2006 WL 581166
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United States District Court,
D. Colorado.

Guy **CHICK**, Plaintiff,
v.
Timithi **BOULTON**, parole officer David Gallegos, Aurora Police Department, and Mike Gaskill, Aurora Police Department, Defendants.

No. 05 CV 00052 REB PAC. | March 7, 2006.

**Attorneys and Law Firms**

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**ORDER CONCERNING DEFENDANT BOULTON'S MOTION TO DISMISS**

BLACKBURN, J.

***1** This matter is before me on defendant Timithi Boulton's Motion to Dismiss [# 33], filed August 1, 2005. Plaintiff filed his *pro se* response [# 41] to the motion on August 24, 2005, and defendant filed his reply [# 42] on September 6, 2005. This motion was referred to the magistrate judge in my general order of reference [# 17], filed May 27, 2005. In an effort to streamline the resolution of this motion, and with the consent of the magistrate judge, I will withdraw my order of reference as to this motion only. For the reasons discussed below, I deny the motion to dismiss. [1]

1 The issues raised by and inherent to the motion to dismiss are fully briefed, obviating the necessity of jurisdictional discovery, evidentiary hearing, or oral argument.

## I. JURISDICTION

I have subject matter jurisdiction under 28 U.S.C. 1331 (federal question).

## II. STANDARD OF REVIEW

When ruling on a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), I must determine whether the allegations set forth in the complaint, if true, are sufficient to state a claim within the meaning of Fed.R.Civ.P. 8(a). I must accept all well-pleaded allegations of the complaint as true. *McDonald v. Kinder–Morgan, Inc.*, 287 F.3d 992, 997 (10th Cir.2002). "However, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Fernandez–Montes v. Allied Pilots Association*, 987 F.2d 278, 284 (5th Cir.1993); *see also Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir.2002) ("All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true."), *cert denied*, 538 U.S. 999, 123 S.Ct. 1908, 155 L.Ed.2d 826 (2003). Thus, Rule 12(b)(6) requires dismissal if, taking all well-pleaded facts as true and construing them in the light most favorable to plaintiff, it is clear that he can prove no set of facts entitling him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Rocky Mountain Helicopters, Inc., v. Bell Helicopter Textron, Inc.*, 24 F.3d 125, 128 (10th Cir.1994).

*Pro se* pleadings are to be construed liberally. *Haines v. Kerner*, 404 U.S. 519, 520–21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). A *pro se* litigant should be given a reasonable opportunity to remedy defects in his pleadings if his factual allegations are close to stating a claim for relief. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir.1991). However, a *pro se* litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be granted." *Id.* A court will not construct legal theories which assume facts that have not been pleaded, *Dunn v. White*, 880 F.2d 1188, 1197 (10th Cir.1989), nor is the court obligated to "supply additional factual allegations to round out a plaintiff's complaint." *Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir.1997).

## III. BACKGROUND

The complaint addressed by the motion to dismiss is the plaintiff's amended complaint [# 14], filed May 19, 2005 (Complaint). The plaintiff, Guy Chick, asserts four claims for relief based on events that occurred during his arrest by the defendants on October 1, 2004. Defendant, Timithi Boulton,

is a parole officer and was Chick's parole officer at the time of Chick's arrest. Defendants Mike Gaskill and David Gallegos, are officers with the Aurora Police Department who assisted in Chick's arrest on October 1, 2004. Chick says he was in his apartment watching television with his niece when he heard a knock on the door. *Complaint,* p. 4. He says he did not answer the door because it was 11:30 at night. *Id.* A short time later, the defendants forced open the door to Chick's apartment, entered, and arrested him.

***2** Chick's four claims are: 1) unlawful entry into plaintiff's home by the defendants; 2) excessive force by Officer Gaskill when he used his taser on plaintiff three times during the course of plaintiff's arrest; 3) police brutality by Officer Gallegos "when he went 'hands on' with plaintiff," apparently when plaintiff was unconscious from a taser shot; and 4) loss of wages resulting from plaintiff's loss of his employment as a restaurant manager due to his arrest and imprisonment. *Complaint,* pp. 4—7. Chick names Boulton as a defendant in claims one and four.

In his motion to dismiss, Boulton argues 1) that plaintiff's claims are barred because he has failed to exhaust his administrative remedies; 2) that Boulton is entitled to qualified immunity on claims against him in his individual capacity; 3) that any official capacity claims plaintiff asserts are barred; 4) that plaintiff fails to state a claim for violation of any Fourth Amendment rights; and 5) that plaintiff's claim for lost wages is barred by *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). The other defendants, Aurora Police Department Officers Gaskill and Gallegos, filed their answer to the complaint on August 12, 2005.

## IV. EXHAUSTION OF REMEDIES

The Prison Litigation Reform Act (PLRA) states: "No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correction facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Chick was incarcerated in the Colorado Department of Corrections when he filed this case. However, his claims concern his arrest at his own home while he was on parole. His claims do not concern prison conditions, and thus are not "brought with respect to prison conditions under section 1983" or any other law. Therefore, the exhaustion requirement of § 1997e(a) is not applicable to this case.

## V. FOURTH AMENDMENT CLAIM—CLAIM ONE

In claim one, Chick asserts a claim for unlawful entry. He claims that the defendants' forcible entry into his home violated his rights under the Fourth Amendment. The Fourth Amendment is applicable to the state of Colorado under the Due Process Clause of the Fourteenth Amendment. *See, e.g., Mapp v. Ohio,* 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

The Fourth Amendment provides protection from unreasonable searches and seizures. In many circumstances, law enforcement must obtain a warrant prior to entering a home and conducting a search. However, parolees do not enjoy "the absolute liberty to which every citizen is entitled, but only ... conditional liberty properly dependent on observance of special parole restrictions." *Morrissey v. Brewer,* 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1982). "These restrictions are designed to ensure rehabilitation and protect the public. These twin aims justify the state's limitation of a parolee's Fourth Amendment rights and consequent expectations of privacy." *U.S. v. Lewis,* 71 F.3d 358, 361 (10th Cir.1995). The United States Supreme Court has recognized exceptions to the warrant requirement when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable. *Lewis,* 71 F.3d at 361. A state's parole system presents such special needs. *Id.*

***3** To ensure adequate monitoring of a parolee's progress, and to deter further criminal conduct, a parole agent must be permitted, in proper circumstances, to act expeditiously and without warning. *Id.* at 362. To determine the lawfulness of the warrantless entry and search at issue here, I must balance the parolee's expectations of privacy against the state's interests to determine the level of individualized suspicion necessary to support a warrantless search. *Id.* I must look to Colorado law to determine whether the "special needs" of its parole system justify the warrantless entry into Chick's home. *Id.* The entry is reasonable under the Fourth Amendment if parole agents carried it out pursuant to state law which itself satisfies the Fourth Amendment's reasonableness requirement. *Id.*

In Colorado, parolees are required, as a condition of parole, to allow parole officers to make residential visits and to search that residence. § 17–2–201(5)(f)(I)(D), C.R.S. (2004). Since the state statute authorizes searches of a parolee's residence as

a condition of parole, a parole officer needs only reasonable suspicion that the parolee has committed or is committing a parole violation or crime. People v. Tafoya, 985 P.2d 26, 29 (Colo.App.1999). This parole officer authority serves legitimate needs of the state parole system.

Again, Chick says he was in his apartment watching television with his niece when he heard a knock on the door. *Complaint*, p. 4. He says he did not answer the door because it was 11:30 at night. *Id.* A short time later, the defendants forced open the door to Chick's apartment, entered, and arrested him. Boulton argues that, hearing noises in Chick's residence but finding that no one answered the door after the defendants knocked on the door, it was reasonable for Boulton to suspect that Chick was avoiding a residential visit and search by his parole officer. *Motion to dismiss*, p. 6. Such avoidance, Boulton argues, supports a reasonable suspicion that Chick was avoiding the visit and/or search because he was committing other parole violations. *Id.*

Boulton's relies on his assertion that he heard noises in Chick's apartment to support his claim that he had a reasonable suspicion that Chick was in the apartment and was avoiding a residential visit and search by his parole officer. I note, however, that Chick's complaint does not contain any allegations that indicate that Boulton heard noises in the apartment, or otherwise could observe indications that someone was in the apartment. Boulton's claim that he heard noises in the apartment is a factual assertion not contained in the Complaint. Unlike a motion for summary judgment, I may not rely on such a factual assertion in resolving the motion to dismiss.

Assuming the allegations in the Complaint to be true, and reading those allegations in the light most favorable to the plaintiff, I cannot conclude that Boulton necessarily had reasonable suspicion sufficient to support the warrantless entry into Chick's apartment. Chick's allegations state a claim for violation of his Fourth and Fourteenth Amendment rights based on Boulton's warrantless entry into Chick's apartment to effect Chick's arrest. Boulton's motion to dismiss Chick's claim one will be denied.

## VI. CLAIM FOUR—LOST WAGES

***4** In claim four Chick asserts a claim for lost wages. He alleges that he was arrested on illegal grounds and was incarcerated in the Arapahoe County Detention Facility. As a result of his incarceration, Chick alleges, he lost his job. Chick says he was paid 24,000 dollars per year. In his prayer for relief, he seeks 16,000 dollars in lost wages, beginning on the date of his arrest, October 1, 2004. The Complaint was signed on May 16, 2005, while Chick was incarcerated at Arapahoe County Detention Facility. These allegations indicate that Chick was incarcerated continuously from the date of his arrest until the filing of his Complaint. Chick's current address of record is at the Skyline Correctional Facility, indicating he remains incarcerated.

Boulton argues that Chick's claim for damages arising from his allegedly unlawful arrest is barred by *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). In *Heck*, the United States Supreme Court held that

> in order to recover damages for ... harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

512 U.S. at 486–87. "[W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 487.

On the current record, I cannot conclude that a judgment in favor of Chick on his claim that his arrest was unlawful would "necessarily imply the invalidity of [Chick's] conviction or sentence." *Id.* The nature of Chick's apparent criminal conviction, the status of his sentence, and his parole status are not clear on the current record. It is difficult to imagine a scenario in which a judgment in Chick's favor in this case would invalidate his conviction. The effect of a judgment in Chick's favor on Chick's sentence also is far from clear.

In short, assuming the allegations in the Complaint to be true, and reading those allegations in the light most favorable to the plaintiff, I cannot conclude that Chick's claim four is barred

by *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).

## VII. QUALIFIED IMMUNITY

To the extent Chick intends to sue Boulton in his individual capacity, Boulton argues that Chick's claims are barred by the doctrine of qualified immunity. Qualified immunity shields public officials from civil damages liability if their actions did not " 'violate clearly established statutory or constitutional rights of which a reasonable person would have known." ' *Pino v. Higgs*, 75 F.3d 1461, 1467 (10th Cir.1996) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

***5** Once a defendant government official raises the defense of qualified immunity, the burden shifts to the plaintiff. *Harris v. Morales*, 69 F.Supp.2d 1319, 1322–1323 (D.Colo.1999) (discussing the plaintiff's pleading requirements in light of a motion to dismiss based on qualified immunity defense). "The plaintiff initially bears a heavy two-part burden when the defendant pleads the defense of qualified immunity." *Id.* (quoting *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir.1996) (citations omitted). First, the plaintiff must demonstrate the individual defendant's conduct violated the law. This burden means coming forward with specific facts establishing the violation. *Id.* (citing *Taylor v. Meacham*, 82 F.3d 1556, 1559 (10th Cir.1996). Second, the plaintiff must prove the relevant law was clearly established when the alleged violation occurred. *Id.* In other words, the plaintiff must demonstrate that the right is sufficiently clear so that a reasonable state official would be aware that his behavior violates that right. Id. (citations omitted). However, the plaintiff need not establish a "precise correlation between the then-existing law and the case at hand." *Patrick v. Miller*, 953 F.2d 1240, 1249 (10th Cir.1992).

"Once a defendant raises the defense of qualified immunity in the context of a motion to dismiss, a court must first determine whether the plaintiff has asserted a violation of federal law." *Currier v. Doran*, 242 F.3d 905, 917 (10th Cir.), *cert. denied*, 534 U.S. 1019 (2001). The Court must consider whether the facts alleged, "[t]aken in the light most favorable to the party asserting the injury, ... show the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). As discussed above, viewing Chick's allegations in the light most favorable to Chick, he has asserted an arguable claim that Boulton violated Chick's Fourth Amendment rights when Boulton entered Chick's apartment. In the context of a motion to dismiss, this satisfies the first part of Chick's burden in response to Boulton's assertion of qualified immunity.

Second, Chick must demonstrate that the relevant law was clearly established when the violation occurred. In this case, the alleged violation occurred on October 1, 2004. The cases discussed above concerning a parolee's rights under the Fourth and Fourteenth Amendments all pre-date Chick's arrest by a substantial period of time. *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1982); *U.S. v. Lewis*, 71 F.3d 358, 361 (10th Cir.1995); *People v. Tafoya*, 985 P.2d 26, 29 (Colo.App.1999). This law, and other well-established Fourth Amendment law, constitutes clearly established law. Reading Chick's allegations in the light most favorable to Chick, and excluding consideration of other factual assertions, Chick's allegations are sufficient to state a claim for violation of this clearly established law. This satisfies the second part of Chick's burden in response to Boulton's assertion of qualified immunity.

***6** On the current record, Boulton is not yet entitled to dismissal of Chick's Complaint based on qualified immunity.

## VIII. SOVEREIGN IMMUNITY

To the extent Chick intends to sue Boulton for damages in his official capacity, Boulton argues that Chick's claims are barred by the Eleventh Amendment. In his request for relief, Chick seeks an award of actual and punitive damages against Boulton. *Complaint*, p. 8. Chick does not seek relief other than damages.

A claim against an official of the state of Colorado in his official capacity is construed as a claim against the State of Colorado. "(A)n official-capacity suit against a state officer is not a suit against the official but rather is a suit against the official's office. As such it is no different from a suit against the State itself." *Hafer v. Melo*, 502 U.S. 21, 26, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991) (citation and internal quotations omitted). The Eleventh Amendment bars claims against state officials in their official capacities for monetary relief and for equitable relief to remedy past wrongs. *See Kentucky v. Graham*, 473 U.S. 159, 166—168, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); *Will v. Michigan Department of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d

45 (1989) (holding that state officials acting in their official capacities are not “persons” subject to suit under 42 U.S.C. § 1983).

To the extent Chick intends to sue Boulton in his official capacity, Chick's claims are barred by the Eleventh Amendment. Boulton's motion to dismiss Chick's claims against Boulton in his official capacity will be granted.

## IX. CONCLUSION & ORDERS

Taking the allegations in Chick's Complaint as true, and construing them in the light most favorable to Chick, I conclude that Chick's allegations are sufficient to state a claim against Boulton under the Fourth and Fourteenth Amendments, including a claim against Boulton for lost wages. Further, on the current record and applying the relevant standards outlined above, I find that qualified immunity does not bar Chick's claims against Boulton. On the other hand, to the extent Chick asserts claims against Boulton in Boulton's official capacity, those claims are barred by the Eleventh Amendment.

THEREFORE, IT IS ORDERED as follows:

1. That my general order of reference in this case [# 17], filed May 27, 2005, is WITHDRAWN as to defendant Timithi Boulton's Motion to Dismiss [# 33], filed August 1, 2005;

2. That defendant Timithi Boulton's Motion to Dismiss [# 33], filed August 1, 2005, is GRANTED as to the plaintiff's claims against Boulton in his official capacity;

3. That defendant Timithi Boulton's Motion to Dismiss [# 33], filed August 1, 2005, otherwise is DENIED;

**All Citations**

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United States District Court,
E.D. New York.

Ronnie HARRELL, Plaintiff,
v.
COUNTY OF NASSAU, Nassau County Police Department, Nassau County Police Officers Joseph Lobello, John Tucker, Ralph Swanson, Gary Farley and Regis Beneville, Defendants.

No. 10–CV–5894 (MKB). | Sept. 27, 2013.

***MEMORANDUM & ORDER***

MARGO K. BRODIE, District Judge.

***1** Plaintiff Ronnie Harrell brought the above-captioned action against Defendants County of Nassau, Nassau County Police Department, Nassau County Police Officers Joseph Lobello, John Tucker, Ralph Swanson and Gary Farley, and Ambulance Medical Technician Regis Beneville, alleging false arrest, false imprisonment, malicious prosecution and excessive force in violation of the Fourth and Fourteenth Amendments of the United States Constitution, 42 U.S.C. § 1983 and "the laws and statutes of the State of New York."(Am.Compl.¶ 1.) Plaintiff also alleged claims of negligence in hiring, training and supervising against Nassau County and Nassau County Police Department, and claims of negligence in the performance of their duties and intentional and negligent infliction of emotional distress against all Defendants. Plaintiff has since abandoned all of his claims except his excessive force and intentional infliction of emotional distress claims. Defendants moved for summary judgment. The Court heard oral argument on August 6, 2013. For the reasons set forth below, Defendants' motion for summary judgment is denied as to Plaintiff's claim for excessive force and granted as to Plaintiff's claim for intentional infliction of emotional distress.

**I. Background**

On September 19, 2009, Plaintiff and his friend Phillip Silver attended a "barbecue backyard party" in Roosevelt, New York, of approximately 75–100 people. (Pl. Dep. 17:10–21:16; Pl. 50–h 51:24–52:14, 54:21–25. [1] ) When they arrived at the party, Plaintiff stayed outside the front of the house speaking on his cellular telephone and Silver went to the back of the house. (Pl. Dep. 19:5–13; Pl. 50–h 5–12.) While Plaintiff was having a conversation on the telephone, Plaintiff's friend Jason drove by the house. (Pl.Dep.19:14–17, 22:6–24.) Jason stopped and spoke to Plaintiff. (*Id.* at 19:17–19, 22:25–6.)Plaintiff heard individuals behind him arguing about money while he was speaking with Jason. (*Id.* at 19:20–20:2, 23:7–24:25.)Plaintiff heard gunshots and started running. (*Id.* at 24:23–25:11.)Plaintiff was shot and fell to the concrete ground. (*Id.* at 19:13–27, 25:10–26:14.)Plaintiff started to get up, and several people yelled at him not to move. (*Id.* at 26:4–27:11.)Plaintiff fainted. (*Id.* at 31:7–12.)Plaintiff testified during his deposition that, after being shot, he "started going crazy," but did not explain what he meant or provide any details as to how he was "going crazy." (*Id.* at 26:7–10.)

[1] Plaintiff testified at a 50–h municipal hearing ("Pl.50–h") on April 23, 2010, and he was deposed ("Pl.Dep.") on March 9, 2012. A "50–h hearing" is an examination provided for under New York General Municipal Law § 50–h. *See*N.Y. Gen. Mun. Law § 50h(1) ("Wherever a notice of claim is filed against a ... county ... the ... county ... shall have the right to demand an examination of the claimant relative to the occurrence and extent of the injuries or damages for which claim is made, ... which examination shall be upon oral questions unless the parties otherwise stipulate...."). A plaintiff's testimony in a 50–h hearing may be considered by the Court on a motion for summary judgment. *See, e.g.*, *Codling v. City of New York*, 68 F. App'x 227, 229 (2d Cir.2003) (considering the plaintiff's testimony at his 50–h hearing when analyzing the defendants' motion for summary judgment); *Decker v. City of New York*, No. 13–CV–0308, 2013 WL 4528531, at *3 (S.D.N.Y. Aug. 27, 2013) ("The admissions in the [50–h] hearing testimony may ... be offered in connection with a motion for summary judgment or at trial."); *Hall v. Cnty. of Saratoga*, No. 10–CV–1120, 2013 WL 838284, at *7 (N.D.N.Y. Mar. 6, 2013) (analyzing the plaintiff's 50–h hearing testimony and his deposition testimony in connection with the defendants' motion for summary judgment).

On September 19, 2009, at approximately 1:18 a.m., Nassau County Police Department ("NCPD") Communications Bureau received a 911 call for a fight on W. Roosevelt Avenue. (Defs. Ex. E ("NCPD Case Report") 1.) Upon arriving on the scene, NCPD officers [2] observed approximately 200 people in the street. (Defs. 56.1 ¶ 5; Pl. 56.1 ¶ 5.) Soon thereafter, NCPD officers heard gunshots,

and a NCPD officer was flagged down by a group of people who stated that Plaintiff had been shot in the back by an unknown individual. (Defs. 56.1 ¶¶ 5–6; Pl. 56.1 ¶¶ 5–6.) NCPD officers requested assistance and that an ambulance be dispatched. (Defs. 56.1 ¶ 7; Pl. 56.1 ¶ 7.) After Plaintiff fainted, the police and the Ambulance Medical Technician ("AMT") Regis Beneville told everyone to move away from Plaintiff, picking him off the ground and putting him on a stretcher. [3] (Pl.Dep.30:17–22.) Plaintiff was surrounded by approximately five to six officers and AMT Beneville as he was placed on the stretcher. (Pl.Dep.32:13–33:3.) The parties dispute whether Plaintiff resisted the attempts of the officers and Beneville to render assistance. (Defs. 56.1 ¶ 14; Pl. 56.1 ¶ 14.) According to Beneville, Plaintiff attempted to flee from the officers. (Beneville Aff. ¶ 7.) NCPD officers and Beneville noted in their reports filed after the incident that Plaintiff refused to provide "information or history." (Defs. 56.1 ¶ 15; *see also* NCPD Case Report; Defs. Ex. F ("NY EMS Report").) Plaintiff asserts that NCPD officers did not ask him any questions. (Pl. 56.1 ¶ 15; *see also* Pl. 50–h 69:10–15.)

