

UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 20-7208

FRANK DURAND TOMLIN,

Plaintiff - Appellant,

v.

TODD E. ISHEE,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, Chief District Judge. (5:20-ct-03109-BO)

Submitted: November 19, 2020

Decided: November 24, 2020

Before WILKINSON, KING, and QUATTLEBAUM, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Frank Durand Tomlin, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Frank Durand Tomlin seeks to appeal the district court's order dismissing some of his allegations under 28 U.S.C. § 1915(e)(2)(B)(ii) but allowing one of his claims to proceed. This court may exercise jurisdiction only over final orders, 28 U.S.C. § 1291, and certain interlocutory and collateral orders, 28 U.S.C. § 1292; Fed. R. Civ. P. 54(b); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949). The order Tomlin seeks to appeal is neither a final order nor an appealable interlocutory or collateral order. Accordingly, we dismiss the appeal for lack of jurisdiction. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:20-CT-3109-BO

FRANK DURAND TOMLIN,)	
)	
Plaintiff,)	
)	
v.)	<u>ORDER</u>
)	
TODD E. ISHEE,)	
)	
Defendant.)	

Plaintiff, a state inmate, filed this civil rights action *pro se* pursuant to 42 U.S.C. § 1983, against defendant Todd E. Ishee (“defendant”)—Director of Prisons for the North Carolina Department of Public Safety (“DPS”). The matter now is before the court for frivolity review pursuant to 28 U.S.C. § 1915. The matter also is before the court on plaintiff’s motion to expedite (DE 9).

Section 1915 provides that courts shall review complaints in which prisoners seek relief from a governmental entity or officer and dismiss such complaints when they are “frivolous.” 28 U.S.C. § 1915(e)(2)(B)(i). A complaint may be found frivolous because of either legal or factual deficiencies. First, a complaint is frivolous where “it lacks an arguable basis . . . in law.” Neitzke v. Williams, 490 U.S. 319, 325 (1989). Legally frivolous claims are based on an “indisputably meritless legal theory” and include “claims of infringement of a legal interest which clearly does not exist.” Adams v. Rice, 40 F.3d 72, 74 (4th Cir. 1994) (quoting Neitzke, 490 U.S. at 327). Under this standard, complaints may be dismissed for failure to state a claim cognizable in law, although frivolity is a more lenient standard than that for failure to state a claim under Federal Rule of Civil

Procedure 12(b)(6). Neitzke, 490 U.S. at 328. Second, a complaint may be frivolous where it “lacks an arguable basis . . . in fact.” Id. at 325. Section 1915 permits federal courts “to pierce the veil of the complaint’s factual allegations and dismiss those claims whose factual contentions are clearly baseless.” See Denton v. Hernandez, 504 U.S. 25, 32 (1992) (citing Neitzke, 490 U.S. at 327).

Plaintiff’s complaint in its entirety provides as follows:

1. At all times relevant to this case Todd Ishee was Director of North Carolina Prisons. He is legally responsible for the operations of North Carolina prisons and for the welfare of all North Carolina prisoners.
2. Ishee has the responsibility to see to it that prison officials provide effective hygiene and cosmetics to North Carolina Prisoners.
3. Per prison policy I, a control status prisoner, am not allowed to buy or receive hygiene or cosmetic from canteen or outside vendor. Prison officials provide hygiene and cosmetics to control status prisoners.
4. In October 2019, Maury C.I. Officials transported me to the High Security Maximum Control (HCON) unit at Polk Correctional Institution. HCON Officials provided control status hygiene and cosmetics kit to me. This kit includes: 3/25 oz AmeriFresh Stick deodorant, 4 oz AmeriFresh Total Body Shampoo 3 in 1 Soap, Shampoo, Shave Gel; 4oz Aloe Vera hand and body moisturizer, 3 oz Freshmint toothpaste, toothbrush, comb. Once a month prison officials issues kit to me.
5. The hygiene and cosmetic don’t work. They are not enough in quality, size, or kind to meet my hygiene and cosmetics needs. My mouth often has bad taste and odor. No floss to floss with. My head is dried out. No grease to moisturize scalp or hair. The moisturizer dries out skin. So my skin is dried out. No Q-tips to clean out ears. And so on. Deodorant doesn’t deodorize. I stink.
6. The electric shaver prison officials issue to control status prisoners won’t shave or trim my facial hair. Also, it collects blood, hair, etc from prisoners whose hair it does cut. It’s unsanitary.

7. Essentially prison officials are buying hygiene and cosmetics that don't really work for cheap and providing them to prisoners just so prison officials can say they're providing hygiene and cosmetics to prisoners.

