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United States Court of Appea
Tenth Circuit

December 12, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SHAIDON BLAKE,

Plaintiff - Appellant,

v.

(FNU) WALLACE; (FNU) GORMAN; (FNU) CHASTAIN; CENTURION HEALTH SERVICES,

Defendants – Appellees,

and

CHRISTIAN (LNU),

Defendant.

No. 22-3163
(D.C. No. 5:21-CV-03046-JWL-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HARTZ**, **KELLY**, and **FEDERICO**, Circuit Judges.

Plaintiff-Appellant Shaidon Blake appeals from the district court's dismissal, pursuant to its screening function, of his civil rights claims for failure to state a claim. 28 U.S.C. § 1915A(b)(1). Blake v. Wallace, No. 21-3046-SAC, 2022 WL

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

3444782 (D. Kan. Aug. 17, 2022). Mr. Blake brought Fourth, Eighth, and Fourteenth Amendment claims against the Defendants.[1] The district court dismissed the claims after issuing an order to show cause and obtaining a Martinez report. On appeal, Mr. Blake argues that the district court erred (1) in relying upon the Martinez report to resolve factual disputes, (2) dismissing his Fourteenth Amendment forced medication claim where the corrections officers invented a medical condition, (3) dismissing his Eighth Amendment claim where the officers exposed him to medically unnecessary narcotics and COVID-19, and (4) failing to grant leave to amend. Aplt. Supp. Br. at 1–2. Our jurisdiction arises under 28 U.S.C. § 1291 and we affirm.

Background

At the time of his complaint, Mr. Blake was a Maryland state prisoner at the El Dorado Correctional Facility in El Dorado, Kansas. Mr. Blake alleged that he was forced into a restraint chair and given injections of morphine and fentanyl upon his refusal to go to the hospital for treatment for a possible stroke. I R. 9–15. He seeks compensatory, punitive, and unspecified injunctive relief. Id. at 15. Responding to the district court's order to show cause, Mr. Blake added a retaliatory motive theory,[2] specifically, that due to his pending legal matters, decisions were made to restrain

[1] Mr. Blake does not appeal the dismissal of his Fourth Amendment claim. Aplt. Supp. Br. at 12 n.12. He also has abandoned his claims against Centurion Health Services. Aplt. Reply Br. at 2 n.1. Accordingly, the Fourth Amendment claim is not before us, and the dismissal of Centurion must be affirmed.

[2] Mr. Blake is not pursuing conspiracy or retaliation claims. Aplt. Reply Br. at 2. He argues that he was not required to plead facts tending to show a conspiracy or retaliation, but such facts make his claims more plausible. Aplt. Reply Br. at 2.

him and send him to the hospital. I R. 35. According to Mr. Blake, Nurse Christian while working for Centurion Health Services, requested the injections and her care was grossly flawed. I R. 12–13, 35, 96.

Discussion

Our review is de novo. Young v. Davis, 554 F.3d 1254, 1256 (10th Cir. 2009). Well-pleaded factual allegations are accepted as true and construed in the light most favorable to the plaintiff. Id. The complaint must have sufficient factual matter "to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). To meet this standard, the plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. Pro se pleadings are construed liberally, but we cannot act as the pro se litigant's advocate. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

A. Request for Injunctive Relief and Official Capacity Claims

As an initial matter, Mr. Blake's request for injunctive relief is moot as he is no longer in Kansas custody. Mr. Blake was transferred to the North Branch Correctional Institution in Maryland. Aplee. Br. (Wallace, Gorman, & Chastain) at 12 n.5; see also Blake v. Maryland, No. DLB-24-0697, 2024 WL 2053494, at *1 (D. Md. May 7, 2024) (denying federal habeas petition after noting his custody in Maryland). At oral argument, Mr. Blake's counsel informed us that he is currently in Illinois custody. Mr. Blake argues that he has been transferred between Kansas and Maryland repeatedly. Aplt. Supp. Br. at 27. However, in Green v. Branson, 108 F.3d

1296, 1299 (10th Cir. 1997), we cited with approval McKinnon v. Taladega County, 745 F.2d 1360, 1363 (11th Cir. 1984), which held that a request for declaratory and injunctive relief was moot even in the absence of any assurance that the inmate would not be returned to the county jail. At oral argument, Mr. Blake's counsel relied on Washington v. Harper, 494 U.S. 210 (1990), to argue that his claims are not moot due to his transfer out of Kansas. Here, however, we lack a "strong likelihood" that Mr. Blake will be transferred from another state to Kansas for medical care. See id. at 218–19.

