IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CRYSTAL NICOLE JONES, *aka* **Chrystal Nicole Kuri,** **Plaintiff,**	)	
v.	)	**Case No. 18-2173-CM-GEB**
OFFICE OF ADMINISTRATIVE HEARINGS, et al., **Defendants.**	)	

REPORT AND RECOMMENDATION

Simultaneous with the filing of this order, the Court granted Plaintiff's request to proceed in this case without prepayment of the filing fee. (Order, ECF No. 5.) However, the authority to proceed without payment of fees is not without limitation. Under 28 U.S.C. § 1915(e)(2), sua sponte dismissal of the case is required if the court determines that the action 1) is frivolous or malicious, 2) fails to state a claim upon which relief may be granted, or 3) seeks relief from a defendant who is immune from suit. Furthermore, "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court *must* dismiss the action."[1] After application of these standards, the undersigned Magistrate Judge issues the following report and recommendation of dismissal pursuant to 28 U.S.C. § 636(b)(1)(B).

[1] *King v. Huffman*, No. 10-4152-JAR, 2010 WL 5463061, at *1 (D. Kan. Dec. 29, 2010) (citing Fed. R. Civ. P. 12(h)(3)) (emphasis added).

Background[2]

Plaintiff files this action after having her nursing license revoked. Although her statement of claim itself is nearly devoid of any alleged facts, her pro se Complaint (ECF No. 1) includes more than 40 pages of attachments (ECF No. 1-1) from which the Court gleans some bases for her claims. In January 2015, Plaintiff worked as a nurse at the Matrix Center, a drug addiction clinic in Wichita, Kansas that treats its patients with methadone. Matrix terminated her employment on January 29, 2015, after a positive drug test revealed she had methadone in her system. The circumstances of her termination are disputed. Matrix contends, based on complaints of patients and the day's drug counts, that Plaintiff shorted the patients' prescriptions to use the methadone for herself. Plaintiff argues her coworkers, unbeknownst to her, laced her food with methadone.

After Plaintiff's termination, the Kansas State Board of Nursing ("Board") investigated. Although a drug and alcohol evaluation recommended no treatment for Plaintiff, and her own physician allegedly stated she was safe to resume nursing, the Board referred her to the Kansas Nurse Assistance Program ("KNAP") for one year of monitoring. Plaintiff refused to participate in KNAP monitoring. An evidentiary hearing was held before the Board to determine the future of her nursing license. The Board, through Presiding Officer/Administrative Law Judge Sandra L. Sharon, found Plaintiff violated the Kansas Nurse Practice Act, and granted the Board's petition to revoke her license on May 23, 2017 (ECF No. 1-1, at 27).

[2] Unless otherwise noted, the information recited in this section is taken from Plaintiff's Complaint (ECF No. 1) and the documents attached to the Complaint, or from documents filed on the Court's Electronic Filing System. This background information should not be construed as judicial findings or factual determinations.

Plaintiff petitioned the Board for a review of the hearing officer's decision, and the Board denied the request for lack of merit on June 12, 2017 (ECF No. 1-1, at 31). Within days, Plaintiff sought reconsideration of the Board's denial, and again the Board determined her request lacked merit (ECF No. 1-1, at 37). Plaintiff did not appeal the issue to the District Court, as provided in the Kansas Judicial Review Act, K.S.A. 77-601 *et seq.*

However, it appears Plaintiff may have attempted to seek review of the Board's decision from multiple other jurisdictions, including the United States Supreme Court; the National Council of State Boards of Nursing ("NCSBN"); a Judicial Ethics Committee; the American Civil Liberties Union; and the Civil Rights Department of Health and Human Services (*see* ECF No. 1-1, at 22, 24). She also disputed the reporting of her license revocation in the National Practitioner Data Bank (ECF No. 1-1, at 39-43). Her petition to the Supreme Court was denied on June 6, 2017; the outcome of any other petition cannot be found in the documents attached to the Complaint.

In September 2015, Plaintiff filed suit in this federal court against the Matrix Center and certain Matrix employees, claiming her coworkers poisoned her with methadone.[3] In No. 15-9293-JAR-GEB, the Court granted Defendants' motion to dismiss, finding the Court lacked jurisdiction over Plaintiff's state law claims.[4]

In this current action, Plaintiff claims the Board, apparently through the Office of Administrative Hearings and the initial decision by Presiding Officer Sandra L. Sharon, denied her due process under the equal protection clause and the Fourteenth Amendment of

[3] *Kuri v. Matrix Center, et al.*, No. 15-9293-JAR-GEB (D. Kan. filed Sep. 29, 2015; closed Feb. 9, 2016).
[4] *Id.* at ECF No. 29.

the U.S. Constitution. She seeks reinstatement of her LPN license and damages for emotional distress and defamation of character in the amount of $77,000.

Analysis

As recited above, although Plaintiff has been permitted to proceed with her case in forma pauperis under 28 U.S.C. § 1915(e)(2), this statute requires the Court to examine the pleadings for merit when determining Plaintiff's financial ability to pursue the action. Additionally, Fed. R. Civ. P. 12(h)(3) requires the Court to dismiss the case "[i]f the court determines at any time that it lacks subject-matter jurisdiction."[5] Utilizing these standards, the undersigned Magistrate Judge issues the following report and recommendation of dismissal.

Because Plaintiff proceeds pro se, her pleadings must be liberally construed.[6] However, Plaintiff still bears the burden to allege "sufficient facts on which a recognized legal claim could be based"[7] and the Court cannot "take on the responsibility of serving as [her] attorney in constructing arguments and searching the record."[8] The Court also cannot "construct a legal theory on plaintiff's behalf."[9]

After thorough review of Plaintiff's claims and applicable law, it appears her claims are barred by the Eleventh Amendment. The only named defendants in this action are the

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[5] *King v. Huffman*, No. 10-4152-JAR, 2010 WL 5463061, at *1 (D. Kan. Dec. 29, 2010) (citing Fed. R. Civ. P. 12(h)(3)) (emphasis added).
[6] *Hall v. Bellmon*, 935 F. 2d 1106, 1110 (10th Cir. 1991).
[7] *Id.*
[8] *Mays v. Wyandotte County Sheriff's Dep't*, 419 F. App'x 794, 796 (10th Cir. 2011) (citing *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005)).
[9] *Gilbert v. State of Kansas*, No. 02-4164-SAC, 2003 WL 21939772, at *1 (D. Kan. July 17, 2003) (quoting *Hall*, 935 F.2d at 1110).

