

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

**EDDIE LEE,**

**Plaintiff,**

**v.**

**CASE NO. 18-3238-SAC**

**(FNU) ENGLISH, Warden,  
USP-Leavenworth, et al.,**

**Defendants.**

**MEMORANDUM AND ORDER  
AND ORDER TO SHOW CAUSE**

Plaintiff Eddie Lee is hereby required to show good cause, in writing, to the Honorable Sam A. Crow, United States District Judge, why this case should not be dismissed due to the deficiencies in Plaintiff's Complaint that are discussed herein. Plaintiff is also given the opportunity to file a proper amended complaint to cure the deficiencies discussed herein.

**I. Nature of the Matter before the Court**

Plaintiff brings this *pro se* civil rights action pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). At the time of filing, Plaintiff was incarcerated at USP-Leavenworth in Leavenworth, Kansas ("USPL"), and was subsequently released from incarceration. The Court granted Plaintiff leave to proceed in forma pauperis. Plaintiff names as Defendants: Warden English; Officer B. Helm; and (fun) (Inu) unidentifiable Administrative Staff. Plaintiff seeks compensatory damages and injunctive relief.

Plaintiff alleges that he was denied due process and subjected to inhumane treatment and unsanitary living conditions at USPL. Plaintiff alleges that on August 8, 2018, Officer Helm refused to secure Plaintiff's locker, resulting in the loss of his property. Plaintiff alleges that Helm was supposed to secure Plaintiff's cell and send his property to the SHU, but failed to do

so. Plaintiff alleges that he has made multiple pleas to Lt. Ratz and property officer Miers and they have failed to listen or to attempt to locate Plaintiff's personal items.

Plaintiff also alleges that Health Services denied him medical attention. Plaintiff alleges that on September 22, 2018, he was placed in a cell with black mold, causing him to start having complications with extreme shortness of breath. Plaintiff alleges that he was not allowed to seek immediate medical attention or "first aid from [his] asthma inhaler" which he is supposed to have on him at all times. Plaintiff alleges that there are no emergency response buttons in the cells and due to the "blatant negligence" of BOP staff he suffered physical and psychological damage.

Plaintiff also alleges that after seeing a DHO on August 22, 2018, an "unidentifiable administrative staff" refused to release Plaintiff back to general population, forcing him to spend 22 extra days in solitary confinement, in a cell with black mold and infested with bugs.

## **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**

#### ***I. Exhaustion***

Plaintiff alleges that he exhausted his administrative remedies by talking to staff at USPL, and that he “could not get anyone to listen or attempt to help [him] help himself.” (Doc. 1, at 2.) Plaintiff indicates on his Complaint that he has not sought informal or formal relief from the appropriate administrative officials regarding his claims. He indicates that because he was in the SHU, staff refused to listen to him and would not attempt to help him by bringing him forms. Under 42 U.S.C. § 1997e(a), “a prisoner must exhaust his administrative remedies prior to filing a lawsuit regarding prison conditions in federal court.” *Little v. Jones*, 607 F.3d 1245, 1249 (10th Cir. 2010). 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), cert. denied, 540 U.S. 1118 (2004). An “inmate who begins the grievance process but does not complete it is barred from pursuing a § 1983 claim under the PLRA for failure to exhaust his administrative remedies.” *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir.

2002); *see also Hansen v. Federal Bureau of Prisons*, 211 F. App'x 690, 691 (10th Cir. 2006) (unpublished) (stating that “[i]t is well established that a plaintiff seeking to assert a *Bivens* claim must first exhaust all available administrative remedies”) (citing *Yousef v. Reno*, 254 F.3d 1214, 1216 n. 1 (10th Cir. 2001)). If an inmate fails to pursue a claim through the entire administrative remedy process, that claim is subject to dismissal. *Watson v. Evans*, No. 13-cv-3035-EFM, 2014 WL 7246800, at \*4 (D. Kan. Dec. 17, 2014) (citing *Jones v. Bock*, 549 U.S. 199, 211 (2007)).

The administrative remedy process available to inmates in federal custody is the BOP's Administrative Remedy Program. 28 C.F.R. § 542.10(a). Under this program, an inmate first must present the issue to staff for informal resolution. *Id.* at § 542.13. If unsuccessful at that stage, the inmate may then submit a formal written remedy request to the Warden. *Id.* at § 542.14. An inmate has 20 days from the date of the incident to submit a request to the Warden. *Id.* If the inmate is unsatisfied with the Warden's response to his request, he may appeal to the appropriate Regional Director, and then finally to the Director, National Inmate Appeals, in the Bureau of Prison's Office of the General Counsel. *Id.* at § 542.15(a). Where an inmate reasonably believes an issue is a sensitive one and would endanger his safety or well-being if its substance were widely known, the inmate may submit his initial request directly to the Regional Manager instead of the Warden. *Id.* at § 542.14(d). The Regional Manager may accept the request or may advise the prisoner to initiate the remedy process at the local level. *Id.*

The court may dismiss sua sponte a prisoner complaint when it is clear on the face of the complaint that the prisoner has not exhausted administrative remedies. *See Aquilar-Avellaveda v. Terrell*, 478 F.3d 1223, 1225 (10th Cir. 2007). Accordingly, Plaintiff is directed to show cause why his Complaint should not be dismissed for failure to exhaust available administrative remedies before filing this action.

