quoting *Gee v. Pacheco*, 627 F.3d 1178, 1191 (10th Cir. 2010)).

The Supreme Court plainly held in *Lewis* that “the injury requirement is not satisfied by just any type of frustrated legal claim.” *Lewis*, 518 at 354. Rather, the injury occurs only when prisoners are prevented from attacking “their sentences, directly or collaterally” or challenging “the conditions of their confinement.” *Id.* at 355. “Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.” *Id.* (emphasis in original); *see also Carper v. DeLand*, 54 F.3d 613, 617 (10th Cir. 1995) (“[A]n inmate’s right of access does not require the state to supply legal assistance beyond the preparation of initial pleadings in a civil rights action regarding current confinement or a petition for a writ of habeas corpus.”) (citations omitted).

A plaintiff must first allege facts in his complaint suggesting an actual injury, “an essential requirement of a denial of access claim.” *Harrison*, 24 F. App’x at 967 (citing *Lewis v. Casey*, 518 U.S. 343, 351–52 (1996)). Plaintiff has failed to allege an actual injury. “It is not enough for [plaintiff] to state that he is unable to file motions or briefs.” *Id.* Plaintiff was able to file the instant case and he has not alleged an injury resulting from his failure to file motions or briefs.

D. Damages

Plaintiff’s request for compensatory damages is barred by 42 U.S.C. § 1997e(e), because Plaintiff has failed to allege a physical injury. Section 1997e(e) provides in pertinent part that “[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.” 42 U.S.C. § 1997e(e).

Plaintiff also seeks punitive damages, which are available in a § 1983 lawsuit. However, they “are available only for conduct which is ‘shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.’” *Searles v. Van Bebber*, 251 F.3d 869, 879 (10th Cir. 2001) (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)). Plaintiff presents no plausible basis for a claim of punitive damages because he alleges no facts whatsoever establishing that any defendant acted with a sufficiently culpable state of mind. Plaintiff’s request for punitive damages is subject to dismissal.

IV. Response and/or Amended Complaint Required

Plaintiff is required to show good cause why his Complaint should not be dismissed for the reasons stated herein. Plaintiff is also given the opportunity to file a complete and proper amended complaint upon court-approved forms that cures all the deficiencies discussed herein.¹ Plaintiff is given time to file a complete and proper amended complaint in which he (1) shows he has exhausted administrative remedies for all claims alleged; (2) raises only properly joined claims and defendants; (3) alleges sufficient facts to state a claim for a federal constitutional violation and show a cause of action in federal court; and (4) alleges sufficient facts to show personal participation by each named defendant.

¹ To add claims, significant factual allegations, or change defendants, a plaintiff must submit a complete amended complaint. *See* Fed. R. Civ. P. 15. An amended complaint is not simply an addendum to the original complaint, and instead completely supersedes it. Therefore, any claims or allegations not included in the amended complaint are no longer before the court. It follows that a plaintiff may not simply refer to an earlier pleading, and the amended complaint must contain all allegations and claims that a plaintiff intends to pursue in the action, including those to be retained from the original complaint. Plaintiff must write the number of this case (18-3144-SAC) at the top of the first page of his amended complaint and he must name every defendant in the caption of the amended complaint. *See* Fed. R. Civ. P. 10(a). Plaintiff should also refer to each defendant again in the body of the amended complaint, where he must allege facts describing the unconstitutional acts taken by each defendant including dates, locations, and circumstances. Plaintiff must allege sufficient additional facts to show a federal constitutional violation.

If Plaintiff does not file an amended complaint within the prescribed time that cures all the deficiencies discussed herein, this matter will be decided based upon the current deficient Complaint.

IT IS THEREFORE ORDERED THAT Plaintiff's request to waive the initial partial filing fee (Doc. 7) is **granted**.

IT IS FURTHER ORDERED that Plaintiff is granted until **September 28, 2018**, in which to show good cause, in writing, to the Honorable Sam A. Crow, United States District Judge, why Plaintiff's Complaint should not be dismissed for the reasons stated herein.

IT IS FURTHER ORDERED that Plaintiff is also granted until **September 28, 2018**, in which to file a complete and proper amended complaint to cure all the deficiencies discussed herein.

The clerk is directed to send § 1983 forms and instructions to Plaintiff.

IT IS SO ORDERED.

Dated in Topeka, Kansas, on this 29th day of August, 2018.

s/ Sam A. Crow
Sam A. Crow
U.S. Senior District Judge