

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION**

**TUJUAN ESTAISYO SESSION  
#1714978**

**V.**

**CHARLES WARE, et al.**

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**W-20-CA-1058-ADA**

**ORDER**

Before the Court are Plaintiff's Amended Complaint (#27), supplements to his amended complaint and advisories (#28, 29, 31, 33, 34, 35), Defendants' Motion to Dismiss (#25), and Plaintiff's responses (#30, 32). Plaintiff, proceeding pro se, has been granted leave to proceed in forma pauperis.

**STATEMENT OF THE CASE**

At the time he filed his complaint pursuant to 42 U.S.C. § 1983, Plaintiff was confined in the Texas Department of Criminal Justice – Correctional Institutions Division. Plaintiff alleges that Defendants violated his constitutional rights by using excessive force, sexually assaulting him, failing to protect him, unlawfully taking his property, threatening him with injury, retaliating against him for a previous lawsuit, and failing to adequately supervise. Specifically, Plaintiff claims that Defendants Herring, Harris, Caldwell, Elder, and Steward threatened him with injury and death on September 22 and 23, 2020. Plaintiff alleges that, due to these threats, he attempted suicide on September 24, 2020. When Plaintiff was found at the time of the suicide

attempt, Plaintiff contends that Defendants Ware, Armour, and Dulski used excessive force and sexually assaulted him. Plaintiff claims that Defendant Hartley failed to protect him from harm. Plaintiff also asserts that Defendant Lark unlawfully gave Plaintiff's property to other inmates. Plaintiff alleges that Defendants' actions were in retaliation for a lawsuit he filed against prison officials at the Roberson Unit in Abilene, Texas. Plaintiff also seeks to impose liability on Defendants Davis and Loftin due to their positions of authority within the prison system. Plaintiff seeks injunctive relief as well as compensatory and punitive damages.

#### DISCUSSION AND ANALYSIS

##### A. Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) authorizes the dismissal of a case for failure to state a claim upon which relief can be granted. When evaluating a motion to dismiss under Rule 12(b)(6) the complaint must be liberally construed in favor of the plaintiff and all facts pleaded therein must be taken as true. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). Although Federal Rule of Civil Procedure 8 mandates only that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief," this standard demands more than unadorned accusations, "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555-57 (2007). Rather, a complaint must

contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* at 570.

The Supreme Court has made clear this plausibility standard is not simply a "probability requirement," but imposes a standard higher than "a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The standard is properly guided by "[t]wo working principles." *Id.* First, although "a court must accept as true all of the allegations contained in a complaint," that "tenet is inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678-79. Second, "[d]etermining 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." *Id.*

Thus, in considering a motion to dismiss, the court must initially identify pleadings that are no more than legal conclusions not entitled to the assumption of truth, then assume the veracity of well-pleaded factual allegations and determine whether those allegations plausibly give rise to an entitlement to relief. If not, "the complaint has alleged-but it has not 'show[n]'-that the pleader is entitled to relief.'" *Id.* (quoting Fed. R. Civ. P. 8(a)(2)). Despite this, courts remain obligated to construe a pro se complaint liberally. See *Erickson v. Pardus*, 551 U.S. 89 (2007) (reiterating long-standing rule that documents filed pro se are to be construed liberally).

B. Eleventh Amendment Immunity

Being sued in their official capacities for monetary damages, Defendants are immune from suit under the Eleventh Amendment because such an action is the same as a suit against the sovereign. *Pennhurst State School Hosp. v. Halderman*, 465 U.S. 89 (1984). The Eleventh Amendment generally divests federal courts of jurisdiction to entertain suits directed against states. *Port Auth. Trans-Hudson v. Feeney*, 495 U.S. 299, 304 (1990). The Eleventh Amendment may not be evaded by suing state agencies or state employees in their official capacity because such an indirect pleading remains in essence a claim upon the state treasury. *Green v. State Bar of Texas*, 27 F.3d 1083,1087 (5th Cir. 1994).

C. Exhaustion of Administrative Remedies

In 1996, Congress enacted the Prison Litigation Reform Act ("PLRA"), which mandated that no action shall be brought by a prisoner "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The Supreme Court subsequently reviewed the 1996 provisions regarding exhaustion and concluded that inmates must exhaust their administrative remedies before proceeding to federal court. *Booth v. Churner*, 532 U.S. 731 (2001).

In *Jones v. Bock*, 549 U.S. 199 (2007), the Supreme Court explained "[t]here is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court." *Id.* at 211. The Fifth Circuit elaborated, noting that district courts have no discretion to waive the PLRA's pre-filing exhaustion requirement.

*Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 788 (5th Cir. 2012) (citations omitted).

As a general matter, courts typically use a standard according to which a grievance should give prison officials "fair notice" of the problem that will form the basis of the prisoner's suit. *Johnson v. Johnson*, 385 F.3d 503, 516 (5th Cir. 2004) (citing *Burton v. Jones*, 321 F.3d 569, 575 (6th Cir. 2003)). When deciding whether a grievance is sufficiently detailed, "a court must interpret the exhaustion requirement in light of its purposes, which include the goal of giving officials 'time and opportunity to address complaints internally.'" *Id.* (quoting *Porter v. Nussle*, 534 U.S. 516, 525 (2002)). Thus, a grievance should be considered sufficient for exhaustion purposes, if the grievance gives officials a fair opportunity to address the problem that will later form the basis of the lawsuit. *Id.* at 516-17.

