

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

**JONATHAN D. LANGSTON,**

**Plaintiff,**

v.

**CASE NO. 20-3213-SAC**

**KEVIN FRIEND,  
Linn County Sheriff, et al.,**

**Defendants.**

**MEMORANDUM AND ORDER  
TO SHOW CAUSE**

Plaintiff Jonathan D. Langston, a prisoner at the Linn County Jail (LCJ) in Mound City, Kansas, at the time of filing, brings this *pro se* civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff proceeds *in forma pauperis*. For the reasons discussed below, Plaintiff is ordered to show cause why his Complaint should not be dismissed.

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

Plaintiff's Complaint (ECF No. 1) alleges his constitutional rights were violated when he was sexually harassed by Brandon Lewis, a Corrections Officer at the LCJ, on January 7, 2020. He further complains that the LCJ does not have available Prison Rape Elimination Act (PREA) access, that the LCJ improperly abated black mold in April of 2020, and that Jason Boddy, Corrections Officer, used excessive force against him on April 27, 2020.

Plaintiff names as defendants Kevin Friend, the Sheriff of Linn County; Kimberly Herring, Jail Administrator; Brandon Lewis; and Jason Boddy. He claims violation of his rights under the First through Eighth Amendments and seeks relief in the form of compensatory and 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 employee of such entity to determine whether summary dismissal is appropriate. 28 U.S.C. § 1915A(a). Additionally, with any litigant, such as Plaintiff, who is proceeding in forma pauperis, the Court has a duty to screen the complaint to determine its sufficiency. *See* 28 U.S.C. § 1915(e)(2). Upon completion of this screening, the Court must dismiss any claim that is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary damages from a defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b), 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 (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. Mold Abatement**

Plaintiff complains that county workers abated black mold in an area of the LCJ one cell over from where he was being detained, and he was not given any protective equipment.

To state a claim for violation of the Eighth Amendment based on conditions of confinement, a plaintiff must meet two requirements. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). “First, the deprivation alleged must be, objectively, ‘sufficiently serious.’” *Id.* To satisfy the objective component, a prisoner must allege facts showing he or she is “incarcerated under conditions posing a substantial risk of serious harm.” *Id.*; *Martinez v. Garden*, 430 F.3d 1302, 1304 (10<sup>th</sup> Cir. 2005). The Eighth Amendment requires prison and jail officials to provide humane conditions of confinement guided by “contemporary standards of decency.” *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). The Supreme Court has acknowledged that the Constitution “‘does not mandate comfortable prisons,’ and only those deprivations denying ‘the minimal civilized measure of life’s necessities’ are sufficiently grave to form the basis of an Eighth Amendment violation.” *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (internal citations omitted). Indeed, prison conditions may be “restrictive and even harsh.” *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). “Under the Eighth Amendment, (prison) officials must provide humane conditions of confinement by ensuring inmates receive the basic necessities of adequate food, clothing, shelter, and medical care and by taking reasonable measures to guarantee the inmates’ safety.” *McBride v. Deer*, 240 F.3d 1287, 1291 (10th Cir. 2001) (citation omitted).

The second requirement for an Eighth Amendment violation “follows from the principle that ‘only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.’” *Farmer*, 511 U.S. at 834. Prison officials must have a “sufficiently culpable state of mind,” and in prison-conditions cases that state of mind is “deliberate indifference” to inmate health or safety. *Id.* “[T]he 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 837. “The Eighth Amendment does not outlaw cruel and unusual ‘conditions’; it outlaws cruel and unusual ‘punishments.’” *Id.* It is not enough to establish that the official should have known of the risk of harm. *Id.*

Because the sufficiency of a conditions-of-confinement claim depends upon “the particular facts of each situation; the ‘circumstances, nature, and duration’ of the challenged conditions must be carefully considered.” *Despain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001) (quoting *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000)). “While no single factor controls ... the length of exposure to the conditions is often of prime importance.” *Id.* As the severity of the conditions to which an inmate is exposed increases, the length of exposure required to make out a constitutional violation decreases. Accordingly, “minor deprivations suffered for short periods would not rise to an Eighth Amendment violation, while ‘substantial deprivations ...’ may meet the standard despite a shorter duration.” *Id.* (citations omitted).

Plaintiff’s allegations regarding mold are sparse and completely conclusory. Plaintiff does not claim the mold at the LCJ has been determined to be toxic “black mold,” as opposed to mold that is simply black in color. *See Silsby v. Sloan*, 2019 WL 2107321, \*3 (N.D. Ohio May 14, 2019). Plaintiff does not state how the mold was being removed or how he would have been exposed during the removal. A “bare allegation of [the presence of] mold ... does not create a

reasonable inference regarding the sort of threat to [a plaintiff's] mental or physical well being which is necessary for violation of the Eighth Amendment.” *Cox v. Grady Cty. Detention Center*, 2008 WL 1925052, at \*3–4 (W.D. Okla. April 29, 2008) (citing *Dittmeyer v. Whetsel*, 91 F. App'x 111 (10th Cir. Feb. 11, 2004)).

