Appendex A

CLYDE PONTEFRACT, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, et 3., Defendants-Appellees.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2020 U.S. App. LEXIS 35268
No. 20-3064
November 6, 2020, Filed

Notice:

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Editorial Information: Prior History

{2020 U.S. App. LEXIS 1}ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.Pontefract v. United States, 2019 U.S. Dist. LEXIS 219682, 2019 WL 7049912 (N.D. Ohio, Dec. 23, 2019)

Counsel Clyde Pontefract, Plaintiff - Appellant, Pro se, Joint Base MDL, NJ.
Judges: Before: SUTTON, COOK, and WHITE, Circuit Judges., HELENE N. WHITE, Circuit Judge, concurring in part and dissenting in part.

Opinion

ORDER

Clyde Pontefract, a pro se federal prisoner, appeals the district court's judgment dismissing his civil rights complaint against the United States, the prison warden, and the prison food administrator. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In his complaint, Pontefract alleged that the defendants violated his Eighth Amendment right to be free from cruel and unusual punishments by serving him less than the recommended 2000 calories of food per day. He laid out a scheme in which inmate workers intentionally provided insufficient portions of food and then stole the remaining amount to sell to other prisoners. He also alleged that the serving trays and utensils are too small, resulting in prisoners receiving too little food. Pontefract asserted that he cannot maintain a proper weight and must avoid exercise or risk burning excess calories.**{2020 U.S. App. LEXIS 2}** He sued under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), which recognized an implied right of action for damages against federal officers alleged to have violated a plaintiff's constitutional rights. He sought declaratory relief, an injunction requiring the defendants to provide larger food trays and allow for more flexible portion sizing, and damages.

The district court screened the complaint, *see* 28 U.S.C. §§ 1915(e)(2), 1915A, and dismissed it for

App. A

Appendix A

failure to state a claim upon which relief could be granted. *Pontefract v. United States*, No. 4:19CV0528, 2019 U.S. Dist. LEXIS 219682, 2019 WL 7049912 (N.D. Ohio Dec. 23, 2019). On appeal, Pontefract argues that his suit is appropriate under *Bivens*.

We review de novo a district court's order dismissing a complaint for failure to state a claim under §§ 1915A and 1915(e)(2)(B), employing the standard for Federal Rule of Civil Procedure 12(b)(6) dismissals set out in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). *Hill v. Lappin*, 630 F.3d 468, 470-71 (6th Cir. 2010). To avoid dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

The district court dismissed the United States as a defendant because it has not waived sovereign immunity for *Bivens* actions. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 69-71, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001). Pontefract argues that the United States is liable under a theory of vicarious liability, but *Bivens* does not support such a claim. *See Iqbal*, 556 U.S. at 676. Thus, the district court was correct to{**2020 U.S. App. LEXIS 3**} dismiss Pontefract's claims against the United States.

To establish liability under *Bivens*, "a complaint must allege that the defendants were personally involved in the alleged deprivation of federal rights." *Nwaebo v. Hawk-Sawyer*, 83 F. App'x 85, 86 (6th Cir. 2003); *see Iqbal*, 556 U.S. at 676-77. The district court dismissed claims against the warden and food administrator because Pontefract had not alleged their personal involvement. **On appeal, Pontefract argues that the food administrator was personally responsible for the actions alleged in the complaint**, stating that "[h]e was legally responsible for the overall operation of the Food Service Department." But "to establish liability," the plaintiff must allege that the constitutional "violation was committed *personally* by the defendant." *Robertson v. Lucas*, 753 F.3d 606, 615 (6th Cir. 2014). To satisfy this requirement, Pontefract would need to allege that the food administrator personally served undersized portions or stole excess food. Because he failed to do so, the district court correctly dismissed those claims. But **Pontefract does maintain that the food administrator "is solely responsible" for ordering the food and the small serving trays and for imposing a one-size-fits-all program for food portions. Those allegations satisfy the personal-involvement requirement**.{**2020 U.S. App. LEXIS 4**}

Regardless, the district court properly dismissed Pontefract's inadequate-nutrition claim because only a narrow range of claims fall within the scope of a *Bivens* claim. *Bivens* is a judicially created right of action that has been applied in limited scenarios, and the Supreme Court has "made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857, 198 L. Ed. 2d 290 (2017) (quoting *Iqbal*, 556 U.S. at 675). Thus, in determining whether *Bivens* applies, a court must ask "[i]f the case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme Court];" if so, "then the context is new." *Id.* at 1859. And when a claim arises in a new context, "a *Bivens* remedy will not be available if there are 'special factors counselling hesitation in the absence of affirmative action by Congress.'" *Id.* at 1857 (quoting *Carlson v. Green*, 446 U.S. 14, 18, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980)).