"Failure to exhaust is an affirmative defense under the PLRA, and . . . inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Bock*, 549 U.S. at 216. However, a complaint may be subject to dismissal, upon motion from a defendant, if the allegations in the complaint show that a plaintiff has failed to exhaust. *See id.* at 215-16.

Texas prisons utilize a two-step formal grievance process. *Johnson*, 385 F.3d at 515. A Texas prisoner must file a Step 1 grievance within fifteen days of the incident being grieved. *Id.* Step 1 grievances are evaluated at the prison facility where the prisoner is incarcerated. *Id.* Upon receiving an adverse Step 1 grievance response, the prisoner may then appeal that response—via a Step 2 grievance—within 15 days of

receiving the Step 1 response. *Id.* Step 2 grievances are evaluated at the state level. *Id.* The prisoner must strictly adhere to TDCJ grievance procedures before a claim may be deemed properly exhausted. *See Johnson*, 385 F.3d at 515 (holding “a prisoner must pursue a grievance through both steps for it to be considered exhausted”).

Defendants argue that Plaintiff failed to exhaust his administrative remedies for all of his claims in this suit. Specifically, Defendants point out that Plaintiff checked “No” in response to the question on the form asking if he had exhausted all steps of the institutional grievance procedure. In addition, Plaintiff admitted in his amended complaint that he had not exhausted both steps of the grievance process, stating “I haven’t gotten a response to my Step 1 Grievances as of yet. When I do, I’m going to appeal immediately.”

Plaintiff admits, in his amended complaint, that he did not complete both steps of the grievance process before filing suit, indicating that he filed his Step 1 Grievances only two weeks before filing his lawsuit. Despite his multiple filings and supplements, Plaintiff never explains why he failed to exhaust before filing his lawsuit. Plaintiff’s response to the motion to dismiss contends that his claims are such significant violations of his rights that the Court should overlook his admitted failure to exhaust.

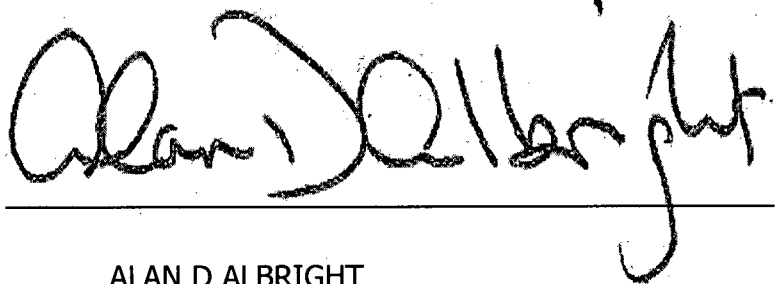
Unfortunately for Plaintiff, the severity of his allegations does not absolve him of the exhaustion requirement, and the Court does not have discretion to waive the pre-filing exhaustion requirement due to the severity of Defendants’ alleged conduct. *See Moussazadeh*, 703 F.3d at 788. Plaintiff’s failure to fully exhaust his administrative remedies prior to filing suit serves to bar his claims and mandates dismissal of this suit.

*Carbe v. Lappin*, 492 F.3d 325, 328 (5th Cir. 2007) ("a court can dismiss a case . . . for failure to state a claim, predicated on failure to exhaust, if the complaint itself makes clear that the prisoner failed to exhaust.") (citing *Bock*, 549 U.S. at 215)

CONCLUSION

It is therefore **ORDERED** that Defendants' Motion to Dismiss (#25) is **GRANTED**.

**SIGNED** on February 25, 2021

A handwritten signature in black ink, reading "Alan D. Albright", written over a horizontal line.

ALAN D ALBRIGHT  
UNITED STATES DISTRICT JUDGE

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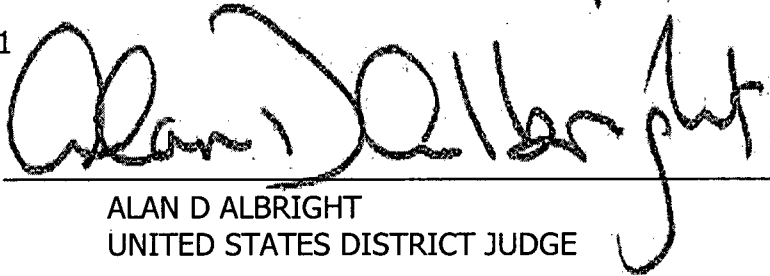
**FINAL JUDGMENT**

Before the Court is the above-entitled cause. Upon review of the entire case file and this Court's Order which granted Defendants' motion to dismiss, the Court renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

**IT IS HEREBY ORDERED** that Plaintiff's complaint is hereby **DISMISSED**.

**IT IS FURTHER ORDERED** that the above entitled cause of action is hereby **CLOSED**.

**SIGNED** on February 25, 2021

  
ALAN D ALBRIGHT  
UNITED STATES DISTRICT JUDGE