

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

**RANDALL KENT MULLENDORE,**

**Plaintiff,**

**v.**

**CASE NO. 22-3160-JWL-JPO**

**CHANDLER CHEEKS, et al.,**

**Defendants.**

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

Plaintiff Randall Kent Mullendore is hereby required to show good cause, in writing to the undersigned, 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 an amended complaint to cure the deficiencies.

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

Plaintiff is a state prisoner confined at the Lansing Correctional Facility ("LCF") in Lansing, Kansas. The plaintiff proceeds *pro se*. Plaintiff has filed two motions requesting leave to proceed in forma pauperis. The first (Doc. 3) was not on the proper form and did not include the required financial information so the Court issued a notice of deficiency (Doc. 5). Plaintiff responded to the notice of deficiency by filing a second motion (Doc. 6), using the correct form. Plaintiff attached a KDOC account withdrawal request form dated August 9, 2022, showing that he has requested the use of his forced savings to pay the full filing fee (Doc. 6-1). The request appears to have been approved but not yet processed by KDOC. Because Plaintiff will not need

to proceed in forma pauperis if he pays the full filing fee, the Court will provisionally deny Plaintiff's motions as moot.

Plaintiff alleges in the Complaint (Doc. 1) that he received inadequate health care at LCF in violation of the Eighth Amendment. Plaintiff states that he is diabetic and wears special medical shoes. At some point, he developed a blister on the bottom of one of his feet. His diabetes was under control and "not an issue." Medical personnel at LCF prescribed medication. He took the medication, even though it was not working, and followed the doctor's orders, but he was "denied any further treatment to such an egregious degree" that his foot had to be amputated. Also, Plaintiff states that he has a bad heart and had to have heart surgery. He is now wheelchair-bound and unable to walk, suffering from shortness of breath.

Plaintiff names the following defendants: Chandler Cheeks, Warden of LCF; Shannon Meyer, previous Warden; (fnu) Skidmore, Interim Warden of LCF; Collette Winklebauer, former employee of LCF; Corizon; Centurion Medical Services; and John Does 1-15, staff and employees of LCF, Corizon and/or Centurion. Plaintiff seeks declaratory relief stating that the actions of the defendants violated his right to be free from cruel and unusual punishment under the Eighth Amendment; an injunction ordering the defendants to properly house Plaintiff and begin providing him with adequate medical care; compensatory damages in the amount of \$1,000,000 from each defendant; and punitive damages in the amount of \$10,000,000 from each defendant.

## **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**

After reviewing Plaintiff’s Complaint, the Court finds that it is subject to dismissal for the following reasons.

#### **A. Insufficient Factual Allegations**

Plaintiff’s Complaint is subject to dismissal because it does not contain sufficient facts to state an actionable claim against any defendant. As explained above, “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*, 492 F.3d at 1163. Plaintiff fails to provide a coherent picture of what happened; the Complaint does not state, for example, when he developed the blister, which foot it was on, when he was first treated for the blister, who treated him, what treatment he received, how long that treatment was followed, what happened next, etc. Plaintiff refers in the Complaint to attached medical records, but no medical records are attached.

Plaintiff is given an opportunity to file an amended complaint. When preparing the amended complaint, Plaintiff should focus on explaining what happened.

### **B. Failure to Allege Personal Participation of Defendants**

Plaintiff also fails to allege the personal participation of the defendants. 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 v. Williams*, 465 F.3d 1210, 1227 (10<sup>th</sup> Cir. 2006); *Foote v. Spiegel*, 118 F.3d 1416, 1423–24 (10<sup>th</sup> 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.

An official’s liability may not be predicated solely upon a theory of respondeat superior. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976); *Duffield v. Jackson*, 545 F.3d 1234, 1239 (10<sup>th</sup> Cir. 2008); *Gagan v. Norton*, 35 F.3d 1473, 1476 n.4 (10<sup>th</sup> Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995). To be held liable under § 1983, a supervisor must have personally participated in the

complained-of constitutional deprivation. *Meade v. Grubbs*, 841 F.2d 1512, 1528 (10th Cir. 1988). “[T]he defendant’s role must be more than one of abstract authority over individuals who actually committed a constitutional violation.” *Fogarty v. Gallegos*, 523 F.3d 1147, 1162 (10th Cir. 2008).

The allegation that an official denied a grievance or failed to respond to a grievance is not sufficient to show personal participation. *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009) (A “denial of a grievance, by itself without any connection to the violation of constitutional rights alleged by plaintiff, does not establish personal participation under § 1983.”); see *Stewart v. Beach*, 701 F.3d 1322, 1328 (10th Cir. 2012).

Plaintiff names at least three defendants who appear to be supervisors and does not allege any personal participation on their part. He also states that he does not know the names of many corrections officers or medical personnel. However, to survive screening, his Complaint must do more than assert that “John or Jane Does 1-15” were “part of the surgery team.” Doc. 1, at 4. Plaintiff needs to state, for example, that Jane Doe #1 saw him on or about [month, day, year] and describe what she did or did not do to violate Plaintiff’s rights. Similarly, Plaintiff names Defendant Winklebaur but does not describe her personal participation beyond that she was “a direct involvement force behind the denial of proper medical care due to her influences and corrupt nature.” Doc. 1, at 3. This is precisely the kind of “conclusory allegation[ ] without supporting factual averments [that is] insufficient to state a claim upon which relief can be based.” *Hall*, 935 F.2d at 1110.

