FILED
United States Court of Appeal
Tenth Circuit

November 10, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JABARI J. JOHNSON,

Plaintiff - Appellant,

v.

STEPHANIE DALTON,

Defendant - Appellee.

No. 21-1017
(D.C. No. 1:20-CV-00435-PAB-MEH)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HOLMES**, **PHILLIPS**, and **EID**, Circuit Judges.

Jabari Johnson appeals the dismissal of his 42 U.S.C. § 1983 claim against Stephanie Dalton. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

Mr. Johnson is an inmate at the Colorado State Penitentiary in Cañon City, Colorado. Dalton is a Colorado Department of Corrections (CDOC) employee. In his complaint, Mr. Johnson alleged that for various stretches of time beginning in

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

August 2018, CDOC deprived him of a medically necessary wheelchair. Although his complaint described actions by multiple CDOC officials and employees, the allegations naming Dalton specified only that she wrote a medical slip "stating item[:] wheelchair, expiration date[:] none," R. at 24, and that, on November 19, 2019, she "took [Mr. Johnson's] wheelchair stating he don't get it," *id.* Mr. Johnson also alleged that on November 22, 2019, another CDOC employee returned his wheelchair to him for a court date. *See id.* at 25. Mr. Johnson sought money damages and injunctive relief.

Before serving Dalton, Mr. Johnson moved for a preliminary injunction. The magistrate judge denied the motion because Mr. Johnson did not certify he provided Dalton with notice of the motion or detail any efforts to effect service.

Counsel entered an appearance for Dalton and moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and (6). The district court, on recommendation of the magistrate judge, dismissed the claim for damages against Dalton in her official capacity because Eleventh Amendment immunity barred that claim. The court then concluded qualified immunity barred Mr. Johnson's claims against Dalton in her individual capacity because he failed to plausibly plead a deliberate indifference Eighth Amendment claim. Mr. Johnson now appeals the denial of his motion for a preliminary injunction and the dismissal of his § 1983 claim.

DISCUSSION

Because Mr. Johnson proceeds pro se, we construe his arguments liberally, but we "cannot take on the responsibility of serving as [his] attorney in constructing

arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). "Questions involving Eleventh Amendment immunity are questions of law that this court reviews de novo." *Cornforth v. Univ. of Okla. Bd. of Regents*, 263 F.3d 1129, 1131 (10th Cir. 2001) (italics omitted). "We review de novo a district court's decision on a Rule 12(b)(6) motion for dismissal for failure to state a claim. Under this standard, we must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1282 (10th Cir. 2019) (italics, citation, and internal quotation marks omitted). But, "in examining a complaint under Rule 12(b)(6), we will disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable." *Id.* (internal quotation marks omitted).

Mr. Johnson first asserts the district court erred in dismissing his official-capacity claims against Dalton, an employee of the State of Colorado. We construe these as claims against the state itself, *Hafer v. Melo*, 502 U.S. 21, 25 (1991), and states are immune from claims for money damages under the Eleventh Amendment, *see Duhne v. New Jersey*, 251 U.S. 311, 313 (1920) ("[I]t has been long since settled that the whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own state without its consent."). Mr. Johnson does not argue Colorado consented to suit or otherwise waived its Eleventh Amendment immunity, but instead states he also sought money damages against Dalton in her individual capacity and injunctive

relief in her official capacity. But this argument does not undermine the basis for the district court's dismissal of his money-damages claim against Dalton in her official capacity, so we affirm that dismissal.

Mr. Johnson next argues the district court erred in concluding Dalton was entitled to qualified immunity. To overcome Dalton's qualified immunity, Mr. Johnson bore the burden to establish "(1) the defendant's conduct violated a constitutional right and (2) the law governing the conduct was clearly established at the time of the alleged violation." *DeSpain v. Uphoff*, 264 F.3d 965, 971 (10th Cir. 2001).

A claim, such as Mr. Johnson's, alleging an Eighth Amendment violation due to deliberate indifference to serious medical needs has two components: objective and subjective. "The objective component of the test is met if the harm suffered is sufficiently serious to implicate the Cruel and Unusual Punishment Clause." *Callahan v. Poppell*, 471 F.3d 1155, 1159 (10th Cir. 2006) (internal quotation marks omitted).

Mr. Johnson alleged Dalton deprived him of his wheelchair on November 19, 2019, but that another CDOC employee returned it to him on November 22, 2019. *See* R. at 24–25, 206. While Mr. Johnson had alleged physical injury stemming from the deprivation of his wheelchair by other, sometimes unclearly specified CDOC officials before November 19, 2019, he did not allege the three-day deprivation he linked to Dalton rose to the level of unnecessary or wanton infliction of pain, so the harm did not implicate the Cruel and Unusual Punishment Clause of the Eighth

Amendment, and he did not plausibly plead the objective component of a deliberate indifference claim. *See Robbins v. Oklahoma*, 519 F.3d 1242, 1249–50 (10th Cir. 2008) ("In § 1983 cases . . . it is particularly important . . . that the complaint make clear exactly *who* is alleged to have done *what* to *whom*, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state.")

Mr. Johnson further objects to the district court's dismissal of his complaint without granting him leave to amend. But because Mr. Johnson did not object to that portion of the magistrate judge's recommendation, under this court's firm-waiver rule he has waived review of that issue on appeal. *See Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) ("The failure to timely object to a magistrate's recommendations waives appellate review of both factual and legal questions.") internal quotation marks omitted)). Mr. Johnson does not invoke any exception to the firm-waiver rule, so we decline to review this issue further.

Mr. Johnson asserts the magistrate judge erred in denying his motion for a preliminary injunction. Mr. Johnson filed the motion before service on Dalton was complete and before counsel had entered an appearance on her behalf. The magistrate judge denied the motion without prejudice because Mr. Johnson failed to comply with the local court rule requiring him to file a certificate of service and a proposed order. *See* D.C. Colo. L. Civ. R. 65.1(a), (b). Mr. Johnson does not address the basis for the magistrate judge's decision to deny his motion on appeal, so we affirm that decision.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court. We deny Mr. Johnson's motions for injunctive relief because he did not establish a likelihood of success on the merits. *See Nken v. Holder*, 556 U.S. 418, 426 (2009). We deny Mr. Johnson's motion to proceed in forma pauperis because he has not presented "a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991).

