

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

JEY ALLEN LEWIS,

Plaintiff,

v.

CASE NO. 23-3088-JWL

JOHNATHON CORTES, et al.,

Defendants.

MEMORANDUM AND ORDER

Plaintiff and state pretrial detainee Jey Allen Lewis brings this pro se civil rights action under 42 U.S.C. § 1983. Plaintiff is in custody at Larned State Hospital in Larned, Kansas and he has been granted leave to proceed in forma pauperis. He initially filed this matter in March 2023 (Doc. 1) and it now comes before the Court on Plaintiff's second amended complaint, filed on March 12, 2024 (Doc. 21). The Court has conducted the statutorily required screening of the second amended complaint. For the reasons explained below, Defendant Cody Porath will be dismissed from this matter, as will the claims against the remaining Defendants in their official capacities. As to the claims against Defendants in their individual capacities, the Court concludes that a responsive pleading is required. Thus, the Court will order service on the remaining three Defendants.

I. The Second Amended Complaint

The events that led to this matter occurred while Plaintiff was housed in the Wyandotte County Jail (WCJ). (Doc. 21, p. 2.) In the second amended complaint, Plaintiff names as Defendants Wyandotte County Sheriff's Department Sergeant Johnathon Cortes, Deputy Eliason Black, Deputy Fabian Carlon, and Deputy Cody Porath. *Id.* at 1-3. As the factual background for

the complaint, Plaintiff asserts that on the morning of February 22, 2023, he requested medical assistance for pain in his right hand. *Id.* at 2, 4. His request was initially refused, but then WCJ staff came to his cell and instructed him to cuff up. *Id.* Plaintiff complied and was taken to the medical pod by Defendants Cortes, Black, and Carlon. Plaintiff repeatedly asked what was going on and received no response.

Defendant Black then pushed Plaintiff against the wall, placing his forearm on the back of Plaintiff's head. Plaintiff was asked to strip, but was still handcuffed with his hands behind his back, so could not comply. *Id.* At Defendant Cortes' direction, Plaintiff was then forced to the ground and his clothing was removed, leaving him naked. *Id.* at 2, 4. Defendant Black still had his forearm on the back of Plaintiff's head, and Defendant Carlon put his hand around Plaintiff's neck and squeezed. *Id.* at 2, 4. Plaintiff stated, "I can't breathe," and Defendant Cortes responded, "If you can say that, th[e]n you can breathe." *Id.* Plaintiff was placed on suicide watch and referred to the disciplinary officer, who ultimately dismissed the behavioral report, saying, "You've done nothing wrong, you were in restraints the whole time behind your [b]ack. How could you undress yourself or cause harm." *Id.* at 2.

As the sole count of the second amended complaint, Plaintiff asserts that Defendants Cortes, Black, and Carlon violated the Fourteenth Amendment by using excessive force. *Id.* at 4. As relief, he seeks money damages of \$1,000,000.00. *Id.* at 6.

II. Screening Standards

Because Plaintiff is a prisoner, the Court is required by statute to screen his second amended complaint and to dismiss it or any portion of it that is frivolous, fails to state a claim on which relief may be granted, or seeks relief from a defendant immune from such relief. 28 U.S.C. § 1915A(a) and (b); 28 U.S.C. § 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, 48-49 (1988) (citations omitted); *Northington v. Jackson*, 973 F.2d 1518, 1523 (10th Cir. 1992). The 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, the Court “will not supply additional factual allegations to round out a plaintiff’s complaint or construct a legal theory on plaintiff’s behalf.” *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997).

“[W]hen 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). Furthermore, 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). The Court must determine whether Plaintiff has “nudge[d] his claims across the line from conceivable to plausible.” *See Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)(quotation marks and citation omitted). “Plausible” in this context 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 met his or her burden. *Robbins v. Okla.*, 519 F.3d 1242, 1247 (10th Cir. 2008) (citing *Twombly*, at 550 U.S. at 570).