Additionally, given the claim for damages, Mr. Blake cannot proceed against the state corrections officers in their official capacities. See 28 U.S.C. § 1915(e)(2)(B)(iii); Kentucky v. Graham, 473 U.S. 159, 166–67 (1985). However, we agree with Mr. Blake that whether these defendants are being sued in their individual capacities could be clarified with an amended complaint. See Pride v. Does, 997 F.2d 712, 715–16 (10th Cir. 1993).

B. Use of the Martinez Report and the Video Evidence

Notwithstanding, even if the corrections defendants are sued in their individual capacities, the district court's decision must be affirmed. Essentially, Mr. Blake argues that the district court utilized the Martinez report to resolve disputed facts and discount his allegations. Of course, the Martinez report cannot be used to resolve material factual disputes when in conflict with pleadings or affidavits. Hall, 935 F.2d at 1111. But Mr. Blake remains responsible for pleading enough facts that "nudge[] . . . [his] claims across the line from conceivable to plausible[.]" See Bell Atl. Corp. v.

Twombly, 550 U.S. 544, 570 (2007). We have observed that pro se plaintiffs require no special training in recounting the facts. Hall, 935 F.2d at 1110.

On appeal, Mr. Blake contends that placing him in a restraint chair,[3] medicating him, and sending him to the hospital were part of a pattern of retaliating against him for his grievances and suits against prison officials. Aplt. Supp. Br. at 6–9. In his complaint, he alleged that Nurse Christian while working for Centurion Health Services made the decision to send him to the hospital based upon an observation that he was having a stroke and her assessment was incorrect because he demonstrated no stroke symptoms. I R. 12. He also contends that Nurse Christian suggested to the EMTs that he be medicated. I R. 35, 196.

We first observe that Mr. Blake does not really challenge the background facts (from the Martinez report) insofar as he was in some distress, Officer Gorman called Nurse Christian, Mr. Blake then was escorted to the cellhouse clinic room, and Nurse Christian conferred with the on-call physician. I R. 316. The essence of the dispute centers upon the rejection of his theory that the medical care decisions were pretextual, retaliatory, and against his insistence that he receive no medical care. In his complaint, Mr. Blake references a video recording of the incident which captures most of the action. 1 R. 12. The parties and the district court relied upon the video. See Aplt. Reply Br. at 22 (arguing that the video in the Martinez report may properly

[3] Mr. Blake subsequently abandoned his Eighth Amendment claim for excessive force based upon placing him in the restraint chair. Aplt. Reply Br. at 20 n.7.

be used to supplement the complaint). We have held that undisputed parts of a Martinez report may be considered like a written document attached to the complaint. Hall, 935 F.2d at 1112–13. We conclude that it is proper to consider the video evidence, notwithstanding Mr. Blake's reporting the videographer for an earlier racist joke and his claim that it may not have captured everything. Where the video evidence blatantly contradicts a material factual allegation, we may disregard that allegation in favor of what is actually depicted on the video. Cf. Scott v. Harris, 550 U.S. 372, 380–81 (2007).

C. Personal Participation

In analyzing Mr. Blake's claims, we must consider the personal participation of each defendant acting under color of state law; mere presence at the scene is insufficient. See Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). Collective allegations of violation of constitutional rights are insufficient in the absence of identifying specific actions by particular defendants. Pahls v. Thomas, 718 F.3d 1210, 1225–26 (10th Cir. 2013). So too are conclusory claims of conspiracy and retaliation. Ashcroft, 556 U.S. at 680–81. Moreover, to claim that a supervisor is liable for a constitutional violation, there must be an underlying constitutional violation by a subordinate as well as some personal involvement by the supervisor, causation, and state of mind. Wise v. Caffey, 72 F.4th 1199, 1210 (10th Cir. 2023).

The district court ultimately determined that Mr. Blake had not adequately alleged personal participation in any constitutional violation regarding corrections officers Gorman and Chastain. I R. 318–19. Given the claims before us, we agree.