Entered for the Court

Jerome A. Holmes
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Civil Action No. 20-cv-00435-PAB-MEH

JABARI J. JOHNSON,

Plaintiff,

v.

STEPHANIE DALTON,

Defendant.

AMENDED ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge (the "recommendation") [Docket No. 105] filed on October 2, 2020. The recommendation addresses plaintiff Jabari J. Johnson's complaint, Docket No. 1, and recommends granting defendant Stephanie Dalton's motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Docket No. 67. Plaintiff filed written objections to the recommendation in a filing titled "Motion of Plaintiff Responding to Motion 105." Docket No. 108. Because plaintiff is *pro se*, the Court construes his filings liberally without serving as his advocate. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). The Court has jurisdiction pursuant to 28 U.S.C. § 1331.

I. BACKGROUND[1]

Plaintiff is an inmate incarcerated at the Colorado State Penitentiary ("CSP") in Cañon City, Colorado. Docket No. 1 at 2. Plaintiff alleges that, from August 21, 2018 to December 10, 2018, "HSA Ryder May refused the Plaintiff . . . a wheelchair" after other individuals assaulted plaintiff. *Id.* at 4. Then, from December 21, 2018 to June 24, 2019, plaintiff was provided a wheelchair at CSP for cell use. *Id.* At Sterling Correctional Facility ("SCF"), plaintiff was provided a wheelchair for cell use from June 24, 2019 to July 16, 2019. *Id.* However, "Valanos, Khaler, Booth & Cathi Herrera" took plaintiff's wheelchair on direction from Ryder May ("May"), and, from July 16, 2019 to August 6, 2019, May deprived plaintiff of his wheelchair and "deprived [him] of rec, shower, wheelchair for cell use and daily living." *Id.* at 4–5.

Later, from August 6, 2019 to October 18, 2019, plaintiff was given a wheelchair for cell use and daily living and an ADA shower at CSP. *Id.* at 5. However, on October 18, 2019, when plaintiff was transported to SCF, he was "attacked" by staff members and, upon returning to CSP, he was not provided a wheelchair, but was made to "scoot on the floor" from November 5, 2019 to November 8, 2019. *Id.* On November 8, 2019, plaintiff "held his tray in order to speak to a [lieutenant] or captain about . . . not having his wheelchair." *Id.* Plaintiff spoke with "LT Pruitt" ("Pruitt") and showed Pruitt his "medical slip[,] which is from HSA Stephanie Dalton," "stating item wheelchair, expiration date none." *Id.* Plaintiff was then "given his wheelchair by Pruitt" on

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[1] The Court assumes that the allegations in plaintiff's complaint are true in considering the motion to dismiss. *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir. 2011).

November 8, 2019; however, from November 15, 2019 to November 19, 2019, staff "harassed the Plaintiff searching the Plaintiff's wheelchair 3 times a day." *Id.* On November 19, 2019, Daniel Barbero and defendant "took the Plaintiff's wheelchair[,] stating he don't get it." *Id.*

While plaintiff was given his wheelchair "for court in Lincoln County" on November 22, 2019, upon arriving back at CSP, his wheelchair was taken from him again. *Id.* at 6. On December 4, 2019, plaintiff was removed from his ADA shower cell and "knowingly and intentionally" placed in a non-ADA cell. *Id.* As such, plaintiff has not been able to shower and has been deprived of his "ADA accomodations [sic] of wheelchair and shower chair" from December 4, 2019 to the date that plaintiff filed his complaint. *Id.* Plaintiff alleges that he has developed open sores on his body. *Id.*

Plaintiff asserts one claim against defendant, in her individual and official capacities, under 28 U.S.C. § 1983 for violation of his Eighth Amendment rights. *Id.* at 2–4. He requests compensatory and punitive damages along with injunctive relief. *Id.* at 7.

Defendant raises two grounds for dismissal. Docket No. 67 at 2–3. First, defendant insists that plaintiff is barred from seeking monetary relief against defendant in her official capacity under the Eleventh Amendment. *Id.* at 2. Second, defendant argues that plaintiff has failed to state a claim for relief because plaintiff does not allege defendant's personal participation in any conduct that violated plaintiff's constitutional rights and, further, plaintiff has failed to allege facts that could satisfy the essential elements of a claim for deliberate indifference. *Id.* at 2–3. As a result, defendant states

that she is shielded from liability because of qualified immunity. *Id.* at 3.

Magistrate Judge Hegarty recommends defendant's motion to dismiss be granted. Docket No. 105 at 1. Plaintiff objected to the recommendation on October 16, 2020. Docket No. 108. Defendant responded to plaintiff's objections on November 2, 2020. Docket No. 112. The Court construes Docket No. 69, filed on November 19, 2020 in Case No. 20-cv-00434, to be plaintiff's reply in this matter. Docket No. 128.

II. LEGAL STANDARD

The Court must "determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). An objection is "proper" if it is both timely and specific. *United States v. One Parcel of Real Prop. Known as 2121 E. 30th St.*, 73 F.3d 1057, 1059 (10th Cir. 1996). A specific objection "enables the district judge to focus attention on those issues – factual and legal – that are at the heart of the parties' dispute." *Id.*

In the absence of an objection, the district court may review a magistrate judge's recommendation under any standard it deems appropriate. *See Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991); *see also Thomas v. Arn*, 474 U.S. 140, 150 (1985) ("It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings."). The Court therefore reviews the non-objected to portions of the recommendation to confirm that there is "no clear error on the face of the record." Fed. R. Civ. P. 72(b), Advisory Committee Notes. This standard of review is something less than a "clearly erroneous or contrary to law" standard of review, Fed.

R. Civ. P. 72(a), which in turn is less than a de novo review. Fed. R. Civ. P. 72(b). Because plaintiff is proceeding *pro se*, the Court will construe his objections and pleadings liberally without serving as his advocate. *See Hall*, 935 F.2d at 1110.

