

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

JOSHUA H. FAIRBANKS,

Plaintiff,

v.

CASE NO. 20-3084-SAC

**JOSE A. LOPEZ,
et al.,**

Defendants.

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

Plaintiff Joshua H. Fairbanks 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 the opportunity to file a proper amended complaint to cure the deficiencies.

1. Nature of the Matter before the Court

Plaintiff brings this *pro se* civil rights complaint under 42 U.S.C. § 1983. Plaintiff is incarcerated at the El Dorado Correctional Facility in El Dorado, Kansas ("EDCF"). The Court granted Plaintiff leave to proceed *in forma pauperis*. (Doc. 6.)

Plaintiff alleges in his Complaint (Docs. 1, 7) that Defendants violated the Eighth Amendment and committed medical malpractice by delaying his dental care. Plaintiff alleges that on April 27, 2019, he sent a request form to Defendants stating "I chipped my tooth and I think I exposed a nerve or something and I've been here almost 2 years now and haven't got my teeth cleaned not one time. Can I get them cleaned please and thank you." (Doc. 7-1.) Plaintiff had an appointment scheduled for May 22, 2019, but the appointment was cancelled. Plaintiff alleges that his appointments were delayed and rescheduled and he did not receive treatment until

August 26, 2019. *Id.* Plaintiff's appointment was scheduled for September of 2019, but because he was suffering from pain and discomfort and he was "sick of waiting," he put in a Health Services Request form on August 25, 2019, and was seen by the dentist on August 26, 2019. Plaintiff alleges that the delay in receiving dental care caused him to suffer pain and discomfort.

Plaintiff attaches the response to his grievance which provides in part that:

The Kansas Department of Corrections Medical Health Authorities reviewed the correspondence, site response, and HER. The offender complained of a chipped tooth on 4/29/2019 and requested a cleaning. A request was sent to dental to schedule an appointment on 5/15/2019. On 5/22/2019, the offender was on callout, but the escort cancelled, and the appointment was rescheduled. Dental received another request from medical on 5/28/2019 and again on 7/22/2019. The latter mentioned the chipped tooth again. Dental received another request on 8/26/2019 and saw the offender that day. The dentist diagnosed him with a chipped filling in tooth #3 the filling was repaired. On 10/21/2019, the offender returned to dental stating he had exposed nerve in his tooth. By the time the dentist saw him, the symptoms had resolved. He returned on 11/11/2019 for evaluation of a broken tooth, which was repaired.

(Doc. 1, at 6.) *See Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002) ("In addition to the complaint, the district court may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity."); *Hall v. Bellmon*, 935 F.2d 1106, 1112 (10th Cir. 1991) ("A written document that is attached to the complaint as an exhibit is considered part of the complaint and may be considered in a Rule 12(b)(6) dismissal.").

Plaintiff also filled out an Inmate Request to Staff Member on August 25, 2019, asking for information on what symptoms a person may experience with a tooth that has an exposed nerve and how long these symptoms may last. *Id.* at 10. Staff responded on September 12, 2019, stating that Plaintiff was seen on August 26, 2019, and Plaintiff "do[es] not have an exposed nerve." *Id.* On October 21, 2019, Defendant Lopez also responded to Plaintiff's grievance as follows:

Mr. Fairbanks was seen on 8/26/19 for a fractured filling over tooth #3 and received a filling, this tooth was treated for sensitivity as it

also has signs of toothbrush abrasion. Pt. was provided with a sample of sensitive toothpaste at that time. We received several request for this patient asking to get apt. for dental cleaning and questions about exposed nerve. After receiving a filling the tooth in question might stay sensitive for a while. Probably this is where the main concern was. Today Mr. Fairbanks was called Pt. received a dental prophylaxis. Was asked if he had any questions or if anything was hurting. Pt. stated that he was feeling better from the area treated on 8/26. Again a sample of Sensitive toothpaste was provided. Pt. was encouraged to return for further treatment.

Id. at 11.

Plaintiff names as defendants Corizon, Inc., and Jose A. Lopez, a dentist employed by Corizon. Plaintiff seeks adequate medical attention and \$75,000 in damages. (Doc. 7, at 5.)

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 ‘entitle[ment] 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

1. Medical Claims

The Eighth Amendment guarantees a prisoner the right to be free from cruel and unusual punishment. “[D]eliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ . . . proscribed by the Eighth Amendment.” *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (citation omitted).