Plaintiff also names Centurion Medical Services and Corizon as defendants. These are private corporations that contract with the state to provide medical care to the prisoners at LCF. A private party that violates the constitutional rights of another while acting under color of state law is subject to suit under § 1983. However, 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 v. Department of Social Services*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).” *Wishneski v. Andrade*, 572 F. App’x 563, 567 (10th Cir. 2014) (unpublished) (citations omitted). Plaintiff must allege an official policy of the corporation that is the “moving force” behind a violation of his constitutional rights. *Monell*, 436 U.S. at 694-95. Plaintiff has failed to allege the requisite causative custom or policy. These defendants are therefore subject to dismissal.

Plaintiff is given an opportunity to file an amended complaint to clarify how the named defendants personally participated in violating his constitutional rights.

### **C. Failure to State a Claim under the Eighth Amendment**

The Eighth Amendment guarantees a prisoner the right to be free from cruel and unusual punishments. The United States Supreme Court has held that an inmate advancing a claim of cruel and unusual punishment based on inadequate provision of medical care must establish “deliberate indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Boyett v. County of Washington*, 282 F. App’x 667, 672 (10th Cir. 2008) (citing *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005)). The “deliberate indifference” standard has two components: “an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that [prison] officials act with a sufficiently culpable state of mind.” *Miller v. Glanz*, 948 F.2d 1562, 1569 (10th Cir. 1991); *Martinez v. Garden*, 430 F.3d 1302, 1304 (10<sup>th</sup> Cir. 2005). In the objective analysis, 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). 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." *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980); *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999); *Martinez*, 430 F.3d at 1304 (quoting *Farmer*, 511 U.S. at 834 (quotation omitted)).

"The subjective component is met if a prison official knows of and disregards an excessive risk to inmate health or safety." *Martinez*, 430 F.3d at 1304 (citing *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000) (quotation omitted)). 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 (citing *Riddle v. Mondragon*, 83 F.3d 1197, 1204 (10th Cir. 1996) (quotation omitted)).

While the Court is hampered by Plaintiff's lack of factual details, it is clear that Plaintiff disagrees with the medical treatment that he was provided. He was prescribed medication after he developed the blister but believes the defendants should have done something different.

An inadvertent failure to provide adequate medical care or a negligent diagnosis "fail[s] to establish the requisite culpable state of mind." *Estelle*, 429 U.S. at 106 ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment."); *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). Likewise, 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; *Handy v. Price*, 996 F.2d 1064, 1067 (10th Cir. 1993) (affirming that a quarrel between a prison inmate and the doctor as to the appropriate treatment for hepatitis did not successfully raise an Eighth Amendment claim); *Ledoux v. Davies*, 961 F.2d 1536 (10th Cir. 1992) (Plaintiff's contention that he was denied treatment by a specialist is insufficient to establish a constitutional violation.); *El'Amin v. Pearce*, 750 F.2d 829, 833 (10th



Cir. 1984) (A mere difference of opinion over the adequacy of medical treatment received cannot provide the basis for an Eighth Amendment claim.). Where the complaint alleges a “series of sick calls, examinations, diagnoses, and medication,” it “cannot be said there was a ‘deliberate indifference’ to the prisoner's complaints.” *Smart v. Villar*, 547 F.2d 112, 114 (10th Cir. 1976).

As the United States Supreme Court explained:

[A]n inadvertent failure to provide adequate medical care cannot be said to constitute “an unnecessary and wanton infliction of pain” or to be “repugnant to the conscience of mankind.” Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medial mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.

*Estelle*, 429 U.S. at 105–106 (footnote omitted). The prisoner’s right is to medical care - not to the type or scope of medical care he personally desires. A difference of opinion between a physician and a patient or even between two medical providers does not give rise to a constitutional right or sustain a claim under § 1983. *Coppinger v. Townsend*, 398 F.2d 392, 394 (10th Cir. 1968).

Plaintiff’s assertion that he received constitutionally inadequate medical care is subject to dismissal for failure to state a claim. Plaintiff’s allegations indicate that he was furnished medical care during the relevant time frame. They also indicate that his claim amounts to a difference of opinion with the course of treatment ordered by medical professionals. Such allegations do not rise to the level of cruel and unusual punishment under the Eighth Amendment and are, at most, grounds for a negligence or malpractice claim in state court.

#### **IV. Motion to Appoint Counsel**

Plaintiff has filed a motion to appoint counsel (Doc. 4). He claims that he is mentally impaired and has trouble with comprehension and complex problem solving. He asks that an attorney be appointed for him “due to the egregious and gross miscarriage of justice, and constitutional violations, and the loss of body part, natural abilities.”

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 overly complex; and (3) Plaintiff appears capable of adequately presenting facts and arguments. Considering these factors, 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.<sup>1</sup> Plaintiff is

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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

given time to file a complete and proper amended complaint in which he concisely (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 for failure to state a claim.

**IT IS THEREFORE ORDERED THAT** Plaintiff is granted until **September 16, 2022**, in which to show good cause, in writing, why Plaintiff's Complaint should not be dismissed for the reasons stated herein.

**IT IS FURTHER ORDERED** that Plaintiff is also granted until **September 16, 2022**, in which to file a complete and proper amended complaint to cure all the deficiencies discussed herein.

**IT IS FURTHER ORDERED** that Plaintiff's Motion to Appoint Counsel (Doc. 4) is **denied without prejudice**.

**IT IS FURTHER ORDERED** that Plaintiff's Motions for Leave to Proceed in forma pauperis (Docs. 3, 6) are **provisionally denied as moot**.

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

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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 (22-3160-JWL-JPO) 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 SO ORDERED.**

**Dated August 26, 2022, in Kansas City, Kansas.**

**S/ James P. O'Hara**  
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**JAMES P. O'HARA**  
**UNITED STATES MAGISTRATE JUDGE**