A. Lack of Subject Matter Jurisdiction

Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) is appropriate if the Court lacks subject matter jurisdiction over claims for relief asserted in the complaint. Rule 12(b)(1) challenges are generally presented in one of two forms: "[t]he moving party may (1) facially attack the complaint's allegations as to the existence of subject matter jurisdiction, or (2) go beyond allegations contained in the complaint by presenting evidence to challenge the factual basis upon which subject matter jurisdiction rests." *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 363 F.3d 1072, 1074 (10th Cir. 2004) (quoting *Maestas v. Lujan*, 351 F.3d 1001, 1013 (10th Cir. 2003)). When resolving a facial attack on the allegations of subject matter jurisdiction, the Court "must accept the allegations in the complaint as true." *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). To the extent a defendant attacks the factual basis for subject matter jurisdiction, the Court "may not presume the truthfulness of the factual allegations in the complaint, but may consider evidence to resolve disputed jurisdictional facts." *SK Finance SA v. La Plata County*, 126 F.3d 1272, 1275 (10th Cir. 1997). "Reference to evidence outside the pleadings does not convert the motion to dismiss into a motion for summary judgment in such circumstances." *Id.* Ultimately, and in either case, plaintiff has "[t]he burden of establishing subject matter jurisdiction" because she is "the party asserting jurisdiction." *Port City Props. v. Union Pac. R.R.*

Co., 518 F.3d 1186, 1189 (10th Cir. 2008).

B. Failure to State a Claim

To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must allege enough factual matter that, taken as true, makes the plaintiff's "claim to relief . . . plausible on its face." *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The 'plausibility' standard requires that relief must plausibly follow from the facts alleged, not that the facts themselves be plausible." *RE/MAX, LLC v. Quicken Loans Inc.*, 295 F. Supp. 3d 1163, 1168 (D. Colo. 2018) (citing *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008)). Generally, "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (quoting *Twombly*, 550 U.S. at 555) (alterations omitted). However, a plaintiff still must provide "supporting factual averments" with his allegations. *Cory v. Allstate Insurance*, 584 F.3d 1240, 1244 (10th Cir. 2009) ("[C]onclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based." (citation omitted)); *see also Moffet v. Halliburton Energy Servs., Inc.*, 291 F.3d 1227, 1231 (10th Cir. 2002) (stating that a court "need not accept [] conclusory allegations"). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (quotations and alterations omitted); *see also Khalik*, 671 F.3d at 1190 ("A plaintiff must nudge [his]

claims across the line from conceivable to plausible in order to survive a motion to dismiss." (quoting *Twombly*, 550 U.S. at 570)). If a complaint's allegations are "so general that they encompass a wide swath of conduct, much of it innocent," then plaintiff has not stated a plausible claim. *Khalik*, 671 F.3d at 1191 (quotations omitted). Thus, even though modern rules of pleading are somewhat forgiving, "a complaint still must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Bryson*, 534 F.3d at 1286 (alterations omitted).

III. ANALYSIS

A. Lack of Subject Matter Jurisdiction – Sovereign Immunity

Magistrate Judge Hegarty recommends that plaintiff's claim for damages against defendant in her official capacity be dismissed. Docket No. 105 at 7. Specifically, the magistrate judge concluded that plaintiff seeks $500,000 in punitive and $750,000 in compensatory damages from defendant and is suing defendant in both her official and individual capacities. *Id.* (citing Docket No. 1 at 2, 25). However, because defendant is a state official, the Court must treat a suit against defendant in her official capacity as a suit against the state itself. Docket No. 105 at 7 (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity . . . should be treated as suits against the State."). The recommendation explains that, because the Eleventh Amendment provides the state immunity from such suits, it also provides defendant immunity, and the Court therefore lacks subject matter jurisdiction against defendant in her official capacity. *Id.* (citing *Fent v. Okla. Water Res. Bd.*, 235 F.3d 553, 559 (10th

Cir. 2000) (Eleventh Amendment "immunity constitutes a bar to the exercise of federal subject matter jurisdiction."). Indeed, "when an action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 277 (1977). As such, the magistrate judge recommends that the motion to dismiss be granted with respect to the damages claim against defendant in her official capacity. Docket No. 105 at 7.

In response to the recommendation, plaintiff states that he has "established and proven jurisdiction under Rule 12(b)(1), in which the courts accept the plaintiffs [sic] complaint as truthful under factual allegations" and that he has provided declarations in support of his arguments. Docket No. 108 at 3. Plaintiff also states that, as discussed below, the magistrate judge found that plaintiff satisfied the burden of proving the objective component of his deliberate indifference claim and, therefore, his allegations are not conclusory. *Id.* at 3. Plaintiff explains that he does not seek monetary damages for his "suit in [defendant's] official capacity," but rather requests "injunctive relief regarding a wheelchair request to be provided." *Id.* at 7. "Yet," plaintiff argues, he "is seeking monetary relief of damages in the defendant's individual capacity as the Federal Rules of Civil Procedure allow." *Id.*

Plaintiff's objections do not contradict the magistrate judge's conclusion that subject matter jurisdiction must be determined "from the allegations of fact in the complaint, without regard to mere [conclusory] allegations of jurisdiction," Docket No. 105 at 3 (quoting *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971)), or facts

submitted outside the complaint. *Id.* at 10. *See Erikson v. BP Expl. & Prod. Inc.*, 567 F. App'x 637, 639 (10th Cir. 2014) (holding that the district court did not err in "failing to consider the materials" that a pro se litigant "attached to his response in opposition" to a motion to dismiss). Furthermore, the affidavits that plaintiff has provided do not establish jurisdiction, as plaintiff's complaint still demands damages in an official-capacity suit.

Plaintiff's more substantive objection – that a plaintiff, in one suit, may seek an injunction for official-capacity claims and damages for individual-capacity claims – also does not contradict the magistrate judge's conclusion that the Court does not have subject matter jurisdiction to consider plaintiff's official-capacity claims for damages.