## 2. FTCA Claim

The Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346(b)(1), 2671–2680, “allows the United States to be sued for claims arising out of negligent or wrongful acts or omissions of its employees, when such employees are acting within the scope of their duties.” *Ingram v. Faruque*, 728 F.3d 1239, 1245 (10th Cir. 2013) (citing § 1346(b)(1)). “The United States is the only proper defendant in an FTCA action.” *Smith*, 561 F.3d at 1099 (quoting *Oxendine v. Kaplan*, 241 F.3d 1272, 1275 n.4 (10th Cir. 2001)); see *Hui*, 559 U.S. at 801 (the FTCA “generally authorizes substitution of the United States as the defendant.”). The FTCA “provides the exclusive avenue to assert a claim sounding in tort against the United States.” *Franklin Sav. Corp., In re*, 385 F.3d 1279, 1286 (10th Cir. 2004), *cert. denied*, 546 U.S. 814 (2005) (citing 28 U.S.C. § 2679(a), which provides that “the FTCA remedy is ‘exclusive’ for all ‘claims which are cognizable under section 1346(b)’”).

The FTCA has procedural and jurisdictional requirements. See *Staggs v. U.S. ex rel. Dep’t of Health and Human Servs.*, 425 F.3d 881, 885 (10th Cir. 2005) (stating that the “FTCA’s presentation requirements are jurisdictional and cannot be waived”) (citation omitted). The Tenth Circuit has summarized the FTCA requirements as follows:

Under the FTCA, filing an administrative claim with the appropriate federal agency is a prerequisite to bringing a civil action against the United States for damages for the negligence or wrongful act of any United States employee. 28 U.S.C. § 2675(a); *Three-M Enterprises, Inc. v. United States*, 548 F.2d 293, 294 (10th Cir. 1977) . . . A claim is deemed presented when a federal agency receives from a claimant “an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in sum certain for . . . personal injury, or death alleged to have occurred by reason of the incident.” 28 C.F.R. § 14.2(a). “[B]ringing an administrative claim is a jurisdictional prerequisite to suit, imposed by Congress, which the courts have no power to waive.” *Nero v. Cherokee Nation of Oklahoma*, 892

F.2d 1457, 1463 (10th Cir. 1989); *see also Bradley v. United States*, 951 F.2d 268, 270 (10th Cir. 1991).

*Industrial Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 967 (10th Cir. 1994). Section 2675(a) provides that “[a]n action shall not be instituted” upon an FTCA claim “unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing . . . .” *Id.* at n.1. The amount of damages claimed in a lawsuit under the FTCA is limited to “the amount of the claim presented to the federal agency.” 28 U.S.C. § 2675(b); *see McNeil v. United States*, 508 U.S. 106, 108 n.2 (1993) (citing 28 U.S.C. § 2675(a)).

Therefore, exhaustion of administrative remedies is a prerequisite to suit under the FTCA, and courts lack jurisdiction over FTCA claims not presented to the appropriate federal agency. *See* 28 U.S.C. § 2675(a); *Greenlee v. U.S. Postal Serv.*, 247 F. App’x 953, 954–55 (10th Cir. 2007). “Because the FTCA constitutes a waiver of the government’s sovereign immunity, the notice requirements established by the FTCA must be strictly construed.” *Bradley v. United States by Veterans Admin.*, 951 F.2d 268, 270 (10th Cir. 1991) (citation omitted). “The requirements are jurisdictional and cannot be waived.” *Id.* (citation omitted); *Duplan v. Harper*, 188 F.3d 1195, 1199 (10th Cir. 1999) (“As a jurisdictional prerequisite, the FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies.”) (citing 28 U.S.C. § 2675(a); *McNeil*, 508 U.S. at 113; *Pipkin v. U.S. Postal Service*, 951 F.2d 272, 273 (10th Cir. 1991)).

Plaintiff has not alleged facts establishing that he exhausted the administrative tort claim remedy in a proper and timely manner prior to filing this action. Because this Court cannot exercise jurisdiction over an administratively unexhausted claim, Plaintiff’s potential FTCA

claim is subject to dismissal under Fed. R. Civ. P. 12(b)(1). Plaintiff is directed to show good cause why any potential FTCA claim should not be dismissed.

### ***3. Defendant English***

Plaintiff's Complaint does not allege sufficient facts to state a claim against Defendant English. Defendant English was the warden at USPL at the time of Plaintiff's incarceration. As warden, she is not liable for any of the alleged constitutional violations of her employees under the doctrine of respondeat superior. *Pahls v. Thomas*, 718 F.3d 1210, 1225 (10th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 676). Indeed, to hold Defendant English liable under *Bivens*, the constitutional violation must be traceable to Defendant's own actions. *Id.* Plaintiff is directed to show good cause why Defendant English should not be dismissed.

## **IV. Response and/or Amended Complaint Required**

Plaintiff is directed to show good cause, in writing, 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.<sup>1</sup> 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

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<sup>1</sup> 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 (18-3238-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.



sufficient facts to show personal participation by each named defendant.

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 BY THE COURT** that Plaintiff is granted until **March 24, 2019**, 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 **March 24, 2019**, in which to file a complete and proper amended complaint to cure all the deficiencies discussed herein.

The Clerk is directed to send Plaintiff forms for filing a civil rights complaint under 28 U.S.C. § 1331.

**IT IS SO ORDERED.**

**Dated in Topeka, Kansas, on this 1st day of March, 2019.**

**S/ Sam A. Crow**  
**SAM A. CROW**  
**SENIOR U. S. DISTRICT JUDGE**