Plaintiff's allegations do not constitute the types of conditions that violate the Eighth Amendment; “extreme deprivations are required.” *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). The mere presence of mold does not suggest the LCJ contravenes society's “evolving standards of decency” so as to constitute a violation of the Eighth Amendment. *Rhodes*, 452 U.S. at 346.

### **B. Sexual Harassment**

Plaintiff claims Defendant Lewis masturbated in his cereal bowl and served it to him. He further claims another employee saw semen in his bowl.

The conduct of which Plaintiff complains, while utterly inappropriate and completely unprofessional, does not reach the magnitude of a constitutional violation as required to state a claim under § 1983. A prisoner alleging a constitutional claim of sexual harassment – as opposed to an ordinary tort claim - must allege facts to establish the objective and subjective components of an Eighth Amendment violation. *Joseph v. Fed. Bureau of Prisons*, 232 F.3d 901 (Table), 2000 WL 1532783, at \*1 (10th Cir. 2000); *see also, e.g., Barney v. Pulsipher*, 143 F.3d 1299, 1310 & n.10, 1312 n.15 (10th Cir. 1998). For the objective component, the plaintiff must allege facts to show that the harassment was objectively, sufficiently serious, causing an “unnecessary and wanton infliction of pain.” *Joseph*, 2000 WL 1532783, at \*1-2 (internal quotation marks omitted) (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Whitley v. Albers*, 475 U.S. 312, 319 (1986); *Freitas v. Ault*, 109 F.3d 1335, 1338 (8th Cir. 1997)). As to the subjective component, the plaintiff must allege facts to show that the defendant acted with “‘deliberate indifference’ to a substantial

risk of serious harm to an inmate.” *Barney*, 143 F.3d at 1310 (quoting *Farmer*, 511 U.S. at 834); *see also Joseph*, 2000 WL 1532783, at \*1-2.

Where a prisoner alleges a guard engaged in inappropriate activity not involving contact, courts have generally found the harassment was not sufficiently serious to meet the objective component of an Eighth Amendment claim. *See, e.g., Barney*, 143 F.3d at 1310 n.11 (noting that allegation of “severe verbal sexual harassment and intimidation” alone—in the absence of sexual “assault[ ]”—is insufficient to state an Eighth Amendment claim); *Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004) (“Although prisoners have a right to be free from sexual abuse, whether at the hands of fellow inmates or prison guards, ... the Eighth Amendment's protections do not necessarily extend to mere verbal sexual harassment.” (internal citation omitted)); *Howard v. Everett*, 208 F.3d 218 (Table), 2000 WL 268493, at \*1 (8th Cir. 2000) (unpublished) (sexual harassment consisting of comments and gestures, absent contact or touching, “does not constitute unnecessary and wanton infliction of pain”); *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997) (isolated episodes of harassment and touching although “despicable,” do not rise to level of Eighth Amendment violation). The Tenth Circuit has found that “[m]ere verbal threats or harassment do not rise to the level of a constitutional violation unless they create ‘terror of instant and unexpected death.’” *Alvarez v. Gonzales*, 155 F. App'x 393, 396 (10th Cir. 2005) (finding no constitutionally protected right where plaintiff claimed guard antagonized him with sexually inappropriate comment), *quoting Northington v. Jackson*, 973 F.2d 1518, 1524 (10th Cir. 1992).

The type of limited, nonphysical conduct alleged by Plaintiff, while inappropriate and unprofessional, is not objectively serious enough to give rise to an Eighth Amendment violation. Plaintiff has failed to state a sexual harassment claim under § 1983 on which relief can be granted, and this claim is subject to dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii).

### **C. Excessive Force**

Plaintiff alleges he was tazed by Defendant Boddy on April 24, 2020 at 3:45 p.m. The only description he provides of the incident is to say he was “unjustly tazed.” Complaint, ECF No. 1, at 4, 5. He does not describe the events leading up to the tazing. To state a claim for excessive force, Plaintiff must show that the force used was objectively harmful enough to establish a constitutional violation and that the defendant used the force “maliciously and sadistically for the very purpose of causing harm,” rather than “in a good faith effort to maintain or restore discipline.” *Redmond v. Crowther*, 882 F.3d 927, 936–37 (10th Cir. 2018) (quoting *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986)). Plaintiff’s conclusory claim that the tazing was “unjust” is not sufficient to state a constitutional claim for excessive use of force.