Pontefract's *Bivens* claim arises in a new context. The district court appreciated that *Carlson* applied *Bivens* to an Eighth Amendment claim for inadequate medical treatment of a federal prisoner's asthma. 446 U.S. at 16 n.1, 18-19. But the district court correctly declined to extend *Bivens* beyond claims of inadequate medical assistance to claims of inadequate nutrition. As the district court noted, Pontefract did not attempt to bring his claim within{**2020 U.S. App. LEXIS 5**} *Carlson* by alleging "that he is medically underweight for his height" or that the prison's meals "have resulted in a serious

App A

Appendix A

medical need to which Defendants are deliberately indifferent." *See Abbasi*, 137 S. Ct. at 1864-65; *see also Hernandez v. Mesa*, 140 S. Ct. 735, 743, 206 L. Ed. 2d 29 (2020) ("[O]ur understanding of a 'new context' is broad.").

Because Pontefract's claim arises in a new context, we "must then look to the special factors analysis." *Jacobs v. Alam*, 915 F.3d 1028, 1037 (6th Cir. 2019). At least two special factors counsel hesitation here. First, "the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action." *Abbasi*, 137 S. Ct. at 1865. Pontefract had several alternatives to bringing this *Bivens* action, including the Bureau of Prison's administrative remedies. *See, e.g.*, 18 U.S.C. § 3626; 28 C.F.R. § 542.10. Second, prison expertise also counsels against recognizing this extension. Courts "owe substantial deference to the professional judgment of prison administrators." *Adkins v. Wolever*, 692 F.3d 499, 506 (6th Cir. 2012) (quoting *Beard v. Banks*, 548 U.S. 521, 522, 126 S. Ct. 2572, 165 L. Ed. 2d 697 (2006)); *see Bistrian v. Levi*, 912 F.3d 79, 94-95 (3d Cir. 2018) (deference to prison administration constituted a special factor counselling hesitation). Both these considerations "show that whether a damages action should be allowed is a decision for the Congress to make, not the courts." *Abbasi*, 137 S. Ct. at 1860.

Pontefract also says that we should grant him declaratory and injunctive relief. But because he "has not given us a good**{2020 U.S. App. LEXIS 6}** reason to distinguish between the forms of relief he requests, we see no need to address his separate claims for equitable relief now that it is clear he lacks a cause of action." *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 525 (6th Cir. 2020). Indeed, he does not remotely explain why he is entitled to this relief in the absence of a cognizable *Bivens* claim. And in any event, Pontefract hasn't even alleged that the defendants acted with the mental state necessary to make out an Eighth Amendment violation. *Bays v. Montmorency Cty.*, 874 F.3d 264, 268 (6th Cir. 2017). The dissent notes that Pontefract complained about his food portions. But those complaints don't show that the food administrator acted with "deliberate indifference" toward his "**serious medical needs**." *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 105, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)). Rather, prison officials' emails reflect an effort to address his complaints. The prison officials advised Pontefract to "check your tray before you walk away from the line" so they could "correct" any issue. And Pontefract thanked them on one occasion for serving "a greater amount" of food.

Finally, Pontefract complains that the district court should have referred the case to a magistrate judge, but that administrative choice falls within the district court's discretion. *See* 28 U.S.C. § 636(b)(1)(A).

We **AFFIRM**.

Concur

Concur by: HELENE N. WHITE

Dissent

Dissent by: HELENE N. WHITE

HELENE N. WHITE, Circuit Judge,{2020 U.S. App. LEXIS 7} concurring in part and dissenting in part. I agree with most of my colleagues' conclusions. However, I would vacate the district court's judgment as to Pontefract's equitable claims against the prison food administrator, Nick Ferguson, because the conclusion that Pontefract is not entitled to bring an action for damages under *Bivens* does not foreclose his entitlement to equitable relief, and construing Pontefract's pro se allegations

App. A

liberally and drawing all reasonable inferences in his favor, Pontefract plausibly alleged that Ferguson violated his Eighth Amendment rights by providing him with constitutionally inadequate nutrition. Accordingly, I respectfully dissent in part.