Office of Administrative Hearings (OAH) and Sandra L. Sharon, an Presiding Officer with the OAH. The OAH is a state agency which "employs administrative judges and other support personnel to conduct proceedings for many Kansas state agencies . . . pursuant to the Kansas Administrative Procedures Act (KAPA) and other state statutes."[10]

But "[t]he United States Supreme Court repeatedly has held that the Eleventh Amendment bars suits against a state by its own citizens."[11] This absolute immunity applies not only to the state itself, but to state agencies.[12] "When the state itself is a named defendant, the Eleventh Amendment bar operates regardless of the legal or equitable nature of the relief sought."[13]

Because Plaintiff claims a deprivation of her constitutional rights, her claims appear to arise under 42 U.S.C. § 1983. Although the state's immunity can be waived if done so unequivocally, the State of Kansas has not explicitly done so, and "Congress expressed no such intention in its enactment of 42 U.S.C. § 1983."[14] Additionally, the law is well-settled that the state "and its agencies are not 'persons' and thus cannot be sued under section 1983."[15] Consequently, the Eleventh Amendment prevents Plaintiff's claims under 42

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[10] Kansas Office of Administrative Hearings, https://www.oah.ks.gov/Home/About (last visited May 23, 2018).
[11] *Kiley v. Lord*, No. 11-2516-KHV, 2012 WL 3066394, at *5 (D. Kan. July 26, 2012) (citing *Edelman v. Jordan*, 415 U.S. 651, 662–63 (1974); *Missouri v. Fiske*, 290 U.S. 18, 28 (1933)).
[12] *Id.* (citing *Fla. Dep't of Health & Rehabilitative Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 150 (1981)).
[13] *Gilbert v. State of Kansas*, No. 02-4164-SAC, 2003 WL 21939772, at *1–2 (D. Kan. July 17, 2003) (citing *Hensel v. Office of Chief Administrative Hearing*, 38 F.3d 505, 509 (10th Cir. 1994)).
[14] *Kiley*, 2012 WL 3066394, at *5 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984); *Ellis v. Univ. of Kan. Med. Ctr.*, 163 F.3d 1186, 1196 & n. 13 (10th Cir. 1998)).
[15] *Id.* (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989)); *see also Davis v. State of California*, No. 18-3013, 2018 WL 2120279, at *1 (10th Cir. May 8, 2018); *Gilbert*, 2003 WL 21939772, at *1–2 (citing *Harris v. Champion*, 51 F.3d 901, 905–06 (10th Cir. 1995)).

U.S.C. § 1983 against OAH, so the Court lacks subject matter over her claims and it would be futile allow her to amend.[16]

Regarding Plaintiff's claims against Presiding Officer Sandra L. Sharon, the "Supreme Court has long held that state officials acting in their official capacities are not 'persons' under 42 U.S.C. § 1983."[17] The Court reasons that "a suit against a state official in his or her official capacity is not a suit against the official but rather a suit against the official's office."[18] Although Plaintiff does not explicitly state as much, it appears from the Complaint that the claims lodged against Ms. Sharon are in her official capacity as a hearing officer only. Therefore, just as the OAH defendant is immune from suit as a state entity, the claims against Ms. Sharon in her official capacity must be dismissed for lack of subject matter jurisdiction.[19]

After careful review of her claims, and being mindful that Plaintiff proceeds on a pro se basis, the Court finds both Defendants are immune from suit under the Eleventh Amendment. Because both Defendants are immune from suit, Plaintiff has failed to allege a basis for this Court to assume jurisdiction over her claims.

IT IS THEREFORE RECOMMENDED that this case be dismissed with prejudice under 28 U.S.C. § 1915(e)(2)(iii) as seeking relief from defendants who are immune from suit, and therefore for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(h)(3).

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[16] *Gilbert*, 2003 WL 21939772, at *1 (finding it "futile to give the plaintiff an opportunity to amend").
[17] *Kiley*, 2012 WL 3066394, at *5 (citing *Will*, 491 U.S. at 71).
[18] *Id.* (citing *Will*, 491 U.S. at 67).
[19] *Id.*

IT IS FURTHER ORDERED that a copy of this recommendation shall be mailed to Plaintiff by certified mail. Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), Plaintiff may file a written objection to the proposed findings and recommendations with the clerk of the district court within fourteen (14) days after being served with a copy of this report and recommendation. Failure to make a timely objection waives appellate review of both factual and legal questions.[20]

IT IS SO ORDERED.

Dated at Wichita, Kansas this 23rd day of May 2018.

s/ Gwynne E. Birzer
GWYNNE E. BIRZER
United States Magistrate Judge

[20] *Morales-Fernandez v. I.N.S.*, 418 F.3d 1116, 1119 (10th Cir. 2005).

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CRYSTAL NICOLE JONES,

Plaintiff,

v.

KANSAS STATE BOARD OF NURSING, et al.,

Defendant.

Case No. 18-2175-JAR-KGG

Received
8-10-2018

MEMORANDUM AND ORDER

Plaintiff Crystal Jones is a former nurse who alleges equal protection and due process claims against the Kansas State Board of Nursing ("KSBN") arising out of the revocation of her nursing license. This matter comes before the Court on Magistrate Judge Kenneth Gale's Report and Recommendation of Dismissal (Doc. 6), Plaintiff's Objection and Memorandum to Recommendation for Dismissal (Doc. 8) thereto, and Plaintiff's Motion to Proceed with Trial and Memorandum (Doc. 7). These matters are fully briefed and the Court is prepared to rule. For the reasons explained below, the Court adopts the Report and Recommendation, overrules Plaintiff's Objections, and denies Plaintiff's Motion to Proceed with trial.

I. Factual Allegations

The following facts are taken from Plaintiff's Complaint (Doc. 1) and documents in Exhibit 1 attached to her Complaint.[1] Plaintiff was employed at a methadone clinic, Matrix, that treats patients for opioid addiction. On January 22, 2015, Plaintiff's supervisor, Steve Kamu,

[1] *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) ("In evaluating a Rule 12(b)(6) motion to dismiss, courts may consider not only the complaint itself, but also *attached exhibits*, and documents incorporated in to the complaint by reference. [T]he district court may consider 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.") (emphasis added).

brought lunch to Matrix employees. On January 26, 2015, Kamu received a call that a long line had formed outside Matrix because methadone was being dispensed at an unusually slow pace. Plaintiff was responsible for dispensing methadone that day. Kamu then had all Matrix employees drug tested.

On January 28, 2015, Plaintiff's drug test came back positive for an unknown substance. A second test on January 29, 2015 came back positive for methadone and barbiturates. Plaintiff was subsequently fired from Matrix. Later on January 29, Kamu received a phone call from a Matrix patient that they were short two pills from their take-home dose.[2] Ultimately, five patients complained about having too few pills and suspected Plaintiff of stealing the missing pills.[3]

On January 30, 2015, after being confronted about her positive drug tests, Plaintiff went to the emergency room at Wesley Medical Center, where she was drug tested. That test came back negative. These events were reported to the Kansas Nurse Assistance Program ("KNAP"), which investigated Plaintiff's test results. The KNAP recommended that Plaintiff participate in a one-year monitoring program. Plaintiff refused to enroll in the program as it would require her to abstain from alcohol. The KSBN reviewed Plaintiff's situation and petitioned to revoke her nursing license. At the end of a lengthy hearing and appeals process, the KSBN revoked Plaintiff's license to practice nursing.

Plaintiff contends she was poisoned with methadone on January 22, 2015 when she got lunch from Kamu. Plaintiff claims her poisoning was racially motivated and alleges Fourteenth Amendment violations. Plaintiff filed suit in this Court and moved for leave to proceed in forma

[2] Doc. 1-1 at 25.