2 Plaintiff does not identify the officers. According to Regis Beneville, the Ambulance Medical Technician ("AMT") who responded to the 911 call for assistance, Police Officers Joseph LoBello and Ralph Swanson were already at the location when he arrived, and Police Officers Gary Farley and John Tucker arrived thereafter. (Beneville Aff. ¶ 5.) Plaintiff spelled Officer LoBello's name as LeBello in his Amended Complaint. However, Defendants in their Answer referred to the officer as LoBello. The Court identifies him in this opinion as LoBello.

3 During his 50–h hearing and his deposition, Plaintiff referred to the "ambulance person" as the "EMT." The parties agree that AMT Beneville is the individual Plaintiff identified. (*See, e.g.*, Def. 56.1 ¶¶ 8, 12; Pl. 56.1 ¶¶ 8, 12, 29.)

***2** As Plaintiff was placed on the stretcher and into the ambulance, Plaintiff got "very upset" and "went crazy" because he was in pain and was "laid ... flat on [his] back where [he] got shot."(Pls. 56.1 ¶ 16; Pl. 50–h 69:21–70:6.) Plaintiff told the officers and Beneville "get off of me, get off of me, get off of me," and "it's hurting, it's hurting, it's hurting."(Pl. 50–h 71:7–21.) One of the officers "came in the [ambulance] and punched [Plaintiff] in the eye" while he was being strapped to the stretcher. (Pl. 50–h 71:15–21; 77:21–78:3; *see also* Pl. Dep. 35:14–16.) Plaintiff stated at his 50–h hearing that the officer "just came in, walked in, and punched [Plaintiff's] eye for no reason," and then tried to move out of the way so Plaintiff would not be able to see him. [4] (Pl. 50–h 71:18–21; 77:10–78:3.) Plaintiff testified at his deposition that the officer first tried to calm him down before punching him in the eye. (Pl.Dep.34:18–35:13.) Plaintiff got blood in his eye. (Pl. Dep. 36:19–22; Pl. 50–h 78:14–20.) Plaintiff told Beneville that he could not see, but Beneville did not assist Plaintiff. (Pl.Dep.36:18–24.)

4 It is unclear when this alleged punch occurred. Plaintiff's description during the 50–h hearing indicates that the alleged punch happened immediately after being placed in the ambulance, while the ambulance was still on location and before Beneville gave Plaintiff an oxygen mask. (*See* Pl. 50–h 70:22–76:2 (describing being placed on the stretcher and telling the officers and Beneville "its hurting," and stating "the next thing" was the alleged punch, which occurred while the ambulance was still at the scene).) However, Plaintiff's description during his deposition indicates that the incident may have happened while Plaintiff was being transported to the hospital and after Beneville gave Plaintiff an oxygen mask. (*See* Pl. Dep. 34:18–37:10 (stating that he did not remember if the ambulance was moving or parked, but that the incident occurred after Beneville gave him an oxygen mask and the offending officer tried to calm him down).)

According to Beneville, Plaintiff "needed to be restrained for his safety and the safety of the personnel on the ambulance."(Beneville Aff. ¶ 7.) However, even after being restrained, Plaintiff "remained combative and uncooperative during transport."(*Id.* ¶ 9;*see also* Defs. 56.1 ¶ 16; Pl. 56.1 ¶ 16; NY EMS Report.) Plaintiff "refused to allow [AMT Beneville] to place an IV or take his blood pressure" and "continuously remove[d] his oxygen mask."(Beneville Aff. ¶ ¶ 7–9.) Plaintiff's physical and mental state were communicated to the Nassau University Medical Center's ("hospital") trauma team, and the trauma team requested that Plaintiff be "immobilized as best as possible." (*Id.* ¶ 10.)Beneville denies that he or any of the officers punched, hit or kicked Plaintiff. [5] (Pl. 56.1 ¶ 16; Pl. Dep. 34:18–36:22; Beneville Aff. ¶ 12.)

5 Plaintiff does not specify which officers were present and which officer allegedly punched him. In his deposition, Plaintiff testified that he did not know which officer punched him. (Pl. Dep. 35:17–25; *see also id.* at 32:17–36:17.)Plaintiff only remembers that the officer was white and tall. (*Id.* at 36:2–10.)

After arriving at the hospital, Plaintiff was immediately sedated. (Defs. 56.1 ¶ 19; Pl. 56.1 ¶ 19; Beneville Aff. ¶ 11; Pl. Dep. 37:17–38:2; Defs. Exs. I, J.) The sedative put Plaintiff to sleep. (Pl.Dep.37:22–25.) When Plaintiff awoke, he had a cut with a Band–Aid on his eye that covered the side of his face. (Pl.Dep.38:9–12.) Doctors gave him ice to apply to his eye to reduce the swelling. (Pl. 50–h 96:25–97:11.) According to hospital records, Plaintiff's chief complaint was a gunshot wound to the left interior scapular region of the back. (Defs. 56.1 ¶ 20; Pl. 56.1 ¶ 20; Defs. Exs. I, J.) Plaintiff had an "abrasion over the left eyebrow," but "no other injuries were noted." (Defs. 56.1 ¶ 21; Pl. 56.1 ¶ 21; Defs. Ex. K, L.) Plaintiff submitted photographs of his face, purportedly taken soon after the incident, that depict an abrasion over his left eyebrow. [6] (Pl.Ex. C.)

6 Defendants claim that these photographs are inadmissible, (Defs. Reply 1), but have not provided any explanation or legal support for their claim.

***3** Plaintiff was released from the hospital on or about September 20, 2009, (Defs. 56.1 ¶ 22; Pl. 56.1 ¶ 23), and filed a complaint with the police about his shooting. (Pl.Dep.40:6–8.) On September 21, 2009, NCPD Public Information Office issued a News Release requesting that "anyone with information regarding [the shooting] contact Crime Stoppers at 1–800–244–TIPS."(Defs. 56.1 ¶ 25; Pl. 56.1 ¶ 25.) According to Defendants, Plaintiff did not return telephone calls or otherwise assist NCPD in the investigation of his shooting. (Defs. 56.1 ¶ 26; *see* NCPD Case Report 2–3). Plaintiff claims that no police officers came to speak with him while he was in the hospital and no one from the police precinct contacted him about the shooting. (Pl.Dep.39:20–23, 42:21–24, 46:8–22.)

## II. Discussion

### a. Standard of Review

Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."Fed.R.Civ.P. 56(a); *see also Kwong v. Bloomberg*, 723 F.3d 160, ——, 2013 WL 3388446, at *4 (2d Cir. July 9, 2013); *Redd v. N.Y. Div. of Parole*, 678 F.3d 166, 174 (2d Cir.2012). The role of the court is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."*Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ.*, 444 F.3d 158, 162 (2d Cir.2006) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). A genuine issue of fact exists when there is sufficient "evidence on which the jury could reasonably find for the plaintiff."*Anderson*, 477 U.S. at 252.The "mere existence of a scintilla of evidence" is not sufficient to defeat summary judgment; "there must be evidence on which the jury could reasonably find for the plaintiff."*Id.* The court's function is to decide "whether, after resolving all ambiguities and drawing all inferences in favor of the non-moving party, a rational juror could find in favor of that party."*Pinto v. Allstate Ins. Co.*, 221 F.3d 394, 398 (2d Cir.2000).

### b. Improper Parties

Plaintiff cannot maintain his suit against NCPD. NCPD is an administrative arm of the County of Nassau, and under New York law, agencies of a municipality are not suable entities. *See Miller v. County of Nassau*, No. 10–CV–3358, 2013 WL 1172833, at *4 (E.D.N.Y. Mar. 19, 2013) (dismissing claims against the Nassau County Sheriff's Department because "[u]nder New York law, departments that are merely administrative arms of a municipality do not have a legal identity separate and apart from the municipality and therefore, cannot sue or be sued"); *Rose v. County of Nassau*, 904 F.Supp.2d 244, 247 (E.D.N.Y.2012) ( "The [Nassau County] Police Department is an administrative arm of the County of Nassau. Under New York law, departments that are merely administrative arms of a municipality do not have a legal identity separate and apart from the municipality and, therefore, cannot sue or be sued."); *Donaldson v. Nassau Cnty. Police Dep't 3rd Precinct*, No. 10–CV–1690, 2010 WL 2976520, at *2 (E.D.N.Y. July 22, 2010) (dismissing claims against the Nassau County Police Department 3rd Precinct because it is not a suable entity); *Robischung Walsh v. Nassau Cnty. Police Dep't*, 699 F.Supp.2d 563, 565 (E.D.N.Y.2010) (dismissing claim against NCPD as an arm of the municipality). Plaintiff's claims against NCPD are dismissed.

***4** Plaintiff's claims against the County of Nassau are also dismissed. In order to hold a municipal entity liable under Section 1983, a plaintiff must establish that he was deprived of his constitutional rights, and that the constitutional violation was caused by a "municipal policy or custom." *Monell v. Dep't of Social Servs. of N.Y.C.*, 436 U.S. 658, 694–95 (1978). At oral argument counsel confirmed that Plaintiff was not pursuing a *Monell* claim against the County of Nassau. (Oral Arg. Tr. 16:2–5.) In addition, Plaintiff failed to present any evidence that the alleged use of excessive force is attributable to a municipal policy or custom. *See*

*Piccone v. Town of Webster,* 511 F. App'x 63, 64–65 (2d Cir.2013) ("[T]o hold a city liable under § 1983 for the unconstitutional actions of its employees, a plaintiff is required to plead and prove three elements: (1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right."(alteration in original) (quoting *Torraco v. Port Auth. of N.Y. & N.J.,* 615 F.3d 129, 140 (2d Cir.2010))); *see also Askins v. Doe No. 1,* —— F.3d ——, ——, 2013 WL 4488698, at *3–4 (2d Cir. Aug. 23, 2013) ("Municipalities are held liable if they adopt customs or policies that violate federal law and result in tortious violation of a plaintiff's rights ...."); *Phelan ex rel. Phelan v. Mullane,* 512 F. App'x 88, 90 (2d Cir.2013) (granting summary judgment to a defendant, assumed to be a state actor, because plaintiffs "failed to adduce evidence raising a triable issue of fact as to a policy or custom of inadequate supervision or training causally responsible for the injuries alleged"). Plaintiff's claims against Nassau County are therefore dismissed.

**c. Section 1983 Excessive Force Claim**

**i. Constitutional Right Allegedly Violated**

"In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force."*Graham v. Connor,* 490 U.S. 386, 394 (1989). An excessive force claim may be brought under the Fourth or Eighth Amendments, or as a substantive due process claim under the Fourteenth Amendment. The law is clear, however, that "[w]here another provision of the Constitution provides an explicit textual source of constitutional protection, a court must assess a plaintiff's claims under that explicit provision and not the more generalized notion of substantive due process."*Kia P. v. McIntyre,* 235 F.3d 749, 758 (2d Cir.2000); *Brown v. Baldwin Union Free Sch. Dist.,* 603 F.Supp.2d 509, 515 (E.D.N.Y.2009) (quoting *Kia P.,* 235 F.3d at 757–58);*see also Piland v. Esposito,* No. 09–CV–825, 2010 WL 918306, at *2 (D.Conn. Mar. 11, 2010) ("The Supreme Court has held that where another provision of the Constitution provides an explicit textual source of constitutional protection, a court must assess a plaintiff's claims under that explicit provision and not the more generalized notion of substantive due process."(quoting *Conn v. Gabbert,* 526 U.S. 286, 293 (1999))).

***5** "Because the Fourth Amendment provides an explicit textual source of constitutional protection" against excessive force used in the course of an arrest, investigatory stop, or other seizure of a free citizen, claims of excessive force in that context must be analyzed under the Fourth Amendment's "reasonableness" standard rather than under the more generalized "substantive due process" approach. *Graham v. Connor,* 490 U.S. at 395;*see also Tracy v.. Freshwater,* 623 F.3d. 90, 96 (2d Cir.2010) ("The Fourth Amendment prohibits the use of unreasonable and therefore excessive force by a police officer."); *Bonilla v. Jaronczyk,* 354 F. App'x 579, 581 (2d Cir.2009) ("[C]laims of excessive force in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment .... " (internal quotation marks omitted) (quoting *Graham v. Connor,* 490 U.S. at 395)). Because the Fourth Amendment's test of reasonableness is one of "objective reasonableness," the inquiry is fact specific and requires a balancing of various factors. *Tracy,* 623 F.3d at 96;*see also Graham v. City of New York,* 928 F.Supp.2d 610 (E.D.N.Y.2013) ("The Fourth Amendment prohibits the use of unreasonable and therefore excessive force by a police officer in the course of an arrest." (internal quotation marks omitted) (quoting *Tracy,* 623 F.3d at 96)); *Wims v. N.Y.C. Police Dep't,* No. 10–CV–6128, 2011 WL 2946369, at *4 (S.D.N.Y. July 20, 2011) ("When excessive force is alleged, a court must determine 'whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.' " (quoting *Graham v. Connor,* 490 U.S. at 397)). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," and the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor,* 490 U.S. at 396–97.A court considers the totality of the circumstances when determining whether excessive force was used against a plaintiff. *Tracy,* 623 F.3d at 96.When determining whether an officer's actions constitute excessive force, a court considers: "(1) the nature and severity of the crime leading to the arrest, (2) whether the suspect poses an immediate threat to the safety of the officer or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight." *Tracy,* 623 F.3d at 96.

Excessive force claims that arise outside of the context of a law enforcement official's arrest, investigatory stop or other seizure are analyzed under the due process clause of

the Fourteenth Amendment.[7] *See County of Sacramento v. Lewis*, 523 U.S. 833, 843–44 (1998) (applying substantive due process standard because "[t]he Fourth Amendment covers only 'searches and seizures,' neither of which took place here"); *Barlow v. Male Geneva Police Officer who Arrested me on January 2005*, 434 F. App'x 22, 25 (2d Cir.2011) (assessing whether to analyze the plaintiff's excessive force claim under the Fourth or Fourteenth Amendment, and stating that the first step is to determine "whether there has been a constitutionally cognizable seizure"); *Hemphill v. Schott*, 141 F.3d 412, 418 (2d Cir.1998) ("[O]utside the context of an arrest, a plaintiff may make claims of excessive force under § 1983 under the Due Process Clause of the Fourteenth Amendment."); *Cooper v. City of Hartford*, No. 07–CV–823, 2009 WL 2163127, at *12–13 (D.Conn. July 21, 2009) (only considering Fourteenth Amendment claim and not Fourth Amendment claim where the plaintiff failed to allege that the circumstances amounted to a search or seizure); *Golden v. City of New York*, No. 98–CV–998, 2000 WL 134690, at *4–5 (S.D.N.Y. Feb. 4, 2000) (excessive force claim arising out of altercation that occurred prior to the arrest was governed by the due process clause of the Fourteenth Amendment, not the Fourth Amendment).

7 Excessive force claims by prisoners are analyzed under the Eighth Amendment. *See, e.g.*, *Wilkins v. Gaddy*, 559 U.S. 34, 34 (2010).

***6** Plaintiff concedes that he was not under arrest. (Pl. Opp'n 3.) Plaintiff also was not seized pursuant to the Fourth Amendment when he was transported to the hospital. "A 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority, ... in some way restrained the liberty of a citizen.' " *Graham v. Connor*, 490 U.S. at 399 n. 10 (alteration in original) (citations omitted). Although Plaintiff was restrained and, according to Defendants, he resisted medical attention, Plaintiff asserts that he "did not resist attempts by [Beneville] and the NCPD to provide him with assistance." (Pl. 56.1 ¶ 14.) Since Plaintiff asserts that he was not forced to go to the hospital against his will, no "seizure" occurred for purposes of the Fourth Amendment. *See Tierney v. Davidson*, 133 F.3d 189, 199 (2d Cir.1998) ( "Plaintiffs do not assert that they were arrested or seized, and therefore these [excessive force] claims fall outside the Fourth Amendment protections applied in *Graham v. Connor*..., and are governed instead by the Due Process Clause of the Fourteenth Amendment."); *Reeves v. Akinwunmi*, No. 07–CV–4964, 2008 WL 2114885, at *1 (E.D.N.Y. May 19, 2008) (finding that plaintiff was not subjected to excessive force under Fourth Amendment where he did "not allege that he was subject to a Fourth Amendment 'seizure' that would give rise to a reasonableness inquiry" (citing *Graham v. Connor*, 490 U.S. at 395)). In addition, counsel conceded at oral argument that Plaintiff was not seized when he was transported to the hospital for medical treatment.[8] (Oral Arg. Tr. 4:14–18.)

8 In his opposition to Defendants' motion for summary judgment, Plaintiff argued that the protections of the Fourth Amendment govern. (Pl. Opp'n 7.) However, at oral argument, counsel for Plaintiff admitted that because Plaintiff was not in custody and was not seized, his excessive force claim should be analyzed under the Due Process Clause of the Fourteenth Amendment. (Oral Arg. Tr. 4:19–22.)

Plaintiff's claim is therefore appropriately analyzed under the Fourteenth Amendment. *See Salamacha v. Lynch*, 165 F.3d 14 (2d Cir.1998) ("In order to establish a claim that the alleged use of excessive force by a local law enforcement officer violates the search and seizure provisions of the Fourth Amendment ... a plaintiff subjected to that force must establish that he or she was unreasonably seized."(quoting *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989))); *Bourn v. Bull*, No. 09–CV–212, 2013 WL 1285858, at *4–5 (D.Vt. Mar. 27, 2013) ("Given that there was no seizure under the Fourth Amendment, the [c]ourt must analyze [the plaintiff's] claim under the substantive due process requirements of the Fourteenth Amendment."(citing *Lewis*, 523 U.S. at 843, 846)); *Smith v. Carey*, No. 10–CV–1247, 2012 WL 6923338, at *5 (N . D.N.Y. Dec. 28, 2012) (analyzing excessive force claim brought by an involuntarily committed individual under the Fourteenth Amendment because it arose in the non-seizure, non-prisoner environment), *report and recommendation adopted*,No. 10–CV–1247, 2013 WL 237722, at *5 (N.D.N.Y. Jan. 22, 2013). Since Plaintiff was not arrested and was not seized, Plaintiff's excessive force claim is appropriately analyzed under the substantive due process standard.

**ii. Due Process Clause Analysis**

***7** The Due Process Clause of the Fourteenth Amendment protects citizens from "unjustified intrusions on personal security." *Matican v. City of New York*, 524 F.3d 151, 155 (2d Cir.2008) (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)); *see also Cooper v. City of Hartford*, No. 07–CV–823, 2009 WL 2163127, at *13 (D.Conn. July 21, 2009) (quoting *Matican*, 524 F.3d at 155)."To prevail on an excessive force

claim under the Due Process Clause, a plaintiff must show that the defendant state actor engaged in conduct that 'shocks the conscience.' " *Golden*, 2000 WL 134690, at *4 (quoting *Hemphill*, 141 F.3d at 419); *Faccio v. Eggleston*, No. 10–CV–783, 2011 WL 3666588, at *11 (N.D .N.Y. Aug. 22, 2011) (citing *Johnson v. Newburgh Enlarged Sch. Dist .*, 239 F.3d 246, 252–53 (2d Cir.2001)). The Second Circuit has held that:

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

*Lindsey v. Butler*, No. 11–CV–9102, 2013 WL 3186488, at *3 (S.D .N.Y. June 24, 2013) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.1973)); *Hemphill*, 141 F.3d at 419 (quoting *Johnson*, 481 F.2d at 1033);*see also D'Attore v. City of New York*, No. 10–CV–6646, 2013 WL 1180395, at *5 (S.D.N.Y. Mar. 15, 2013) ("Excessive force claims have subjective and objective components. The objective component focuses on the harm done in light of 'contemporary standards of decency,' and asks whether 'the deprivation alleged is sufficiently serious or harmful enough to reach constitutional dimensions.'The subjective component requires a showing that the defendant had 'the necessary level of culpability, shown by actions characterized by wantonness' in light of the particular circumstances surrounding the challenged conduct."(citations omitted)); *Yeldon v. Sawyer*, No. 10–CV–266, 2012 WL 1995839, at *4 (N.D.N.Y. Apr. 26, 2012) ("[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level."(quoting *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 239, 251–52 (2d Cir.2001))), *report and recommendation adopted*,No. 10–CV–266, 2012 WL 1987134 (N.D.N.Y. June 4, 2012). In practice, this analysis "utilizes the same standard as claims by convicted prisoners under the Eighth Amendment."*Tavares v. City of New York*, No. 08–CV–3782, 2011 WL 5877548, at *3 (S.D.N.Y. Nov. 23, 2011) (citing *Mayo v. County of Albany*, 357 F. App'x 339, 341 (2d Cir.2009)); *see also D'Attore*, 2013 WL 1180395, at *5 ("Courts considering a Fourteenth Amendment claim for excessive force apply the same standards used to evaluate excessive force claims brought by convicted inmates under the Eighth Amendment."(citing *United States v. Walsh*, 194 F.3d 37, 48 (2d Cir.1999))); *Gashi v. County of Westchester*, No. 02–CV–6934, 2007 WL 749684, at *5 (S.D.N.Y. Mar. 12, 2007) ("[T]he same legal standard applies to excessive force claims brought under the Eighth and Fourteenth Amendments."). Viewing the facts in the light most favorable to Plaintiff in applying the factors suggested by the Second Circuit—the need for the application of force, the relationship between the need and the amount of force used, the extent of the injury inflicted and the reason for the use of force—the Court concludes that a reasonable jury could find that excessive force was used against Plaintiff in violation of his substantive due process rights.