The Court has reviewed the non-objected portions of the recommendation to satisfy itself that there is "no clear error on the face of the record." Fed. R. Civ. P. 72(b), Advisory Committee Notes. Based on this review, the Court concludes that this portion of the recommendation is a correct application of the facts and the law. Therefore, because plaintiff has not objected to the magistrate judge's conclusion that the Court does not have subject matter jurisdiction to consider official-capacity damages claims, the Court accepts the magistrate judge's recommendation that plaintiff's official-capacity damages claims be dismissed.

B. Failure to State a Claim – Qualified Immunity

The magistrate judge recommends granting defendant's motion because plaintiff has not sufficiently alleged a constitutional violation and, therefore, defendant is entitled to qualified immunity. Docket No. 105 at 12. The magistrate judge concluded that qualified immunity protects from litigation a public official whose possible violation of a

plaintiff's civil rights was not clearly a violation at the time of the official's actions. Docket No. 105 at 7 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). To overcome qualified immunity, a plaintiff must show that "(1) a reasonable jury could find facts supporting a violation of a constitutional right, which (2) was clearly established at the time of defendant's conduct." *Id.* at 7–8 (quoting *Estate of Smart by Smart v. City of Wichita*, 951 F.3d 1161, 1169 (10th Cir. 2020)). Because plaintiff complained that defendant violated his Eighth Amendment right against cruel and unusual punishment when she took away his wheelchair, the magistrate judge analyzed both the objective and subjective components of plaintiff's deliberate indifference claim, as deliberate indifference "to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). To establish deliberate indifference, a plaintiff must show that "the harm suffered is sufficiently serious to implicate the Cruel and Unusual Punishment Clause." *Callahan v. Poppell*, 471 F.3d 1155, 1159 (10th Cir. 2006). This is the objective component.[2] A plaintiff must also show that the defendant "knew [that the plaintiff] faced a substantial risk of harm and disregarded that risk, by failing to take reasonable measures to abate it." *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999). This is the subjective

[2] The magistrate judge found that plaintiff met his burden as to the objective component and that plaintiff had established a link between defendant and his alleged constitutional deprivation. Docket No. 105 at 8, 10. Plaintiff did not object to this portion of the recommendation, and the Court finds "no clear error in the face of the record." Fed. R. Civ. P. 72(b), Advisory Committee Notes. Based on this review, the Court has concluded that this portion of the recommendation is a correct application of the facts and the law.

component.

The magistrate judge determined that plaintiff's allegations "do not evince a conscious disregard of risk to Plaintiff's health." Docket No. 105 at 11. The magistrate judge concluded, therefore, that plaintiff "has not plausibly pleaded the subjective component of a deliberate indifference claim." *Id.* at 12. According to the magistrate judge, plaintiff alleged that defendant "(1) . . . gave a medical slip to Pruitt, (2) took Plaintiff's wheelchair on November 19, 2019, and (3) knowingly and intentionally deprive[d] . . . Plaintiff of care, and (4) knowingly and intentionally imede [sic] upon Plaintiff[']s access to the courts." *Id.* (citing Docket No. 1 at 5–7). Plaintiff's allegations that defendant "knowingly and intentionally" deprived care are conclusory allegations that the Court need not accept as true. *Id.* (citing *Iqbal*, 556 U.S. at 678). Therefore, the magistrate judge concluded, "the Court could possibly find negligent action, but that is insufficient to establish a claim." *Id.* at 12 (citing *Van Riper v. Wexford Health Sources, Inc.*, 67 F. App'x 501, 504 (10th Cir. 2003) ("An inadvertent failure to provide adequate medical care does not rise to the level of an unnecessary and wanton infliction of pain.")).

Plaintiff reiterates that defendant knew of the substantial risk and yet failed to take reasonable measures to "abate" it. Docket No. 108 at 7. In support, plaintiff explains that, because defendant "prescribed the wheelchair as permanent with an expiration date of none," she knew of the risks to plaintiff, yet she took away the wheelchair before plaintiff could see a doctor. Docket No. 108 at 7. Plaintiff further states that defendant took his wheelchair "in retaliation," which "violates the subjective

component of the 8th Amendment." *Id.*[3] Defendant responds that plaintiff has failed to establish "Ms. Dalton's subjective knowledge regarding Mr. Johnson's need for a wheelchair, or his medical condition generally, when she allegedly took his wheelchair," or "that she consciously disregarded [his needs] by taking the wheelchair." Docket No. 112 at 2.

The Court finds that, contrary to her argument, defendant was clearly aware of plaintiff's need for a wheelchair, as she prescribed the wheelchair, and, when she took it away, she disregarded this need. Defendant does not argue that this is a mere disagreement over whether a wheelchair was the correct treatment for plaintiff's disability or that taking the wheelchair away was justified. *See, e.g.*, *Djonne v. Holst*, No. 08-cv-01146-LTB-KLM, 2009 WL 1765687, at *3 (D. Colo. June 22, 2009). Nor did prison medical personnel determine that a wheelchair was not needed or would cause more harm than good. *See, e.g.*, *Callahan*, 471 F.3d at 1157. Plaintiff states that, without a wheelchair, he has been forced to "scoot" and "crawl on his butt" around his cell, has not been able to use his accessible shower, and has developed "open sores"

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[3] Plaintiff argues that taking away his wheelchair "depriv[ed] [him] of attorney and legal visits, as Stephanie Dalton knowingly and intentionally imede [sic] upon [his] access to the courts." Docket No. 1 at 7. Defendant sought dismissal of any claim that could be construed as a First Amendment violation. Docket No. 67 at 2. The magistrate judge determined, however, that the Court "cannot take on the responsibility of serving as the litigant's attorney in constructing arguments." Docket No. 105 at 5–6 n.2 (quoting *Lucero v. Koncilja*, 781 F. App'x 786, 788 (10th Cir. 2019)). Therefore, because plaintiff did not address a First Amendment claim in response to the motion to dismiss, the magistrate judge construed plaintiff's silence as indicating that he is not pursuing a First Amendment claim. *Id.* Plaintiff did not object to this portion of the recommendation, and the Court finds "no clear error in the face of the record." Fed. R. Civ. P. 72(b), Advisory Committee Notes. Based on this review, the Court has concluded that this portion of the recommendation is a correct application of the facts and the law.

on his "chest, back, stomach, arms[,] and shoulders." Docket No. 1 at 6. Defendant knew about plaintiff's need for a wheelchair and presumably took his general medical condition into account when she prescribed it. Further, because it was defendant who both prescribed and took away the wheelchair, she knew of and yet disregarded the risks to plaintiff's health and safety by forcing him to make due without it. Plaintiff has not, therefore, stated a claim for mere negligence, but rather has plausibly alleged that defendant intentionally disregarded a risk that she was aware of.