[3] *Id.*

pauperis on April 12, 2018. Judge Gale issued a Memorandum and Order granting Plaintiff's motion for leave to proceed in forma pauperis.[4] Judge Gale also screened Plaintiff's complaint pursuant to 28 U.S.C. § 1915(e)(2), and issued a Report and Recommendation for dismissal because Plaintiff failed to state a claim upon which relief may be granted.

II. Legal Standard

"[O]nce a litigant has been granted [in forma pauperis] status, the district court is required to evaluate the claims for merit."[5] When evaluating the claims under 28 U.S.C. § 1915(e)(2), "[t]he court shall dismiss the case at any time if the court determines that the action or appeal fails to state a claim on which relief may be granted."[6] When performing the evaluation, the Court applies the same standard of review as under Fed. R. Civ. P. 12(b)(6).[7]

Under Fed. R. Civ. P. 72(b)(2), a party may file written objections to a magistrate judge's proposed findings and recommendations. "The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions."[8] Thus, in conducting a de novo review of Judge Gale's recommendations—to which Plaintiff has timely objected—the Court applies the same Rule 12(b)(6) standard employed in the § 1915(e)(2) screening process.[9]

To survive a motion to dismiss brought under Rule 12(b)(6), a complaint must contain factual allegations that, assumed to be true, "raise a right to relief above the speculative level"

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[4] Doc. 5.

[5] *Buchheit v. Green*, 705 F.3d 1157, 1161 (10th Cir. 2012).

[6] 28 U.S.C. § 1915(e)(2).

[7] *See Kay v. Bemis*, 500 F.3d 1214, 1217–18 (10th Cir. 2007).

[8] Fed. R. Civ. P. 72(b)(3).

[9] *Id.*

and must include "enough facts to state a claim for relief that is plausible on its face."[10] Under this standard, "the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims."[11] The plausibility standard does not require a showing of probability that "a defendant has acted unlawfully," but requires more than "a sheer possibility."[12] "[M]ere 'labels and conclusions,' and 'a formulaic recitation of the elements of a cause of action' will not suffice; a plaintiff must offer specific factual allegations to support each claim."[13] Finally, the court must accept the nonmoving party's factual allegations as true and may not dismiss on the ground that it appears unlikely the allegations can be proven.[14]

The Supreme Court has explained the analysis as a two-step process. For the purposes of a motion to dismiss, the court "must take all the factual allegations in the complaint as true, [but is] 'not bound to accept as true a legal conclusion couched as a factual allegation.'"[15] Thus, the court must first determine if the allegations are factual and entitled to an assumption of truth, or merely legal conclusions that are not entitled to an assumption of truth.[16] Second, the court must determine whether the factual allegations, when assumed true, "plausibly give rise to an entitlement to relief."[17] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

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[10] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007).

[11] *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original).

[12] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[13] *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011) (quoting *Twombly*, 550 U.S. at 555).

[14] *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

[15] *Id.* (citing *Twombly*, 550 U.S. at 555).

[16] *Id.* at 678–79.

[17] *Id.* at 679.

misconduct alleged."[18] Generally, when pleading civil rights violations, plaintiffs must plead facts that show that the defendant acted with a discriminatory purpose.[19]

"A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers."[20] The Tenth Circuit interprets this rule as follows:

> We believe that this rule means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements. At the same time, we do not believe it is the proper function of the district court to assume the role of advocate for the pro se litigant.[21]

"The broad reading of the plaintiff's complaint does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based."[22] "[C]onclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based."[23]

III. Discussion

A. Due Process

Plaintiff first pleads that the revocation of her nursing license in Kansas is a violation of her due process rights under the Fourteenth Amendment. "[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to

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[18] *Id.* at 678.

[19] *See Iqbal*, 556 U.S. at 677.

[20] *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Herner*, 404 U.S. 519, 520-21 (1972)).

[21] *Id.*

[22] *Id.*

[23] *Id.*

constitutionally adequate procedures."[24] "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'"[25] In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action.[26] Plaintiff provides no factual support in her pleading that raises a plausible inference of lack of due process in the events that led to the revocation of her nursing license. Plaintiff alleges only that her due process rights were violated "numerous times."[27]

Attached to Plaintiff's Complaint are 43 pages of correspondence between Plaintiff and Defendant that reflect the process by which Plaintiff's license was revoked. The documents show that she received a full hearing prior to the revocation of her license, that she twice petitioned for review of the KSBN's orders, and that the KSBN fully considered her petitions.[28] Given the lack of any factual allegations reflecting a deprivation of due process in her Complaint, and the documents attached to her Complaint showing that the KSBN afforded her numerous opportunities to be heard, the Court finds Plaintiff's claim fails to meet the pleading standard under Rule 12(b)(6). Accordingly, the Court dismisses Plaintiff's due process claim.

B. Equal Protection Clause

Plaintiff also alleges a claim for violation of her rights under the Equal Protection Clause.[29] The Equal Protection Clause states that no state shall "deny to any person within its

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[24] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

[25] *Id.* (*quoting Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950)).

[26] *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976)).

[27] Doc. 1 at 3.

[28] Doc. 1-1 at 24–34 (describing evidentiary hearing, initial order revoking Plaintiff's nursing license, and Plainitff's petitions for review of orders).

[29] Doc. 1 at 3.

jurisdiction the equal protection of the laws."[30] "The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest."[31] "[T]he essence of the equal protection requirement is that the state treat all those similarly situated similarly."[32] As such, to state a plausible equal protection claim, a plaintiff must show that the state treats two similarly situated groups, or individuals, differently.[33]

As with her due process claim, Plaintiff alleges no facts that support a plausible equal protection claim. She simply alleges that she is "a victim of Civil/Bill of Rights violations . . . under [the] Equal Protection clause and the 14th Amendment."[34] The documents attached to the Complaint show that Plaintiff was afforded the right to partake in the same hearing process that all nurses in Kansas go through when facing discipline by the KSBN. She was offered the chance to participate in a monitoring program, she had a full evidentiary hearing, and she utilized the appeals process that applies to KSBN disciplinary actions. In addition, there is no factual support in the Complaint or documents attached thereto that show a difference in how Plaintiff's case was handled versus how any other case would be adjudicated by Defendant. Thus, taking all facts in the Complaint and attached Exhibit as true and construing the Complaint liberally in favor of Plaintiff, the Court finds that Plaintiff fails to state a plausible equal protection claim. Accordingly, the Court dismisses Plaintiff's equal protection claim.

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[30] U.S. Const. amend. XIV, § 1.

[31] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973) (citing *McGinnis v. Royster*, 410 U.S. 263, 270 (1973)).

[32] *Powers v. Harris*, 379 F.3d 1208, 1215 (10th Cir. 2004) (quoting *Bartell v. Aurora Pub. Schs.*, 263 F.3d 1143, 1149 (10th Cir. 2001)).

[33] *Id.* at 1215.

[34] Doc. 1 at 13.