III. Discussion

A. Defendant Porath

This action is subject to dismissal as against Defendant Porath because the second amended complaint does not sufficiently allege Defendant Porath’s personal participation in the alleged

constitutional violation. An essential element of a civil rights claim under § 1983 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 (10th Cir. 2006). In other words, a § 1983 claim must establish that each defendant caused a violation of Plaintiff's constitutional rights. *See Walker v. Johiuddin*, 947 F.3d 124, 1249 (10th Cir. 2020) (quoting *Pahls v. Thomas*, 718 F.3d 1210, 1228 (10th Cir. 2013)). As a result, Plaintiff must not only name each defendant in the caption of the complaint, he must do so again in the body of the complaint and include in the body a description of the acts taken by each defendant that violated Plaintiff's federal constitutional rights.

The Court previously explained this requirement to Plaintiff. (*See* Doc. 5, p. 4-5.) Yet the second amended complaint names Porath as a Defendant but does not specifically allege his involvement in the events that led to this action. Because the Court has already advised Plaintiff of the personal-participation requirement yet this deficiency remains in his second amended complaint, the Court declines to allow Plaintiff the opportunity to further amend his complaint. *See Jensen v. West Jordan City*, 968 F.3d 1187, 1202 (10th Cir. 2020) (explaining that refusing leave to amend is justified when there is “failure to cure deficiencies by amendments previously allowed”). Thus, the Court will dismiss Defendant Porath from this action without prejudice.

B. Relief Requested

As relief, Plaintiff seeks money damages in the amount of \$1,000,000.00. He does not specify in his second amended complaint whether he seeks this relief from Defendants in their official capacities or their individual capacities. In any event, “[s]ection 1983 plaintiffs may sue individual-capacity defendants only for money damages and official-capacity defendants only for injunctive relief.” *Brown v. Montoya*, 662 F.3d 1152, 1161 n.5 (10th Cir. 2011) (citing *Hafer v.*

Melo, 502 U.S. 21, 27, 30 (1991)). This is because “[t]he Eleventh Amendment precludes anyone from suing an arm of the state or asserting a damage claim against state officers in their official capacities.” *See Colby v. Herrick*, 849 F.3d 1273, 1276 (10th Cir. 2017). Thus, Plaintiff may proceed on his request for money damages from Defendants only in their individual capacities. To the extent that the second amended complaint could be liberally construed to seek money damages from Defendants in their official capacities, such a request must be dismissed.

IV. Summary

To summarize, Defendant Porath will be dismissed from this matter because the second amended complaint fails to allege his personal participation in the allegedly unconstitutional acts. Moreover, to the extent that the claim against the remaining Defendants could be liberally construed to seek monetary relief from Defendants in their official capacities, it will be dismissed. Plaintiff may seek monetary damages from the remaining Defendants only in their individual capacities. With respect to the remaining Defendants, the Court concludes that a responsive pleading is necessary. Because Plaintiff is proceeding in forma pauperis, the Clerk of Court must undertake service of process under 28 U.S.C. § 1915(d).

IT IS THEREFORE ORDERED BY THE COURT that all claims against Defendant Cody Porath are dismissed without prejudice for failure to state a plausible claim for relief. This leaves Defendants Johnathon Cortes, Eliason Black, and Fabian Carlon as the defendants in this matter and, as Plaintiff seeks only money damages, the § 1983 claims against them may be brought against them in their individual capacity only.

IT IS FURTHER ORDERED that the claim in this action require a responsive pleading from the remaining Defendants, Johnathon Cortes, Eliason Black, and Fabian Carlon. The Court

therefore directs the Clerk of the Court to prepare and issue a waiver of service form for each Defendant pursuant to Fed. R. Civ. P. 4(d) to be served upon each Defendant at no cost to Plaintiff.

IT IS SO ORDERED.

Dated March 14, 2024, in Kansas City, Kansas.

S/ John W. Lungstrum
JOHN W. LUNGSTRUM
UNITED STATES DISTRICT JUDGE