However, plaintiff alleges that he developed these sores after his wheelchair was taken from him on previous occasions. *Id.* at 5. Further, plaintiff alleges that defendant took away his wheelchair on November 19, 2019 but that his wheelchair was returned to him on November 22, 2019. *Id.* at 5–6. Plaintiff has not alleged that being without a wheelchair from November 19 to 22 or having it taken away without a doctor's visit rises "to the level of unnecessary and wanton infliction of pain." Docket No. 105 at 12 (quoting *Van Riper*, 67 F. App'x at 503), or that defendant caused his injuries. He has not, therefore, alleged that defendant's confiscation of his wheelchair for that period violated the Eighth Amendment, and the Court will accordingly overrule his objection.

plaintiff never stated the wheelchair was provided back on 11/22/2019

C. Leave to Amend

The general rule in this circuit is that, if "it is at all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim for relief, the court should dismiss with leave to amend." *Reynoldson v. Shillinger*, 907 F.2d 124, 126 (10th Cir. 1990). This is particularly true where "deficiencies in a complaint are attributable to oversights likely the result of an untutored pro se litigant's

ignorance of special pleading requirements." *Id.* However, "[c]omplaints drafted by pro se litigants . . . are not insulated from the rule that dismissal with prejudice is proper for failure to state a claim when 'it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him the opportunity to amend.'" *Fleming v. Coulter*, 573 F. App'x 765, 769 (10th Cir. 2014) (quoting *Perkins v. Kan. Dep't of Corre.*, 165 F.3d 803, 806 (10th Cir. 1999)).

The magistrate judge recommends dismissal with prejudice – that is, without leave to amend – because the deficiencies in plaintiff's complaint are not due to his being an "untutored" litigant; rather, plaintiff states that he is "well educated [and] experienced." Docket No. 105 at 13 (citing Docket Nos. 28 at 1, 44 at 1, 96 at 1). The magistrate judge also explains that, from August 2017 to January 2020, plaintiff has filed forty complaints in this district, indicating that he is familiar with how to plead an Eighth Amendment claim. *Id.* Plaintiff's deficiencies, therefore, are not attributable to ignorance of special pleading requirements, and the magistrate judge recommends dismissal on the merits. *Id.* (citing *Stubblefield v. Henson*, 989 F.2d 508, 1993 WL 55936, at *2 (10th Cir. 1993)).

Plaintiff explains that he has "no need to amend his complaint, yet has the right to file a supplemental complaint" that includes additional violations that have occurred since filing his complaint in this matter. Docket No. 108 at 9. This response is not an objection to the magistrate judge's recommendation. The Court has reviewed the non-objected to portions of the recommendation to satisfy itself that there is "no clear error on the face of the record." Fed. R. Civ. P. 72(b), Advisory Committee Notes. Based on this review, the Court has concluded that this portion of the recommendation is a

correct application of the facts and the law, and the Court will dismiss plaintiff's claims with prejudice.

IV. CONCLUSION

It is therefore

ORDERED that the Recommendation of United States Magistrate Judge [Docket 105] is **ACCEPTED**. It is further

ORDERED that the Motion of Plaintiff Responding to Motion 105 [Docket No. 108] is **OVERRULED**. It is further

ORDERED that the Defendant's Motion to Dismiss [Docket No. 67] is **GRANTED**. It is further

ORDERED that the plaintiff's official-capacity claims are **DISMISSED** without prejudice. It is further

ORDERED that the plaintiff's individual-capacity claims are **DISMISSED** with prejudice. It is further

ORDERED that the case is closed.

DATED January 7, 2021.

BY THE COURT:

PHILIP A. BRIMMER
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-00435-PAB-MEH

JABARI J. JOHNSON,

Plaintiff,

v.

STEPHANIE DALTON,

Defendant.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Michael E. Hegarty, United States Magistrate Judge.

Plaintiff Jabari J. Johnson ("Plaintiff") asserts an Eighth Amendment claim in his Prisoner Complaint ("Complaint"). ECF 1 at 4.[1] Defendant Stephanie Dalton ("Defendant") filed the present motion to dismiss ("Motion") pursuant to Fed. R. Civ. P. 12(b)(1) and (6). ECF 67. The Motion is fully briefed and has been referred by Chief Judge Philip A. Brimmer for a recommendation. ECF 68. As set forth below, this Court respectfully recommends that Defendant's Motion be granted.

BACKGROUND

The following are factual allegations (as opposed to legal conclusions, bare assertions, or merely conclusory allegations) made by the Plaintiff in his Complaint, which are taken as true for analysis under Fed. R. Civ. P. 12(b)(1) pursuant to *Holt v. United States*, 46 F.3d 1000, 1002 (10th

[1] Plaintiff's operative complaint is the one he initially filed. Plaintiff filed a motion to amend (and an amended prisoner complaint), but the motion was denied as moot during initial screening. ECF 9.