IV. Conclusion

Plaintiff provides little factual support for her claims. Rather, her Complaint includes only conclusory allegations that her rights were violated because Defendant denied her due process and equal protection under the Fourteenth Amendment. Even under a liberal pleading standard, these allegations fall short of stating plausible claims under Rule 12(b)(6). The documents that Plaintiff attached to her Complaint cut against her claims by showing that Plaintiff participated in a neutral hearing and appeals process prior to her license being revoked and thus she received an opportunity to present her case prior to receiving discipline. Accordingly, the Court adopts Judge Gale's Report and Recommendation and dismisses Plaintiff's claims.

IT IS THEREFORE ORDERED BY THE COURT that Plaintiff's Motion to Proceed with Trial and Memorandum (Doc. 7) is **denied**.

IT IS FURTHER ORDERED BY THE COURT that Plaintiff's Objection and Memorandum to Recommendation for Dismissal (Doc. 8) is **overruled**. The Court adopts Magistrate Judge Kenneth Gale's Report and Recommendation (Doc. 6) and dismisses Plaintiff's Complaint with prejudice.

IT IS SO ORDERED.

Dated: August 6, 2018

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CRYSTAL NICOLE JONES,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 18-2175-JAR-KGG
	)	
KANSAS STATE BOARD OF NURSING, *et al.*,	)	
	)	
	)	
Defendant.	)	
	)	

MEMORANDUM & ORDER ON
MOTION TO PROCEED WITHOUT PREPAYMENT OF FEES,
MOTION TO APPOINT COUNSEL, AND
REPORT & RECOMMENDATION FOR DISMISSAL

In conjunction with her federal court Complaint (Doc. 1), Plaintiff Crystal Nicole Jones has also filed an Application to Proceed Without Prepaying Fees or Costs ("IFP application," Doc. 3, sealed) with a supporting financial affidavit (Doc. 3-1). Plaintiff also filed a Motion to Appoint Counsel. (Doc. 4.) After review of Plaintiff's motions, as well as the Complaint, the Court **GRANTS** the IFP application (Doc. 3), **DENIES** her request for counsel (Doc. 4), and

recommends Plaintiff's claims be **dismissed** for failure to state a viable federal cause of action.

A. Motion to Proceed IFP.

Under 28 U.S.C. § 1915(a), a federal court may authorize commencement of an action without prepayment of fees, costs, etc., by a person who lacks financial means. 28 U.S.C. § 1915(a). "Proceeding in forma pauperis in a civil case 'is a privilege, not a right – fundamental or otherwise.'" ***Barnett v. Northwest School***, No. 00-2499, 2000 WL 1909625, at *1 (D. Kan. Dec. 26, 2000) (quoting ***White v. Colorado***, 157 F.3d 1226, 1233 (10th Cir. 1998)). The decision to grant or deny in forma pauperis status lies within the sound discretion of the court. ***Cabrera v. Horgas***, No. 98-4231, 1999 WL 241783, at *1 (10th Cir. Apr. 23, 1999).

There is a liberal policy toward permitting proceedings in forma pauperis when necessary to ensure that the courts are available to all citizens, not just those who can afford to pay. *See generally*, ***Yellen v. Cooper***, 828 F.2d 1471 (10th Cir. 1987). In construing the application and affidavit, courts generally seek to compare an applicant's monthly expenses to monthly income. See ***Patillo v. N. Am. Van Lines, Inc.***, No. 02-2162, 2002 WL 1162684, at *1 (D.Kan. Apr. 15, 2002); ***Webb v. Cessna Aircraft***, No. 00-2229, 2000 WL 1025575, at *1 (D.Kan. July 17, 2000) (denying motion because "Plaintiff is employed, with monthly income exceeding her monthly expenses by approximately $600.00").

In the supporting financial affidavit, Plaintiff indicates she is 38 and separated. (Doc. 3, sealed, at 1.) She lists one dependent, but lists the dependent's age as 18. (*Id.*, at 2.) Plaintiff does not include an explanation as to why this individual, who is legally an adult, should be considered a dependent (such as mental or physical impairment). As such, the Court will not consider this in determining Plaintiff's *IFP* status.

Plaintiff is currently employed with a home health care company as a "non-medical assistant," earning a modest wage. (*Id.*) Plaintiff owns real property, in which there is a small amount of equity. (*Id.*, at 3.) She also owns a modest automobile. (*Id.*, at 4.) She lists no cash on hand. (*Id.*) Plaintiff lists typical monthly expenses, including rent, groceries, utilities, and automobile insurance. (*Id.*, at 5.) She also lists an outstanding debt to Kansas Gas, with a significant monthly payment. (*Id.*)

Considering the information contained in her financial affidavit, the Court finds that Plaintiff has established that her access to the Court would be significantly limited absent the ability to file this action without payment of fees and costs. The Court thus **GRANTS** Plaintiff leave to proceed *in forma pauperis*. (Doc. 3, sealed.)

B. Motion to Appoint Counsel.

Plaintiff has also filed a motion requesting the appointment of counsel. (Doc. 4.) As an initial matter, the Court notes that there is no constitutional right to have counsel appointed in civil cases such as this one. ***Beaudry v. Corr. Corp. of Am.***, 331 F.3d 1164, 1169 (10th Cir. 2003). "[A] district court has discretion to request counsel to represent an indigent party in a civil case" pursuant to 28 U.S.C. § 1915(e)(1). ***Commodity Futures Trading Comm'n v. Brockbank***, 316 F. App'x 707, 712 (10th Cir. 2008). The decision whether to appoint counsel "is left to the sound discretion of the district court." ***Lyons v. Kyner***, 367 F. App'x 878, n.9 (10th Cir. 2010) (citation omitted).

The Tenth Circuit has identified four factors to be considered when a court is deciding whether to appoint counsel for an individual: (1) plaintiff's ability to afford counsel, (2) plaintiff's diligence in searching for counsel, (3) the merits of plaintiff's case, and (4) plaintiff's capacity to prepare and present the case without the aid of counsel. ***McCarthy v. Weinberg***, 753 F.2d 836, 838-39 (10th Cir. 1985) (listing factors applicable to applications under the IFP statute); ***Castner v. Colorado Springs Cablevision***, 979 F.2d 1417, 1421 (10th Cir. 1992) (listing factors applicable to applications under Title VII). Thoughtful and prudent use of the appointment power is necessary so that willing counsel may be located without the need to make coercive appointments. The indiscriminate appointment of

volunteer counsel to undeserving claims will waste a precious resource and may discourage attorneys from donating their time. ***Castner***, 979 F.2d at 1421.

As discussed in Section A., *supra*, Plaintiff's financial situation would make it impossible for her to afford counsel. The second factor is Plaintiff's diligence in searching for counsel. Based on the information contained in the form motion, Plaintiff has been diligent, but unsuccessful, in her attempt to secure legal representation. (Doc. 4.) As for the next factor, the Court has concerns regarding the viability of Plaintiff's claims in federal court, as discussed in Section C., *infra*. *See* ***McCarthy***, 753 F.2d at 838-39 (10th Cir. 1985); ***Castner***, 979 F.2d at 1421. The Court's analysis thus turns to the final factor, Plaintiff's capacity to prepare and present the case without the aid of counsel. ***Castner***, 979 F.2d at 1420-21.