The majority cites *Callahan v. Federal Bureau of Prisons*, 965 F.3d 520, 525 (6th Cir. 2020), to suggest that Pontefract may not seek equitable relief. I do not read *Callahan* as precluding equitable relief for prisoners, like Pontefract, who allege an ongoing constitutional violation even though they may not be entitled to money damages by way of a *Bivens* action. We have previously explained that federal prisoners "may file suit in federal court seeking injunctive relief" once they have exhausted administrative remedies with the Bureau of Prisons. *Koprowski v. Baker*, 822 F.3d 248, 256 (6th Cir. 2016) (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001)); *see also Callahan*, 965 F.3d at 527 (Moore, J., dissenting) (explaining**{2020 U.S. App. LEXIS 8}** that, "by definition, *Bivens* actions seek monetary damages," and that resolution of the *Bivens* question does not resolve claims seeking equitable relief). Further, in *Callahan*, the court concluded that the plaintiff's allegations could not establish a constitutional violation. Because I do not agree that Pontefract has failed to plausibly allege an Eighth Amendment violation against Ferguson, I also do not agree that *Callahan* precludes equitable relief.

The district court found that Pontefract did not adequately allege that he suffered a sufficiently serious constitutional deprivation to sustain a deliberate-indifference claim, noting that he did not allege "that he is medically underweight for his height or that meals consisting of approximately 2000 calories per day have resulted in a serious medical need." *Pontefract v. United States*, No. 4:19CV0528, 2019 U.S. Dist. LEXIS 219682, 2019 WL 7049912, at *3 (N.D. Ohio Dec. 13, 2019). Yet Pontefract alleged that he received "way below the daily recommended calorie intake of 2000 calories per day"; that the serving utensils are too small to provide adequate portions; that the servings he receives are below the recommended levels; and that he is malnourished. The majority finds that Pontefract did not adequately allege the requisite**{2020 U.S. App. LEXIS 9}** mental state. However, Pontefract alleged that he sent emails to prison staff and filed grievances about these issues, and thus it is reasonable to infer, construing Pontefract's pro se complaint liberally, that Ferguson was subjectively aware of the nutritional deficiencies and did not respond reasonably to remedy them. Accordingly, viewing his allegations in the light most favorable to him, Pontefract has adequately alleged an objectively serious deprivation that could sustain an Eighth Amendment claim for the actions in which Pontefract alleged that Ferguson was personally involved.

I respectfully dissent in part.

ENTERED BY ORDER OF THE COURT

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Clyde Pontefract — PETITIONER
(Your Name)

VS.

United States of America, et 3 — RESPONDENT(S)

PROOF OF SERVICE

I, Clyde Pontefract, do swear or declare that on this date, _____, 20__, as required by Supreme Court Rule 29 I have served the enclosed [redacted] PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W. Washington, D.C. 20530-0001.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Jan 20, 2021

Clyde Pontefract
(Signature)

PONTEFRACT, CLYDE 13955035

Appendex B

CLYDE PONTEFRACT, Plaintiff, v. UNITED STATES OF AMERICA, et al., Defendants.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION
2019 U.S. Dist. LEXIS 219682
CASE NO. 4:19CV0528
December 23, 2019, Decided
December 23, 2019, Filed

Counsel {2019 U.S. Dist. LEXIS 1}Clyde Pontefract, Plaintiff, Pro se, Lisbon, OH.

Judges: Benita Y. Pearson, United States District Judge.

Opinion

Opinion by: Benita Y. Pearson

Opinion

MEMORANDUM OF OPINION AND ORDER

Pro Se Plaintiff Clyde Pontefract is a federal prisoner at the Federal Correctional Institution Elkton ("FCI Elkton") in Lisbon, Ohio. He brings this action pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), against the United States of America, Warden Steven Merlak, and Nick Ferguson (collectively "Defendants"). Complaint (ECF No. 1). Plaintiff claims that Defendants are deliberately indifferent to his basic nutritional needs in violation of his rights under the Eighth Amendment of the United States Constitution to be free from cruel and unusual punishment.