**1. Need for Application of Force**

***8** The genesis of Plaintiff's claim is his own combative behavior after he was shot in the back. According to Plaintiff, he "started going crazy" and was extremely combative after being shot, (Pl. 56.1 ¶ 12; Pl. Dep. 26:4–27:11), and he continued being combative even after being placed on the stretcher, (Pl. 56.1 ¶ 16). Officers attempting to restrain an individual for medical transport may be authorized to use force. *See, e.g., Nogbou v. Mayrose*, No. 07–CV–3763, 2009 WL 3334805, at *7 (S.D.N.Y. Oct. 15, 2009) (Fourth Amendment context) (dismissing excessive force claim because, among other things, plaintiff was "behaving in an aggressive and combative manner necessitating the application of a minimal amount of force to restrain [p]laintiff until he reached [the] Hospital"), *aff'd*,400 F. App'x 617 (2d Cir.2010); *Vazquez v. Marciano*, 169 F.Supp.2d 248, 253 (S.D.N.Y.2001) (Fourth Amendment context) (holding that "the force used by [the officer] to restrain plaintiff in the ambulance does not give rise to any claim under Section 1983"); *c.f. Stanley v. Meier*, No. 09–CV–1643, 2012 WL 2367386, at *5 (D. Conn. June 21, 2012) (Fourth Amendment context) ("When an individual is resisting attempts to subdue him and threatening officers, limited use of force is reasonable."(citing *Lopez v. City of New York*, No. 05–CV–10321, 2009 WL 229956, at *8 (S.D.N.Y. Jan. 30, 2009))). There is evidence in the record that Plaintiff, who had suffered a gunshot wound to his back, was "combative" while being transported to the hospital. This factor therefore weighs in favor of Defendants, since it appears that some level of force was necessary to restrain Plaintiff.

**2. Need for Force Versus Amount of Force Used**

Whether the need for force was commensurate with the amount of force used is a factor to be considered in analyzing an excessive force claim. *See, e.g., Husbands ex rel. Forde v. City of New York*, 335 F. App'x 124, 129 (2d Cir.2009) (Fourth Amendment context) (analyzing the relationship between the amount of force that was used and the need for force); *Elliott v. County of Monroe*, 115 F. App'x 497, 498 (2d Cir.2004) (Fourth Amendment context) (analyzing excessive force claim and inquiring into whether, "to the extent such force was deliberate, was that degree of force reasonably necessary to effect plaintiff's arrest under the circumstances then confronting the officers"); *Cannon v. Wood*, No. 10–CV–01332, 2013 WL 838299, at *8 (N.D.N.Y. Jan. 22, 2013) (examining "the correlation between that need [for the application of force] and the amount of force used" when assessing the plaintiff's Eighth Amendment excessive force claim), *report and recommendation adopted*,No. 10–CV–1332, 2013 WL 838294 (N.D.N.Y. Mar. 6, 2013); *Ford v. Phillips*, No. 05–CV–6646, 2007 WL 946703, at *7 (S.D.N.Y. Mar. 27, 2007) (Eighth Amendment context) (granting defendants summary judgment because plaintiff, who brutally attacked an officer, did not allege that "defendants used force even commensurate with the force that he used" but instead alleged that the officers "punched and kicked him as they got him under control"); *Smith*, 2012 WL 6923338, at *6 (Fourteenth Amendment context) ("Here, the evidence shows that Defendants used an appropriate amount of force to confine [involuntarily committed] Plaintiff to the side room after he began yelling at staff. The only contact between Plaintiff and any of the Defendants occurred when Defendant Liggins pushed Plaintiff and, arguably, when Defendant Fullem kicked the door while Plaintiff's hand was on it. Plaintiff did not fall as a result of the push and suffered no injury other than swelling from the kick. There is no evidence that any Defendant used any more force than was necessary to close the door or that any Defendant continued to use force after the door was closed.")."[N]ot every push or shove by a state officer constitutes a violation of substantive due process."*Hernandez v.. City of New York*, No. 00–CV–9507, 2004 WL 2624675, at *7 (S.D.N.Y. Nov. 18, 2004) (quoting *Robison v. Via*, 821 F.2d 913, 923 (2d Cir.1987)); *see also Cannon*, 2013 WL 838299, at *7 ("[A] de minimis use of force will rarely suffice to state a constitutional claim[.]'... In that respect, '[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights.'" (citations omitted)).

***9** Plaintiff does not object to the limited amount of force used to initially restrain him and place him on the stretcher. Instead, Plaintiff argues that the "act of punching [him] in the face" after he was restrained in the ambulance and on his way to the hospital was unjustified. (Pl. Opp'n 4.) The Court agrees. According to Defendants, Plaintiff "needed to be restrained for his safety and the safety of the personnel in the ambulance," (Beneville Aff. ¶ 8), but they do not explain how Plaintiff was endangering the safety of Beneville or the officers while lying on his back and while being strapped to the stretcher.[9] *See Cannon*, 2013 WL 838299, at *8–9 (denying summary judgment where some amount of force was used and the parties disputed the circumstances under which force was used, because a reasonable jury could find that the plaintiff posed no threat and therefore "force was used maliciously"); *McClendon v. Cnty. of Nassau*, No. 11–CV–0190, 2012 WL 4849144, at *10 (E.D.N.Y. Oct. 11, 2012) (denying summary judgment on plaintiff's excessive force claim because genuine issues of material fact remained on, among other things, plaintiff's behavior towards the officers prior to use of force, and the use of force may have been "[u]nnecessary"); *Yeldon*, 2012 WL 1995839, at *5–6 (finding that, although defendants presented evidence that they "only used *de minimis* force for a limited period of time and only for the purpose of restoring order, .... if [p]laintiff's sworn testimony in his deposition is to be believed, [d]efendants assaulted [p]laintiff without any 'reason,' " and therefore genuine issues of material fact precluded summary judgment), *report and recommendation adopted*,No. 10–CV–00266, 2012 WL 1987134 (N.D.N.Y. June 4, 2012). Plaintiff admits that he continued to be combative even after he was initially restrained. (Pl. 56.1 ¶ 16.) The hospital trauma team did instruct that Plaintiff should be immobilized as "best as possible," and Beneville had a difficult time determining Plaintiff's blood pressure and attaching an intravenous line to Plaintiff. (Beneville Aff. ¶¶ 7–10.) If a jury believes Plaintiff's statement that he was punched in the face, a jury could also find that a punch to Plaintiff's face by a police officer, while Plaintiff was being restrained on a stretcher with a gunshot wound to his back and was complaining about the amount of pain caused by the shooting, was "beyond what was necessary to subdue" Plaintiff. *See Lagasse, City of Waterbury*, No. 09–CV–391, 2011 WL 2709749, at *8 (D.Conn. July 12, 2011) (Fourth Amendment context) ("In order to succeed on an excessive force claim, a plaintiff must 'show that [the officer] used more force than was necessary to subdue him.' " (quoting *Curry v. City of Syracuse*, 316 F.3d 324, 332 (2d Cir.2003))). This factor weighs in favor of Plaintiff.

9 Defendants dispute that Plaintiff was punched, but it is not for this Court but rather a jury to decide whether to credit Plaintiff's version or Defendant's version of the facts. *See In re Fosamax Products Liab. Litig.*, 707 F.3d 189, 194 n. 4 (2d Cir.2013) ("[T]he general rule remains that 'a district court may not discredit a witness's deposition testimony on a motion for summary judgment, because the assessment of a witness's credibility is a function reserved for the jury.' " (quoting *Fincher v. Depository Trust and Clearing Corp.*, 604 F.3d 712, 725 (2d Cir.2010)), *cert. denied*,569 U.S. ——, 133 S.Ct. 2783 (2013); *Milfort v.. Prevete*, No. 10–CV–4467, 2013 WL 519041, at *5 (E.D.N.Y. Feb. 13, 2013) ("[T]he credibility of witnesses is not to be assessed by the court on a motion for summary judgment. Resolutions of credibility conflicts and choices between conflicting versions of the facts are matters for the jury, not for the court on summary judgment." (citations and internal quotation marks omitted)).

**3. Extent of Injury Inflicted**

"[T]he extent of injury is a relevant factor" in evaluating an excessive force claim. *Abreu v. Nicholls*, 368 F. App'x 191, 193 (2d Cir.2010); *see also Murray v. Johnson No. 260*, 367 F. App'x 196, 198 (2d Cir.2010) ("To satisfy the objective condition [of an excessive force claim], one must show that the resulting harm or deprivation was sufficiently serious. With respect to this element, *Hudson [v. McMillan*, 503 U.S. 1 (1992),] makes clear that a claim of excessive force may be established even if the victim does not suffer serious or significant injury, provided that the amount of force used is more than *de minimis*, or involves force that is repugnant to the conscience of mankind."(citations and internal quotation marks omitted)); *D'Attore*, 2013 WL 1180395, at *5 (S.D .N.Y. Mar. 15, 2013) ("The objective component focuses on the harm done in light of 'contemporary standards of decency,' asks whether 'the deprivation alleged is sufficiently serious or harmful enough to reach constitutional dimensions.' ...The Constitution's prohibition against excessive force does not extend to 'de minimis uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.' " (citations omitted)); *Yeldon*, 2012 WL 1995839, at *5–6 (denying summary judgment where plaintiff suffered a swollen ear and a scraped shin because genuine issues of material fact remained regarding defendants' claim that they "only used *de minimis* force for a limited period of time and only for the purpose of restoring order")."*De minimis* injuries 'include short-term pain, swelling, and bruising, ... brief numbness from tight handcuffing, ... claims of minor discomfort from tight handcuffing, ... and two superficial scratches with a cut inside the mouth.' " *Porath v. Bird*, No. 11–CV–963, 2013 WL 2418253, at *7 (N.D.N.Y. June 3, 2013) (citations omitted) (analyzing Fourth Amendment excessive force claim); *see also Hudson*, 503 U.S. at 10 (finding that "the blows directed at [plaintiff], which caused bruises, swelling, loosened teeth, and a cracked dental plate, are not *de minimis* for Eighth Amendment purposes"); *Jackson v. City of New York*, No. 10–CV–2530, 2013 WL 1622165, at * 11–12 (E.D .N.Y. Apr. 16, 2013) (denying summary judgment on the plaintiff's Fourth Amendment excessive force claim where, after being handcuffed, she suffered contusions on her back, tenderness in her abdomen, and swelling around her wrists); *Graham v. City of New York*, 928 F.Supp.2d 610 (denying summary judgment of the plaintiff's Fourth Amendment excessive force claim where plaintiff complained that he was forcibly removed from his car and handcuffed without justification and, although he experienced no lasting damage, suffered immense pain and swelling); *Laporte v. Fisher*, No. 11–CV–9458, 2012 WL 5278543, at *3–4 (S.D.N.Y. Oct. 24, 2012) (finding that a punch to the plaintiff's stomach which caused him to lose his breath could constitute excessive force if done to harass plaintiff); *Hodge v. Village of Southampton*, 838 F.Supp.2d 67, 77–78 (E.D.N.Y.2012) (denying summary judgment where plaintiff was treated for bruising at a hospital and discharged with Motrin).

***10** Plaintiff contends that an officer punched him in the eye, causing it to bleed. (Pl. 56.1 ¶ 28.) Hospital records establish that Plaintiff suffered an "abrasion over the left eyebrow." (Defs. 56.1 ¶ 21; Pl. 56.1 ¶ 21; Defs. Exs. K, L.) Plaintiff was given ice to reduce the swelling. (Pl. 50–h 96:25–97:11.) Although the abrasion was only temporary and Plaintiff suffered no lasting damage, the force applied, as discussed above, was more than de minimus. Therefore, this factor arguably weighs in favor of Plaintiff.

**4. Purpose of Force Applied**

Courts also consider "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."*Lindsey*, 2013 WL 3186488, at *3;*see also Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010) (Eighth Amendment) (explaining that the "core judicial inquiry" is not "whether a certain quantum of injury was sustained, but rather 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm' " (quoting

*Hudson*, 503 U.S. at 7)); *see also Yeldon*, 2012 WL 1995839, at *4 (Fourteenth Amendment context) ("To determine whether an excessive force violation occurred, the 'core judicial inquiry is ... whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.' "); *McCrory v. Belden*, No. 01–CV–0525, 2003 WL 22271192, at *6 (S.D.N.Y. Sept. 30, 2003) (Eighth Amendment context) ("Depending on the specific facts of how the altercation began and proceeded, a reasonable fact-finder could conceivably conclude that some of the actions that plaintiff attributes to each of these defendants represented malicious or sadistic conduct, or at least reflected an excessive and unreasonable use of force to keep or restore order.").

According to Plaintiff, the officer punched him without provocation while he was crying and in extreme pain after being shot in the back and was being restrained on a stretcher. (Pl. 56.1 ¶ 16; Pl. 50–h 69:21–71:21, 77:10–78:3.) Defendants argue that Plaintiff was not punched in the eye, force was only used to calm and subdue Plaintiff and force was necessary in order to "render pre-hospital assistance and to transport Plaintiff to the hospital after being shot."(Def. Mem. 1; Def. Reply 5; Beneville Aff. ¶¶ 7–10.) Whether Plaintiff was punched and the officer's motivation for punching Plaintiff are issues to be decided by a jury. *See Bourn*, 2013 WL 1285858, at *5 (holding that plaintiff failed to establish an excessive force claim under the Fourteenth Amendment because it was *undisputed* that "there was no intent to cause any sort of harm"). Plaintiff's testimony creates an issue of fact as to whether Plaintiff was punched and whether the officer who allegedly punched Plaintiff acted with the necessary level of malice and wantonness to sustain a Fourteenth Amendment excessive force claim. [10] *See Pooler v. Hempstead Police Dep't*, 897 F.Supp.2d 12, 26 (E.D.N.Y.2012) (finding that issues of fact surrounding the circumstances of the alleged use of excessive force—specifically whether it occurred without justification—that occurred while the plaintiff was on his way to the mental health unit precluded summary judgment); *Jeanty v. Cnty. of Orange*, 379 F.Supp.2d 533, 541 (S.D.N.Y.2005) ("Courts in this district are hesitant to dismiss complaints alleging excessive force even at the summary judgment stage if conflicts exist in the record regarding the degree and justification of force."(citation and internal quotation marks omitted)). Drawing all inferences in favor of Plaintiff, a reasonable jury could find that Plaintiff was punched and that the singular act of punching Plaintiff in the face, while Plaintiff was being restrained on a stretcher with a gunshot wound to his back and was complaining about the amount of pain caused by the shooting, "shocks the conscience."

10 Plaintiff argues that "intentional, gratuitous uses of force that are not required to subdue an individual likely will fail the [Fourth Amendment] objective unreasonableness test."(Pl. Opp'n 12 (citing *Pierre–Antoine v. City of New York*, No. 04–CV–6987, 2006 WL 1292076, at *4 (S.D.N.Y. May 9, 2006) as holding that the "use of force against an already subdued individual would constitute an objectively unreasonable use of force under the Fourth[.]")). For the reasons outlined above, Plaintiff's claim is more appropriately analyzed under the Fourteenth Amendment.

***11** Reviewing the evidence in the light most favorable to Plaintiff, the Court finds that Plaintiff has presented disputed issues of fact such that a reasonable jury could conclude that an officer punched Plaintiff in his face without provocation, and that the punch constituted excessive force and a violation of Plaintiff's substantive due process rights.

**d. Qualified Immunity**

"[A] decision dismissing a claim based on qualified immunity at the summary judgment stage may only be granted when a court finds that an official has met his or her burden demonstrating that no rational jury could conclude '(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct.' " *Coollick v. Hughes*, 699 F.3d 211, 219 (2d Cir.2012); *see also Zalaski v. City of Hartford*, 723 F.3d 382, 388 (2d Cir.2013) ("Two questions inform qualified immunity analysis. First, do the facts show that the officer's conduct violated plaintiff's constitutional rights? If the answer to this question is no, further inquiry is unnecessary because where there is no viable constitutional claim, defendants have no need of an immunity shield. But if the answer is yes, or at least not definitively no, a second question arises: was the right clearly established at the time of defendant's actions?"). "[T]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a *reasonable officer* that his conduct was unlawful in the situation he confronted." *Zalaski*, 723 F.3d at 389 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). Therefore, "even if a right is clearly established in certain respects, qualified immunity will still shield an officer from liability if 'officers of reasonable competence could disagree' on the legality of the action at issue in its particular factual context." *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "Although a conclusion that the defendant official's

conduct was objectively reasonable as a matter of law may be appropriate where there is no dispute as to the material historical facts, if there is such a dispute, the factual question must be resolved by the factfinder." *Taravella v. Town of Wolcott*, 599 F.3d 129, 135 (2d Cir.2010) (quoting *Kerman v. City of New York*, 374 F.3d 93, 109 (2d Cir.2004)); *see also Bonilla v. United States*, 357 F. App'x 334, 335 (2d Cir.2009) ("Although qualified immunity is a question of law for the Court, if there are factual disputes that bear directly upon whether it was objectively reasonable for an official to believe that he was acting lawfully, these disputes must be resolved by a jury before the legal question can be addressed." (citing *Stephenson v. Doe*, 332 F.3d 68, 81 (2d Cir.2003))); *Higazy v. Templeton*, 505 F.3d 161, 170 (2d Cir.2007) ("Though immunity ordinarily should be decided by the court, that is true only in those cases where the facts concerning the availability of the defense are undisputed; otherwise, jury consideration is normally required ...." (quoting *Oliveira v. Mayer*, 23 F.3d 642, 649 (2d Cir.1994))).

***12** Freedom from the use of excessive force is a clearly established constitutional right, and therefore the issue is whether it was objectively reasonable for the officer to believe that his actions, as described by Plaintiff, did not violate Plaintiff's right to be free from the use of excessive force. *See Swartz v. Insogna*, 704 F.3d 105, 111 (2d Cir.2013) (holding that a police officer is immune if he had "an objectively reasonable belief that his actions [were] lawful"). The factual circumstances surrounding the action are disputed. Plaintiff argues that he was punched in the face without provocation, and Defendants argue that Plaintiff was not punched and that they only used necessary force to calm Plaintiff. A reasonably jury could, crediting Plaintiff's testimony, determine that no reasonable officer could believe that his actions were lawful, but a reasonable jury could equally conclude, crediting Defendants' evidence, that it was objectively reasonable for the officer to believe that his actions were lawful. *See Cooper v. City of New Rochelle*, 925 F.Supp.2d 588, 609 (S.D.N.Y.2013) ("[I]n the event that there are triable disputes as to the circumstances that could dictate whether the defendant[ ] could reasonably believe that his [or her] conduct was lawful, summary judgment based on an immunity defense must be denied."(quoting *Allen v. N.Y.C. Dep't of Corr.*, No. 06–CV–7205, 2010 WL 1644943, at *15 (S.D.N.Y. March 17, 2010) (citations omitted)); *Pooler*, 897 F.Supp.2d at 29–30 (finding that genuine issues of material fact regarding the circumstances in which force was used precluded summary judgment based on qualified immunity); *Atkins v. Cnty. of Orange*, 372 F.Supp.2d 377, 402 (S.D.N.Y.2005) ("In the case at bar, there is an issue of fact surrounding the circumstances of the alleged excessive force. [The plaintiff] maintains that he was purposely slammed into walls by the COs on the way to the mental health unit, while defendants maintain that if [plaintiff's] body did bump into any walls, it was an accident because the COs were merely slipping on water that was on the floor as a result of the broken sprinkler. These factual issues preclude summary judgment on the defense of qualified immunity."). The Court cannot, at the summary judgment stage, determine that the officer punched Plaintiff in his face in order to calm him down, nor can it determine that, even if he did so, a reasonable jury would be compelled to find such a punch objectively reasonable. Viewing the facts in the light most favorable to Plaintiff, the offending officer is not entitled to qualified immunity because there are genuine disputes of material fact regarding whether the officer acted reasonably in employing the type of force used against Plaintiff under these circumstances.