Although noting this issue in the supplemental opening brief, Mr. Blake addresses collective action on the part of the Defendants. Aplt. Supp. Br. at 21. Although in reply, Mr. Blake argues that the various defendants should be held liable for taking him from his cell, restraining him, disregarding his requests to refuse treatment, and lying to the EMTs about his condition, Aplt. Reply Br. at 22, these undifferentiated assertions come too late and lack factual development.

D. Eighth and Fourteenth Amendment Claims

We next consider the various underlying principles that animate Eighth Amendment claims of excessive force, deliberate indifference to serious medical needs, and Fourteenth Amendment claims of involuntary medication. Ashcroft, 556 U.S. at 675. To make out a claim that officers applied excessive force in violation of the Eighth Amendment, a plaintiff must allege facts addressing "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 7 (1992). Physical injury is not required, but the force must be "objectively harmful enough to establish a constitutional violation[.]" Wilkins v. Gaddy, 559 U.S. 34, 37–38 (2010); Redmond v. Crowther, 882 F.3d 927, 936 (10th Cir. 2018). Factors to be considered include the officers' reasonable perceptions of the threat and the "relationship between that need and the amount of force used" and efforts to temper such force. Hudson, 503 U.S. at 7.

An Eighth Amendment claim regarding deficient medical care requires allegations tending to show "acts or omissions sufficiently harmful to evidence

deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). The Court has stated that

> 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.

Farmer v. Brennan, 511 U.S. 825, 837 (1994).

We recognize that Mr. Blake has a significant liberty interest protected by the Fourteenth Amendment in avoiding unwanted treatment by prison officials and that any such treatment must be reasonably related to legitimate penological interests. Washington v. Harper, 494 U.S. 210, 223–24 (1990). The institution has a responsibility to undertake treatment not only for the inmate's medical interests, but also consistent with the needs of the institution. Id. at 225. We have relied upon the following formulation in assessing claims of involuntary treatment:

> [A] prison may compel a prisoner to accept treatment when prison officials, in the exercise of professional judgment, deem it necessary to carry out valid medical or penological objectives. As in the case of mental institution authorities, the judgment of prison authorities will be presumed valid unless it is shown to be such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such judgment.

White v. Napoleon, 897 F.2d 103, 113 (3rd Cir. 1990). See Lowery v. Honeycutt, 211 F. App'x 709, 712 (10th Cir. 2007) (unpublished).

E. The Law Applied

With those standards in mind, we turn to individual liability. The district court

determined that prison officials could not be liable for using force to carry out the directive to go to the hospital for an evaluation. Mr. Blake now contends that his Eighth Amendment excessive force claim relates to his forced medication claim. Aplt. Reply Br. at 20 n.7. Even assuming that this was raised, and accepting the EMT's statement that Mr. Blake was medicated for pain, no facts alleged suggest a malicious and sadistic desire to cause harm on the part of any Defendant.

To the contrary and germane to the Eighth Amendment claim relating to medical care, we agree with the district court that despite Mr. Blake's allegations that he was administered narcotics and taken to the hospital for an evaluation as a pretext for retaliation, his pleadings do not raise this theory to a plausible one given the video evidence and underlying constitutional standards. The EMTs administered the specific narcotics, not the Defendants. P903002 at 1:40–6:07. The contention that the EMTs were duped based upon the retaliatory motive of the prison staff is belied by the entirety of the interaction including an EMT questioning the officers and Nurse Christian about Mr. Blake's condition. We note that the officers and medical personnel attempted to reassure Mr. Blake that given his reported symptoms, heart issues, and prior stroke, it would be best to get checked out. To be sure, Mr. Blake was anxious, expressed that he did not want to go to the hospital given his dislike of needles and fear of contracting Covid-19, and apparently returned without a stroke diagnosis. He reminds us that administration of narcotics in a prison is unusual for obvious reasons. None of this, however, suggests that any Defendant was deliberately indifferent. To the contrary, given how Mr. Blake presented, including

his extreme anxiety, a prior stroke, a report of slurred speech, the on-call doctor's recommendation, the video evidence at best suggests a difference of opinion about treating Mr. Blake. It simply does not show an effort to retaliate against Mr. Blake, no matter how forcefully Mr. Blake argues otherwise.

