

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-02559-BNB

NICKY L. SMITH,
Plaintiff,

v.

CPT. SCOTT GIBSON, and
WARDEN KEVIN MILYARD,
Defendants.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

NOV 17 2010

GREGORY C. LANGHAM
CLERK

ORDER DIRECTING PLAINTIFF TO FILE AMENDED COMPLAINT

Plaintiff, Nicky L. Smith, is a prisoner in the custody of the Colorado Department of Corrections at the Sterling Correctional Facility in Sterling, Colorado. Mr. Smith has filed *pro se* a Prisoner Complaint pursuant to 42 U.S.C. § 1983 alleging that his rights under the United States Constitution have been violated. The court must construe the complaint liberally because Mr. Smith is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the court should not be an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110. For the reasons stated below, Mr. Smith will be ordered to file an amended complaint if he wishes to pursue his claims in this action.

Mr. Smith alleges in the complaint that he was subjected to excessive force that caused serious physical injuries on February 19, 2009, and that Defendant Gibson participated in the alleged use of excessive force. The Court construes this claim as an Eighth Amendment claim against Defendant Gibson. However, Mr. Smith fails to assert any claim against Defendant Milyard, the prison warden, or to allege any facts that

implicate Defendant Milyard in the alleged use of excessive force. Therefore, Mr. Smith will be ordered to file an amended complaint if he wishes to pursue any claim against Defendant Milyard.

Mr. Smith is advised that the general rule that *pro se* pleadings must be construed liberally has limits and “the court cannot take on the responsibility of serving as the litigant’s attorney in constructing arguments and searching the record.” **Garrett v. Selby Connor Maddux & Janer**, 425 F.3d 836, 840 (10th Cir. 2005). In order to state a claim in federal court, Mr. Smith “must explain what each defendant did to him or her; when the defendant did it; how the defendant’s action harmed him or her; 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). Personal participation is an essential allegation in a civil rights action. **See Bennett v. Passic**, 545 F.2d 1260, 1262-63 (10th Cir. 1976). To establish personal participation, Mr. Smith must show that each Defendant caused the deprivation of a federal right. **See Kentucky v. Graham**, 473 U.S. 159, 166 (1985). There must be an affirmative link between the alleged constitutional violation and each Defendant’s participation, control or direction, or failure to supervise. **See Butler v. City of Norman**, 992 F.2d 1053, 1055 (10th Cir. 1993). A Defendant may not be held liable for the unconstitutional conduct of his or her subordinates on a theory of respondeat superior. **See Ashcroft v. Iqbal**, 129 S. Ct. 1937, 1948 (2009). Furthermore,

when a plaintiff sues an official under **Bivens** or § 1983 for conduct “arising from his or her superintendent responsibilities,” the plaintiff must plausibly plead and eventually prove not only that the official’s subordinates violated the Constitution, but that the official by virtue of his

own conduct and state of mind did so as well.

See *Dodds v. Richardson*, 614 F.3d 1185, 1198 (10th Cir. 2010) (quoting ***Iqbal***, 129 S. Ct. at 1949). Therefore, in order to succeed in a § 1983 suit against a government official for conduct that arises out of his or her supervisory responsibilities, a plaintiff must allege and demonstrate that: “(1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.” ***Id.*** at 1199. Accordingly, it is

ORDERED that Mr. Smith file **within thirty (30) days from the date of this order** an amended complaint that complies with this order if he wishes to pursue any claims against Defendant Milyard in this action. It is

FURTHER ORDERED that the clerk of the court mail to Mr. Smith, together with a copy of this order, two copies of the following form: Prisoner Complaint. It is

FURTHER ORDERED that, if Mr. Smith fails to file an amended complaint that complies with this order to the court’s satisfaction within the time allowed, Defendant Milyard will be dismissed as a party to this action without further notice.

DATED November 17, 2010, at Denver, Colorado.

BY THE COURT:

s/ Boyd N. Boland
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF MAILING

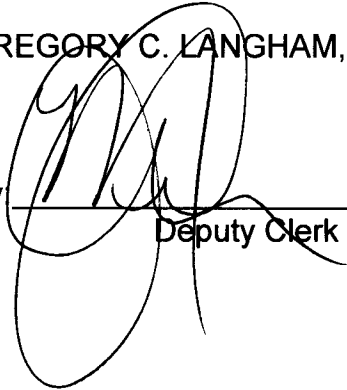
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Nicky L. Smith
Prisoner No. 98861
Sterling Correctional Facility
PO Box 6000
Sterling, CO 80751

I hereby certify that I have mailed a copy of the **ORDER** and **two copies of the Prisoner Complaint** to the above-named individuals on 11/17/10

GREGORY C. LANGHAM, CLERK

By



Deputy Clerk