**e. Intentional Infliction of Emotional Distress**

To maintain a claim for intentional infliction of emotional distress, a plaintiff must establish: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress."*Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 122 (1993); *see also Gay v. Carlson*, 60 F.3d 83, 89 (2d Cir.1995) (outlining test for intentional infliction of emotional distress); *Cardona v. Cmty. Access, Inc.*, No. 11–CV–4129, 2013 WL 304519, at *8 (E.D.N.Y. Jan. 25, 2013) (same)."New York courts have been 'very strict' in applying these elements."*Gay*, 60 F.3d at 89 (citing *Martin v. Citibank, N.A.*, 762 F.2d 212, 220 (2d Cir.1985))."[T]he standard for stating a valid claim of intentional infliction of emotional distress is 'rigorous, and difficult to satisfy.' " *Conboy v. AT & T Corp.*, 241 F.3d 242, 258 (2d Cir.2001) (quoting *Howell*, 81 N.Y.2d at 122). The offending conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency" and is of such a nature that it is "utterly intolerable in a civilized community." *Marmelstein v. Kehillat New Hempstead*, 11 N.Y.3d 15, 22–23 (2008) (quoting *Murphy v. Am. Home Products Corp.*, 58 N.Y.2d 293, 303 (1983)); *see also Biberaj v. Pritchard Indus., Inc.*, 859 F.Supp.2d 549, 564 (S.D.N.Y.2012) (noting that "New York sets a particularly high bar" for intentional infliction of emotional distress cases requiring "conduct that is so 'extreme and outrageous' " (citations omitted)).

***13** Plaintiff's intentional infliction of emotional distress claim is based on allegations that Defendants "assaulted and battered, falsely imprisoned, falsely arrested, wrongfully detained and maliciously prosecuted the Plaintiff"; Defendants "falsely accused the Plaintiff of criminal activities that the Defendants knew or should have known were false which actions were intended and did cause the Plaintiff to suffer great indignities"; and Defendants' "knowing, intentional and willful false accusations, false arrest and imprisonment, and malicious prosecution forced the Plaintiff to submit to baseless [c]ourt proceedings."(Am.Compl.¶¶ 68–71.) Plaintiff has admitted that he was not, in fact, arrested or prosecuted in connection with his shooting. (Pl. Opp'n 3.) At oral argument counsel for Plaintiff argued that the alleged punch that occurred after Plaintiff was in the ambulance constitutes "extreme and outrageous" conduct. (Oral Arg. Tr. 13:3–15:17.) The Court disagrees.

In New York, a claim for intentional infliction of emotional distress is "extremely disfavored," and "[o]nly the most egregious conduct has been found sufficiently extreme and outrageous to establish" such a claim. *Medcalf v. Walsh*, No. 12–CV–5091, 2013 WL 1431603, at *7 (S.D.N.Y. Apr. 9, 2013); *see also Tebbenhoff v. Elec. Data Sys. Corp.*, 244 F. App'x 382, 384 (2d Cir.2007) (observing that New York's standard for extreme and outrageous conduct is "rigorous, and difficult to satisfy"). The "extreme and outrageous conduct" element requires that the conduct rise to the level of being "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society."*Rubinow v. Boehringer Ingelheim Pharms., Inc* ., 496 F. App'x 117, 119 (2d Cir.2012) (citation and internal quotation marks omitted); *see also Margrabe v. Sexter & Warmflash, P.C.*, 353 F. App'x 547, 550 (2d Cir.2009) ("[C]ourts are reluctant to allow recovery under the banner of intentional infliction of emotional distress absent a deliberate and malicious campaign of harassment or intimidation.... [A] court may decide whether alleged conduct is sufficiently outrageous as a matter of law."(citations and internal quotation marks omitted)); *Lan Sang v. Ming Hai*, No. 12–CV–7103, 2013 WL 3215458, at *16 (S.D.N.Y. June 27, 2013) (" '[T]he rigor of the outrageousness standard is well established.' Conduct must have been 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.' " (citations omitted)). A single act of force employed while trying to transport a patient to the hospital for treatment following a traumatic gunshot injury, even if determined to be unreasonable, does not reach the high threshold of "extreme and outrageous conduct" required under New York law. *See, e.g., Yang Feng Zhao v. City of New York*, 656 F.Supp.2d 375, 405 (S.D.N.Y.2009) ("[T]he force allegedly used on [the plaintiff] by the interrogating detectives, even if excessive, was hardly of such brutality as to take this out of the mainstream of cases involving excessive force after arrest."); *Elmowitz v. Executive Towers at Lido, LLC*, 571 F.Supp.2d 370, 379 (E.D.N.Y.2008) ("New York courts have held that the extreme and outrageous requirement was not satisfied in ...*Saunders v. Taylor*, 6 Misc.3d 1015, 800 N.Y.S.2d 356, 2003 WL 24002776, at *3 (N.Y.Sup.Ct.2003), where the defendant punched plaintiff in the face and yelled vulgarities at her.").

***14** Moreover, even assuming that a punch to Plaintiff's face under the circumstances discussed above was extreme and outrageous, counsel confirmed at oral argument that the record does not contain any evidence that the punch was intended to cause severe emotional distress, or that Plaintiff suffered any severe emotional distress as a result of the punch. (Oral Arg. Tr. 15:4–19.) *See, e.g.*, *James Biggs v. City of New York*, No. 08–CV–8123, 2010 WL 4628360, at *9 (S.D.N.Y. Nov. 16, 2010) (granting defendants summary judgment on plaintiff's intentional infliction of emotional distress claim where the plaintiff "offered no medical evidence of severe emotional injury"); *Sloane v. Kraus*, No. 06–CV–5372, 2010 WL 3489397, at *11 (S.D.N.Y. Sept. 3, 2010) (plaintiff who alleged that "an officer held a gun to his back in the Shelter bathroom and punched him in the face following his arraignment" failed to establish an intentional infliction of emotional distress claim where, *inter alia*, the plaintiff failed to "show that he has suffered severe emotional distress as a result of these alleged incidents"); *Pepe v. Maklansky*, 67 F.Supp.2d 186, 187 n. 1 (S.D.N.Y.1999) (dismissing intentional infliction of emotional distress claim of one of the plaintiffs where that plaintiff failed to present supporting medical evidence that he suffered severe emotional distress). Plaintiff simply has no evidence to support his claim of intentional infliction of emotional distress and the claim is dismissed.

**III. Conclusion**

For the reasons discussed above, Defendants' motion for summary judgment is denied as to Plaintiff's claim for excessive force but granted as to Plaintiff's claim for intentional infliction of emotional distress.

SO ORDERED.

**All Citations**

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United States District Court, S.D. New York.

Roy MANDINA, Plaintiff,
v.
THE CITY OF YONKERS, Police Officer "Jane Doe", Police Officer "John Doe", Eric Miotto and Linda Miotto, Defendants.

No. 97 CIV. 1087(LAP). | Sept. 16, 1998.

## MEMORANDUM AND ORDER

PRESKA, District J.

***1** Plaintiff Roy Mandina brings this action alleging multiple claims against the City of Yonkers and two police officers ("City Defendants"), as well as Eric and Linda Miotto ("Miotto Defendants"). The City Defendants move, pursuant to Federal Rule of Civil Procedure 56, for summary judgment. For the reasons that follow, the motion is granted. In addition, because I sua sponte determine that I do not have subject matter jurisdiction over the cause of action against the Miotto Defendants, the claim asserted against them is dismissed as well.

## BACKGROUND

The specific facts necessary to resolve this matter are discussed in more detail below in the context of the specific claims raised by plaintiff. Briefly summarized here, in the light most favorable to plaintiff, are the general facts that form the background to this matter.

Plaintiff and defendant Linda Miotto had a child. *See* Complaint ¶ 11. At an unspecified point in time, their relationship deteriorated, and various court proceedings were necessary to resolve their differences. As a result of these proceedings, both parties possess respective orders of protection against each other ("Order of Protection").*See id.* ¶ 13.Some time after plaintiff and Linda Miotto ended their relationship, Linda Miotto married Eric Miotto. *See id.* ¶ 11.The Order of Protection, discussed in greater detail below, generally prevents either plaintiff or Linda Miotto from harassing the other and requires both parties to stay away from each other, with the further proviso that plaintiff is required to stay away from Linda Miotto's "family members." *See* Order of Protection; annexed as Ex. A to the Declaration Affidavit of Eileen Ahearn, dated September 2, 1997 ("Ahearn Dec.").

On February 19, 1996, plaintiff went to Dunwoodie's Pizzeria on Yonkers Avenue in the City of Yonkers. *See* Complaint ¶ 14. While at the pizzeria, plaintiff and Eric Miotto engaged in a verbal argument. *See id.* ¶ 15.Plaintiff left the pizzeria and proceeded to the Yonkers City Police Department. There, he spoke to Officer Valara about the incident. *See id.* ¶ 16.While plaintiff was standing in front of Officer Valara, one of the Miotto Defendants called the police department, spoke to Officer Valara and complained that plaintiff was at their home harassing them. *See id* . ¶ 17.Officer Valara told plaintiff to go home and obtain his copy of the Order of Protection. *See id.* ¶ 18.

When plaintiff returned with the Order of Protection, Officer Valara was no longer on duty. *See id.* ¶ 19.Plaintiff explained what happened to the new desk officer. *See id.* ¶ 19.Officer Ahearn then spoke with plaintiff about what transpired that evening. *See* Ahearn Dec. ¶ 3. Soon thereafter, Officer Ahearn asked plaintiff for a copy of the Order of Protection and arrested him. *See* Complaint ¶ 20. Plaintiff asked Officer Ahearn to call Officer Valara, but she refused. *See id.* ¶ 21.While placing plaintiff in a squad car, Officer Ahearn "pushed and shoved" plaintiff, injuring his back. *See id.* ¶ 22.Sometime later that evening, Officer Ahearn took plaintiff to a hospital. *See id.* ¶ 23.Plaintiff left the hospital later that evening and returned to central booking. *See id.* ¶ 24.

## DISCUSSION

***2** Based upon these events, plaintiff alleges the following causes of action against the City Defendants: (1) false arrest; (2) intentional infliction of emotional distress; (3) assault and battery; (4) negligence; (5) a section 1983 claim; and (6) negligent hiring and supervision. The City Defendants move for summary judgment, and for the reasons that follow, the motion is granted.

### I. *Summary Judgment Standard*

Under Fed.R.Civ.P. 56(c), "[a] motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the

moving party as a matter of law."*Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 36 (2d Cir.1994); *see*Fed.R.Civ.P. 56(c).*See generally Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). An issue of fact is genuine when "a reasonable jury could return a verdict for the nonmoving party," and facts are material to the outcome of the particular litigation if application of the relevant substantive law requires their determination.*Anderson*, 477 U.S. at 248.

"A party who moves for summary judgment has the burden of showing that no genuine issue of material fact exists and that the undisputed facts entitle it to judgment as a matter of law."*Rule v. Brine, Inc.*, 85 F.3d 1002, 1011 (2d Cir.1996); *accord Chambers*, 43 F.3d at 36. "In moving for summary judgment against a party who will bear the ultimate burden of proof at trial," however, "the movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim."*Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir.1995); *accord Gallo v. Prudential Residential Servs., Ltd. Partnership*, 22 F.3d 1219, 1223–24 (2d Cir.1994) ("[T]he moving party may obtain summary judgment by showing that little or no evidence may be found in support of the nonmoving party's case."). The moving party, in other words, does not bear the burden of disproving an essential element of the nonmoving party's claim.

If the moving party meets its burden, the burden shifts to the nonmoving party to come forward with "affidavits, depositions, or other sworn evidence as permitted by Fed.R.Civ.P. 56, setting forth specific facts showing that there exists a genuine issue of material fact."*Rule*, 85 F.3d at 1011;*accord*Fed.R.Civ.P. 56(e); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 525–26 (2d Cir.1994). The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts."*Matsushita*, 475 U.S. at 586. Instead, the nonmovant must " 'come forward with enough evidence to support a jury verdict in its favor, and the motion will not be defeated merely ... on the basis of conjecture or surmise.' " *Trans Sport, Inc. v. Starter Sportswear*, 964 F.2d 186, 188 (2d Cir.1992) (citation omitted).

***3** "In ruling on a motion for summary judgment, the district court is required to draw all factual inferences in favor of, and take all factual assertions in the light most favorable to, the party opposing summary judgment."*Id.; accord Chambers*, 43 F.3d at 36. "The function of the district court in considering the motion for summary judgment is not to resolve disputed issues of fact but only to determine whether there is a genuine issue to be tried."*Rule*, 85 F.3d at 1011. Accordingly, "[a]ssessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment."*Id.* Similarly, "[a]ny weighing of the evidence is the prerogative of the finder of fact."*Id.*"If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a *reasonable* inference could be drawn in favor of the nonmoving party, summary judgment is improper."*Chambers*, 43 F.3d at 37 (emphasis added).

**II. *False Arrest Claim***

"A § 1983 claim for false arrest, resting on the Fourth Amendment right of an individual to be free from unreasonable seizures, including arrest without probable cause, is substantially the same as a claim for false arrest under New York law."*Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir.1996) (citations omitted). To succeed on a claim for false arrest under New York law, a plaintiff must show that: "(1) the defendant intended to confine the plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged."*Bernard v. United States*, 25 F.3d 98, 102 (2d Cir.1994). Probable cause to arrest "constitutes justification and 'is a complete defense to an action for false arrest,' whether that action is brought under state law or under § 1983."*Weyant*, 101 F.3d at 852 (citing *Bernard*, 25 F.3d at 102; *Broughton v. State*, 37 N.Y.2d 451, 458, 373 N.Y.S.2d 87, 95, 335 N.E.2d 310, 315 (1975), *cert. denied*,423 U.S. 929, 96 S.Ct. 277, 46 L.Ed.2d 257 (1975); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 118 (2d Cir.1995), *cert. denied*,517 U.S. 1189, 116 S.Ct. 1676, 134 L.Ed.2d 779 (1996)). Accordingly, "[t]here is no liability under § 1983 for false arrest, ... if the arresting officer had probable cause to arrest the plaintiff."*Bryant v. Rudman*, 933 F.Supp. 270, 274 (S.D.N.Y.1996) (citing *Lennon*, 66 F.3d at 423–24; *Singer*, 63 F.3d at 118). Here, the only issue in dispute is whether Officer Ahearn had probable cause to arrest plaintiff.

Probable cause exists where officers "have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested

has committed or is committing a crime."*Weyant,* 101 F.3d at 852. Consequently, probable cause does not demand scientific precision, but seeks a realistic balance between individual rights and law enforcement goals. Indeed, as the Supreme Court noted, the probable cause standard

> ***4** seek[s] to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. [It] also seek[s] to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.

*Gerstein v. Pugh,* 420 U.S. 103, 112, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) (internal quotation marks and citation omitted).

"[T]he validity of an arrest does not depend upon an ultimate finding of guilt or innocence. Rather, the soundness of the arrest hinges on the existence of probable cause at the time the arrest was made."*Haussman v. Fergus,* 894 F.Supp. 142, 147 (S.D.N.Y.1995) (citation omitted). The existence of "[p]robable cause is evaluated under an objective standard."*Id.* at 148 (citing *Lindsey v. Loughlin,* 616 F.Supp. 449, 451 (E.D.N.Y.1985)). In conducting the evaluation, evidence " 'must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." ' *Illinois v. Gates,* 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (quoting *United States v. Cortez,* 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)).

As discussed more fully *infra,* although a number of facts in this matter are disputed by the parties, plaintiff admits a number of critical facts which demonstrate the absence of a genuine issue of material fact on the question of whether Officer Ahearn had probable cause to arrest him. Accordingly, defendants' motion for summary judgment is granted.

Plaintiff does not dispute that an "altercation" took place with Eric Miotto at Dunwoodie's Pizzeria. *See* Mandina Mem. at 3; Complaint ¶ 15 ("Eric [Miotto] harassed the plaintiff and provoked him into a verbal argument."). In fact, during his deposition, plaintiff described this incident in some detail:

> Q: [Eric Miotto] spoke to you first?
>
> A: Yes.
>
> Q: What did he say?
>
> A: He looked at me and smiled and said your son is getting real big.
>
> Q: Did you respond to that?
>
> A: Yes.
>
> Q: What did you say to him?
>
> A: I said, so is your daughter Valerie.
>
> ...
>
> Q: Who is Valerie?
>
> A: Valerie is a little girl that he is the father of that he has not seen in many years.
>
> ...
>
> Q: What did he say to you?
>
> A: Exactly.
>
> Q: Exactly.
>
> A: I don't give a fuck about her.
>
> Q: What did you say to him?
>
> A: I said that is because you are a piece of shit.
>
> Q: What did he say to you?

***5** A: He said you want to go outside.

Q: And what did you say to him?

A: I said, I will lead the way.

Q: And then what happened?

A: Then he just sat there.

Q: Did you say anything else?

A: He started to rub in my face how I am not seeing my son.

Q: While he was rubbing this in your face, did you physically confront him?

A: No.

...

Q: What, if anything, did you say to him?

A: When he started to say how I was never going to see him again, he said he would have custody of my son and you and your wife are not going to see him again and he started to get up and come towards me. I took my hands out of my pockets and he stood there and started screaming, call the police, call the police.

The guy behind the counter started to get nervous and I said to the old man there, you don't have to call the police, I am going to the police right now.... We were both yelling back and forth at each other ....

Q: As you were yelling back and forth to each other, do you remember what it was you were yelling?

A: Something about his daughter.

Mandina Depo. 49–53. Subsequently, plaintiff went to the police station and conveyed this information to both Officers Valara and Ahearn. *See* Complaint ¶ 19; Ahearn Dec. ¶ 3.

Finally, the Order of Protection, provides, in pertinent part, as follows:

ORDERED, ADJUDGED AND DECREED, that neither party shall harass, molest, menace, assault or threaten the other or their family members; and it is further

...

ORDERED, ADJUDGED AND DECREED, that ... Roy Mandina[ ] shall remain away from ... Linda Miotto, and her immediate family members, and shall remain away from her residence, her place of business or that of her family members ....

It is also not disputed that at the time of plaintiff's arrest, Officer Ahearn possessed a copy of the Order of Protection.*See* Complaint ¶ 18.

These undisputed facts establish that there are no material issues of fact as to whether Officer Ahearn had probable cause to arrest plaintiff. Officer Ahearn was reasonable in concluding, based upon information conveyed to her, that plaintiff violated the Order of Protection. More specifically, by telling Eric Miotto (under the circumstances) that his daughter, whom plaintiff believed Mr. Miotto had not seen in "many years," was getting "real big," by calling him a "piece of shit," and by yelling at him "[s]omething about his daughter," Officer Ahearn was certainly reasonable in concluding that plaintiff violated two provisions of the Order of Protection. First, plaintiff was forbidden from harassing or menacing Linda Miotto's "family members." Second, he was required to remain away from Linda Miotto's "immediate family members." Because it was reasonable for Officer Ahearn to view these actions as a violation of either provision in the Order of Protection, she had probable cause to arrest plaintiff. *See, e.g.*, *Otero v. Jennings*, 698 F.Supp. 42, 45 (S.D.N.Y.1988) ("New York equates an order of protection with a showing of probable cause."); *Sassower v. City of New Rochelle*, No. 77 Civ. 5728(LAS), 1980 WL 4673, at *6 (S.D.N.Y. Nov.17, 1980) (finding, in a ruling after a bench trial, that officers' belief that plaintiff violated the terms of an order of protection was reasonable and that, therefore, the officers possessed probable cause to arrest plaintiff).

***6** In opposition, plaintiff makes a number of arguments, none of which dissuade me from reaching this conclusion. First, at times, plaintiff seems to take the position that, in essence, he did not violate the Order of Protection because Eric Miotto initiated the altercation. *See* Mandina Aff. ¶¶ 5–6. [1] Even assuming that to be true, Eric Miotto's purported unlawful conduct did not give plaintiff license to violate the

terms of the Order of Protection. *See Steiner v. City of New York*, 920 F.Supp. 333, 339–40 (E.D.N.Y.1996) (finding that officers had probable cause to arrest plaintiff for violating a court order of protection and concluding, as to a second individual who had engaged in similarly disruptive conduct, that "[a]lthough the police might perhaps be criticized for not arresting [both individuals], they may not properly be held liable for arresting [the plaintiff]"). Regardless of what Eric Miotto may have said or done, plaintiff violated the terms of the Order by harassing him about his daughter, by calling him a "piece of shit" and by failing to "stay away" from Eric Miotto after it should have become clear to plaintiff that the situation in Dunwoodie's Pizzeria was likely to lead to violence. Indeed, plaintiff aggravated the situation by accepting Eric Miotto's invitation to "step outside" and by telling Eric Miotto that he would "lead the way."

