

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

MICHAEL LEWIS,

Plaintiff,

v.

(FNU) SMITH, et al.,

CASE NO. 24-3050-JWL

Defendants.

MEMORANDUM AND ORDER TO SHOW CAUSE

Plaintiff Michael Lewis 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.

I. Nature of the Matter before the Court

Plaintiff brings this pro se civil rights action 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.

Plaintiff names Colonel Smith and Unit Team Manager Jennell L. Buchanan of EDCF as defendants. (Doc., 1, at 1-2.) He alleges that in August 2023, while in the showers at EDCF, he asked Colonel Smith for toenail clippers for hygiene purposes and to attempt to fix his ingrown toenail. *Id.* at 2. Colonel Smith denied Plaintiff's request for toenail clippers and also denied multiple request for toenail clippers that Plaintiff made after he returned to his cell; UTM Buchanan denied the Form 9 grievance Plaintiff later filed about the denial. *Id.* at 2-3.

Plaintiff alleges Defendants violated his Eighth Amendment rights. *Id.* at 3. He seeks \$30,000 in compensatory damages, and an order requiring Defendants to enforce EDCF policies

that allow inmates to have toenail clippers during showers and allow inmates to order and keep toenail clippers in their cells. *Id.* 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 ‘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

1. Eighth Amendment

A prison official violates the Eighth Amendment when two requirements are met. *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 (10th 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.*

It does not appear that the Tenth Circuit has directly addressed a prisoner’s allegations regarding the denial of nail clippers requested to “attempt to fix” an ingrown nail. Other federal district courts, however, have held that unless the nail is infected, an ingrown nail is not a serious medical need sufficient to support an Eighth Amendment claim. *See Tucker v. Rudd*, 2017 WL 1353420, at *3 (M.D. Tenn. April 13, 2017) (unpublished) (collecting cases). This aligns with the Tenth Circuit’s acknowledgment that an inmate is required to “show that conditions were more than uncomfortable, and instead rose to the level of ‘conditions posing a substantial risk of serious harm’ to inmate health or safety.” *White v. Whetsel*, 2001 WL 939337, at *1 (10th Cir. 2001) (unpublished) (citing *Despain v. Uphoff*, 264 F.3d 965, 973–974 (10th Cir. 2001) (quoting *Farmer*, 511 U.S. at 834)).

Plaintiff does not claim that his ingrown toenail was or is now infected, nor does he allege any facts that show the denial of toenail clippers was inhumane or support the conclusion that Colonel Smith was aware that denying Plaintiff’s requests would leave Plaintiff at substantial risk of serious harm. Plaintiff focuses on the fact that the denials were against EDCF policies. (Doc. 1, at 3.) The Tenth Circuit has clearly held that “[f]ailing to comply with jail policy does not amount to a constitutional violation on its own.” *Paugh v. Uintah Cnty.*, 47 F.4th 1139, 1162 (10th Cir. 2022) (quoting *George v. Beaver Cnty.*, 32 F. 4th 1246, 1254 (10th Cir. 2022)). Failure to comply with prison policy may, in certain cases, “provide circumstantial evidence that a [prison official] knew of a substantial risk of serious harm.” *Id.* (quoting *Prince v. Sheriff of Carter Cnty.*, 28 F.4th 1033, 1046). Under the circumstances alleged in this case, however, there is simply no

indication that Colonel Smith had the required deliberate indifference that a substantial risk of serious harm to Plaintiff's health or safety could follow his denial of Plaintiff's requests for toenail clippers. Nor is there any indication that UTM Buchanan was deliberately indifferent when she denied Plaintiff's grievance.

In short, Plaintiff alleges no facts showing that a defendant both knew of and disregarded an excessive risk to his health or safety. Plaintiff's complaints regarding the conditions of his confinement at EDCF are subject to dismissal for failure to state a claim of cruel and unusual punishment. Plaintiff should show good cause why his Eighth Amendment claim should not be dismissed.

2. Personal Participation

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). "[V]icarious liability is inapplicable to . . . § 1983 suits, [so] a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). "[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 only allegations about UTM Buchanan are that she did not respond to Plaintiff's Form 9 in the way he had hoped. An allegation that an official denied or failed to respond to a grievance is not enough to show personal participation as required for a plausible claim under § 1983. *See Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009). Thus, Plaintiff should show good cause why his claim against UTM Buchanan should not be dismissed.

3. Damages

Plaintiff's request for compensatory damages is barred by 42 U.S.C. § 1997e(e), because Plaintiff has failed to allege a physical injury. Section 1997e(e) provides in pertinent part that "[n]o 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." 42 U.S.C. § 1997e(e).

IV. Motion to Appoint Counsel

Plaintiff has filed a Motion for Appointment of Counsel (Doc. 3). Plaintiff argues that he cannot afford counsel because he is in segregation without a job and owes over \$600 in fines. (Doc. 3, at 3.)

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. Boergermann*, 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 refiling the motion if Plaintiff's complaint survives screening.

V. Response Required

Plaintiff is required to show good cause why his Complaint should not be dismissed for the reasons stated herein. Failure to respond by the Court's deadline may result in dismissal of this action without further notice for failure to state a claim.

IT IS THEREFORE ORDERED BY THE COURT that Plaintiff's Motion for Appointment of Counsel (Doc. 3) is **denied without prejudice**.

IT IS FURTHER ORDERED that Plaintiff is granted until **May 13, 2024**, in which to show good cause, in writing to the undersigned, why Plaintiff's Complaint should not be dismissed for the reasons stated herein.

IT IS SO ORDERED.

Dated April 11, 2024, in Kansas City, Kansas.

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