Cir. 1995) and under Fed. R. Civ. P. 12(b)(6) pursuant to *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Plaintiff alleges that from August 21, 2018 to December 10, 2018, "HSA Ryder May refused the Plaintiff . . . a wheelchair after" other individuals assaulted Plaintiff. ECF 1 at 4. From December 21, 2018 to June 24, 2019, Plaintiff "was provided his wheelchair at [Colorado State Penitentiary ("CSP")] for cell use." *Id.* Subsequently, from June 24, 2019 to July 16, 2019, Plaintiff was provided a wheelchair for cell use at Sterling Correctional Facility ("SCF"), but "Valanos, Khaler, Booth, & Cathi Herrer took Plaintiff's wheelchair" on direction from Ryder May. *Id.* From July 16, 2019 to August 6, 2019, Ryder May deprived Plaintiff of his wheelchair and "deprived [him] of rec, shower, wheelchair for cell use and daily living." *Id.* at 5.

Plaintiff was given a wheelchair for cell use and daily living and an ADA shower cell at CSP from August 6, 2019 to October 18, 2019. *Id.* On October 18, 2019, Plaintiff was transported to SCF and "attacked" by staff members. *Id.* Returning to CSP, Plaintiff was not provided a wheelchair and "was made to scoot on the floor" from November 5, 2019 to November 8, 2019. *Id.* On November 8, 2019, Plaintiff "held his tray in order to speak to a [lieutenant] or captain about the Plaintiff not having his wheelchair." *Id.* "LT Pruitt" ("Pruitt") spoke with Plaintiff, and he showed Pruitt "his medical slip which is from HSA Stephanie Dalton." *Id.* The medical slip showed no expiration date for a wheelchair. *Id.* On November 8, 2019, Plaintiff "was given his wheelchair by Pruitt." *Id.* On November 19, 2019, "Daniel Barbero and [Defendant] took the Plaintiff[']s wheelchair stating[,] he don't [sic] get it." *Id.* Plaintiff requests compensatory and punitive damages, along with injunctive relief. *Id.* at 7.

LEGAL STANDARDS

I. 12(b)(1)

Rule 12(b)(1) empowers a court to dismiss a complaint for "lack of subject matter jurisdiction." Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case, but only a determination that the court lacks authority to adjudicate the matter. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). A court lacking jurisdiction "must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). A Rule 12(b)(1) motion to dismiss "must be determined from the allegations of fact in the complaint, without regard to mere [conclusory] allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *See Basso*, 495 F.2d at 909. Accordingly, Plaintiff in this case bears the burden of establishing that this Court has jurisdiction to hear his claims.

Generally, Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction take two forms. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995).

> First, a facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint. In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true.
>
> Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1). In such instances, a court's reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion.

Id. at 1002-03 (citations omitted). The present Motion launches a facial attack on this Court's subject matter jurisdiction; therefore, the Court will accept the truthfulness of the Complaint's factual allegations.

II. 12(b)(6)

The purpose of a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is to test the sufficiency of the plaintiff's complaint. *Sutton v. Utah State Sch. For the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 2008). "To survive a motion to dismiss, 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 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pled facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id. Twombly* requires a two-prong analysis. First, a court must identify "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Id.* at 680. Second, the Court must consider the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id.* at 681. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id.* at 679. In the context of a pro se litigant, the "pleadings are to be liberally construed." *Farrell v. Ramsey*, 28 F. App'x 751, 753 (10th Cir. 2001).

Plausibility 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 plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (quoting *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008)). "The nature and specificity of the allegations required to state a plausible claim will

vary based on context." *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011). Thus, while the Rule 12(b)(6) standard does not require that a plaintiff establish a prima facie case in a complaint, the elements of each alleged cause of action may help to determine whether the plaintiff has set forth a plausible claim. *Khalik*, 671 F.3d at 1192. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. The complaint must provide "more than labels and conclusions" or merely "a formulaic recitation of the elements of a cause of action," so that "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint has made an allegation, "but it has not shown that the pleader is entitled to relief." *Id.* (quotation marks and citation omitted).

ANALYSIS

Plaintiff's Complaint asserts one claim against Defendant for violation of his Eighth Amendment rights pursuant to 28 U.S.C. § 1983. ECF 1 at 4. Defendant asserts two arguments for dismissal. First, this Court lacks subject matter jurisdiction over Plaintiff's damages claim against Defendant in her official capacity based on the Eleventh Amendment. Second, the defense of qualified immunity bars this case, because Plaintiff does not plausibly state a constitutional violation. [2] For the reasons set forth below, the Court respectfully recommends dismissal without

[2] Defendant also seeks dismissal of any First Amendment claim brought by Plaintiff. Mot. at 5. Because Plaintiff alleges "that he was deprived of care 'due to retaliation' and that [Defendant] imede [sic] upon the Plaintiff[']s access to the courts," Defendant believes this Court could

prejudice of the damages claim against Defendant in her official capacity and dismissal with prejudice of the remaining individual-capacity claims for failure to state a claim.

I. Sovereign Immunity

Defendant contends that Plaintiff's claim against her in her official capacity for damages is barred by the Eleventh Amendment. Mot. at 4–5. Plaintiff responds that dismissal pursuant to Rule 12(b)(1) is improper for "lawsuits against (a) state officials in their individual capacity for damages or (B) against state officials in their official capacity for injunctive relief." Resp. at 2.

Pursuant to the Eleventh Amendment, the Supreme Court has "consistently held that a[] [non-]consenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Edelman v. Jordan*, 415 U.S. 651, 662–663 (1974); *see Kentucky v. Graham*, 473 U.S. 159, 169 (1985) ("[A]bsent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court."). "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 281, 277 (1997) (quoting *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459 (1945)). "Thus, the Eleventh Amendment bars a suit brought in federal court by the citizens of a state against the state or its agencies." *Johns v. Stewart*, 57 F.3d 1544, 1552 (10th Cir. 1995) (internal citation omitted). This immunity applies to Section 1983 suits. *Quern v. Jordan*, 440 U.S. 332,

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construe the Complaint to state a claim under the First Amendment. The Court "cannot take on the responsibility of serving as the litigant's attorney in constructing arguments." *Lucero v. Koncilja*, 781 F. App'x 786, 788 (10th Cir. 2019); *see Piller v. Ford*, 542 U.S. 225, 231 (2004) ("[Courts] have no obligation to act as counsel or paralegal to pro se litigants."). Though Plaintiff filed a thorough response to the Motion, he did not address any First Amendment claim. The Court construes Plaintiff's silence as indicating that he is not pursuing a First Amendment claim.