In considering this factor, the Court must look to the complexity of the legal issues and Plaintiff's ability to gather and present crucial facts. *Id.*, at 1422. The Court notes that the factual and legal issues in this case are not unusually complex. *Cf.* ***Kayhill v. Unified Govern. of Wyandotte***, 197 F.R.D. 454, 458 (D.Kan. 2000) (finding that the "factual and legal issues" in a case involving a former employee's allegations of race, religion, sex, national origin, and disability discrimination were "not complex").

The Court sees no basis to distinguish Plaintiff from the many other untrained individuals who represent themselves *pro se* on various types of claims

in Courts throughout the United States on any given day. Although Plaintiff is not trained as an attorney, and while an attorney might present this case more effectively, this fact alone does not warrant appointment of counsel. As such, the Motion to Appoint Counsel (Doc. 4, sealed) is **DENIED**.

C. Sufficiency of Complaint and Recommendation for Dismissal.

Pursuant to 28 U.S.C. §1915(e)(2), a court "shall dismiss" an *in forma pauperis* case "at any time if the court determines that . . . the action or appeal – (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." "When a plaintiff is proceeding in forma pauperis, a court has a duty to review the complaint to ensure a proper balance between these competing interests." ***Mitchell v. Deseret Health Care Facility***, No. 13-1360-RDR-KGG, 2013 WL 5797609, at *1 (D. Kan. Sept. 30, 2013). The purpose of § 1915(e) is "the prevention of abusive or capricious litigation." ***Harris v. Campbell***, 804 F.Supp. 153, 155 (D.Kan. 1992) (internal citation omitted) (discussing similar language contained in § 1915(d), prior to the 1996 amendment). *Sua sponte* dismissal under § 1915 is proper when the complaint clearly appears frivolous or malicious on its face. ***Hall v. Bellmon***, 935 F.2d 1106, 1108 (10th Cir. 1991).

In determining whether dismissal is appropriate under § 1915(e)(2)(B), a plaintiff's complaint will be analyzed by the Court under the same sufficiency

standard as a Rule 12(b)(6) Motion to Dismiss. *See* ***Kay v. Bemis***, 500 F.3d 1214, 1217-18 (10th Cir. 2007). In making this analysis, the Court will accept as true all well-pleaded facts and will draw all reasonable inferences from those facts in favor of the plaintiff. *See* ***Moore v. Guthrie***, 438 F.3d 1036, 1039 (10th Cir.2006). The Court will also liberally construe the pleadings of a pro se plaintiff. *See* ***Jackson v. Integra Inc.***, 952 F.2d 1260, 1261 (10th Cir.1991).

This does not mean, however, that the Court must become an advocate for the *pro se* plaintiff. ***Hall***, 935 F.2d at 1110; *see also* ***Haines v. Kerner***, 404 U.S. 519, 92 S.Ct. 594 (1972). Liberally construing a pro se plaintiff's complaint means that "if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." ***Hall***, 935 F.2d at 1110.

A complaint "must set forth the grounds of plaintiff's entitlement to relief through more than labels, conclusions and a formulaic recitation of the elements of a cause of action." ***Fisher v. Lynch***, 531 F. Supp.2d 1253, 1260 (D. Kan. Jan. 22, 2008) (citing ***Bell Atlantic Corp. v. Twombly***, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929 (2007), and ***Hall v. Bellmon***, 935 F.2d 1106, 1110 (10th Cir.1991) (holding that a plaintiff need not precisely state each element, but must

plead minimal factual allegations on those material elements that must be proved)). "In other words, plaintiff must allege sufficient facts to state a claim which is plausible – rather than merely conceivable – on its face." ***Fisher***, 531 F. Supp.2d at 1260 (citing ***Bell Atlantic Corp. v. Twombly***, 127 S.Ct. at 1974). Factual allegations in the complaint must be enough to raise a right to relief "above the speculative level." ***Kay v. Bemis***, 500 F.3d at 1218 (citing ***Bell Atlantic Corp. v. Twombly***, 127 S.Ct. At 1965).

While a complaint generally need not plead detailed facts, Fed.R.Civ.P. 8(a), it must give the defendant sufficient notice of the claims asserted by the plaintiff so that they can provide an appropriate answer. ***Monroe v. Owens***, Nos. 01-1186, 01-1189, 01-1207, 2002 WL 437964 (10th Cir. Mar. 21, 2002). Rule 8(a) requires three minimal pieces of information in order to provide such notice to the defendant: (1) the pleading should contain a short and plain statement of the claim showing the pleader is entitled to relief; (2) a short and plain statement of the grounds upon which the court's jurisdiction depends; and (3) the relief requested. Fed. R. Civ. P. 8(a). After reviewing Plaintiff's Complaint (Doc. 1) and construing the allegations liberally, if the Court finds that he has failed to state a claim upon which relief may be granted, the Court is compelled to recommend that the action be dismissed.

Plaintiff alleges that she is "a victim of Civil/Bill of Rights violations because [Defendant] KBN denied [her] due process under Equal Protection Clause and the 14th Amendment." (Doc. 1, at 3.) Plaintiff's *pro se* Complaint does not provide any specifics as to how or when these alleged violations occurred. (*See generally* Doc. 1.) Plaintiff does, however, attach some 43 pages of documents to her Complaint which, taken as a whole, provide sufficient factual context regarding the process by which her nursing license was revoked. (*See generally* Doc. 1-1.) Unfortunately for Plaintiff, this factual context would appear to establish that Plaintiff was given due process through numerous opportunities to present her claims to review boards and agencies.

As such, the Court finds that Plaintiff has failed to state a claim for which relief can be granted under the facts alleged. Plaintiff has not specified how her rights have been violated and the Court cannot discern a viable claim against Defendants based on the facts alleged (and contained in the attachments to her Complaint). The undersigned Magistrate Judge thus **recommends** to the District Court that Plaintiff's claims be **DISMISSED** in their entirety.

IT IS THEREFORE ORDERED that Plaintiff's motion for IFP status (Doc. 3) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's Motion for Appointment of Counsel (Doc. 4) is **DENIED**.

IT IS RECOMMENDED to the District Court that Plaintiff's Complaint be DISMISSED for the failure to state a claim on which relief may be granted. The Clerk's office shall not proceed to issue summons in this case.

IT IS THEREFORE ORDERED that a copy of the recommendation shall be sent to Plaintiff via certified mail. Pursuant to 28 U.S.C. §636(b)(1), Fed.R.Civ.P. 72, and D.Kan. Rule 72.1.4, Plaintiff shall have fourteen (14) days after service of a copy of these proposed findings and recommendations to serve and file with the U.S. District Judge assigned to the case, any written objections to the findings of fact, conclusions of law, or recommendations of the undersigned Magistrate Judge. Plaintiff's failure to file such written, specific objections within the 14-day period will bar appellate review of the proposed findings of fact, conclusions of law, and the recommended disposition.

IT IS SO ORDERED AND RECOMMENDED.

Dated at Wichita, Kansas, on this 2nd day of May, 2018.