[1] It appears that the Order of Protection does not require Eric Miotto to stay away from plaintiff, nor does the Order appear to prevent Eric Miotto from harassing plaintiff. Of course, I express no opinion on whether Eric Miotto's conduct violated any other laws.

Second, plaintiff argues that he did not violate the "stay away" provision because it does not prevent him from going to Dunwoodie's Pizzeria. *See* Mandina Aff. ¶ 4. That may be true, but it is also irrelevant. Plaintiff was not arrested because he was required to "stay away" from Dunwoodie's Pizzeria, he was arrested because he engaged in a verbal altercation with Eric Miotto and because he was required to "stay away" from Eric Miotto.

Plaintiff also attempts to link the terms of the Order of Protection to New York Criminal Procedure Law section 140.10(4), which provides, in pertinent part, as follows:

> (4) Notwithstanding any other provisions of this section, a police officer shall arrest a person, and shall not attempt to reconcile the parties or mediate, where such officer has reasonable cause to believe that:
>
> ...
>
> (b) a duly served order of protection is in effect ... and
>
> (i) Such order directs that the respondent or defendant stay away from persons on whose behalf the order of protection has been issued and the respondent or defendant committed an act or acts in violation of such "stay away" provision of such order; or
>
> (ii) The respondent or defendant commits a family offense as defined in subdivision one of section eight hundred twelve of the family court act or subdivision one of section 530.11 of this chapter in violation of such order of protection.

N.Y.Crim. Proc. Law § 140.10(4) (McKinney Supp.1998). Plaintiff argues that under sub-section (i), only a "stay away" violation suffices and plaintiff did not violate this provision by entering Dunwoodie's Pizzeria and that, under sub-section (ii), he did not commit a "family offense" because Eric Miotto is not a family member within the meaning of the applicable statutory scheme. [2]

[2] I note here that plaintiff does not argue that the terms of the Order of Protection—"family members" and "immediate family members"—somehow exclude Eric Miotto. Instead, as noted *supra*, plaintiff argues that the statutory scheme specifically referred to in sub-division (ii) does not include Eric Miotto. The Order of Protection does not define these terms, and in the absence of any argument to the contrary based upon a specific provision which would preclude such a reading, Eric Miotto is, in relation to his wife, Linda Miotto, a "family member [ ]" or an "immediate family member [ ]."

***7** First, I note that plaintiff's argument suffers from a conceptual flaw in that section 140.10 is not a substitute for an Order of Protection; rather, as its terms clearly provide, it operates as a mandatory arrest provision where certain conditions are satisfied. Indeed, when read in conjunction with the other three subdivisions of section 140.10, which all refer to a police officer's discretionary authority to arrest individuals ("A police officer *may* arrest a person ..."), this reading of the statute becomes even more evident. Consistent with this reading, there is nothing on the face of the statute to suggest that activity which otherwise violates an order of protection somehow becomes non-actionable because that same conduct does not also fall within section 140.10. Similarly, and most relevant to the present matter, nothing on the face of the statute suggests that conduct which otherwise violates an order of protection, and thus gives rise to the requisite showing of probable cause, somehow no longer suffices to establish probable cause solely because that conduct does not also fall within the purview of section 140.10.

That having been said, plaintiff's argument is easily disposed because it is irrelevant whether his conduct violated section 140.10. The point is that it violated the Order of Protection and that is all that is necessary to give rise to the requisite showing of probable cause. Nonetheless, even assuming that it was somehow necessary to show a violation of section 140.10, plaintiff's conduct did that, too. Plaintiff's argument as to the purported inapplicability of section 140.40(4)(b)(i) is that he did not violate the "stay away" provision by entering Dunwoodie's Pizzeria. For reasons discussed *supra*, that argument is irrelevant—plaintiff did not "stay away" from Eric Miotto.

Finally, it is certainly correct, as plaintiff argues, that material presented in this motion reveals that there are questions of fact in dispute. Specifically, plaintiff and Eric Miotto have differing recollections as to what transpired at Dunwoodie's Pizzeria. Mr. Miotto signed a sworn statement, and provided it to Officer Ahearn in connection with plaintiff's arrest, which, in essence, states that plaintiff entered the restaurant and initiated the verbal altercation and that the extent of the verbal attacks were markedly more graphic and derogatory. *See* Miotto Sworn Statement, dated February 19, 1996; annexed as Ex. B to the Ahearn Dec. Plaintiff's deposition, and affidavit in opposition, present a very different picture. *See* Mandina Aff. at ¶¶ 5 & 10; Mandina Depo. at 49–55.

In addition, while plaintiff was at the police department entering a complaint against Eric Miotto and informing Officer Valara of the incident, either Linda Miotto or Eric Miotto called the police department and spoke to Officer Valara. While plaintiff was standing in front of Officer Valara, the caller said that plaintiff was at their house, harassing them and violating the order of protection. *See* Mandina Aff. at ¶ 8. Eric Miotto's sworn statement, in which he indicates that he was the caller, states that he waited approximately one hour after plaintiff left his home to call the police because he did not want to upset his family. Putting aside the disputed issues concerning this timing problem, plaintiff affirmatively swears that he was never at Eric Miotto's residence. *See* Mandina Aff. at ¶ 7.

***8** When plaintiff returned to the police department later that evening, Officer Valara was no longer on duty. Instead, Officer Ahearn, who was not present during the telephone call incident, was on duty. Plaintiff claims that he informed Officer Ahearn about the call and that he urged her to call Officer Valara to confirm as much. *See* Mandina Aff. ¶ 10. Plaintiff claims that because the Miotto Defendants falsified their claims against him, and because the police department should have been aware of that fact, there was no probable cause to arrest him. *See* Mandina Aff. ¶¶ 8–10.

My resolution of this motion avoids these disputed issues. Plaintiff is certainly correct that if the only evidence before me was these disputed versions of the events, summary judgment would not be appropriate. What plaintiff fails to realize, however, is that his own version of the events, as conveyed to the police department, establishes the absence of a material fact on the question of probable cause. Thus, in reaching my decision, I do not rely on Eric Miotto's sworn statement (or, for that matter, any aspect of his version of the events), nor do I rely upon any events that may or may not have taken place at the Miotto residence. Again, instead, and as set forth *supra*, I rely upon plaintiff's version of what transpired at Dunwoodie's Pizzeria. Officer Ahearn states that she, too, relied upon plaintiff's version of the events at Dunwoodie's in arresting him. *See* Ahearn Aff. ¶¶ 9–10.

In sum, I find that there are no material issues of fact as to whether Officer Ahearn had probable cause to arrest plaintiff. Accordingly, defendants are entitled to summary judgment, and plaintiff's section 1983 action based upon his claim of false arrest is dismissed. [3]

3 Because the false arrest claim is dismissed, plaintiff's claim against the City of Yonkers for negligent hiring and supervision is also dismissed.

**III. *Excessive Force***

The standard to be applied to a claim of excessive force during an arrest is well-settled. "[T]he Supreme Court has made it clear that excessive force that is used by officers arresting a suspect ought to be characterized as invoking the protections of the Fourth Amendment, which guarantee citizens the right to be free from unreasonable seizures of the person."*Hemphill v. Schott*, 141 F.3d 412, 416–17 (2d Cir.1998) (citing *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). In determining whether the force used violated the Fourth Amendment, I must make "an exclusively objective" inquiry and examine the following factors: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight."*Id.* at 417 (citing *Graham*, 490 U.S. at 396). I must also take into account "the perspective of the officer at the time of the arrest ... [and] the fact that the officer may have been required to make a

split-second decision."*Lowth v. Town of Cheektowaga,* 82 F.3d 563, 573 (2d Cir.1996); *see also Nash v. Cahill,* No. 94 Civ. 4091(LAP), 1996 WL 412859, at *3 (S.D.N.Y. July 22, 1996).

***9** In the Complaint, plaintiff claims that Officer Ahearn "forcibly removed the plaintiff from the precinct and pushed and shoved him into the rear seat of a police car, injuring plaintiff's back."Complaint ¶ 22. As the proof has developed, plaintiff claims that Officer Ahearn placed handcuffs on him too tightly and that putting his hands behind his back caused him to suffer pain. *See* Mandina Depo. at 70. Plaintiff complained that the handcuffs were too tight, but Officer Ahearn did not loosen them. *See id.*In addition, plaintiff claims that Officer Ahearn pushed his head down as he was entering the back of the car and that as a result he "landed hard on the seat and jammed something in [his] back."*Id.* at 72.

After complaining of this back pain, Officer Ahearn took plaintiff to a hospital. In August 1992, prior to his arrest, plaintiff suffered two herniated disks in a work-related accident. *See id.* at 10.Plaintiff claims that Officer Ahearn's conduct injured this same part of his back. *See id.* at 11.At the hospital, plaintiff went to the emergency room, his spine was x-rayed and he was prescribed pain medication, which plaintiff believes was codeine and valium. *See id.* at 14–15 & 84.The procedure took six or seven hours. *See id.* at 82.The doctor told plaintiff that he could not find anything wrong with his back based upon the x-rays, *see id.* at 83, and that if the pain persisted, he should see his regular physician. After being released from the hospital, plaintiff did not see his regular physician for the pain he allegedly suffered during his arrest. *See id.* at 13–15.

The Court of Appeals and the Supreme Court have made clear that " '[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment."*Graham,* 490 U.S. at 384 (quoting *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir.), *cert. denied,*414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973)). Here, the Complaint alleges that Officer Ahearn "pushed and shoved" plaintiff into the rear of the police car. Complaint ¶ 22. Having considered the evidence in the light most favorable to plaintiff (indeed, having only considered his deposition testimony and the records from his visit to the hospital), I find that there are no material issues as to whether this "push and shove" violated plaintiff's Fourth Amendment rights and that, accordingly, defendants are entitled to summary judgment. Plaintiff's deposition testimony reveals that while he may have suffered some pain, and while the City Defendants admit that some force was used, the treating physician at the hospital, after taking an x-ray of plaintiff's back, could not identify any injury and that, although plaintiff was specifically advised that he should see his personal doctor if the pain persisted, plaintiff chose not to do so. Accordingly, defendants are entitled to summary judgment on plaintiff's excessive force claim. [4]

4 As to plaintiff's various state law causes of action against the City Defendants, plaintiff asks me to exercise supplemental jurisdiction under 28 U.S.C. § 1367. *See* Complaint ¶ 4. Because all of the federal claims have been dismissed, I decline to exercise supplemental jurisdiction. I also note that although the Complaint refers to violations of plaintiff's First, Fourth, Fifth, Eighth and Fourteenth Amendment rights, *see* Complaint ¶ 1, and although the City Defendants specifically moved to dismiss these claims, plaintiff has not offered any evidence or arguments concerning these claims. Accordingly, to the extent they were even properly pled, they are dismissed as well.

**IV. *Subject Matter Jurisdiction and the Miotto Defendants***

***10** Although the Miotto Defendants have not moved to dismiss, the action is dismissed as against them for lack of subject matter jurisdiction. The only federal cause of action pled in the Complaint was plaintiff's section 1983 claim against the City Defendants. *See* Complaint ¶¶ 54–57. As against the Miotto Defendants, plaintiff's sole claim sounds in the state law cause of action for malicious prosecution. *See id.* ¶¶ 62–66.Because the federal cause of action has been dismissed, and because I decline to exercise supplemental jurisdiction over the state law claims, plaintiff's claim against the Miotto Defendants is dismissed for lack of subject matter jurisdiction. *See, e.g., Westmoreland Capital Corp. v. Findlay,* 100 F.3d 263, 266 (2d Cir.1996) (proper for district court to consider lack of subject matter jurisdiction sua sponte and in the absence of a motion).

**CONCLUSION**

For the reasons stated above, the City Defendants' motion for summary judgment is granted. In addition, the action against the Miotto Defendants is dismissed for lack of subject matter jurisdiction.

The Clerk of the Court shall mark this action closed and all pending motions denied as moot.

SO ORDERED:

**All Citations**

Not Reported in F.Supp.2d, 1998 WL 637471

**End of Document**

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Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Anthony BOVE, Plaintiff,
v.
NEW YORK CITY, New York City Police Department, Officer Deutsch and Four Other Unknown Officers, and Mary Blinn, Defendant.

No. 98 CIV. 8800(HB). | Aug. 6, 1999.

**MEMORANDUM & ORDER**

BAER, District J.

***1** Plaintiff Anthony Bove brings this action alleging claims for violations of 42 U.S.C. §§ 1981, 1981a, 1983 and 1985, based on, *inter alia*, a physical beating he allegedly sustained at the hands of several New York City Police Department ("NYPD") officers. The plaintiff moves to amend his complaint, and the currently-named defendants now move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons set forth below, the plaintiff's motion is DENIED, and the defendants' motion is GRANTED.

**I. BACKGROUND**

The plaintiff commenced this action on December 14, 1998. The complaint alleges that "[o]n or about December 18, 1996[sic], the plaintiff was beaten severely by five New York City Police Officers" just outside the apartment of named-defendant Mary Blinn. (Compl.¶ 1.)[1] The beating allegedly occurred around midnight on December 18, 1995 after Blinn telephoned 911 to report a domestic dispute between her and the plaintiff. Six officers from the First Precinct —Sergeant Singer and Officers Doscher, Martin, Minerly, O'Brien and Verdino—responded to the call. (Declaration of Barbara Curtis, Assistant Corporation Counsel ("Curtis Decl.") ¶¶ 4–9 and Exhibit B.) Sometime later, the plaintiff, who lives in the same apartment building as Blinn, knocked on her door.[2] When the door to Ms. Blinn's apartment opened, "approximately five police officers emerged and began beating the plaintiff about the body with their night sticks and shoes."(Compl.¶ 2.) Since Blinn declined to press charges at the time, the plaintiff was not arrested,[3] though Officer Doscher prepared a complaint regarding the domestic dispute that prompted Blinn's 911 call. (*Id.* ¶ 4.)

1 Although the complaint indicates December 18, 1996, the alleged incident in fact occurred on December 18, 1995. Plaintiff's counsel explained this oversight as a proofreading error.

2 The plaintiff's account of the events leading up to this incident are unclear at best, and contradictory at worst. In his original complaint, Bove said that he went upstairs "pursuant to a telephone call made by Ms. Blynn [sic] to come to her premises."(Compl.¶ 2.) Similarly, in his statements to the Civilian Complaint Review Board ("CCRB") he claims that "she insisted that he 'come upstairs so we can talk about it" ' and that she implored him to come quickly. (Curtis Decl. Exhibit B.) Yet during his deposition, the scene is set quite differently. When the question posed was, "[Blinn] didn't ask you to come upstairs?" Bove answered, "No, I went upstairs on my own to apologize", and he answered "Yes" when asked if that was the last phone call made before he went to Blinn's apartment. (Declaration of Elisabeth Youngclaus, Assistant Corporation Counsel ("Youngclaus Decl.") Ex. A at 5.) Still later, paragraph 2 of the plaintiff's proposed amended complaint, submitted some two weeks after the plaintiff's deposition, reads, "At the time and place heretofore mentioned, plaintiff had knocked on the door of the said Mary Blinn."

3 On December 29, 1995, however, Blinn signed a criminal complaint which alleged that on December 17, 1995 at approximately 11:47 p.m., Bove came to her apartment and hit and pushed her. (*See* Declaration of Muriel Goode–Trufant, Assistant Corporation Counsel ("GT Decl.") Ex. E.) The complaint also alleged that Bove had called her "in excess of 200 times" at home and at work, making threats against Blinn and her friends. (*Id.*) After his arrest in January 1996, Bove pled guilty on June 28, 1996 to Aggravated Harassment in the Second Degree and was sentenced to three years probation. (*Id.*)

Sometime later, the plaintiff called the First Precinct alleging that he had been severely beaten by officers from that precinct. (Declaration of Anthony Bove ("Bove Decl.") ¶ 8.) Sergeant Fazzolari responded to the plaintiff's call and went to the plaintiff's apartment to speak with him about the

alleged incident. Bove alleges that Fazzolari offered medical assistance, but he refused.

At 4:03 a.m., the plaintiff registered at the emergency room of the New York Downtown Hospital. (GT Decl. Ex. D.) After extensive examination and testing that included a cervical spine x-ray, the plaintiff was diagnosed as having a "contusion"—i.e., a bruise—on his head, (*Id.*), and was released.(*Id.*)

On December 21, 1995, the plaintiff filed a complaint with the Civilian Complaint Review Board. (Bove Decl. ¶ 10.) Moreover, on or about March 12, 1996, the plaintiff filed a notice of claim with the Comptroller's Office of the City of New York. (*See* GT Decl. Ex. C.) The notice of claim states that Bove's claim arose on December 18, 1995 at approximately 12:30 a.m., "when approximately five officers of the NYPD, whose identity is yet to be ascertained, kicked, hit and struck the complainant with their nightsticks, [4] causing complainant to sustain injuries to his head, neck and spine ...."(*Id.*)More specifically, the plaintiff claims that the incident resulted in injuries including "a double hernia, a herniated disc, a deviated septum causing painful fluid to collect in my ear, damage to my hearing, and damage to my eyesight."(Affidavit of Anthony Bove ("Bove Aff.") ¶ 2.)

[4] Again, the description Bove gave to the CCRB is different and reads: "Mr. Bove said that the officers did not hit him with their nightsticks, but hit him with something 'that stung' and was black and metal."(Curtis Decl. Ex. B.)

***2** On December 14, 1998, the plaintiff commenced this action, naming as defendants the City of New York, the New York City Police Department ("NYPD"), "Officer Deutsch, and Four Other Unknown Officers" and Mary Blinn. The complaint "is an action pursuant to 42 U.S.C.1981, 1983, and 1985 for the violation of the plaintiff's Civil Rights, and conspiracy to violate plaintiff's civil rights."(Compl.¶ 1.) Although the plaintiff cites as "Statutes involved" 42 U.S.C. §§ 1981, 1981a(1), 1988(b), 1985, "Conspiracy Against [sic] Rights 18 U.S.C.241 [sic]" and "the equal protection clause of the Fourteenth Amendment", (Compl.¶ 6), Bove's request for damages is limited to "42 U.S.C., [sic] 1981 and [sic] 1981a and 42 U.S.C.1983 [sic]" based on "the unlawful conspiracy to violate plaintiff's rights ...." (*See* Compl. at 5.) The plaintiff also alleges two causes of action under New York state law for "tortious assault" and "intentional infliction" and seeks compensatory and punitive damages.

The plaintiff now seeks to amend his complaint, and the currently-named defendants move for summary judgment.

## II. DISCUSSION

### A. *Motion to Amend*

By his "Memorandum of Law in Support of the Motion to Amend the Complaint to Add Parties [sic] Defendants", the plaintiff seeks to amend his complaint to substitute for the herein-captioned "Officer Deutsch and Four Other Unknown Officers" the names of five NYPD officers: Officers Nicholas Doscher, Paul Minerly, Richard Verdino, Sean O'Brien, and Sergeant Carmine Fazzolari.

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend should "be freely given when justice so requires."Fed.R.Civ.P. 15(a). However, a court may deny leave to amend if the proposed amendment(s) would be futile. *See American Express v. Robinson*, 39 F.3d 395, 402 (2d Cir.1994). Because I find that the proposed amendments in the case at bar would be futile—due to both procedural and substantive defects—the plaintiff's motion is denied.

#### 1. Officer Doscher

The plaintiff contends that his claims against Officer Nicholas Doscher in the proposed amended complaint relate back to the original complaint, which mistakenly identified Doscher as "Officer Deutsch."

Federal Rule of Civil Procedure 15(c) governs the determination of whether an amended complaint that seeks to substitute the name of a party will "relate back" to the date of the original complaint. Rule 15(c) reads, in relevant part:

An amendment of a pleading relates back to the date of the original pleading when

> ...
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received

such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

***3** Fed.R.Civ.P. 15.

Bove retained his lawyer on November 1, 1998. (*See* Wolf Decl. ¶¶ 3, 6.) The complaint in the case at bar was filed on December 14, 1998. Thus, approximately *six weeks* passed between the time that the plaintiff consulted his attorney and the time the action was commenced. [5] The relation back doctrine serves to correct mistakes of fact and law—not to encourage delay—and should not apply to salvage a plaintiff's lack of diligence. It is undisputed that Doscher, the purportedly "proper defendant", is not "already in court." *See Arendt v. Vetta Sports, Inc.*, 1996 WL 5324, *2 (N.D.Ill. Jan. 4, 1996) ("Relation back is generally allowed in order to correct a misnomer of defendant where the proper defendant is *already* in court and the effect is merely to correct the name under which he is sued.") (emphasis added). Indeed, the plaintiff has made no attempts to formally put Officer Doscher on notice of this suit, and no attempt has been made to actually serve him.

5 In fact, the time between Mr. Wolf's first contact with Bove—and presumably, receiving some form of notice and description as to the plaintiff's possible claim—and the filling of the complaint was much greater than six weeks. Counsel's declaration indicates that during *the summer* of 1998, "I received a call from the plaintiff who was recuperating from an operation and was not up to seeing me."(Wolf Decl. at ¶ 2.)