Medical decisions do not represent cruel and unusual punishment. Estelle, 429 U.S. at 107. We recently noted "the reality that doctors constantly deal with probabilities and make medical decisions in the face of risk." Estate of Hurtado by & through Hurtado v. Smith, 119 F.4th 1233, 1239 (10th Cir. 2024). For similar reasons, with respect to Mr. Blake's Fourteenth Amendment claim, no specific facts suggest a substantial departure from accepted professional judgment, practice or standards as to demonstrate that any Defendant actually did not base the decision on such judgment at the time the decision was made. In fact, Defendants acted with knowledge of Mr. Blake's extensive medical history in mind.

F. Leave to Amend

Finally, we reject the assertion that the district court erred by not sua sponte allowing Mr. Blake leave to amend. The district court earlier in the proceedings denied Mr. Blake leave to amend his complaint reasoning that the claims and parties did not appear to involve the events here and that no proposed amended complaint had been submitted. I R. 80. Understandably, the district court was reluctant to expand the contours of the complaint to address numerous other incidents not directly related to the claims here. On appeal, Mr. Blake claims that he could add a First Amendment claim and should be allowed to amend to address any deficiencies in the

complaint. Notwithstanding Fed. R. Civ. P. 15(a)(2) and the liberal policy of amendment when justice so requires, Foman v. Davis, 371 U.S. 178, 182 (1962), Mr. Blake has produced voluminous pleadings and not cured the inherent deficiencies recognized by the district court. Accordingly, we find no error in the district court's dismissal without granting leave to amend.

AFFIRMED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SHAIDON BLAKE,

Plaintiff,

v. **CASE NO. 21-3046-SAC**

(FNU) WALLACE, et al.,

Defendants.

MEMORANDUM AND ORDER

This civil rights case is before the Court for screening after the submission of a *Martinez* Report. Plaintiff alleges that his constitutional rights were violated while he was housed at the El Dorado Correctional Facility (EDCF) in El Dorado, Kansas. After reviewing the *Martinez* Report filed by officials of the EDCF and Plaintiff's responses to the Report, the Court finds that Plaintiff's Complaint should be dismissed for failure to state a claim upon which relief may be granted under § 1983 for the same reasons outlined in the Court's order to show cause (Doc. 4). Those reasons are explained again below, with references to the Report and Plaintiff's responses.

I. Nature of the Matter before the Court

Plaintiff's Complaint alleges that he was forced into a restraint chair and given injections of morphine and fentanyl when he refused to be transferred to a hospital after EDCF staff determined that he may have been having a stroke. Plaintiff claims this violated his right to refuse medical treatment and was an excessive use of force.

Plaintiff names as defendants Sergeant Wallace, Sergeant Gorman, Sergeant Chastain, Nurse Christian, and Centurion Health Services. He seeks compensatory and punitive damages, as well as unspecified injunctive relief.

II. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or employee of such entity to determine whether summary dismissal is appropriate. 28 U.S.C. § 1915A(a). Additionally, with any litigant, such as Plaintiff, who is proceeding in forma pauperis, the Court has a duty to screen the complaint to determine its sufficiency. *See* 28 U.S.C. § 1915(e)(2). Upon completion of this screening, the Court must dismiss any claim that is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary damages from a defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b), 1915(e)(2)(B).

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins,* 487 U.S. 42, 48 (1988) (citations omitted); *Northington v. Jackson*, 973 F.2d 1518, 1523 (10th Cir. 1992). A court liberally construes a pro se complaint and applies "less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). In addition, the court accepts all well-pleaded allegations in the complaint as true. *Anderson v. Blake*, 469 F.3d 910, 913 (10th Cir. 2006). On the other hand, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief," dismissal is appropriate. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007).

A pro se litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555 (citations omitted). The Complaint's "factual allegations must be enough to raise a right to relief above the speculative level" and "to state a claim to relief that is plausible on its face." *Id.* at 555, 570.

The Tenth Circuit Court of Appeals has explained "that, to state a claim in federal court, a complaint must explain what each defendant did to [the *pro se* plaintiff]; when the defendant did it; how the defendant's action harmed [the plaintiff]; and, what specific legal right the plaintiff believes the defendant violated." *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1163 (10th Cir. 2007). The court "will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997) (citation omitted).