S/ KENNETH G. GALE
KENNETH G. GALE
United States Magistrate Judge

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Kansas

CRYSTAL NICOLE JONES
a/k/a Cyrstal Nicole Kurt
Plaintiff(s)

v.

OFFICE OF ADMINISTRATIVE HEARINGS
and SANDRA L. SHARON
Defendant(s)

Civil Action No. 18-2173-CM-GEB

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus post judgment interest at the rate of _____ %, per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____ .

☑ other: Pursuant to the Memorandum and Order filed on July 23, 2018, judgment is entered in favor of defendants Office of Adminsitrative Hearings and Sandra L. Sharon against the plaintiff Crystal Nicole Jones and this case is dismissed with prejudice under 28 U.S.C. § 1915(e)(2)(iii).

This action was *(check one)*:

☐ tried by a jury with _____ presiding, and the jury has rendered a verdict.

☐ tried by _____ without a jury and the above decision was reached.

☐ decided by _____ on a motion for _____

Date: 07/23/2018

TIMOTHY M. O'BRIEN
CLERK OF COURT

Sharon Scheurer
Signature of Clerk or Deputy Clerk

D

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Kansas

CRYSTAL NICOLE JONES

Plaintiff(s)

v.

KANSAS STATE BOARD OF NURSING, ET AL.,

Defendant(s)

Civil Action No. 18-2175-JAR-KGG

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus post judgment interest at the rate of _____ %, per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____ .

☑ other: This action is dismissed with prejudice pursuant to the Court's adoption of United States Magistrate Judge Kenneth Gale's Report and Recommendation.

This action was *(check one)*:

☐ tried by a jury with _____ presiding, and the jury has rendered a verdict.

☐ tried by _____ without a jury and the above decision was reached.

☑ decided by Chief Judge Julie A. Robinson on a motion for

Report and Recommendation. The Court adopts Magistrate Judge Gale's Report and Recommendation for dismissal and denies Plaintiff's motions. This action is dismissed with prejudice.

Date: 8/6/2018

TIMOTHY M. O'BRIEN
CLERK OF COURT

S/ Bonnie Wiest

Signature of Clerk or Deputy Clerk

A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CRYSTAL NICOLE JONES,
aka Crystal Nicole Kuri,

Plaintiff,

v.

OFFICE OF ADMINSTRATIVE HEARINGS, et al.,

Defendant.

Case No. 18-2173-CM-GEB

MEMORANDUM AND ORDER

This court referred the following case to United States Magistrate Judge Gwynne E. Birzer, who issued a report and recommendation, and an order pertaining to plaintiff's case. Judge Birzer filed the report and recommendation on May 28, 2018, and she recommended that the court dismiss this case with prejudice under 28 U.S.C. § 1915(e)(2)(iii) as seeking relief from defendants who are immune from suit. Judge Birzer also filed an order on May 28, 2018, denying plaintiff's motion to appoint counsel. Plaintiff timely filed an objection to Judge Birzer's report and recommendation and order denying appointment of counsel. Plaintiff also filed a motion to proceed with trial.

I. Background

The following facts are taken primarily from the documents attached to plaintiff's complaint. Plaintiff's complaint contains very few factual allegations, so the court refers to the exhibits to understand the background of this case. The facts recited below are generally not critical to the resolution of this case, and are provided primarily for context. They should not be construed as judicial findings or factual determinations.

Plaintiff is a resident of Wichita, Kansas. Plaintiff was a licensed practical or vocational nurse ("L.P.N."). Defendants are the Office of Administrative Hearings ("OAH") and Sandra L. Sharon, a Presiding Officer with OAH.

In January 2015, plaintiff was employed as a dispensing nurse at Matrix Center, a methadone clinic for opioid addiction. During the early morning of January 26, 2015, plaintiff was reported to have been working at an "extremely slow pace." As a result, the owner/manager of the facility, Steve Kuma, decided to drug test all staff members. Plaintiff tested positive.

On January 29, 2015, plaintiff took a second drug test and tested positive for methadone and barbiturates. Plaintiff was prescribed barbiturates, but not methadone. That same day, several patients of the facility reported that their prescriptions for methadone were short. It was suspected—but not confirmed—that plaintiff shorted these patient's prescriptions.

Plaintiff argues she tested positive for methadone because Matrix employees poisoned her when they bought her lunch on January 22, 2015. After these events, plaintiff's employment with Matrix was terminated.

Following plaintiff's termination, these events were reported to the Kansas State Board of Nursing ("Board"). After its own investigation, the Board referred plaintiff to the Kansas Nurse Assistance Program ("KNAP"). KNAP recommended that plaintiff participate in a one-year monitoring program, but plaintiff refused. As a result, KNAP petitioned to revoke plaintiff's license for violating K.S.A. § 65-1120(a)(7) and K.A.R. § 60-3-10(s).

On April 26, 2017, the Board conducted a hearing about this matter pursuant to K.S.A. § 77-536. OAH appointed Ms. Sharon to preside over the hearing. Ms. Sharon granted the Board's petition to revoke plaintiff's license to practice nursing on May 23, 2017.

Following this hearing, plaintiff filed multiple petitions, all of which were denied. Plaintiff may have also attempted to seek review of the Board's decision from multiple other jurisdictions. Plaintiff is now before this court, claiming that OAH and Ms. Sharon denied her due process and equal protection rights under the Fourteenth Amendment. Plaintiff also claims emotional distress and defamation of character. Plaintiff requests $77,000 and reinstatement of her nursing license.

II. Standard of Review

Judge Birzer granted plaintiff's request to proceed in forma pauperis under 28 U.S.C. § 1915(e)(2), which requires a court to examine the pleadings for merit when determining plaintiff's financial ability to pursue the action. The authority to proceed without payment of fees is not without limitation. Under 28 U.S.C. § 1915(e)(2)(B), a court shall dismiss a case at any time if the court determines that the action (1) is frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks monetary relief against a defendant who is immune from such relief. Additionally, Fed. R. Civ. P. 12(h)(3) requires the court to dismiss a case if it lacks subject matter jurisdiction.

Because plaintiff proceeds pro se, the court liberally construes her pleadings. *Perkins v. Kan. Dep't of Corr'ns*, 165 F.3d 803, 806 (10th Cir. 1999). Nevertheless, plaintiff still bears the burden to allege sufficient facts on which a recognized legal claim could be based. *Id.* Moreover, this court cannot construct arguments, search the record, or construct legal theories on behalf of plaintiff. *Id.* The dismissal of a pro se complaint is proper only when it is obvious that the plaintiff cannot prevail on the facts she has alleged and it would be futile to give her an opportunity to amend. *Whitney v. New Mexico*, 113 F.3d 1170, 1173 (10th Cir. 1997).

III. Analysis

A. Appointment of Counsel

Plaintiff first asks this court to review an order of Magistrate Judge Birzer in which Judge Birzer denied plaintiff appointment of counsel for this case. An order on a motion for appointment of counsel is a nondispositive order, and the court therefore reviews it under a "clearly erroneous or contrary to law" standard. *See* Fed. R. Civ. P. 72(a).