8. The lack of access to working hygiene and cosmetics has left me with dried out hair and scalp, waxy ears, bad tasting and odored[sic] mouth, stinking armpits, dried out skin, body odor, untrimmed and unshaved facial hair, and so on. The worse damage has been done to mind at the psychological level of having dignity of being hygienic and cosmetic stripped from me.

9. I submitted a grievance on issue. Prison officials responded that they provide hygiene kits and shaver. No further action recommended. In essence, they rubber stamped their denial of hygiene and cosmetics that work.

(Compl. ¶ V).

"To state a claim under [section] 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). Additionally, a section 1983 plaintiff must plausibly allege the personal involvement of a defendant. See, e.g., Ashcroft v. Iqbal, 556 U.S. 662, 676–77; Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691–94 (1978).

To survive frivolity review on a claim that prison conditions violate the Eighth Amendment, a plaintiff must plausibly allege "(1) that the deprivation of a basic human need was objectively sufficiently serious, and (2) that subjectively the officials acted with a sufficiently culpable state of mind." De'lonta v. Johnson, 708 F.3d 520, 525 (4th Cir. 2013) (quotation, emphasis, and alterations omitted); Strickler v. Waters, 989 F.2d 1375, 1379 (4th Cir. 1993). The objective prong requires the prisoner to plausibly allege that "the deprivation of [a] basic human need was objectively sufficiently

serious.” Strickler, 989 F.2d at 1379 (emphasis and quotation omitted). “Only an extreme deprivation, that is, a serious or significant physical or emotional injury resulting from the challenged conditions, or substantial risk thereof, will satisfy the objective component of an Eighth Amendment claim challenging conditions of confinement.” De'lonta, 708 F.3d at 525 (quotations omitted).

The court begins with plaintiff’s claim against defendant Ishee based upon DPS’s alleged policies and procedures regarding the sanitation of razors on the HCON unit. Plaintiff asserts that the policies at issue permit the razors to become contaminated with blood from other inmates using the same razor without proper sanitation. The court ALLOWS plaintiff to proceed with this Eighth Amendment claim against defendant Ishee. See Johnson v. Epps, 479 F. App’x 583, 591 (5th Cir. 2012).

The court now turns to plaintiff’s remaining allegations regarding the alleged denial of adequate hygiene products when he was transferred to the HCON unit. (Compl. p. 6). It is clear from plaintiff’s complaint that he receives hygiene products on a regular basis. Plaintiff, however, is not satisfied with the quality of the products he receives. The conditions described by plaintiff are not sufficiently serious to amount to a constitutional violation, and plaintiff does not allege that he suffered any physical injury. See Kimble v. Jenkins, No. 1:19-cv-57-FDW, 2019 WL 2453615, at *2 (W.D.N.C. June 11, 2019); McFadden v. Jenkins, No. 1:17-cv-98-FDW, 2017 WL 4350979, at *2 (W.D.N.C. Sept. 29, 2017), appeal dismissed, 2017 WL 8942576 (Dec. 27, 2017); Lore v. Wilkes, No. 1:12CV165, 2013 WL 5935072, at *7 (M.D.N.C. Nov. 1, 2013) (holding that the plaintiff’s allegation that he was denied personal grooming materials failed to state a claim, “particularly given the Complaint’s lack of factual matter indicating that he suffered any harm.”); Eakle v. Grover Rosencrance, No. 2:09-CV-00105, 2009 WL 6057260, at *1, *3 (N.D.W. Va. Dec.

4, 2009) (finding that the denial of soap, shampoo, deodorant, and toothpaste in the segregation unit failed to state a claim under the Eighth Amendment), adopting R&R, 2010 WL 1006602 (N.D.W. Va. Mar. 17, 2010). Thus, the court DISMISSES plaintiff's remaining allegations for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

In summary, the court ALLOWS plaintiff to proceed against defendant on plaintiff's claim regarding DPS's razor sanitation policy. The court, however, DISMISSES plaintiff's remaining claims pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). Because the court has conducted its initial review of plaintiff's action, the court DENIES as MOOT plaintiff's motion to expedite (DE 9). The Clerk of Court is DIRECTED to proceed in accordance with standing order 14-SO-02 which governs service of process in state prisoner civil rights cases. In the event it becomes necessary, the court DIRECTS the United States Marshal Service to make service pursuant to 28 U.S.C. § 1915(d).

SO ORDERED, this the 27 day of July, 2020.


TERRENCE W. BOYLE
Chief United States District Judge