The Tenth Circuit has pointed out that the Supreme Court's decisions in *Twombly* and *Erickson* gave rise to a new standard of review for § 1915(e)(2)(B)(ii) dismissals. *See Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007) (citations omitted); *see also Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). As a result, courts "look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief." *Kay*, 500 F.3d at 1218 (citation omitted). Under this new standard, "a plaintiff must 'nudge his claims across the line from conceivable to plausible.'" *Smith*, 561 F.3d at 1098 (citation omitted). "Plausible" in this context does not mean "likely to be true," but rather 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 plaintiff has not "nudged [his] claims across the line from conceivable to plausible." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (citing *Twombly*, 127 S. Ct. at 1974).

III. Discussion

Plaintiff's Complaint is dismissed for the following reasons.

A. Failure to State a Claim

The Complaint fails to state a claim for violation of Plaintiff's constitutional rights. Plaintiff claims he was sedated and forced to go to the hospital when Defendant Christian suspected he was having a stroke. He alleges violation of his Fourteenth and Eighth Amendment rights. [1]

Fourteenth Amendment

Plaintiff states "the law protects me from being forced to receive any invasive medical procedure." Doc. 1, at 6. Essentially, he claims Defendants violated his liberty interest in rejecting unwanted medical treatment.

"[T]he proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is reasonably related to legitimate penological interests." *Washington v. Harper,* 494 U.S. 210, 223 (1990). Thus, "prison officials may compel a prisoner to accept treatment when [they], in the exercise of professional judgment, deem it necessary to carry out valid medical or penological objectives." *Lowry v. Honeycutt,* 211 F. App'x 709, 712 (10th Cir. 2007) (unpublished opinion). Here, the defendants had legitimate medical objectives for requiring Plaintiff to go to the hospital for

[1] Plaintiff also alleges violation of his Fourth Amendment rights. However, the Supreme Court has held that the Fourth Amendment governs "pretrial deprivations of liberty." *Albright v. Oliver*, 510 U.S. 266, 274 (1994). Therefore, it is not applicable to Plaintiff's claims.

evaluation. Corrections officials are required to provide prisoners with adequate medical care. As stated by Plaintiff, "corrections staff w/ Nurse Christian made the decision to force [Plaintiff] to go to the hospital off site . . . based on their observation, not by request from [Plaintiff]. They said I looked like I was experiencing a stroke." Doc. 1, at 4. Even though Plaintiff disagreed with that assessment, "the judgment of prison authorities will be presumed valid unless it is shown to be such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such judgment." *Lowry*, 211 F. App'x at 712. The allegations contained in the Complaint do not overcome that presumption of validity, and nothing in the *Martinez* Report or Plaintiff's responses casts anything more than speculative, unsupported doubt on the defendants' motives or the validity of their objectives.

To the contrary, the video recording submitted as an exhibit to the Report shows all EDCF personnel behaving calmly and respectfully, even kindly, toward Plaintiff. Defendant Chastain and Nurse Christian repeatedly explained to Plaintiff why they were sending him to the hospital and reassured him that it was for assessment and he would not have to stay at the hospital if he was okay.

Plaintiff responds to the Report by arguing that Defendants had a retaliatory motive for forcing him to go to the hospital for further assessment of his condition. As explained above, the Report provides no support Plaintiff's assertion that the defendants had anything other than a valid medical objective for their actions. Plaintiff refers to allegations, incidents, and grievances which have been the subject of past lawsuits to attempt to demonstrate an improper motive on Defendants' behalf. The Court does not find his argument persuasive.

Plaintiff also asserts that because his life was not in danger, the defendants had to get his consent to provide medical treatment and he did not consent. This argument is only possible in hindsight. At the time, the defendants did not know that Plaintiff's life was not in danger. They made an assessment based on what they saw, and the fact that the assessment may have been wrong has no bearing on their motives or their justification for providing Plaintiff with medical treatment.

Eighth Amendment

Plaintiff alleges the violation of his Eighth Amendment rights. He questions the medical judgment made by Defendant Christian, and he alleges corrections officers used excessive force in effectuating that judgment.