Notwithstanding the plaintiff's contentions to the contrary, the information needed by the plaintiff to obtain the names and/or identities of the officers on the scene of the alleged incident was available long before the statute of limitations had run. The final CCRB report, which included interviews with all the officers on the scene that evening, and of course, each officer's name, shows that the final supervisor's signature was affixed on April 21, 1997. (*See* Curtis Decl. Ex. B.) Even assuming that the report was not immediately made available to the plaintiff, [6] it is both the plaintiff's and his lawyer's position that on November 4, 1998, Bove received and forwarded to counsel a letter from the CCRB which informed him that the investigation was being closed since "the Board was unable to identify the police officer(s) alleged to have been involved in the incident."(Wolf Decl. Exhibit A.). This letter should have alerted the plaintiff that a final report had been completed. The CCRB materials were and would have been available to the plaintiff had he simply written a letter to the Board and *asked* for a copy. [7] Plaintiff's counsel did not obtain the CCRB's investigation file and report until *May* 13, 1999—over six months after it became available and approximately five months after suit was commenced—and only after defense counsel referenced the file during a teleconference with the Court and *suggested* that plaintiff's counsel obtain a copy. Moreover, in conjunction with the discovery that was available to the plaintiff during his criminal proceedings, the plaintiff obtained or could have obtained copies of the report made by Officer Doscher the night of the alleged beating. Put another way, a modicum of diligence would have allowed the names of all the officers to be in the complaint.

6 The plaintiff was also apparently in contact with the investigating officer ("I.O.") during the investigation. I.O. Chen's notes, dated February 25, 1997, indicate that he received a telephone call from Bove to confirm his address and phone number. (*See* Curtis Decl. Ex. B.)

7 This information was conveyed to the Court by representatives of the CCRB. Moreover, I was informed, the plaintiff could have obtained the Board's investigation materials—and thus the officers' names—*before* the investigation was closed, simply by having subpoenaed the file.

While "heroic" diligence is not required, neglect and inaction are inexcusable. Accordingly, I find the doctrine of relation back inapplicable to the case at bar and deny the plaintiff's motion to amend. [8]

8 Alternatively, fatal to the plaintiff's application to amend his complaint was his failure to serve Officer Doscher within the time proscribed by Rule 4(m). Since the complaint was filed on December 14, 1998, the plaintiff was allowed 120 days after the filing—until April 13, 1999—to serve the defendants named therein. *See*Fed.R.Civ.P. 4(m). By letter to the Court dated March 17, 1999, plaintiff's counsel indicated that "On the same day of the [February 18, 1999] conference, we provided Corporation Counsel with the name of one of the officers, an officer "Doscher." My client advises me that upon checking with the precinct, Officer Doscher is there."(GT Decl. Ex. G.) Thus, the plaintiff was aware by at least February 18, 1999 that Officer Doscher was known and available for effective service. The Court's records indicate that Officer Doscher has not, to this day, been served by the plaintiff. Given the failure to serve

this proposed defendant by the April 13, 1999 deadline, this Court was and is able to on its own initiative dismiss this action. *See*Fed.R.Civ.P. 4(m).

**2. Officers Minerly, Verdino, O'Brien and Carmine**

***4** As to Officers Minerly, Verdino, O'Brien and Fazzolari, the plaintiff's motion to amend is also denied. The plaintiff alleges that he was only recently able to identify these officers as the ones allegedly involved in his beating. (*See* Bove Aff. ¶ 12.)[9] Thus, at the time the complaint was filed in this action, the plaintiff did not know their identities. In *Barrow v. Wethersfield Police Department,* 66 F.3d 466, 470 (2d Cir.1996), the Second Circuit ruled that "Rule 15(c) does not allow an amended complaint adding new defendants to relate back if the newly-added defendants were not named originally because the plaintiff did not know their identities."The plaintiff in *Barrow* named as defendants in his complaint ten "John Does" police officers since their identities were not known to him. The plaintiff then amended his complaint, after the statute of limitations, to identify the officers by name. The Second Circuit affirmed the district court's dismissal of the amended complaint as untimely, holding that "[s]ince the new names were added not to correct a mistake but to correct a lack of knowledge, the requirements of Rule 15(c) for relation back are not met."*Id.* at 470.Similarly here, the plaintiff did not know the identity of the officers until he sought to file an amended complaint more than a year after the statute of limitations had run. Thus, as in *Barrow*, Bove sought to correct a lack of knowledge, not to correct a mistake, and the amendment is therefore untimely.

9 The plaintiff's memorandum in support of his motion to amend similarly reads: "It is [sic] when the depositions of all the officers listed in the C.C.R.B. report resulted in a virtual line-up that the plaintiff was able to identify the perpetrators."(Pl.'s Mem. Supp. Am. at 6.)

The plaintiff contends that equitable tolling should operate to extend the statute of limitations. On this score, Bove relies on *Farkas v. Farkas,* 168 F.3d 638 (2d Cir.1999) and *Blaskiewicz v. County of Suffolk,* 29 F.Supp.2d 134 (E.D.N.Y.1998) for the proposition that a coverup by the six officers prevents the defendants from raising the statute of limitation as a defense. The holding in *Farkas*, however, was limited to cases of the concealment of conversion. 168 F.3d at 642 ("[P]articipation in the concealment of a conversion, if 'intentional' or even 'careful', can be a sufficient basis for estoppel.") (internal citations omitted). More importantly is that there was no coverup or concealment by the officers—at least none that prevented the plaintiff from discovering their identities. It is undisputed that all six officers interviewed by the CCRB concede that they responded to Blinn's apartment on the night in question. Moreover, the statements given to the CCRB by Officers Doscher and Minerly identify the other four officers who responded to the scene that night, a fact which belies any claims of cover-up or concealment such that the plaintiff was prevented from obtaining the names of the alleged wrongdoers. (Curtis Decl. Ex. B.) In summation, the officers were identified and available to the plaintiff well before the three year statute of limitation ran.

Moreover, the plaintiff's reliance on *Blaskiewicz* is misplaced, if not harmful to his position. Indeed, the court there correctly ruled that equitable tolling arises where a party's acts of concealment prevent a plaintiff from "becoming aware of facts that give rise to a cause of action ... The doctrine is applicable where the defendant engages in conduct that concealed from the plaintiff *the existence of* the cause of action."29 F.Supp.2d at 141 (emphasis added) (internal citations and quotations omitted). In the case at bar, the defendants could not possibly have engaged in conduct that concealed from Bove the facts that gave rise to his cause of action. Assuming *arguendo* that the alleged beating did in fact occur, the plaintiff left the scene well aware that his cause action existed. Indeed, the plaintiff filed a complaint with the CCRB immediately after the alleged incident, filed a timely notice of claim, and timely commenced the instant action.

**C. *Defendants' Motion for Summary Judgment*[10]**

10 The plaintiff erroneously named as defendants both the City of New York and New York Police Department. Pursuant to the New York City Charter, an agency of the City of New York cannot be sued independently. *See* N.Y. City Charter, Chapter 17, § 396 ("[a]ll actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the City of New York and not in that of any agency"). Accordingly, the plaintiff's complaint against the New York City Police Department is dismissed. *See East Coast Novelty Co. v. City of New York,* 781 F.Supp. 999, 1010 (S.D.N.Y.1992) ("As an agency of the City, the police department is not a suable entity.").

***5** Although the plaintiff's claims against the officers must be dismissed on procedural grounds, the substance of Bove's claims warrant brief comment.

**1. Standards for Summary Judgmnt**

Summary judgment is properly granted only when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue of material fact and the movant is entitled to summary judgment as a matter of law. Fed.R.Civ.P. 56(c). The substantive law determines what facts are material to the determination. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In assessing the record before the court, the "non-movant will have his allegations taken as true,"*Distasio v. Perkin Elmer Corporation*, 157 F.3d 55, 61 (2d Cir.1998), but he or she may not oppose summary judgment merely by offering conclusory allegations or denials. *See Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98, 101 (2d Cir.1997).

**2. Section 1981 Claim**

To establish a claim under § 1981, a plaintiff must establish the following three elements: (1) the plaintiff is a member of a racial minority; (2) the defendants intended to discriminate against the plaintiff on the basis of race; and (3) the discrimination "concerned one or more of the activities enumerated in the statute (i.e., make and enforce contracts, sue and be sued, give evidence, etc.)."*Mian v. Donaldson, Lufkin & Jenrette Securities Corporation*, 7 F.3d 1085, 1087 (2d Cir.1993). As a white male of European ancestry, Bove is not a member of a racial minority. Moreover, the plaintiff does not allege that he was discriminated against because of his race.*Jenkins v. Arcade Building Maintenance*, 44 F.Supp.2d 524, 528 (S.D.N.Y.1999) ("In order to survive a motion to dismiss, the events of the intentional and purposeful discrimination, as well as the racial animus constituting the motivating factor for the defendant's actions must be specifically pleaded in the complaint.") (internal quotations omitted). Accordingly, the plaintiff's § 1981 claims must be dismissed. [11]

11 The plaintiff's claims based on § 1981a are even less meritorious and are similarly dismissed. Indeed, § 1981a applies only to cases involving allegations of intentional discrimination in the employment context. *See*42 U.S.C. § 1981a. There are no allegations in the case at bar that so much as hint at this form of discrimination.

**3. Section 1983**

**a. Claims Against the Officers**

The plaintiff argues that the officers' alleged use of excessive force against him violated his rights under the Fourteenth Amendment. The defendants counter that an allegation of excessive force used by police officers implicates the Fourth Amendment's prohibition against unreasonable searches and seizures, not the Fourteenth Amendment's protections. Contrary to the defendants' claim, the Second Circuit has recognized that the use of excessive force by police officers can implicate the Fourteenth Amendment's guarantee of substantive due process. As the court recently noted in *Hemphill v. Schott*,"This court has held that *outside the context of an arrest*, a plaintiff may make claims of excessive force under § 1983 under the Due Process Clause of the Fourteenth Amendment."141 F.3d 412, 418 (2d Cir.1998) (emphasis added) (citing *Rodriguez v. Phillips*, 66 F.3d 470, 477 (2d Cir.1995)); *see also Tierney v. Davidson*, 133 F.3d 189, 199 (2d Cir.1998) ("Plaintiffs do not assert that they were arrested or seized, and therefore these [Section 1983] claims fall outside the Fourth Amendment protections ... and are governed instead by the Due Process Clause of the Fourteenth Amendment.") The plaintiff was neither arrested nor seized on the night in question, and thus, a Fourteenth Amendment analysis is appropriate.

***6** A four part test is employed to determine whether an officer's use of force qualifies as excessive under the Fourteenth Amendment—indeed, whether the alleged force "shocks the conscience." *See Hemphill*, 141 F.3d at 419; *Tierney*, 133 F.3d at 199. These factors are: "(1) the need for the application of force, (2) the relationship between the need and the amount of force that was used, (3) the extent of injury inflicted, and (4) whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."*Id.* (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.1973)).

Given the conflicting accounts of what exactly happened outside of defendant Blinn's door in the early morning of December 18, 1995—the plaintiff's allegations of a brutal beating versus the defendants' view that no such incident took place—it might appear at first blush that this factual dispute would preclude summary judgment. However, the plaintiff's alleged injuries that are supported by the objective hospital records lead me to conclude that, as a matter of law, the force—if any—used by the NYPD on the night in question was at worst, *de minimis*, and insufficient to shock this Court's conscience. *See Tierney*, 133 F.3d at 199 (granting summary judgment against plaintiff's § 1983 claim where officers' alleged conduct was "*de minimis* " and "benign").

To be sure, after the alleged altercation, the plaintiff returned to his apartment and chose to call the First Precinct to complain of the alleged incident. (Bove Aff. ¶ 3.) Defendant

Fazzolari came to the plaintiff's apartment to document the complaint, and it was at that time that the officer offered to the plaintiff medical assistance. [12] The plaintiff declined, and it was not until some time later that Bove, as a "non-urgent," walk-in patient at the New York Downtown Hospital emergency room, was registered for and sought medical attention. (Curtis Decl. Ex. B.) Medical personnel conducted an extensive examination of Bove, and concluded that the only "injury" was a slight bruise to his head, for which he was told to apply ice and take Motrin. (*Id.*) Although the plaintiff complained of having been kicked in the shoulder and elsewhere, no bruises were found. (*Id.*) A cervical spine x-ray failed to reveal any discernable injuries. Notwithstanding the hospital's findings, Bove now contends that the injuries resulted in "a double hernia, a herniated disc, a deviated septum causing painful fluid to collect in my ear, damage to my hearing, and damage to my eyesight."(Bove Aff. ¶ 6.) The plaintiff also alleges that he has since been operated on for "a double hernia, and hemorrhoids" and that a third operation is required. These allegations are completely contradicted by the hospital's records and, more importantly, are unsupported by any evidence other than the plaintiff's assertions. Indeed, notably absent from the plaintiff's papers is any documentation as to his alleged injuries. There are no affidavits from the plaintiff's treating physicians or psychologists, no hospital records—in short, nothing to substantiate that the plaintiff's current ailments exist, let alone that the alleged "beating" by the NYPD was the proximate cause of these injuries. All the record contains for purposes of this motion are Bove's bald and conclusory allegations which are insufficient to withstand a motion for summary judgment. *See Podell,* 112 F.3d at 101;*see also International Minerals and Resources v. Pappas,* 96 F.3d 586, 592 (2d Cir.1996) ("The mere scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant].") (citations omitted).

12 It was Fazzolari's testimony that the plaintiff at that time showed no signs of physical injury. (BC Declaration at ¶ 5.)

**b. Claims Against the City of New York**

***7** The plaintiff's claim against the City of New York also fail as a matter of law. It is well-settled that a municipality may not be held liable under section 1983 on the basis of *respondeat superior*. *Monell v. Department of Social Services,* 436 U.S. 658 (1978). Instead, the plaintiff must show that his or her constitutional rights were violated by acts committed pursuant to "official policy" of the municipality. *Id.* at 694; *Turpin v. Mailet,* 619 F.2d 196, 197 (2d Cir.1980). This requirement was intended to distinguish acts of the municipality from the acts of its employees, and thus to only hold a municipality liable based upon actions for which it is actually responsible. *See Pembaur v. Cincinnati,* 475 U.S. 469, 479–80 (1986).

Despite having not even pled a *Monell* claim, [13] nor having conducted any *Monell* discovery, the plaintiff seeks to hold the City of New York liable based on the alleged conduct of the individual officers. Bove argues that "[t]he depositions [of the police officers] together with the Mollen Commission Report and the Report of Amnesty International of Violence in the N.Y.P.D., *inter alia,* support a Monel [sic] claim against the defendant City."(Pl.'s Mem. Opp. Summ. J. at 5.) Both reports were annexed to the plaintiff's submissions.

13 The plaintiff's proposed amended complaint *hints* at a "negligent supervision" or "negligent training" policy or custom claim. Paragraph 16 reads, "That upon the appearance of the plaintiff at the entranceway of the [sic] defendant Blinn's apartment, the officers violated the training and procedures of the defendant New York City Police Department."(Proposed Am. Compl.) Unfortunately for the plaintiff, "[t]he mere assertion ... that a municipality has such a custom or policy is insufficient in the absence of allegations of fact tending to support, at least circumstantially, such an inference."*Dwares v. City of New York,* 985 F.2d 94, 100 (2d Cir.1993); *see also Ricciuti v. N.Y.C. Transit Authority,* 941 F.2d 119, 124 (2d Cir.1991) ("our prior cases suggest that an allegation of municipal policy or custom would be insufficient if wholly conclusory").

The plaintiff seeks to recover under Section 1983–based allegations that the City has a policy or custom which includes the use of *excessive force* by the NYPD, not for damages based upon any type of coverup or concealment. The two reports are therefore inapposite. The Mollen Commission's findings fail to even hint at a policy or custom of excessive force, but rather addressed what it saw as pockets of corruption within specific precincts. The Amnesty International Report deals with the alleged practice by police of "overcharging" suspects—i.e. adding charges of additional offenses to the charges that provided the basis for the suspects' arrest—to cover up police misconduct, and is therefore equally inapplicable here.

Without these two reports, the plaintiff relies on one alleged incident of excessive force by the police. It is well-settled

that "[a] single incident alleged in a complaint, especially if it involved only actors below the policymaking level, generally will not suffice to raise an inference of the existence of a custom or policy."*Dwares*, 985 F.2d at 100. Accordingly, the complaint as to the City of New York is dismissed.

**4. Section 1985 Claims**

To prevail on a claim brought pursuant to § 1985(3), a plaintiff must show: (1) that a conspiracy existed; (2) the purpose of the conspiracy was to deprive, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act was committed in furtherance of the conspiracy; and (4) "whereby another is injured in his person or property."42 U.S.C. § 1985(3). Moreover, the conspiracy must also be motivated by "some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action."*Mian*, 7 F.3d at 1088 (citing *United Brotherhood of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 829 (1983)). Here, the complaint does not allege, nor does the plaintiff set out to prove, that the alleged beating was motivated by Bove's race or other class-based animus. *See id*, 7 F.3d at 1088 ("an essential element to [a Section 1985 claim] is a requirement that the alleged discrimination took place because of the individual's race"). Thus, the plaintiff's's claims based on § 1985 must also be dismissed.

**5. State Law Causes of Action**

***8** The plaintiff also alleges two causes of action under New York state law for "tortious assault" and "intentional infliction." New York's General Municipal Law §§ 50–e and 50–i require that a plaintiff asserting state law tort claims against a municipality or its employees acting within the scope of their employment must: (1) file a notice of claim within 90 days of the incident giving rise to the plaintiff's claim, and (2) commence the suit within one year and ninety days from the date upon which the cause of action first accrues. N.Y. Gen. Mun. Law §§ 50–e and 50–i. The plaintiff's cause of action accrued on December 18, 1995, the date of the alleged assault. Although Bove timely filed a notice of claim, his lawsuit was not filed until December 14, 1998, well after the one year and ninety day period proscribed by the laws of New York. The plaintiff's state law causes of action are therefore time-barred and dismissed. [14]

14 Because the plaintiff's claims fall short on the merits, the complaint as to defendant Blinn is similarly dismissed. Indeed, her alleged participation is based on her entry into a conspiracy to violate the plaintiff's civil rights. To support a cause of action for conspiracy under § 1983 or otherwise, a plaintiff must show that the defendants "acted in a willful manner, culminating in an agreement ... that violated plaintiff's rights, privileges, or immunities secured by the Constitution."*Ahlers v. Carrillo*, 1997 WL 167049, *3 (S.D.N.Y. April 9, 1997) (citations omitted). As discussed herein, the plaintiff's claim that his rights were violated fail as a matter of law, and with it, so too do his claims against defendant Blinn for her purported role in the conspiracy.

## III. CONCLUSION

For the reasons stated above, the plaintiff's motion is DENIED, and the defendants' motion is GRANTED in its entirety. The Clerk of the Court is instructed to close this case.

SO ORDERED.

**All Citations**

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Only the Westlaw citation is currently available.
United States District Court,
E.D. Washington.

Ronald L. McGOVERN, Plaintiff,
v.
SPOKANE POLICE
DEPARTMENT, et al., Defendants.

No. CV–08–378–LRS. | May 3, 2010.

**Attorneys and Law Firms**

Ronald L. McGovern, Colbert, WA, pro se.

Ellen M. O'Hara, Spokane City Attorney's Office, Spokane, WA, for Defendants.

**ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

LONNY R. SUKO, Chief Judge.

***1 BEFORE THE COURT** is the Defendants' Motion For Summary Judgment (Ct.Rec.30). It is heard without oral argument.

This is a 42 U.S.C. Section 1983 action in which the Plaintiff claims he was falsely arrested by City of Spokane police officers who used excessive force upon him in violation of his federal constitutional rights. Plaintiff apparently also asserts related state law claims. Furthermore, Plaintiff asserts his rights under the Americans With Disabilities Act (ADA), 42 U.S.C. Section 12101 *et seq.*, were violated. [1]

[1] These are the claims asserted in Plaintiff's Second Amended Complaint. (Ct.Rec.17). Although Plaintiff did file a Third Amended Complaint (Ct.Rec.26), he did so without filing a motion and seeking leave of the court, although he was instructed in an order (Ct.Rec.27) of the necessity of doing so. Accordingly, the Third Amended Complaint is not considered.

**SUMMARY JUDGMENT STANDARD**

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d 1129 (9th Cir.), *cert. denied*,423 U.S. 1025, 96 S.Ct. 469, 46 L.Ed.2d 399 (1975). Under Fed.R.Civ.P. 56, a party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion.*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Semegen v. Weidner*, 780 F.2d 727, 732 (9th Cir.1985). Summary judgment is precluded if there exists a genuine dispute over a fact that might affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248.