335 (1979) ("[Section] 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States.").

In this case, Plaintiff seeks monetary compensation from Defendant. ECF 1 at 25 (requesting $500,000 in punitive and $750,000 in compensatory damages). Plaintiff also indicates that he is suing Defendant in both her individual and official capacities. *Id.* at 2. Defendant is a state official; accordingly, the Court must treat a suit against her in her official capacity as a suit against the state itself. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity . . . should be treated as suits against the State."). Based on the Eleventh Amendment and as undisputed by Plaintiff, the state is immune from such suits, and the Court lacks subject matter jurisdiction over Plaintiff's damages claim against Defendant in her official capacity. *Fent v. Okla. Water Res. Bd.*, 235 F.3d 553, 559 (10th Cir. 2000) (Eleventh Amendment "immunity constitutes a bar to the exercise of federal subject matter jurisdiction."). This Court respectfully recommends that the Motion be granted with respect to the damages claim against Defendant in her official capacity.

II. Qualified Immunity

With respect to the individual-capacity claims, Defendant asserts the defense of qualified immunity. Qualified immunity protects from litigation a public official whose possible violation of a plaintiff's civil rights was not clearly a violation at the time of the official's actions. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It is an entitlement not to stand trial or face the other burdens of litigation. *Ahmad v. Furlong,* 435 F.3d 1196, 1198 (10th Cir. 2006) (internal quotations and citations omitted). The privilege is an immunity from suit rather than a mere defense to liability. *Id.* The defense of qualified immunity requires that "(1) a reasonable jury could find facts supporting a violation of a constitutional right, which (2) was clearly established

at the time of the defendant's conduct." *Estate of Smart by Smart v. City of Wichita*, 951 F.3d 1161, 1169 (10th Cir. 2020). The Supreme Court in *Pearson v. Callahan* emphasized that courts have the discretion to decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 555 U.S. 223, 236 (2009); *see also Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1277 (10th Cir. 2009). Here, the Court will begin by analyzing whether Plaintiff states a plausible constitutional violation.

A. Deliberate Indifference

"[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)) (internal citation omitted). A claim for deliberate indifference must satisfy an objective and subjective component. *Callahan v. Poppell*, 471 F.3d 1155, 1159 (10th Cir. 2006). The objective component is met if the plaintiff can show that "the harm suffered is sufficiently serious to implicate the Cruel and Unusual Punishment Clause." *Id.* (citation and quotation marks omitted). For a case involving allegations of delay in treatment, the plaintiff must show "'that the delay resulted in substantial harm,' a requirement that 'may be satisfied by' a showing of 'lifelong handicap, permanent loss, or considerable pain.'" *Vasquez v. Davis*, 882 F.3d 1270, 1275 (10th Cir. 2018) (quoting *Al-Turki v. Robinson*, 762 F.3d 1188, 1193 (10th Cir. 2014)). "To prevail on the subjective component, the prisoner must show that the defendants knew he faced a substantial risk of harm and disregarded that risk, by failing to take reasonable measures to abate it." *Id.* (citation and quotation marks omitted). "'[A]n inadvertent failure to provide adequate medical care' does not give rise to an Eighth Amendment violation." *Id.* (quoting *Estelle*, 429 U.S. at 105–06).

Defendant argues that Plaintiff "has not met his burden of establishing either the objective or subjective components of an Eighth Amendment deliberate indifference claim." Mot. at 9. Plaintiff responds that "all factors of the Defendant [sic] violation of objective and subjective components have been proven." Resp. at 2.

1. Objective Component

"[T]he question raised by the objective prong of the deliberate indifference test is whether the alleged harm . . . is sufficiently serious." *Mata v. Saiz*, 427 F.3d 745, 753 (10th Cir. 2005). "A 'medical need is sufficiently serious if it is 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.'" *Id.* at 751 (quoting *Sealock v. Colorado*, 87 F.3d 1205, 1209 (10th Cir. 2000)).

Defendant argues that the "Complaint does not allege facts indicating that a physician has determined that he requires the use of a wheelchair, nor that his need for a wheelchair is so obvious that any lay observer would recognize it as such." Mot. at 10. Plaintiff responds that the objective component is established, because "he was deprived of a medical need that is objectively sufficiently serious." Resp. at 3. Plaintiff alleges that he showed Pruitt a "medical slip" from Defendant, demonstrating Plaintiff's need for a wheelchair. ECF 1 at 5. Construing that allegation liberally and taking it as true, the Court finds Plaintiff has a sufficiently serious medical need diagnosed by a physician or one "so obvious that even a lay person would easily recognize" the need for medical attention. *Mata*, 427 F.3d at 753. As such, the Court finds Plaintiff meets his burden as to the objective component.

Additionally, Defendant argues Plaintiff fails to state a claim, because he "has not asserted that [she] personally participated in any Eighth Amendment violations." Mot. at 13. "[A] plaintiff

must do more than allege a constitutional violation; he must allege 'an affirmative link between each defendant and the constitutional deprivation.'" *Stone v. Albert*, 338 F. App'x 757, 759 (10th Cir. 2009) (quoting *Duffield v. Jackson*, 545 F.3d 1234, 1238 (10th Cir. 2008)). Plaintiff responds, in part, by espousing new allegations. These include that Defendant "provided the Plaintiff with a shower cell" and "a wheelchair, ADA shower cell, [and] physical therapy." Resp. at 2. The Complaint is devoid of such allegations. "Generally, the sufficiency of a complaint must rest on its contents alone." *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir.2010). There are limited exceptions to this general rule by which a court may consider materials beyond the four corners of the complaint. *Id.* These three exceptions are: "(1) documents that the complaint incorporates by reference; (2) documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity; and (3) matters of which a court may take judicial notice." *Id.* (internal citations and quotations omitted). Plaintiff's response (with new allegations therein) does not fall under any of those three exceptions; accordingly, the Court will not consider them in the adjudication of the Motion.[3] *See Erickson v. BP Expl. & Prod. Inc.*, 567 F. App'x 637, 639 (10th Cir. 2014) (finding that the district court did not err in "failing to consider the materials" a pro se litigant "attached to his response in opposition" to a motion to dismiss). But, even without consideration of these allegations, the Court finds Plaintiff alleged an affirmative link to Defendant. Plaintiff specifically alleges that Defendant took Plaintiff's wheelchair and gave a "medical slip" to Pruitt. ECF 1 at 5. Those allegations adequately provide the link between Defendant and the alleged constitutional deprivation.