Medical Care

The Eighth Amendment guarantees a prisoner the right to be free from cruel and unusual punishments. The United States Supreme Court has held that an inmate advancing a claim of cruel and unusual punishment based on inadequate provision of medical care must establish "deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Boyett v. County of Washington*, 282 F. App'x 667, 672 (10th Cir. 2008) (citing *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005)). The "deliberate indifference" standard has two components: "an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that [prison] officials act with a sufficiently culpable state of mind." *Miller v. Glanz*, 948 F.2d 1562, 1569 (10th Cir. 1991); *Martinez v. Garden*, 430 F.3d 1302, 1304 (10th Cir. 2005).

Plaintiff does not demonstrate any improper motive for Nurse Christian's medical judgment or the actions of corrections staff in implementing Christian's decision to send Plaintiff to the hospital. His allegations do not establish the deliberate indifference required for an Eighth

Amendment claim. Even if Plaintiff could establish that Nurse Christian's assessment of him was so flawed that it rose to the level of medical malpractice, a negligent diagnosis "fail[s] to establish the requisite culpable state of mind." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment."); *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). Likewise, a mere difference of opinion between the inmate and prison medical personnel regarding diagnosis or reasonable treatment does not constitute cruel and unusual punishment. *See Estelle*, 429 U.S. at 106–07; *Handy v. Price*, 996 F.2d 1064, 1067 (10th Cir. 1993) (affirming that a quarrel between a prison inmate and the doctor as to the appropriate treatment for hepatitis did not successfully raise an Eighth Amendment claim); *Ledoux v. Davies*, 961 F.2d 1536 (10th Cir. 1992) (Plaintiff's contention that he was denied treatment by a specialist is insufficient to establish a constitutional violation.); *El'Amin v. Pearce*, 750 F.2d 829, 833 (10th Cir. 1984)(A mere difference of opinion over the adequacy of medical treatment received cannot provide the basis for an Eighth Amendment claim.). As the United States Supreme Court explained:

> [A]n inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medial mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.

Estelle, 429 U.S. at 105–06 (footnote omitted). Here, Plaintiff disagrees with Defendant Christian's diagnosis that he may have suffered a stroke. A difference of opinion between a medical provider and a patient does not give rise to a constitutional right or sustain a claim under § 1983. *Coppinger v. Townsend*, 398 F.2d 392, 394 (10th Cir. 1968).

The *Martinez* Report describes the events as follows. Defendant Gorman was escorting the medication pass in Plaintiff's cellhouse. When they arrived at Plaintiff's cell, Gorman observed Plaintiff behaving strangely. He had been yelling but began to speak quietly and in a slurred manner. Plaintiff reported that he had some pressure in his chest and did not feel well. His face was drooping, and he was having difficulty keeping his balance. Plaintiff's cellmate helped him sit on the toilet while Gorman called Nurse Christian. (*See* Doc. 28-3, at 3; Incident Report completed by Gorman.) Christian observed Plaintiff and decided she needed to assess him further. Plaintiff was escorted to the cellhouse clinic room. Christian contacted the on-call physician, Dr. Wilnaur, and they determined that Plaintiff should go to the emergency room for evaluation. (Doc. 28-3, at 9; 9/2/20 email of Laura Christian.) According to statements made during the video recording of the incident, Plaintiff has a history of heart problems, a suspected stroke about a year before this incident, and other medical and psychological issues.

In response to the Report, Plaintiff continues to disagree with Christian's assessment of him. He argues that he could speak, and his continuing verbal abuse would be "physically impossible" for someone having a stroke. He alleges that his blood pressure was normal, and the doctor at the emergency room immediately said Plaintiff had not suffered a stroke. This is no more than a disagreement about a diagnosis. As explained above, a disagreement over diagnosis or treatment does not support a finding that Plaintiff's constitutional rights were violated. Plaintiff's Eighth Amendment claim for constitutionally inadequate medical care is dismissed.

Excessive Force

As for Plaintiff's allegation of excessive force, a prison guard's use of force against an inmate is "cruel and unusual" only if it involves "the unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). "[A]n excessive force claim involves two prongs:

(1) an objective prong that asks if the alleged wrongdoing was objectively harmful enough to establish a constitutional violation, and (2) a subjective prong under which the plaintiff must show that the officials acted with a sufficiently culpable state of mind." *Giron v. Corr. Corp. of America*, 191 F.3d 1281, 1289 (10th Cir. 1999). "An official has a culpable state of mind if he uses force 'maliciously and sadistically for the very purpose of causing harm,' rather than 'in a good faith effort to maintain or restore discipline.'" *Redmond v. Crowther*, 882 F.3d 927, 936–37 (10th Cir. 2018) (quoting *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986)).

