IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MICHAEL WALLE,

Plaintiff,

v. **CASE NO. 19-3185-SAC**

OFFICER MAIN #750,

Defendants.

NOTICE AND ORDER TO SHOW CAUSE

This matter is a civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff, a pretrial detainee, proceeds pro se and in forma pauperis.

Nature of the Complaint

Plaintiff, a prisoner at the Saline County Jail, brings this action against a transport officer who took him to court in Saline County from the Ottawa County Jail. During the transfer, plaintiff was placed in a holding room while wearing restraints. Another inmate in the room who was not in restraints struck plaintiff in the face. Plaintiff alleges that this conduct was gross negligence; he seeks monetary damages.

Screening

A federal court must conduct a preliminary review of any case in which a prisoner seeks relief against a governmental entity or an officer or employee of such an entity. *See* 28 U.S.C. §1915A(a). Following this review, the court must dismiss any portion of the complaint that is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary damages from a defendant who is immune from that relief. *See* 28 U.S.C. § 1915A(b).

In screening, a court liberally construes pleadings filed by a party proceeding pro se and applies "less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

To state a claim for relief under Section 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).

To avoid a dismissal for failure to state a claim, a complaint must set out factual allegations that "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The court accepts the well-pleaded allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *Id*. However, "when the allegations in a complaint, however true, could not raise a [plausible] claim of entitlement to relief," the matter should be dismissed. *Id*. at 558. A court need not accept "[t]hreadbare recitals of the elements of a cause of action supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rather, "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 Tenth Circuit has observed that the U.S. Supreme Court's decisions in *Twombly* and *Erickson* set out a new standard of review for dismissals under 28 U.S.C. § 1915(e)(2)(B)(ii) dismissals. *See*

Key v. Bemis, 500 F.3d 1214, 1218 (10th Cir. 2007)(citations omitted). Following those decisions, 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 internal citations omitted). A plaintiff "must nudge his claims across the line from conceivable to plausible." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). In this context, "plausible" 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 [the] claims across the line from conceivable to plausible." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (citing *Twombly* at 1974).

Discussion

The Court liberally construes petitioner's claim to allege a failure to protect under the Eighth Amendment, which guarantees a prisoner the right to be free from cruel and unusual punishment. *See Farmer v. Brennan*, 511 U.S. 825, 833-34 (1994)(discussing duty to protect prisoners from violence by other prisoners).

A prison official violates the Eighth Amendment only when two components are met: first, an objective component, showing the prisoner plaintiff was held under conditions posing a substantial risk of serious harm, and second, a subjective component, showing that the official acted with obduracy and wantonness, not inadvertence or error in good faith.

Because the "Eighth Amendment protects inmates from the 'infliction of punishment' - it does not give rise to claims sounding in negligence or medical malpractice." *Sherman v. Klenke*, 653 F. App'x 580, 586 (10th Cir. 2016)(quoting *Farmer v. Brennan*, 511 U.S. 825, 838

(1994)). Here, plaintiff's allegations do not plausibly assert that the defendant officer acted with "obduracy and wantonness." Rather, plaintiff presents a claim of negligence, which is actionable in state court, rather than a claim of conduct prohibited by the Cruel and Unusual Punishments Clause. *See, e.g., Harris v. Werholtz*, 260 P.2d 101 (Table), 2011 WL 4440314 (Kan. App. 2011).

Order to Show Cause

For the reasons set forth, the Court directs plaintiff to show cause why this matter should not be dismissed for failure to state a claim for relief under § 1983.[1] The failure to file a timely response may result in the dismissal of this matter without additional notice.

IT IS, THEREFORE, BY THE COURT ORDERED that on or before **November 8, 2019**, plaintiff shall show cause why this matter should not be dismissed for failure to state a claim for relief.

IT IS SO ORDERED.

DATED: This 8th day of October, 2019, at Topeka, Kansas.

S/ Sam A. Crow
SAM A. CROW
U.S. Senior District Judge

[1] Such a dismissal will not prevent plaintiff proceeding in state court. The Court offers no opinion on the merits of such a claim.