For the reasons that follow, this case is dismissed.

I. Background

Plaintiff alleges that he is 59 years old, 5'11" in height, and weighs 160 pounds or less. ECF No. 1 at ¶¶ 34-36. He claims that he is receiving insufficient portion sizes at meal time which prevents him from acquiring enough calories "to maintain proper weight and health over three years at below calorie intake of 2000."1 ECF No. 1 at PageID #: 14. Plaintiff claims that he must be cautious with respect to exercise to avoid burning excessive calories. ECF No. 1 at ¶ 66. But, Plaintiff does not allege what he believes{2019 U.S. Dist. LEXIS 2} to be a "proper weight" or that he is underweight.2 Nor does Plaintiff allege that his weight or reduced exercise has had a negative impact on his health.

Plaintiff claims that receiving insufficient portion sizes at meal time results from the "one size fits all" portions served at FCI Elkton, Defendants not allowing a "Hot-Bar" at the institution, a food serving tray that is too small, and food service workers stealing food to sell to the inmate population. ECF No. 1 at ¶¶ 19, 25; PageID #: 15.

Plaintiff extensively cites menu items, required portions, and the reduced portions he claims to be receiving. He filed numerous internal complaints and grievances to which the Warden responded that proper portion sizes were being served that meet the nutritional requirements established by a

App B

PONTEFRAC

C-C

Appendex B

registered dietician. Unsatisfied, Plaintiff suggested that the issue be settled by weighing 10 separate items to determine "who is right and who is wrong" but that was not permitted. ECF No. 1 at ¶¶ 57-62.

Plaintiff asks the Court (among other actions) to: declare Defendants have violated his rights under federal health and safety**{2019 U.S. Dist. LEXIS 3}** laws and the Constitution's prohibition against cruel and unusual punishment; require Defendants to install a "Hot-Bar"; require larger food trays to allow for increased portion sizes; discontinue the "one size fits all" practice with respect to food portion sizes; and, award him $200,000 in punitive damages. *See* ECF No. 1 at ¶¶ 67-73.

II. Standard of Review

Pro se pleadings are liberally construed by the Court. *Boag v. MacDougall*, 454 U.S. 364, 365, 102 S. Ct. 700, 70 L. Ed. 2d 551 (1982) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972). Notwithstanding, the district court is required under 28 U.S.C. § 1915(e)(2)(B) to review all *in forma pauperis* complaints, and to dismiss before service any such complaint that the Court determines is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. *See Hill v. Lappin*, 630 F.3d 468, 470 (6th Cir. 2010). While some latitude must be extended to *pro se* plaintiffs with respect to their pleadings, the Court is not required to conjure unpleaded facts or construct claims against defendants on behalf of a *pro se* plaintiff. *See Grinter v. Knight*, 532 F.3d 567, 577 (6th Cir. 2008) (citation omitted); *Thomas v. Brennan*, No. 1:18CV1312, 2018 U.S. Dist. LEXIS 107248, 2018 WL 3135939, at *1 (N.D. Ohio June 26, 2018) (Gaughan, C.J.) (citing *Beaudett v. City of Hampton*, 775 F.2d 1274, 1277 (4th Cir. 1985) and *Erwin v. Edwards*, 22 F. App'x. 579, 580 (6th Cir. 2001)).

In order to withstand scrutiny under § 1915(e)(2)(B) and § 1915A, "'a complaint must contain sufficient factual matter, accepted as true, to state**{2019 U.S. Dist. LEXIS 4}** a claim to relief that is plausible on its face.'" *Hill*, 630 F.3d at 470-71 (holding that the dismissal standard articulated in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), governs dismissals for failure to state a claim under § 1915(e)(2)(B) and § 1915A) (quoting *Iqbal*, 556 U.S. at 678, quoting *Twombly*, 550 U.S. at 570)). Thus, a complaint fails to state a claim on which relief may be granted when it lacks "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 471.

III. Analysis

Before discussing the merits of Plaintiff's claim, the Court must determine whether that claim states a *Bivens* cause of action. *Bivens* provides a cause of action against individual officers acting under color of federal law alleged to have acted unconstitutionally. *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001). It does not support an action against the United States government or its agencies. *Id.* Accordingly, Plaintiff fails to state a cause of action against the United States of America.