Setting aside the question of whether the use of force Plaintiff alleges was objectively harmful enough to rise to the level of a constitutional violation, Plaintiff clearly fails to establish the subjective prong of an excessive force claim. The prison officials used force to carry out Defendant Christian's medical judgment that Plaintiff should go to the hospital to be evaluated for a stroke. Plaintiff's allegations do not support a finding that force was used maliciously or sadistically or was intended to cause harm to Plaintiff.

Nothing in the Report indicates otherwise. The video shows that Plaintiff was agitated and verbally aggressive. The video also shows all EDCF personnel behaving calmly and respectfully toward Plaintiff. Defendant Chastain and Nurse Christian repeatedly explained to Plaintiff why they were sending him to the hospital and reassured him that it was for assessment and he would not have to stay at the hospital if he was okay. As opposed to forcing him into the restraint chair, the officers assisted him. Plaintiff appeared upset and expressed anxiety initially about someone coming to "f___ him up," then about going to the hospital and about needles in general. He also appeared to be in pain as he was assisted to the chair and at other points. He repeatedly verbally confronted the person recording the incident about a joke he apparently told at some point in the past that Plaintiff found to be racist. The video also shows that it was the Emergency Medical

Technicians (EMTs), not EDCF personnel, who administered pain medication to Plaintiff prior to moving him from the restraint chair to the gurney in apparent response to Plaintiff's anxiety and pain.

Plaintiff argues that he was not combative, only verbally aggressive, so the use of force (the restraint chair) was not justified under the KDOC's policy. However, KDOC's policy does not provide the standard for a constitutional violation. The standard is whether a defendant used force "maliciously and sadistically for the very purpose of causing harm." Nothing in the Complaint, the Report, or Plaintiff's response provides any support for such a finding. Plaintiff fails to state a claim for the infliction of excessive force under the Eighth Amendment.

B. Defendants

Plaintiff fails to allege the personal participation of two of the named defendants. An essential element of a civil rights claim against an individual is that person's direct personal participation in the acts or inactions upon which the complaint is based. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Trujillo v. Williams*, 465 F.3d 1210, 1227 (10th Cir. 2006); *Foote v. Spiegel*, 118 F.3d 1416, 1423–24 (10th Cir. 1997). Conclusory allegations of involvement are not sufficient. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) ("Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."). As a result, a plaintiff is required to name each defendant not only in the caption of the complaint, but again in the body of the complaint and to include in the body a description of the acts taken by each defendant that violated plaintiff's federal constitutional rights.

In describing the incident, Plaintiff refers to Defendants Christian and Wallace. Otherwise, he mentions "corrections staff", "the defendants", and "officers." He does not refer to any actions

or involvement of Defendants Gorman or Chastain. While he describes them as "unit supervisor[s]", an official's liability may not be predicated solely upon a theory of respondeat superior. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976); *Duffield v. Jackson*, 545 F.3d 1234, 1239 (10th Cir. 2008); *Gagan v. Norton*, 35 F.3d 1473, 1476 n.4 (10th Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995). To be held liable under § 1983, a supervisor must have personally participated in the complained-of constitutional deprivation. *Meade v. Grubbs*, 841 F.2d 1512, 1528 (10th Cir. 1988). "[T]he defendant's role must be more than one of abstract authority over individuals who actually committed a constitutional violation." *Fogarty v. Gallegos*, 523 F.3d 1147, 1162 (10th Cir. 2008).

Plaintiff also names Centurion Health Services as a defendant. Assuming without deciding that Centurion is a state actor, a corporation acting under color of state law can be held liable under § 1983 only for unconstitutional policies and practices. It cannot be held liable under the doctrine of respondeat superior for the individual actions of its employees. *Fischer v. Cahill*, 474 F.2d 991, 992 (3d Cir. 1973) (state prison medical department not a "person" under § 1983); *Green v. Rubenstein*, 644 F. Supp. 2d 723, 738 (S.D. W.Va. 2009); *Dudley v. Food Service-Just Care*, 519 F. Supp. 2d 602, 604 (D.S.C. 2007). Plaintiff has made no allegation about any policy of Centurion. He appears to have named Centurion solely because Defendant Christian is a Centurion employee.