The “deliberate indifference” standard includes both an objective and a subjective component. *Martinez v. Garden*, 430 F.3d 1302, 1304 (10th Cir. 2005) (citation omitted). In the objective analysis, the deprivation must be “sufficiently serious,” and 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), *Martinez*, 430 F.3d at 1304 (citation omitted). A serious medical need includes “one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor’s attention.” *Martinez*, 430 F.3d at 1304 (quoting *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000)).

“The subjective component is met if a prison official knows of and disregards an excessive risk to inmate health or safety.” *Id.* (quoting *Sealock*, 218 F.3d at 1209). 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 (quoting *Riddle v. Mondragon*, 83 F.3d 1197, 1204 (10th Cir. 1996)).

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; *see also Coppinger v. Townsend*, 398 F.2d 392, 394 (10th Cir. 1968) (prisoner’s right is to medical care—not to type or scope of medical care he desires and difference of opinion between a physician and a patient does not give rise to a constitutional right or sustain a claim under § 1983).

Plaintiff’s allegations do not show a complete lack of dental care, but rather show a delay in receiving proper care. The attachments to Plaintiff’s Complaint show that Plaintiff’s original appointment was rescheduled due to the escort cancelling.

Plaintiff has failed to show that any defendant was deliberately indifferent regarding his medical care and his medical claims are subject to dismissal. Plaintiff has failed to show that Defendants disregarded an excessive risk to his health or safety or that they were both aware of facts from which the inference could be drawn that a substantial risk of serious harm existed, and also drew the inference. Plaintiff’s claims suggest, at most, negligence, and are subject to dismissal. Any medical malpractice claim that Plaintiff may have must be brought in state court.

2. Corizon, Inc.

Plaintiff names Corizon as a defendant. In the Tenth Circuit, “to hold a corporation liable under § 1983 for employee misconduct, a plaintiff must demonstrate the existence of the same sort of custom or policy that permits imposition of liability against municipalities under *Monell*.” *Wishneski v. Andrade*, 572 F. App’x 563, 567 (10th Cir. 2014) (unpublished) (citations omitted). Plaintiff has failed to allege the requisite causative custom or policy. This action is subject to dismissal as against Defendant Corizon.

IV. Motion to Appoint Counsel

Plaintiff has filed a motion for appointment of counsel (Doc. 4), asserting that he is indigent and cannot hire an attorney and has limited education. Plaintiff alleges that he is in an “Individualized Reintegration Unit” for inmates with unstable mental health issues, and therefore he is not allowed to have legal materials in his cell and his access to the law library is limited.

The Court has considered Plaintiff’s motion for appointment of counsel. There is no constitutional right to appointment of counsel in a civil case. *Durre v. Dempsey*, 869 F.2d 543, 547 (10th Cir. 1989); *Carper v. DeLand*, 54 F.3d 613, 616 (10th Cir. 1995). The decision whether to appoint counsel in a civil matter lies in the discretion of the district court. *Williams v. Meese*, 926 F.2d 994, 996 (10th Cir. 1991). “The burden is on the applicant to convince the court that there is sufficient merit to his claim to warrant the appointment of counsel.” *Steffey v. Orman*, 461 F.3d 1218, 1223 (10th Cir. 2006) (quoting *Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1115 (10th Cir. 2004)). It is not enough “that having counsel appointed would have assisted [the prisoner] in presenting his strongest possible case, [as] the same could be said in any case.” *Steffey*, 461 F.3d at 1223 (quoting *Rucks v. Boergemann*, 57 F.3d 978, 979 (10th Cir. 1995)).

In deciding whether to appoint counsel, courts must evaluate “the merits of a prisoner’s claims, the nature and complexity of the factual and legal issues, and the prisoner’s ability to investigate the facts and present his claims.” *Hill*, 393 F.3d at 1115 (citing *Rucks*, 57 F.3d at 979). The Court concludes in this case that (1) it is not clear at this juncture that Plaintiff has asserted a colorable claim against a named defendant; (2) the issues are not complex; and (3) Plaintiff appears capable of adequately presenting facts and arguments. The Court denies the motion without prejudice to refile the motion if Plaintiff’s Complaint survives screening.

V. 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) raises only properly joined claims and defendants; (2) alleges sufficient facts to state a claim for a federal constitutional violation and show a cause of action in federal court; and (3) alleges 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 and may be dismissed without further notice.

IT IS THEREFORE ORDERED that Plaintiff's motion for appointment of counsel (Doc. 4) is **denied without prejudice**.

IT IS FURTHER ORDERED that Plaintiff is granted until **August 17, 2020**, 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.

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 (20-3084-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.

IT IS FURTHER ORDERED that Plaintiff is also granted until **August 17, 2020**, 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 July 17, 2020, in Topeka, Kansas.

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