The moving party has the initial burden to prove that no genuine issue of material fact exists. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."*Id.* The party opposing summary judgment must go beyond the pleadings to designate specific facts establishing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In ruling on a motion for summary judgment, all inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmovant.*Matsushita*, 475 U.S. at 587. Nonetheless, summary judgment is required against a party who fails to make a showing sufficient to establish an essential element of a claim, even if there are genuine factual disputes regarding other elements of the claim. *Celotex*, 477 U.S. at 322–23.

**FALSE ARREST**

Officer James Muzatko had reasonable suspicion to stop the vehicle the Plaintiff was driving. An officer must have "a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause. *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989), citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Officer Muzatko had developed information that a vehicle bearing a certain license plate he had observed coming from a location known for criminal activity was registered to a felony warrant suspect, "Roger C," who had a felony warrant out of Wenatchee under the alias "Rodney C." This was the vehicle Plaintiff turned out to be driving on the morning he was stopped by Officer Muzatko. According to Officer Muzatko, the driver of the vehicle (who turned out to be the Plaintiff) matched the general physical description of "Roger C."

***2** Under the circumstances, it was appropriate for Officer Muzatko to inquire regarding Plaintiff's identity. Questions concerning a suspect's identity are a routine and accepted part of *Terry* stops. *Hiibel v. Nevada*, 542 U.S. 177, 185–89, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004). Plaintiff denied he was "Roger C" and Officer Muzatko then asked the Plaintiff for identification. Plaintiff indicated he did not have any identification and that he did not have a driver's license either. Plaintiff then identified himself as "Ronald McGovern." Officer Muzatko ran Plaintiff's name through the computer, along with the Plaintiff's date of birth and other identifying information, and learned the Plaintiff had a suspended driver's license. Officer Muzatko then informed the Plaintiff he was under arrest for misdemeanor "Driving with a Suspended License in the 3rd degree."

The Fourth Amendment requires law enforcement officers to have probable cause before making a warrantless arrest. *Michigan v. Summers*, 452 U.S. 692, 700, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981)."Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested."*United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir.2007). An arrest is unlawful unless there is probable cause to believe a specific criminal statute has been or is being violated.*Devenpeck v. Alford*, 543 U.S. 146, 152, 124 S.Ct. 588 (2004). Because probable cause is a wholly objective "reasonable officer" standard, the officer's subjective motivation is irrelevant. *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Here, Officer Muzatko clearly had probable cause to arrest the Plaintiff for driving with a suspended license considering the offense had been committed in the officer's presence. The offense of driving on a suspended license in the third degree is a misdemeanor for which, in the State of Washington, the driver may be arrested.*State v. Perea*, 85 Wash.App. 339, 341–42, 932 P.2d 1258 (1997).

The stop of the vehicle the Plaintiff was driving, and the arrest of Plaintiff for driving with a suspended license, were constitutionally proper. There are no genuine issues of material fact to preclude the court from making such findings as a matter of law. [2]

2 The search of Plaintiff's vehicle incident to the arrest was constitutionally proper under the law prevailing at the time, *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

**EXCESSIVE FORCE**

Excessive force claims are analyzed under the Fourth Amendment's "objectively reasonable" test. *Graham v. Connor*, 490 U.S. 386, 394–95, 109 S.Ct. 1865, 104 L.Ed.2d 443, S.Ct. (1989)." '[T]he right to make an arrest ... necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.' " *Muehler v. Mena*, 544 U.S. 93, 99, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005), quoting *Graham*, 490 U.S. at 396. The force, however, must be "objectively reasonable" in light of the facts and circumstances confronting the officers, without regard to their underlying intent or motivation. *Graham*, 490 U.S. at 397. The use of handcuffs is warranted in inherently dangerous settings to minimize the risk of harm to suspects, officers and innocent third parties. *Muehler*, 544 U.S. at 100. Alleged injuries reflecting only minimal force are insufficient to qualify as constitutionally excessive or overcome the officers' entitlement to qualified immunity. *Nolin v. Isbell*, 207 F.3d 1253, 1258 (11th Cir.2000) (Police officer's use of force against arrestee was *de minimis*, and thus, officer did not lose his qualified immunity from arrestee's § 1983 claim alleging excessive force; officer grabbed arrestee and shoved him a few feet against a vehicle, pushed his knee into the arrestee's back and pushed arrestee's head against the van, searched arrestee's groin area in an uncomfortable manner, and placed the arrestee in handcuffs); *Bowles v. State*, 37 F.Supp.2d 608, 612 (S.D.N.Y.1999) (In § 1983 action, arrestee failed to state claim of use of excessive force, where arrestee merely alleged that he was pushed and shoved by officer during search incident to arrest).

***3** The record shows that Officer Muzatko, with the assistance of Officer David Grenon [3], used a standard handcuffing ("double cuff") procedure on the Plaintiff which was justified under the circumstances and which entailed a *de minimis* use of force. Likewise, the record shows the subsequent removal of the handcuffs was pursuant to standard procedure and entailed only a *de minimis* use of force. [4] Plaintiff has not raised a genuine issue of material fact that the officers employed excessive force and has not produced any medical evidence establishing he suffered injuries at that time which were more serious than what would be expected from a *de minimis* use of force. This *de minimis* use of force was reasonable and not excessive. Furthermore, even if the force used was excessive in some respect, the individual officers would be entitled to qualified immunity from damages on the basis that a reasonable officer would have believed the force used was justified and not excessive.

There was no clearly established law which would have put the officers on notice that the force used by them during these standard handcuffing and "uncuffing" procedures was excessive and in violation of Plaintiff's constitutional rights. The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."*Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Even assuming the existence of a constitutional violation, an officer is entitled to qualified immunity if the constitutional right was not clearly established at the time of the alleged violation. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

3 Officer Grenon necessarily must be the "Officer Eugene" referred to in Plaintiff's Second Amended Complaint.

4 Plaintiff's Second Amended Complaint, which is the complaint of record, appears to contend the alleged excessive force occurred when the handcuffs were removed.

**STATE LAW CLAIMS**

To the extent Plaintiff is asserting state law claims for false arrest and excessive force (assault), those claims are barred by the applicable two year statute of limitations. RCW 4.16.100(1). The incident occurred on December 5, 2005 and Plaintiff did not file his complaint until December 5, 2008. [5]

5 The federal Section 1983 claims are timely since the three-year limitation period specified in RCW 4.16.080(2) pertains to those claims. *Rose v. Rinaldi*, 654 F.2d 546 (9th Cir.1981).

To the extent Plaintiff alleges a state law claim of "outrage," it appears it is not time-barred because the three-year limitation period specified in RCW 4.16.080(2) applies. *Cox v. Oasis Physical Therapy, PLLC*, 153 Wash.App. 176, 192, 222 P.3d 119 (2009). The elements of "outrage" are: 1) extreme and outrageous conduct; 2) intentional or reckless infliction of emotional distress, and 3) actual result to the plaintiff of severe emotional distress.*Brower v. Ackerley*, 88 Wash.App. 87, 98, 943 P.2d 1141(1997). Based on the undisputed facts of record, and the court having found as a matter of law there was no false arrest of the Plaintiff and excessive force was not used upon him, the court finds as a matter of law the officers did not engage in extreme and outrageous conduct and intentionally or recklessly inflict emotional distress upon the Plaintiff. Moreover, there is no evidence in the record establishing that Plaintiff suffered severe emotional distress.

**ADA CLAIM**

***4** There is no evidence in the record raising a genuine issue of material fact as to whether Plaintiff was "excluded from participation in or denied the benefit of [a] public entity's services, programs, or activities, or was otherwise discriminated against by [a] public entity" by reason of a disability. 42 U.S.C. Section 12132. Because Plaintiff was legitimately arrested, and force was reasonably used upon him, it necessarily follows that Plaintiff was not discriminated against because of any physical disability.

**CONCLUSION**

Defendants' Motion For Summary Judgment (Ct.Rec.30) is **GRANTED.**Defendants are awarded judgment on all claims asserted by Plaintiff in his Second Amended Complaint. Because no constitutional violation was committed by the individual officers, there can be no liability on the part of the City of Spokane or its police department. *City of Los Angeles v. Heller*, 475 U.S. 796, 798–99, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986).

**IT IS SO ORDERED.**The District Court Executive is directed to enter judgment accordingly and forward copies of the judgment and this order to Plaintiff and to counsel for Defendants.

**All Citations**

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416 Fed.Appx. 704
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Tenth
Circuit Rule 32.1. (Find CTA10 Rule 32.1)
United States Court of Appeals,
Tenth Circuit.

James Alistar MERCER–SMITH; Janet Mercer–Smith, Plaintiffs–Appellants,
v.
NEW MEXICO CHILDREN, YOUTH AND FAMILIES DEPARTMENT, Defendant,
and
Deborah Hartz; Mary Dale Bolson; Dorian Dodson; Rebecca Liggett; Angela Dominguez; Roland Trujillo; Carmella Alcon; Veronica Vallejos; Lou Ann Hoeppner; Teresa Vigil; Flora Aragon; Kimberly Crespin; Beth Reich, all in their individual and official capacities, Defendants–Appellees.

No. 10–2053. | March 21, 2011.

**Synopsis**
**Background:** Parents filed suit against state agency, certain of its employees, and physician who reported her suspicions that parents' girls had been sexually abused, alleging federal civil rights violations, and various state law claims based on contention that their family unit had been destroyed by misconduct. The United States District Court for the District of New Mexico granted individual defendants' motion to dismiss and physician's motion for summary judgment, and parents appealed.

**Holdings:** The Court of Appeals, Mary Beck Briscoe, Chief Judge, held that:

[1] limitations period on parents' § 1983 claims against state employees began to run before court ruled on their motion seeking to hold those employees in contempt for violating state court's original order placing their children in foster care, and

[2] limitations period on parents' § 1983 claims against physician began to run a full seven years before parents filed suit.

Affirmed.

West Headnotes (7)

**[1] Limitation of Actions**
Civil rights

Limitations period on parents' § 1983 claims against state employees began to run before court ruled on their motion seeking to hold those employees in contempt for violating state court's original order placing their children in foster care; contempt motion contained so many specific allegations of wrongdoing that it was clear that parents were on notice by time they filed motion that employees violated their constitutional rights. 42 U.S.C.A. § 1983.

Cases that cite this headnote

**[2] Limitation of Actions**
Concealment of Cause of Action

**Limitation of Actions**
Suspension or stay in general; equitable tolling

Limitations period on parents' § 1983 claims against state employees was not equitably tolled until state court ruled on their contempt motion, until which time parents did not know of the full effect of state employees' actions in violation of state court's original order placing their children in foster care; even if state employees fraudulently concealed their behavior, parents' contempt motion indicated that they were aware that employees were acting improperly. 42 U.S.C.A. § 1983.

Cases that cite this headnote

**[3] Limitation of Actions**
Liabilities Created by Statute

Doctrine of continuing violations, under which a plaintiff may avoid the statute of limitations when the defendant has acted pursuant to a pattern or longstanding policy or practice of constitutional violations, does not apply to § 1983 claims. 42 U.S.C.A. § 1983.

8 Cases that cite this headnote

**[4] Federal Civil Procedure**

Amendments by briefs or motion papers

**Federal Civil Procedure**

Pleading over

Because of parents' lack of compliance with New Mexico's local rules requiring parties seeking leave to amend to file a motion stating with particularity the grounds for amendment, file a separate brief in support of the motion to amend, and attach a proposed amended complaint to the motion to amend with applicable rules, district court did not abuse its discretion by not granting parents leave to amend their complaint; parents simply added at the end of their opposition to motion to dismiss a blanket request for leave to amend if the district court found the complaint to be inadequate. U.S.Dist.Ct.Rules N.M., Civil Rules 7.1, 7.5, 15.1.

1 Cases that cite this headnote

**[5] Limitation of Actions**

Amendment of Pleadings

Amendment of parents' complaint against state employees alleging federal civil rights violations, and various state law claims would be futile since amendment could not cure statute-of-limitations defect; no matter what allegations the parents added to their amended complaint, fact remained that they knew of the employees' alleged unlawful actions when they filed their motion for contempt four years earlier.

3 Cases that cite this headnote

**[6] Limitation of Actions**

Civil rights

Limitations period on parents' § 1983 claims against physician, who reported to state authorities her suspicions that parents' girls had been sexually abused, began to run a full seven years before parents filed suit; at such time, parents knew they that physician had reported father's alleged abuse, were aware of the medical foundation upon which physician based her expert opinion, and were aware of the reports of other psychologists who disagreed with physician's conclusions. 42 U.S.C.A. § 1983.

Cases that cite this headnote

**[7] Federal Courts**

Environment and health

Because the district court had previously dismissed parents' federal civil rights claims against physician, federal question jurisdiction was lacking over state law claims based on physician's alleged wrongful actions in reporting to state authorities her suspicions that parents' girls had been sexually abused.

Cases that cite this headnote

**Attorneys and Law Firms**

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Timothy V. Flynn–O'Brien, Esq., Timothy V. Flynn–O'Brien, Attorney at Law, Albuquerque, NM, for Defendants–Appellees/Defendant.

Before BRISCOE, Chief Judge, EBEL and O'BRIEN, Circuit Judges.

## ORDER AND JUDGMENT *

* 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.

MARY BECK BRISCOE, Chief Judge.

**1 Plaintiffs James Mercer–Smith and Janet Mercer–Smith appeal from the district court's grant of the individual defendants' motion to dismiss and defendant Dr. Beth *706 Reich's motion for summary judgment. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

## I

### *Factual Background*

Dr. James Mercer–Smith and Dr. Janet Mercer–Smith, both of whom work at the Los Alamos National Laboratory in New Mexico, have three daughters, Julia, Rachel, and Alison. The Mercer–Smiths adopted Julia in 1987. During the adoption proceedings, Janet gave birth to Rachel, who is eight months younger than Julia. In 1992, Janet gave birth to Alison.

In 1989, when Julia was two or three years old, she began having significant behavioral problems that required treatment by medical professionals. While Julia received professional counseling, a former babysitter and Janet Mercer–Smith's mother began claiming that James Mercer–Smith had sexually abused his daughters. In 1989 and again in 1992, Janet's mother complained to the New Mexico Children Youth and Families Department ("CYFD") regarding James' alleged sex abuse. CYFD investigated these allegations and ultimately concluded that Janet's mother's allegations were "unsubstantiated" and "unconfirmed." ROA Vol. 1, at 43–44.

In 2000, then twelve-year old Rachel required medical treatment for major depression. The Mercer–Smiths took Rachel to Dr. Beth Reich, who placed Rachel on anti-depressant medication. Rachel's condition began to worsen, however, and the Mercer–Smiths became concerned that she was having suicidal thoughts. The Mercer–Smiths again contacted Dr. Reich, who made arrangements to have Rachel admitted to the psychiatric ward of an area hospital. While in the hospital, Rachel attended group therapy sessions and began taking different medication. Although Rachel denied that she had ever been the victim of sexual abuse, the attending physician recommended that she reside with her nanny because he believed "parental stress might be contributing to [her] condition." *Id.* at 44. The Mercer–Smiths agreed to this course of action, and in late January 2001, Rachel was released from the psychiatric ward and placed in the custody of her nanny.

On February 7, Rachel's nanny called the Mercer–Smiths and told them that Rachel was having another psychiatric episode. The Mercer–Smiths immediately took Rachel back to Dr. Reich, who discussed with them the 1990 and 1992 allegations of sexual abuse. Dr. Reich then met with Rachel and Julia together and asked them if their father had ever sexually abused them. Rachel and Julia "did not recall any actual sexual abuse." *Id.* "During the drive home with their nanny, however, the girls [1] ... became concerned that they may have been sexually abused by [their father] as children." *Id.* The nanny and the children immediately returned to Dr. Reich's home, where the girls "reported memories ... that when they were ages four to seven, they would sometimes get into bed at night with [their father] ... and [he] would touch them all over including their private parts." *Id.* at 45.

1 The record is not clear on this issue, but it appears that Julia was also living with the nanny during this time.

**2 Dr. Reich contacted CYFD that night. A few hours later, at about 3:30 a.m., CYFD representatives went to the Mercer–Smiths' home, spoke with the family, and removed Alison (then eight years old) from the home and placed her with the *707 nanny pending further investigation. On February 20, CYFD officials conducted interviews of all three daughters at a "safe house." There, Julia and Rachel told the medical examiner that their father touched them in inappropriate ways. Alison, however, denied that her father ever engaged in such conduct with her. [2]

2 Shortly after taking Alison to a safe house, CYFD released her to the custody of her parents. Unlike Julia and Rachel, CYFD never obtained custody of Alison.

In March 2001, Julia was referred to a second psychiatrist, who conducted five therapy sessions with her. He found Julia to be "untruthful and manipulative and did not believe her sexual abuse claims." *Id.* He was later removed from the case by CYFD, and Dr. Reich was reinstated as the girls'

psychiatrist. Following additional therapy, Dr. Reich reported that Julia and Rachel recalled memories indicating that they might have been raped by their father.

James Mercer–Smith "categorically denied ever touching any of his daughters in an inappropriate manner." *Id.* at 46. Nonetheless, James submitted to psychological testing, including an Abel Screen and a Penile Plethysmography. "Neither of these laboratory tests indicated that [James] was sexually attracted to children." *Id.* In addition, the psychiatrist who examined him concluded that there was no evidence that he suffers from pedophilia.

During the investigation period, CYFD hired an independent psychologist to render an opinion regarding Julia and Rachel's situation. The independent psychologist reviewed Janet's mother's allegations of sexual abuse in 1990 and 1992, each psychiatric evaluation of Julia and Rachel, and the results of James' psychological tests. He also conducted follow-up interviews with every member of the Mercer–Smith family, their nanny, and the other psychologists who worked with them. The independent psychologist ultimately concluded that "except for the claims of [Julia] and [Rachel], there [was] no evidence to support the allegations of sexual abuse" against James Mercer–Smith. *Id.* He therefore recommended that CYFD "facilitate a process of reconciliation and reunifying the family as soon as possible." *Id.*

Despite this report, CYFD moved forward with child custody hearings in New Mexico state court, including possible criminal charges against James for child sexual abuse. A few weeks before the hearing, Julia and Rachel's nanny informed the Mercer–Smiths that the girls did not want to testify in court. After being told she would have to testify, Rachel apparently "took a large overdose of ibuprofen requiring her stomach to be pumped at the hospital." *Id.* at 47. The nanny also told the Mercer–Smiths that she was fearful Julia "might harm herself or run away to avoid testifying." *Id.*

On August 30, 2001, James Mercer–Smith entered a plea of no-contest to the charge that he "touched his children Julia and Rachel in a way that made them feel uncomfortable and which they reasonably perceived as sexual." ROA Vol. 2, at 36. Janet also entered a plea of no contest on the charge that she "knew or should have known that her husband ... touched ... Julia and Rachel in a way that made them feel uncomfortable and which they reasonably perceived as sexual and she did not take reasonable steps to protect [them] ... from further harm." *Id.* at 37. The Mercer–Smiths allege they pled no contest to these charges because their daughters did not wish to testify and because a psychologist recommended they not confront the girls on this matter. The state court accepted James and Janet's no-contest ***708** pleas, determined that Julia and Rachel were "abused children," and ordered the state to take legal custody of the children "for an indeterminate period [of] up to two years." *Id.* at 38.

****3** For much of the two year period in which the Mercer–Smiths lost custody of Julia and Rachel, the girls were placed in the Casa Mesita Group Home. Gay Farley, the former executive director of the home, and Jennifer Schmierer, a former counselor at the home, both worked with Julia and Rachel at Casa Mesita. In June 2003, CYFD petitioned the state court to approve a proposed plan to transfer Julia to foster care with the Schmierer family and Rachel to foster care with the Farley family. The Mercer–Smiths opposed this plan because placement with these families would create an improper counselor/patient relationship and because these families were opposed to reunification of the Mercer–Smith family.

The state court denied CYFD's motion in November 2003. The court cited to the Code of Ethics for Occupational and Professional Licensing, Counselors, and Therapists, which provides that "licensed or registered individuals shall not enter into a sexual or other dual relationship with a client." ROA Vol. 1, at 60. The state court concluded that because Gay Farley and Jennifer Schmierer had counseled with Julia and Rachel at the Mesita Group Home, they were not eligible to act as the girls' foster parents. CYFD later obtained the court's consent to place Julia and Rachel in the home of the Ritter family, a family that was willing and able to serve as a foster family for the girls. [3]

3 As far as the record indicates, the Mercer–Smiths did not object to having their daughters placed in the Ritters' home.

Over the next several months, the Mercer–Smiths became suspicious that their daughters were actually living with the Farley and Schmierer families, rather than with the Ritters. On July 29, 2004, the Mercer–Smiths filed a motion to hold CYFD and a number of its employees in contempt of court for ignoring the state court's order regarding placement of the children. In their motion, the Mercer–Smiths alleged CYFD had "created a sham to mask" the fact that the Farleys and Schmierers were acting as the true foster parents of Rachel and Julia. ROA Vol. 2, at 168.