For these reasons, Plaintiff fails to state a claim against Defendants Gorman, Chastain, or Centurion.

VI. Plaintiff's Pending Motions

A. Motion for Summary Judgment/Default (Doc. 29)

This is Plaintiff's second Motion for Summary Judgment. The motion has the same basis as the first motion: Plaintiff argues that the defendants failed to comply with the deadline to file the *Martinez* Report. The first motion was denied because the order states, "No answer or motion addressed to the Complaint shall be filed until the *Martinez* Report required herein has been prepared." (Doc. 7.) The Report had not been filed at the time of Plaintiff's motion and has now been filed. Therefore, Plaintiff's motion is denied.

The Court again points out that it ordered KDOC to prepare the *Martinez* Report, and KDOC is not a defendant to this action but rather merely an interested party. Hence, the Court declines to attribute KDOC's missed deadline to Defendants.

Plaintiff also argues that the defendants were ordered to interview him as part of the *Martinez* Report, and they have not done so. That is incorrect. KDOC (not the defendants) was authorized to interview him but not ordered to do so. Plaintiff has repeatedly and effectively made his view and recollection of events known to the Court and the defendants through his filings.

B. Request for Discovery/Request for Exhibits (Doc. 36)

Plaintiff asks for a copy of the DVD containing the recording of the incident (Doc. 34). He states that he has also not viewed the DVD.

Defendants filed a response to Plaintiff's motion (Doc. 41). The response states that Plaintiff viewed the DVD on July 21, 2022, and is able to view the video again upon written request. Doc. 41, at 2.

The Court denies the motion as moot since Plaintiff has viewed the DVD and has the ability to view it again. To the extent Plaintiff's motion may be construed as requesting that the DVD (Doc. 34) be unsealed, his request is denied.

C. Motion to Supplement Exhibits (Doc. 38) and Second Motion to Supplement with Exhibit (Doc. 40)

Plaintiff asks to supplement his response to the *Martinez* Report by adding an exhibit. The exhibit consists of more than 70 pages and includes motions and orders from this case, notices of electronic filing from this case, disciplinary hearing documentation for incidents unrelated to the events of that are the subject of this Complaint, documents and filings from two of Plaintiff's other civil rights actions (Case Nos. 21-cv-3176-SAC and 18-cv-3146-EFM-GEB), and emails between KDOC and Maryland Department of Corrections officials related to Plaintiff's classification status. Plaintiff argues that this exhibit "substantiates plaintiff's claims of retaliation and bolsters the credibility of the claims of excessive use of force." Doc. 38, at 1.

The Court has considered the motions and reviewed the exhibit. Plaintiff does not raise a separate claim of retaliation in his Complaint. However, he has raised retaliatory motive in connection with the subjective prong of the excessive force analysis. As explained above, the Court does not find his argument to be persuasive. He has not pointed to anything specific demonstrating that, *in this instance*, the defendants had a culpable state of mind, i.e., that force was used "maliciously and sadistically for the very purpose of causing harm." *Redmond*, 882 F.3d at 936–37.

To the extent Plaintiff's motions are requesting that Exhibit ZZ be considered by the Court and added to his response (Doc. 30) to the *Martinez* Report, they are granted.

IT IS THEREFORE ORDERED THAT this matter is **dismissed** for failure to state a claim upon which relief may be granted.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment/Default (Doc. 29) is **denied**.

IT IS FURTHER ORDERED that Plaintiff's Request for Discovery/Request for Exhibits (Doc. 36) is **denied** as moot.

IT IS FURTHER ORDERED that Plaintiff's Motion to Supplement Exhibits (Doc. 38) and Second Motion to Supplement with Exhibit (Doc. 40) are **granted**. Exhibit ZZ (Doc. 38-1) shall be filed as an exhibit to Doc. 30.

IT IS SO ORDERED.

DATED: This 17th day of August, 2022, at Topeka, Kansas.

s/ Sam A. Crow
SAM A. CROW
U.S. Senior District Judge

Additional material from this filing is available in the Clerk's Office.