### **D. 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, 165–66 (1985); *Trujillo v. Williams*, 465 F.3d 1210, 1227 (10th Cir. 2006); *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) (“Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.”). 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 has failed to allege how the Defendant Friend or Defendant Herring personally participated in any of the alleged deprivations of his constitutional rights. Plaintiff does not mention Defendants Friend or Herring in the body of the Complaint.



Mere supervisory status is insufficient to create personal liability. *Duffield v. Jackson*, 545 F.3d 1234, 1239 (10th Cir. 2008) (supervisor status is not sufficient to create § 1983 liability). An official’s liability may not be predicated solely upon a theory of respondeat superior. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976); *Gagan v. Norton*, 35 F.3d 1473, 1476 n.4 (10th Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995). A plaintiff alleging supervisory liability must show “(1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.” *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010), *cert. denied*, 563 U.S. 960 (2011). “[T]he factors necessary to establish a [supervisor’s] § 1983 violation depend upon the constitutional provision at issue, including the state of mind required to establish a violation of that provision.” *Id.* at 1204 (citing *Iqbal*, 129 S. Ct. at 1949).

Because Plaintiff has not alleged the personal participation or supervisory liability of Defendants Friend or Herring, those defendants are subject to dismissal.

#### **E. PREA**

Plaintiff states the LCJ has “no federal mandated PREA.” Complaint, ECF No. 1, at 4. Plaintiff cannot sue for violation of the PREA. The PREA, 42 U.S.C. § 15601-15609, “authorizes the reporting of incidents of rape in prison, allocation of grants, and creation of a study commission,” but there is nothing in the PREA to indicate that it created a private right of action, enforceable under § 1983. *Porter v. Jennings*, No. 1:10-cv-01811-AWI-DLB PC, 2012 WL 1434986, at \*1 (E.D. Cal. Apr. 25, 2012); *see also Burke v. Corr. Corp. of Am.*, No. 09-3068-SAC, 2010 WL 890209, at \*2 (D. Kan. Mar. 10, 2010); *Moreno v. Corizon Medical Provider*, No. 16-CV-01063, 2017 WL 3052770, at \*2 (D.N.M. June 21, 2017); *Moorman v. Herrington*, No.

4:08CV-P127-M, 2009 WL 2020669, at \*2 (W.D. Ky. 2009)(collecting cases); *De'lonta v. Clarke*, No. 7:11-cv-00483, 2013 WL 209489, at \*3 (W.D. Va. Jan. 14, 2013); *Chinnici v. Edwards*, No. 1:07-cv-229, 2008 WL 3851294, at \*3 (D. Vt. Aug. 13, 2008). “Section 1983 imposes liability on anyone who, under color of state law, deprives a person ‘of any rights privileges, or immunities secured by the Constitution and laws.’” *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). “In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal right, not merely a violation of federal law.” *Id.* (emphasis in original) (citing *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989)). The Court concludes that, as a matter of law, Plaintiff cannot pursue a § 1983 claim based on an alleged failure to comply with the PREA.

#### **F. Claim for damages barred**

Plaintiff seeks damages in the amount of \$2,000,000 for each claim. He does not include credible allegations that he suffered any physical harm. Section 1997e(e) of the Prison Litigation Reform Act (PLRA) provides in pertinent part:

No 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 or the commission of a sexual act.

42 U.S.C. § 1997e(e). This provision bars a claim for compensatory damages without a prior showing of a physical injury. *See Perkins v. Kansas Dept. of Corrections*, 165 F.3d 803, 807 (10<sup>th</sup> Cir. 1999); *see also Lawson v. Engleman*, 67 F. App'x 524, 526–27 (10th Cir. 2003) (“While claims for mental and emotional distress are cognizable under § 1983, under § 1997e(e) ‘such a suit [by a prisoner] cannot stand unless the plaintiff has suffered a physical injury in addition to mental or emotional harms.’”) (citation omitted). Section 1997e(e) applies regardless of the nature of the underlying substantive violation asserted. *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002).

Because Plaintiff's Complaint does not credibly allege a physical injury arising from each of the alleged violations, Plaintiff's claims are subject to dismissal under Fed. R. Civ. P. 12(b)(6) and 42 U.S.C. § 1997e(e) insofar as they seek compensatory damages.

#### **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.<sup>1</sup> 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 BY THE COURT** that Plaintiff is granted until **May 29, 2021**, in which to show good cause, in writing, why Plaintiff's Complaint should not be dismissed for the reasons stated herein.

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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 (20-3149-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 **May 29, 2021**, in which to file a complete and proper amended complaint to cure all the deficiencies discussed herein.

**IT IS SO ORDERED.**

DATED: This 29<sup>th</sup> day of April, 2021, at Topeka, Kansas.

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