In order to state a plausible *Bivens* claim against Merlak and Ferguson, Plaintiff must allege facts suggesting Merlak and Ferguson were personally involved in the claimed deprivation of his constitutional rights. *See Nwaebo v. Hawk-Sawyer*, 83 F. App'x. 85, 86 (6th Cir. 2003) (citing *Rizzo v. Goode*, 423 U.S. 362, 373-77, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976)). Plaintiff alleges that Warden Merlak was "legally responsible for the overall operation of every department within [FCI Elkton.]"**{2019 U.S. Dist. LEXIS 5}** *See* ECF No. 1 at ¶¶ 7, 64. Similarly, Plaintiff asserts that Ferguson, as the Food Administrator, is legally responsible for the operation of the food service

App B

Appendex B

department at FCI Elkton. ECF No. 1 at ¶¶ 8, 64. But, Plaintiff does not claim that any conduct was personally undertaken by either Merlak or Ferguson that allegedly violated his rights under the Eighth Amendment. Neither Merlak nor Ferguson can be liable under *Bivens* on a theory of *respondeat superior*. *See Johnson v. U.S. Bureau of Prison*, No. 4:12CV2802, 2013 U.S. Dist. LEXIS 60703, 2013 WL 1819227, at *4 (N.D. Ohio April 29, 2013) (Pearson, J.) (citing *Okoro v. Scibana*, 63 F. App'x 182, 184 (6th Cir. 2003)); *Jones v. City of Memphis, Tenn.*, 586 F.2d 622, 625 (6th Cir. 1978) ("the theory of [r]espondeat superior [is] fundamentally inconsistent with the import of *Bivens*" (quotation marks and citation omitted)). Accordingly, Plaintiff fails to state a plausible claim for relief against Merlak and Ferguson, and they must be dismissed from this action.

Even if Plaintiff were able to allege conduct personally undertaken by Merlak or Ferguson with respect to his claim of inadequate nutrition, his claim would nevertheless be subject to dismissal. The United States Supreme Court has made it clear that federal courts should refrain from extending a *Bivens* remedy outside of the three specific contexts in which it has already been applied, absent**{2019 U.S. Dist. LEXIS 6}** the presence of special factors which are not present here. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017). The Constitution does not directly provide for a damages remedy for alleged constitutional violations. While Congress provided a damages remedy for plaintiffs whose constitutional rights were violated by state officials through 42 U.S.C. § 1983, they did not provide such an expansive corresponding remedy for constitutional violations by federal officials. But in *Bivens*, the Supreme Court recognized an **implied damages** action to compensate persons injured by federal officers who violated the Fourth Amendment's prohibition against unreasonable searches and seizures. Since then, the Court allowed a *Bivens* remedy only in two other contexts: (1) in a Fifth Amendment gender-discrimination case, *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979), and (2) in an Eighth Amendment cruel and unusual punishment clause case, *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980). Beyond these three contexts, the Supreme Court has not approved of an **implied damages** remedy under the Constitution itself. *Ziglar*, 137 S. Ct. at 1855.

In *Carlson*, the Supreme Court permitted a *Bivens* action arising under the Eighth Amendment for deliberate indifference to a federal prisoner's serious medical needs in failing to treat the prisoner's asthma. Here, Plaintiff asserts an Eighth Amendment cruel and unusual punishment claim related to adequate nutrition. Plaintiff claims he is only receiving approximately**{2019 U.S. Dist. LEXIS 7}** 2000 calories per day, is hungry after meals, and his weight is 160 pounds or less. Plaintiff does not allege, however, that he is medically underweight for his height or that meals consisting of approximately 2000 calories per day have resulted in a serious medical need to which Defendants are deliberately indifferent.