The court has reviewed Judge Birzer's order, and determines that it both appropriately identifies the governing law and applies that law. Judge Birzer reasonably applied the factors of *Castner v. Colo. Springs Cablevision*, 979 F.2d 1417, 1420 (10th Cir. 1992) and recognized that there is no constitutional right to appointed counsel in civil actions. Further, there is no indication that denial of counsel in this case would be fundamentally unfair. The court therefore overrules plaintiff's objection to Judge Birzer's order.

B. Report and Recommendation

Plaintiff also asks this court to review a report and recommendation of Magistrate Judge Birzer in which she suggested that this court lacks subject matter jurisdiction because defendants are immune from suit pursuant to the Eleventh Amendment. Plaintiff objected, arguing that defendants violated her due process and equal protection rights and she suffered defamation and emotional distress. After review, the court determines that the court lacks subject matter jurisdiction because plaintiff's claims are barred by the Eleventh Amendment.

The Eleventh Amendment grants states absolute immunity from suits brought by individuals in federal court. *Edelman v. Jordan*, 415 U.S. 651, 662–63 (1974). Moreover, the immunity provided to states under the Eleventh Amendment applies equally to state agencies. *Fla. Dep't of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 150 (1981). And it applies to state officials acting in their official capacities because courts interpret a suit against an individual official as a suit against the official's office. *Id.* A state may waive its Eleventh Amendment immunity, but only when stated "by

the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Id.*

In this case, plaintiff is likely seeking relief under 42 U.S.C. § 1983 against the OAH and Ms. Sharon. However, OAH is a state agency, and is therefore granted immunity by the Eleventh Amendment, unless the immunity was waived by the state. Ms. Sharon is a state official, appointed by the Board, and is also granted immunity by the Eleventh Amendment, unless the immunity was waived by the state. The State of Kansas has not waived immunity for a state agency or officials of that agency as applied to claims under 42 U.S.C. § 1983. *Gilbert v. Kan.*, No. 02-4164-SAC, 2003 WL 21939772, at 1* (D. Kan. July 17, 2003). Therefore, this court lacks subject matter jurisdiction over this matter because plaintiff is barred by the Eleventh Amendment from filing suit against OAH and Ms. Sharon.

C. Motion to Proceed with Trial

Plaintiff filed a motion to proceed with trial in conjunction with her memorandum objecting to Judge Birzer's recommendation for dismissal. This court, however, lacks subject matter jurisdiction over this case because it is barred by the Eleventh Amendment, as discussed above. Therefore, plaintiff's motion to proceed with trial is denied.

IT IS THEREFORE ORDERED that the Report and Recommendations (Doc. 6) filed May 23, 2018, is adopted in its entirety.

IT IS FURTHER ORDERED that plaintiff's Motion to Proceed With Trial (Doc. 8) and Appeal of Magistrate Judge Decision to District Judge: Motion for Appointment of Counsel filed May 29, 2018 (Doc. 9) are denied.

IT IS FURTHER ORDERED that the case is closed. The Clerk of Court is directed to enter judgment against plaintiff and in favor of defendants.

Dated this 23rd day of July, 2018, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

E

FILED
United States Court of Appeal
Tenth Circuit

December 11, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CRYSTAL NICOLE JONES, a/k/a Crystal Nicole Kuri,

Plaintiff - Appellant,

v.

OFFICE OF ADMINISTRATIVE HEARINGS; SANDRA L. SHARON,

Defendants - Appellees.

No. 18-3153
(D.C. No. 2:18-CV-02173-CM-GEB)
(D. Kan.)

CRYSTAL NICOLE JONES,

Plaintiff - Appellant.

v.

KANSAS STATE BOARD OF NURSING; BRYCE D. BENEDICT; JUDITH HINER; CAROL BRAGDON; MARY BLUBAUGH,

Defendants - Appellees.

No. 18-3166
(D.C. No. 2:18-CV-02175-JAR-KGG)
(D. Kan.)

ORDER AND JUDGMENT*

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* After examining the briefs and appellate records, this panel has determined unanimously that oral argument wouldn't materially assist in the determination of these appeals. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument. This order and judgment isn't binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

Before **BACHARACH**, **MURPHY**, and **MORITZ**, Circuit Judges.

Crystal Jones filed separate complaints against multiple defendants, alleging that those defendants violated her constitutional rights under the Equal Protection Clause and the Due Process Clause. Proceeding pro se[1] and in forma pauperis (IFP), Jones now appeals the two separate orders—issued by two separate district courts—dismissing those complaints under 28 U.S.C. § 1915(e)(2)(B). For the reasons discussed below, we affirm.

Background

Jones was formerly employed as a dispensing nurse at Matrix Center (Matrix), a methadone clinic that offers treatment for opioid addiction.[2] On January 26, 2015, Matrix manager Steve Kamu witnessed Jones dispensing medication at an "extremely slow pace." App. 18-3166, 33. As a result, Kamu ordered all Matrix employees to submit to drug testing. After Jones tested positive for methadone, Matrix terminated her employment on January 29, 2015. That same day, several Matrix patients

[1] Because Jones appears pro se, we liberally construe her filings. *See Gallagher v. Shelton*, 587 F.3d 1063, 1067 (10th Cir. 2009). But we won't act as her advocate. *See id.*

[2] We derive these historical facts from Jones's complaints and the documents attached thereto. *Cf. Oxendine v. Kaplan*, 241 F.3d 1272, 1275 (10th Cir. 2001) ("[I]n deciding a motion to dismiss . . . , a court may look both to the complaint itself and to any documents attached as exhibits to the complaint."); *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 806 (10th Cir. 1999) ("In determining whether dismissal is proper, we must accept the allegations of the complaint as true and we must construe those allegations, and any reasonable inferences that might be drawn from them, in the light most favorable to the plaintiff.").

reported that their "take home doses [of methadone] were short"; they also indicated they believed Jones was responsible for shorting their prescriptions. *Id.* at 34.

After it learned of and investigated the allegations against Jones, the Kansas State Board of Nursing (the KSBN) referred her to the Kansas Nurse Assistance Program (KNAP). KNAP then recommended that Jones participate in a one-year monitoring program. But Jones refused to participate, in part because doing so would have required her to "abstain from alcohol for the time she was in the program." *Id.* at 35.

As a result, the KSBN petitioned to revoke Jones's nursing license, alleging that she violated the Kansas Nurse Practice Act by failing to complete the recommended monitoring program. Administrative Law Judge Sandra Sharon presided over the subsequent revocation hearing and concluded that Jones indeed violated the Kansas Nurse Practice Act. Sharon therefore granted the KSBN's petition to revoke Jones's license. Jones then petitioned the KSBN to review Sharon's decision. The KSBN denied her petition as well as her subsequent petition for reconsideration.

Proceeding IFP, Jones then filed two separate complaints—one against the KSBN and the other against the Office of Administrative Hearings (the OAH) and Sharon—alleging violations of the Equal Protection Clause and the Due Process

Clause.[3] In separate orders, two separate district courts sua sponte dismissed Jones's complaints pursuant to § 1915(e)(2)(B). Jones appeals.