[3] Nor will the Court construe the addition of these allegations as a request to amend Plaintiff's Complaint. *See* Fed. R. Civ. P. 15(a)(2); *Fleming v. Coulter*, 573 F. App'x 765, 769 (10th Cir. 2014) ("[C]ourts have no obligation to permit a pleading amendment when a litigant does not file a formal motion for leave to amend.").

2. Subjective Component

The Supreme Court has held "a prison official must have a sufficiently culpable state of mind" to violate the Eighth Amendment. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quotation marks and citation omitted). "[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; 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 837. A prisoner must plead that defendants "disregarded [the] risk, by failing to take reasonable measures to abate it." *Spradley v. LeFlore Cnty. Detention Center Pub. Trust Bd.*, 764 F. App'x 692, 701 (10th Cir. 2019); *see Mata*, 427 F.3d at 755 ("[W]ere the symptoms such that a prison employee knew the risk to the prisoner and chose (recklessly) to disregard it?").

Plaintiff's allegations do not evince a conscious disregard of risk to Plaintiff's health. The totality of Plaintiff's allegations against Defendant are: (1) she gave a medical slip to Pruitt, (2) took Plaintiff's wheelchair on November 19, 2019, (3) "knowingly and intentionally deprive[d] . . . Plaintiff of care, and (4) "knowingly and intentionally imede [sic] upon the Plaintiff[']s access to the courts." ECF 1 at 5–7. None of these allegations establish Defendant "k[new] of and disregard[ed] an excessive risk" to Plaintiff's health. *Farmer*, 511 U.S. at 837. Plaintiff's allegation that Defendant "knowingly and intentionally" deprived care is a conclusory statement that the Court does not need to accept as true. *Iqbal*, 556 U.S. at 678 (mere conclusory statements do not suffice to plausibly state a claim.). Even with a liberal construction, the Court finds no allegation sufficient to establish a conscious disregard of excessive risk. *See Breedlove v. Costner*, 405 F. App'x 338, 343 (10th Cir. 2010) ("Although a district court must construe pro

se pleadings liberally, a pro se plaintiff must still allege sufficient facts on which a recognized legal claim can be based."). At most, the Court could possibly find negligent action, but that is insufficient to establish a claim. *See Van Riper v. Wexford Health Serv., Inc.*, 67 F. App'x 501, 503 (10th Cir. 2003) ("An inadvertent failure to provide adequate medical care does not rise to the level of an unnecessary and wanton infliction of pain.").

For these reasons, the Court finds Plaintiff has not plausibly pleaded the subjective component of a deliberate indifference claim. Hence, the Court respectfully recommends finding Defendant is entitled to qualified immunity and granting Defendant's Motion for failure to state a claim.

B. Leave to Amend

Having found Plaintiff failed to sufficiently plead his claim against Defendant, the Court now turns to the issue of whether dismissal of the claims should be with or without prejudice. Generally, in a case involving a pro se litigant, the Tenth Circuit has held that if "it is at all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim for relief, the court should dismiss with leave to amend." *Reynoldson v. Shillinger*, 907 F.2d 124, 126 (10th Cir. 1990). "Particularly where deficiencies in a complaint are attributable to oversights likely the result of an untutored pro se litigant's ignorance of special pleading requirements, dismissal of the complaint without prejudice is preferable." *Id.* However, "[c]omplaints drafted by pro se litigants . . . are not insulated from the rule that dismissal with prejudice is proper for failure to state a claim when 'it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him the opportunity to amend,'" *Fleming*, 573 F. App'x at 769 (quoting *Perkins v. Kan. Dep't of Corre.*, 165 F.3d 803, 806 (10th Cir. 1999)).

In this case, Plaintiff is not an "untutored" litigant; he readily admits to being a "well educated, experienced . . . pro se litigant." *See, e.g.*, Resp. at 1 ; ECF 28 at 1 (motion requesting change to motion titles); ECF 44 at 1 (motion requesting videoconference); ECF 96 at 1 (motion requesting copies). In fact, from August 2017 to January 2020, Plaintiff filed forty prisoner complaints in this District. *See* 20-cv-00037-RM-MEH, ECF 3 at 1. Plaintiff demonstrated in his Complaint his familiarity with how to plead a claim under the Eighth Amendment; for example, he alleged that he was being subjected to "cruel conditions of confin[e]ment." ECF 1 at 7. Plaintiff's failure to plead supporting facts does not indicate to the Court that Plaintiff's "deficiencies . . . are attributable to oversights [in] . . . [Plaintiff's] ignorance of special pleading requirements." *Reynoldson*, 907 F.2d at 126. Moreover, the Court is not recommending dismissal "on the basis of any special pleading requirements," but rather recommending dismissal "on the merits." *Stubblefield v. Henson*, 989 F.2d 508, 1993 WL 55936, at *2 (10th Cir. 1993).

Accordingly, this Court recommends granting the Motion with prejudice for failure to state a claim.

CONCLUSION

The Court respectfully RECOMMENDS Defendant's Motion [filed August 7, 2020; ECF 67] be **GRANTED** as follows: dismiss without prejudice the official capacity claim for damages pursuant to Fed. R. Civ. P. 12(b)(1) and dismiss with prejudice the remaining claims pursuant to Fed. R. Civ. P. 12(b)(6).[4]

[4] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a *de novo* determination by the District Judge of the proposed findings and

Respectfully submitted this 2nd day of October, 2020, at Denver, Colorado.

BY THE COURT:

Michael E. Hegarty
United States Magistrate Judge

recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court. *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) (quoting *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991)).