The Supreme Court has not extended a *Bivens* remedy under the Eighth Amendment in the context that Plaintiff asserts here and this Court declines to do so. *Ziglar*, 137 S. Ct. at 1859-60 (when a different constitutional right is at issue from previous *Bivens* cases decided by the Supreme Court, then the context is new). Indeed, another court considering an Eighth Amendment *Bivens* claim concerning adequate nutrition also determined that such a claim represents a "new context" and declined to extend a *Bivens* remedy. *Lovett v. Ruda*, No. 17-CV-02010-PAB-KLM, 2018 U.S. Dist. LEXIS 167854, 2018 WL 4659111, at *8 (D. Colo. Sept. 28, 2018) ("[T]he Court finds that the magistrate judge correctly applied *Ziglar*, 137 S. Ct. at 1854, in finding that plaintiff's Eighth Amendment claim based on the deprivation of adequate nutrition constitutes a 'new context' for purposes of determining whether to imply a *Bivens* remedy."), *appeal dism'd*, No. 18-1413, 2018 U.S. App. LEXIS 37065, 2018 WL 8058575 (10th Cir. Dec. 11, 2018); *see also Hanson v. United States*, No. 18-17-DLB, 2018 U.S. Dist. LEXIS 178164, 2018 WL 5046067, at *2 (E.D. Ky. Oct. 17, 2018) (citing *Carlson*, *supra*; *Ziglar*, *supra*) (dismissing and declining to extend *Bivens* when plaintiff alleged

App B

13955035

Appendix B

an Eighth Amendment violation{**2019 U.S. Dist. LEXIS 8**} related to prison bathroom access), *appeal dism'd*, No. 18-6173, 2018 U.S. App. LEXIS 37202, 2018 WL 7220935 (6th Cir. Dec. 28, 2018); *Pauley on behalf of Asatru/Odinist Faith Cmty. v. Samuels*, No. 1:15-CV-158, 2019 U.S. Dist. LEXIS 161734, 2019 WL 4600195, at *10 (W.D. Pa. Sept. 23, 2019) (citing *Karkalas v. Marks*, No. 19-948, 2019 U.S. Dist. LEXIS 127441, 2019 WL 3492232, at *7 (E.D. Pa. July 31, 2019); *Hanson*, 2018 U.S. Dist. LEXIS 178164, 2018 WL 5046067, at *3) (*Bivens* claim at issue in *Carlson* was based on an alleged violation of the Eighth Amendment for failure to provide adequate medical care, not conditions of confinement).

Because Plaintiff has failed to state a cognizable *Bivens* claim, this action must be dismissed.

IV. Conclusion

For all of the foregoing reasons, this action is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B). The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that an appeal from this decision could not be taken in good faith.

IT IS SO ORDERED.

/s/ Benita Y. Pearson

Benita Y. Pearson

United States District Judge

December 23, 2019

Date

JUDGMENT ENTRY

Having filed its Memorandum of Opinion and Order, the Court hereby dismisses this action pursuant to 28 U.S.C. § 1915(e). Furthermore, the Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that an appeal from this decision could not be taken in good faith.

IT IS SO ORDERED.

/s/ Benita Y. Pearson

Benita Y. Pearson

United States District Judge

December 23, 2019

Date

Footnotes

1

For *Bivens* claims arising in Ohio, the statute of limitations is two years. *See Sinkfield v. United States Marshals Serv.*, No. 1:19CV00392, 2019 U.S. Dist. LEXIS 173764, 2019 WL 4991644, at *2 n.8 (N.D. Ohio Oct. 7, 2019) (Pearson, J.) (citations omitted). To the extent that Plaintiff is alleging a *Bivens* claim beyond the two-year statute of limitations for doing so, those claims are time-barred and dismissed.

2

App B

Appendex B.

As an aside, according to the U.S. Department of Health and Human Services ("HHS"), a body mass index ("BMI") of less than 18.5 indicates that an individual is underweight, and a BMI of 25 or more indicates that an individual is overweight. An individual's weight is considered normal in a BMI range of 18.5-24.9. *See* https://www.nhlbi.nih.gov/health/educational/lose wt/BMI/bmicalc.htm. According to the BMI calculator found at the HHS website, an individual with a height of 71" and weight of 160 pounds has a BMI of 22.3. An individual of the same height and a weight of 150 pounds has a BMI of 20.9. While this information is not dispositive of the Court's ruling herein, the Court notes that it may take judicial notice of undisputed information on a government website and may consider such information when determining whether a claim must be dismissed for failure to state a claim. *See Roberts v. Morvac*, No. 6:18-CV-196-GFVT, 2018 U.S. Dist. LEXIS 194963, 2018 WL 6004666, at *2 n. 2 (E.D. Ky. Nov. 15, 2018) (citations omitted).

App B