Analysis

"[O]nce a litigant has been granted IFP status, the district court is required to evaluate the claims for merit." *Buchheit v. Green*, 705 F.3d 1157, 1161 (10th Cir. 2012). After performing that evaluation, the district court "shall dismiss the case" if it "determines that . . . the action or appeal . . . [1] is frivolous or malicious; [2] fails to state a claim on which relief may be granted; or [3] seeks monetary relief against a defendant who is immune from such relief." § 1915(e)(2)(B).

I. Appeal No. 18-3166

In the first of these two appeals, Jones challenges the district court's order dismissing her due-process and equal-protection claims against the KSBN for failure to state a claim. *See* § 1915(e)(2)(B)(ii). We review the district court's order de novo. *See Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007).

"Dismissal of a pro se complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts [s]he has alleged and it would be futile to give [her] an opportunity to amend." *Perkins*, 165 F.3d at 806. Critically, although "[a] pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers," this

[3] Jones named additional defendants in her suit against the KSBN. But Jones doesn't mention her claims against those individuals on appeal. Accordingly, we do not address them further.

standard "does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

A. Jones's Procedural Due Process Claim

"[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). To that end, the Due Process Clause requires that any such deprivation "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.* at 542 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950)).

Here, the district court dismissed Jones's procedural due-process claim because Jones "provide[d] no factual support in her pleading that raise[d] a plausible inference of lack of due process in the events that led to the revocation of her nursing license." App. 18-3166, 73. Instead, Jones simply asserted, repeatedly and without elaboration, that the KSBN violated her due-process rights. But such "conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based." *Hall*, 935 F.2d at 1110. Further, as the district court pointed out, the documents attached to Jones's complaint show that she received numerous opportunities to be heard. In particular, those documents demonstrate that Jones received a full evidentiary hearing before the KSBN revoked her license, that

she repeatedly petitioned for review of the KSBN's orders, and that the KSBN fully considered her petitions.

On appeal, Jones fails to explain how or why these procedures were constitutionally inadequate. And we see no indication they were. Indeed, in the context of an adverse administrative action like the one at issue here, "something less" than the full evidentiary hearing that Jones received will generally suffice to satisfy the Due Process Clause. *Cleveland Bd. of Educ.*, 470 U.S. at 541 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976)).

Thus, because Jones's complaint failed to provide sufficient "factual averments" to support her due-process claim, we agree with the district court that Jones failed to adequately state such a claim. *Hall*, 935 F.2d at 1110. And in light of the documents attached to Jones's complaint, we likewise agree with the district court that it would be futile to grant Jones an opportunity to amend. Accordingly, we affirm the district court's order dismissing Jones's due-process claim under § 1915(e)(2)(B)(ii).

B. The Equal Protection Claim

Jones next challenges the district court's order dismissing her equal-protection claim. Generally speaking, the Equal Protection Clause precludes the government from treating individuals differently if those individuals are similarly situated—i.e., if those individuals "are alike in all relevant respects." *Grissom v. Roberts*, 902 F.3d 1162, 1173 (10th Cir. 2018) (quoting *Requena v. Roberts*, 893 F.3d 1195, 1210 (10th Cir. 2018)).

Here, the district court concluded that Jones "allege[d] no facts [to] support a plausible equal protection claim." App. 18-3166, 74. In particular, the district court pointed out that Jones failed to provide any facts in her complaint that might indicate there was "a difference in how [her] case was handled versus how any other case would be adjudicated." *Id.* On the contrary, the district court reasoned that the documents attached to Jones's complaint suggest just the opposite. For instance, the district court noted that those documents indicate Jones was able "to partake in the same hearing process that all nurses in Kansas go through when facing discipline by the KSBN," that Jones received "the chance to participate in a monitoring program," that "she had a full evidentiary hearing," and that "she utilized the appeals process that applies to KSBN disciplinary actions." *Id.*

Because Jones has not alleged, nor does the record on appeal establish, that the KSBN treated her differently than other similarly situated nurses, we agree with the district court that Jones failed to adequately plead an equal-protection claim and that it would be futile to grant her an opportunity to amend. We therefore affirm the district court's order dismissing Jones's equal-protection claim under § 1915(e)(2)(B)(ii).

II. Appeal No. 18-3153

In the second of these two appeals, Jones challenges the district court's order dismissing her complaint against the OAH and Sharon. Like her complaint against the KSBN, Jones's complaint against the OAH and Sharon alleged violations of the Equal Protection Clause and the Due Process Clause. And, like her claims against the

KSBN, Jones's claims against the OAH and Sharon were also dismissed pursuant to § 1915(e)(2)(B). Specifically, the district court concluded that the OAH and Sharon were both entitled to Eleventh Amendment immunity. *See Kentucky v. Graham*, 473 U.S. 159, 169 (1985) ("[A]bsent waiver by the [s]tate or valid congressional override, the Eleventh Amendment bars a damages action against a [s]tate in federal court. This bar remains in effect when [s]tate officials are sued for damages in their official capacity." (internal citation omitted)); *Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1253 (10th Cir. 2007) (noting that "Eleventh Amendment immunity extends to states and state entities"). And the district court then dismissed Jones's claims against the OAH and Sharon under § 1915(e)(2)(B)(iii), which provides for dismissal of claims that "seek[] monetary relief against a defendant who is immune from such relief."

Jones doesn't acknowledge this basis for the district court's ruling, let alone identify any error in it. That is, she neither asserts that the district court erred in concluding that the OAH and Sharon enjoy Eleventh Amendment immunity nor suggests that the district court's Eleventh Amendment immunity finding was insufficient to trigger dismissal under § 1915(e)(2)(B)(iii). Instead, she merely repeats her allegations against the OAH and Sharon. But to prevail on appeal, Jones must do more than "[r]ecit[e] . . . a tale of apparent injustice"; she must "explain what was wrong with the reasoning that the district court relied on in reaching its decision." *Nixon v. City & Cty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015). Because she fails to do so, we affirm. *See id.* at 1369 (affirming district court's order dismissing appellant's due-process claim without further discussion because

appellant's "opening brief contain[ed] nary a word to challenge the basis of" district court's ruling).

Conclusion

For the reasons set forth above, we affirm the district courts' orders dismissing Jones's claims against the KSBN, the OAH, and Sharon under § 1915(e)(2)(B).

Entered for the Court

Nancy L. Moritz
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
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Chris Wolpert
Chief Deputy Clerk

December 11, 2018

Crystal Nicole Jones
1641 North Poplar
Wichita, KS 67214

RE: **18-3153, Jones v. Office of Admin. Hearings, et al.**
Dist/Ag docket: 2:18-CV-02173-CM-GEB
18-3166, Jones v Kansas State Board of Nursing, et al.
Dist/Ag docket: 2:18-CV-02175-JAR-KGG

Dear Appellant:

Enclosed is a copy of the order and judgment issued today in these matters. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Please contact this office if you have questions.

Sincerely,

Elisabeth A. Shumaker

Elisabeth A. Shumaker
Clerk of the Court

EAS/dd