On January 3, 2008 (more than three years after the Mercer–Smiths filed their contempt motion and after Julia and Rachel attained the age of majority), the state court determined that CYFD had violated the court's order (1) by permitting the Farleys and Schmierers to "continue ... providing transportation to and from school for the girls, taking Rachel to dance class, and Julia to Santa Fe for her therapy"; and (2) by asking the Ritters to "provide a place for [the girls] to sleep, with minimal oversight required." ROA Vol. 1, at 78. The state court further stated that "[t]he designation by CYFD of the Ritters as 'foster parents' was done deliberately by CYFD for the purposes of concealing from the Court and James and Janet Mercer–Smith the fact that Jennifer and Eric Schmierer served the function of being foster parents for Julia ... and [that] Gay and Dwain Farley served the function of being foster parents for Rachel." *Id.* at 87.

### *Procedural History*

On April 7, 2009, the Mercer–Smiths filed suit in the district court against CYFD; CYFD employees Deborah Hartz, Mary–Dale Bolson, Dorian Dodson, Rebecca ***709** Liggett, Angela Dominguez, Roland Trujillo, Carmella Alcon, Veronica Vallejos, Lou Ann Hoeppner, Teresa Vigil, Flora Aragon, and Kimberly Crespin[4] ("the individual defendants"); and Dr. Beth Reich. The Mercer–Smiths named the individual defendants and Dr. Reich in their individual and official capacities.

[4] Veronica Vallejos and Lou Ann Hoeppner were never served with process, and they have not made appearances in this case. The parties agree that Vallejos and Hoeppner are now non-parties to this action.

****4** The Mercer–Smiths alleged the following claims against all defendants: (1) violation of 42 U.S.C. § 1983 (count I); (2) civil conspiracy under 42 U.S.C. § 1985 (count II); (3) continuing violations under § 1983 and § 1985 (count III); (4) negligence, defamation, malicious abuse of process, professional negligence, and medical malpractice under the New Mexico Tort Claims Act (count IV); state common law claims for intentional infliction of emotional distress, invasion of privacy, defamation, professional negligence, negligence, medical malpractice, and malicious abuse of process (count V); and compensatory and punitive damages (count VI).[5]

[5] Count VI is the only count the district court did not ultimately dismiss. The parties agree, however, that compensatory and punitive damages are remedies, not causes of action.

On February 8, 2010, the district court granted the individual defendants' Motion for Qualified Immunity and to Dismiss and dismissed counts I, III, IV, and V without prejudice. The district court did so because "[a]ll claims against the State Defendants ... appear to have expired under the applicable statute of limitations." ROA Vol. 1, at 239.

Also on February 8, the district court granted Dr. Reich's motion for summary judgment on the Mercer–Smiths' § 1983 claim (counts I and III). The court granted the motion and dismissed these claims with prejudice because (1) the Mercer–Smiths had not brought forth evidence indicating that Dr. Reich violated their § 1983 rights; (2) Dr. Reich is immune from suit; (3) Dr. Reich is not a state actor and therefore not liable under § 1983; and (4) the statute of limitations bars the Mercer–Smiths' § 1983 claim against Dr. Reich. The district court also *sua sponte* dismissed with prejudice the Mercer–Smiths' claims under the New Mexico Tort Claims Act (count IV), and it dismissed without prejudice their claims under New Mexico common law (count V).

The Mercer–Smiths timely appealed the district court's grant of the individual defendants' motion to dismiss and Dr. Reich's motion for summary judgment.

## II

### *Standard of Review*

The court reviews both the grant of a motion to dismiss and the grant of a motion for summary judgment under a *de novo* standard. *PJ v. Wagner*, 603 F.3d 1182, 1192–93 (10th Cir.2010); *Christy Sports, LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188, 1191 (10th Cir.2009).

### *Analysis*

#### *A. The Individual Defendants' Motion to Dismiss*

The Mercer–Smiths argue the district court erred in dismissing their § 1983 claim and state claims against the

individual defendants. We address the federal claim and the state claims in turn.

***1. Section 1983***

The district court held that the Mercer–Smiths' § 1983 claim was barred by the statute of limitations. The statute of limitations ***710** in a § 1983 claim "is drawn from the personal-injury statute of the state in which the federal district court sits." *Mondragon v. Thompson*, 519 F.3d 1078, 1082 (10th Cir.2008). In New Mexico, that statute of limitations is three years. *O'Connor v. St. John's College*, 290 Fed.Appx. 137, 140 (10th Cir.2008) (unpublished). The district court held that the statute of limitations had run on the Mercer–Smiths' § 1983 claim because they filed suit on April 7, 2009, but knew of the facts giving rise to their claim against the individual defendants when they filed their motion in 2004 to hold them in contempt. Noting that the Mercer–Smiths' claims in this lawsuit "are based on the same conduct as the[ir] 2004 contempt motion," the district court held that "it [was] clear" the Mercer–Smiths were "fully aware ... [of the] facts in 2004 ... that should have put them on notice" regarding their claims. ROA Vol. 1, at 236.

****5** The Mercer–Smiths claim the district court's ruling was incorrect based on the doctrines of (1) accrual, (2) equitable tolling, and (3) continuing violation. We are not persuaded by any of these assertions.

***a. Accrual***

"[F]ederal law governs the question of accrual of federal causes of action, and thus, dictates when the statute of limitations begins to run for purposes of § 1983." *Smith v. City of Enid ex rel. Enid City Comm'n*, 149 F.3d 1151, 1154 (10th Cir.1998) (citations omitted). "A civil rights action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Id.* (quoting *Baker v. Bd. of Regents*, 991 F.2d 628, 632 (10th Cir.1993)). "Since the injury in a § 1983 case is the violation of a constitutional right, such claims accrue when the plaintiff knows or should have known that his or her constitutional rights have been violated." *Id.* (citations and quotation omitted). "This requires the court to identify the constitutional violation and locate it in time." *Id.* (citation and quotation omitted).

The Mercer–Smiths argue the district court erred in dismissing their § 1983 claim because the claim did not accrue until 2008 when the state court issued its contempt order, thereby "confirming [that] the family unit had been destroyed by unconstitutional conduct."[6] Aplt. Op. Br. at 31. According to the Mercer–Smiths, while they "may have entertained suspicions of misconduct" by the defendants prior to 2008, they were not on notice of such conduct until after the state court issued its order. *Id.*

6 We note that the Mercer–Smiths also claim the district court erred in relying on the substance of their contempt motion to determine that the statute began to run in 2004. According to the Mercer–Smiths, the district court could not properly rely on the contempt motion because they did not attach it to their complaint. This argument fails. When a document is "referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy of the court to be considered on a motion to dismiss." *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir.1997). The Mercer–Smiths alleged in the complaint that "CYFD's and its agents' conduct continued to be in flagrant violation of the court's orders, resulting in the filing of a contempt motion by the Mercer–Smiths." ROA, Vol. 1 at 10. Because the Mercer–Smiths referred to the 2004 contempt motion in their complaint and because the motion is central to the Mercer–Smiths' claims, it was proper for the district court to consider it in ruling on the individual defendants' motion to dismiss.

**[1]** We are not persuaded by this argument because the record indicates the Mercer–Smiths knew of the individual defendants' unlawful actions no later than 2004 and were therefore on notice that ***711** their constitutional rights may have been violated. For one, the very fact that the Mercer–Smiths filed a motion seeking to hold the individual defendants in contempt indicates that they believed the individual defendants were violating the state court's original placement order. In addition, the factual assertions the Mercer–Smiths make in their contempt motion indicate they knew in 2004 that the Farleys and Schmierers were improperly involved in their daughters' lives. The Mercer–Smiths cite specific examples in their motion of incidents which caused them to believe the Farleys and Schmierers were disregarding the state court's order that they not act as the girls' foster parents. For example, the Mercer–Smiths allege that from October to December 2003, Alison would frequently meet her sisters at various restaurants and see Julia arriving and leaving in a car driven by Mr. or Mrs. Schmierer and Rachel arriving and leaving with Mr. or Mrs. Farley. ROA Vol. 2, at 162–63. In addition, the Mercer–Smiths allege that on November 11, they personally saw the Schmierers and Farleys drop off Julia and Rachel at a restaurant to have lunch with Alison. *Id.* at 162.

****6** The 2004 contempt motion further indicates that the Mercer–Smiths acted affirmatively to confirm their suspicions. First, they allege that James "had a check done" to determine the origins of two unknown phone numbers from which Julia and Rachel's cell phones had been called. *Id.* at 162–63. According to the Mercer–Smiths, one phone number belonged to Eric Schmierer and the other belonged to Gay Farley. *Id.* In addition, the Mercer–Smiths hired a private investigator to follow the Schmierers and Farleys. According to the Mercer–Smiths, the private investigator discovered that each morning the Schmierers picked up Julia from the Ritters' house and took her to school, while the Farleys picked up Rachel every morning and took her to school. *Id.* at 164–66.

In short, the Mercer–Smiths' contempt motion contains so many specific allegations of wrongdoing that it is clear they were on notice in 2004 that the individual defendants violated their constitutional rights. *Smith*, 149 F.3d at 1154. The Mercer–Smiths allege facts based on their own observations, the work of their private investigator, and statements by their youngest daughter, Alison. Because they were aware of these facts, the Mercer–Smiths cannot reasonably argue that they were not on notice regarding their constitutional claim against the individual defendants until the state court issued its contempt order in 2008.

***b. Equitable Tolling***

**[2]** The Mercer–Smiths also argue that even if the accrual period started prior to 2008, their claims should not be time-barred because of the doctrine of equitable tolling. "[S]tate law governs the application of tolling in a [federal] civil rights action." *Alexander v. Oklahoma*, 382 F.3d 1206, 1217 (10th Cir.2004). Under New Mexico law, equitable tolling (also known as fraudulent concealment) tolls the statute of limitations "only when the plaintiff does not discover the alleged [wrong] within the statutory period as a result of the defendant's fraudulent concealment." *Tomlinson v. George*, 138 N.M. 34, 116 P.3d 105, 106 (2005). Thus, "if a plaintiff discovers the injury within the time limit, fraudulent concealment does not apply because the defendant's actions have not prevented the plaintiff from filing the claim within the time period and the equitable remedy is not necessary." *Id.* at 111.

The Mercer–Smiths allege the district court should have applied the doctrine of equitable tolling because they "could ... prove that they lacked essential information necessary to appreciate the existence ***712** and cause of the [defendants'] constitutional violation[s]." Aplt. Op. Br. at 37. We are not persuaded by this argument because the Mercer–Smiths have not specifically alleged that the individual defendants concealed from them the fact that the Farleys and Schmierers were the de facto foster parents for Julia and Rachel. Instead, the Mercer–Smiths simply allege that they did not know of the full effect of the Farleys and Schmierers' actions until 2008, when the state court ruled on their contempt motion. In the absence of an assertion that the defendants fraudulently concealed information from the Mercer–Smiths, equitable tolling does not apply to this case. *See Tomlinson*, 116 P.3d at 106.

****7** Moreover, even if the individual defendants fraudulently concealed their behavior, the Mercer–Smiths' 2004 contempt motion indicates that they were aware the individual defendants were acting improperly. As noted, the Mercer–Smiths allege that they saw the Farleys and Schmierers dropping their daughters off at a restaurant, that they traced phone calls from the Farleys and Schmierers to their daughters' cell phones, and that their private investigator saw the Farleys and Schmierers pick up the girls from the Ritters' home and take them to school. These allegations are sufficient to indicate that the Mercer–Smiths knew of the individual defendants' unlawful behavior. The doctrine of equitable tolling therefore does not apply to this case. *See id.* at 111 (a plaintiff cannot claim the benefits of the equitable tolling doctrine if he or she discovers the injury within the statutory time period).

***c. Continuing Harm***

**[3]** Finally, the Mercer–Smiths allege the district court erred by declining to apply the doctrine of continuing violations. Under this doctrine, a plaintiff may avoid the statute of limitations when the defendant has acted pursuant to a pattern or longstanding policy or practice of constitutional violations. *E.g.*, *Robinson v. Maruffi*, 895 F.2d 649, 655 (10th Cir.1990). The Mercer–Smiths' argument clearly fails because the doctrine of continuing violations does not apply to § 1983 claims. *Hunt v. Bennett*, 17 F.3d 1263, 1265 (10th Cir.1994) (holding that the doctrine of continuing violations does not "extend[ ] ... to a § 1983 claim"); *see also Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1514 (10th Cir.1997) (The doctrine of continuing violations applies to Title VII claims because "of the need to file administrative charges," but does not apply to claims that do "not require [the] filing of such charges before a judicial action may be brought.").

***2. State Claims***

In addition to dismissing the Mercer–Smiths' § 1983 claim against the individual defendants, the district court dismissed their state law claims contained in count IV (negligence, defamation, malicious abuse of process, professional negligence, and medical malpractice under the New Mexico Tort Claims Act) and count V (state common law claims for intentional infliction of emotional distress, invasion of privacy, defamation, professional negligence, negligence, medical malpractice, and malicious abuse of process). In dismissing these claims, the district court held that the Mercer–Smiths' state law claims were time-barred under the two and three year [7] statutes of limitations "for the same reasons set forth" in the court's ***713** dismissal of the § 1983 claim. ROA Vol. 1, at 238.

7 The statute of limitations for the Mercer–Smiths' claims in count IV (New Mexico Tort Claims Act) is two years, while the applicable statute of limitations for their claims in count V (New Mexico common law) is three years. *See* ROA Vol. 1, at 238.

We affirm the district court's dismissal of these claims because the latest factual allegation in the Mercer–Smiths' complaint supporting any claim for relief is the allegation that, in 2003, the individual defendants "placed the children with the Farley and Schmierer families in direct violation of the [state court's] order." *Id.* at 8. Because the Mercer–Smiths knew of these actions prior to filing their contempt motion in 2004, the statute of limitations on each state law claim had clearly run by 2009, when the Mercer–Smiths filed suit. We therefore affirm the district court's dismissal of their state law claims against the individual defendants.

***3. Leave to Amend***

****8** In their response to the individual defendants' motion to dismiss, the Mercer–Smiths stated: "If, for any reason, the court deems the present complaint inadequate, Plaintiffs request thirty (30) days to re-plead." ROA Vol. 1, at 40. The district court did not address this request in its order granting the individual defendants' motion to dismiss: it simply dismissed the relevant claims without prejudice. The Mercer–Smiths now argue the district erred in not permitting them to amend their complaint. We review the refusal of leave to amend for abuse of discretion. *Gohier v. Enright*, 186 F.3d 1216, 1218 (10th Cir.1999).

**[4]** We conclude that the district court did not abuse its discretion because the Mercer–Smiths did not comply with the District of New Mexico's Local Rules as they relate to amendments of pleadings. As we have previously noted, New Mexico's Local Rules require parties seeking leave to amend to (1) file a motion stating with particularity the grounds for amendment (Rule 7.1); (2) file a separate brief in support of the motion to amend (Rule 7.5); and (3) attach a proposed amended complaint to the motion to amend (Rule 15.1). *DeHaan v. United States*, 3 Fed.Appx. 729, 731 (10th Cir.2001) (unpublished). The Mercer–Smiths did not comply with any of these rules; instead, they simply added at the end of their opposition a blanket request for leave to amend if the district court found the complaint to be inadequate. Because the Mercer–Smiths did not properly seek leave to amend, the district court did not abuse its discretion by not granting them leave to amend the complaint. *See Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977, 986 (10th Cir.2010).

**[5]** The district court also did not err because amendment in this case would be futile. "Although [the Federal Rules] provide[ ] that leave to amend shall be given freely, the trial court may deny leave to amend where amendment would be futile." *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1126 (10th Cir.1997). It would be futile to permit the Mercer–Smiths to amend their complaint because amendment will not change the fact that the statute of limitations bars their § 1983 claim and state law claims against the individual defendants. No matter what allegations the Mercer–Smiths add to their amended complaint, the fact remains that they knew of the defendants' alleged unlawful actions when they filed their motion for contempt in 2004. Because amendment cannot cure this statute-of-limitations defect, the district court was not required to permit the Mercer–Smiths to amend their complaint.

***B. Dr. Beth Reich's Motion for Summary Judgment***

The Mercer–Smiths also claim the district court erred in granting Dr. Reich's motion for summary judgment on their § 1983 claim and in dismissing *sua sponte* ***714** their state law claims contained in counts IV and V.

***1. § 1983 claim***

The Mercer–Smiths argue the district court should not have granted summary judgment on their § 1983 claim because the evidence indicates that Dr. Reich "set out to deprive them of their constitutional interest in the integrity of their family unit." ROA Vol. 1, at 225. Specifically, the

Mercer–Smiths claim Dr. Reich violated their constitutional rights by relying on a "widely discredited" theory regarding recovered memories and by "persist [ing]" with her claims that Julia and Rachel had been sexually abused despite "overwhelming contrary evidence and opinions from her professional colleagues." *Id.* at 5, 9.

****9** **[6]** We affirm the district court's ruling that the statute of limitations bars the Mercer–Smiths' § 1983 claim against Dr. Reich.[8] As the Mercer–Smiths state in their complaint, Dr. Reich's allegedly unlawful actions—her reckless reliance on a "widely discredited" scientific theory and her persistent allegations against James Mercer–Smith despite "overwhelming evidence" of his innocence—all took place no later than 2002, a full seven years before the Mercer–Smiths filed suit. Moreover, the record indicates that the Mercer–Smiths knew of Dr. Reich's allegedly unlawful actions at that time. By 2002, they knew Dr. Reich had reported James' alleged abuse to CYFD, they were aware of the medical foundation upon which Dr. Reich based her expert opinion, and they were aware of the reports of other psychologists who disagreed with Dr. Reich's conclusions. *Id.* at 46–47, 241. Accordingly, the district court correctly granted Dr. Reich's motion for summary judgment based on her statute of limitations defense.

8 We note that the district court also granted Dr. Reich's motion for summary judgment (1) because the Mercer–Smiths failed to raise genuine issues of material fact necessary to defeat summary judgment; (2) because Dr. Reich is immune from suit; and (3) because Dr. Reich cannot be liable as a non-state actor under § 1983. Since we affirm the district court's ruling with respect to the statute of limitations, we do not address the other reasons the district court granted summary judgment on the § 1983 claim.

The Mercer–Smiths argue in their opening brief that, at the very least, a factual question exists regarding whether Dr. Reich engaged in unlawful activity within the limitations period. In support of this assertion, they note that on November 6, 2006, CYFD's attorney sent Dr. Reich a subpoena requiring her to testify at a state court hearing regarding custody of Julia and Rachel. *Id.* at 160. The next day, however, CYFD's attorney faxed Dr. Reich a letter indicating that the subpoena had been sent to her in error and that she would not be needed at the upcoming hearing. *Id.* at 159.

Despite the Mercer–Smiths' assertions to the contrary, the November 2006 notice of subpoena fails to create a factual dispute regarding the running of the statute of limitations. The fact that CYFD sent Dr. Reich a subpoena (which it later retracted) in 2006 does not reasonably indicate that Dr. Reich was engaged in any sort of improper activity at that time. It is not surprising that Dr. Reich could have been called to testify in 2006—she first contacted CYFD regarding her suspicions that the girls had been sexually abused and she had been deposed in 2002 regarding her professional opinion on this matter. More important, however, is the fact that even if CYFD's 2006 subpoena created some sort of factual dispute regarding the propriety of Dr. Reich's conduct, the statute of limitations still began running no later than 2002 when the Mercer–Smiths learned fully of Dr. Reich's involvement in ***715** the state of New Mexico's attempt to obtain custody of their children. Accordingly, we conclude that the district court's decision to grant summary judgment on statute of limitations grounds was correct.

***2. State Claims***

The Mercer–Smiths also appeal the district court's dismissal of their state law claims against Dr. Reich. After granting Dr. Reich's motion for summary judgment on the § 1983 claim, the district court *sua sponte* dismissed the remaining state law claims. The district court dismissed the claims in count IV, which arise out of the New Mexico Tort Claims Act, "given [its] findings" regarding the Mercer–Smiths' § 1983 claim. ROA Vol. 1, at 228. And after dismissing those claims, the district court declined to accept jurisdiction of the New Mexico common law claims in count V and dismissed them for lack of federal jurisdiction.

****10** We affirm the district court's dismissal of the state law claims contained in counts IV and V. As to the claims in count IV, the district court properly dismissed these claims because, like the Mercer–Smiths' § 1983 claim, they arise from Dr. Reich's allegedly improper report of sexual abuse to CYFD and improper medical conclusions, both of which the Mercer–Smiths were aware no later than 2002. Thus, the Mercer–Smiths' knowledge of Dr. Reich's actions bar not only her § 1983 claim, but also her state law claims contained in count IV.

**[7]** We also affirm the district court's refusal to accept jurisdiction of the state law claims in count V. Because the district court had previously dismissed the Mercer–Smiths' § 1983 and § 1985 claims against Dr. Reich, federal question jurisdiction in this case was lacking. Further,

because all involved parties in this case are citizens of New Mexico, diversity jurisdiction in this case does not exist. Accordingly, the district court was within its discretion to decline supplemental jurisdiction[9] on the remaining state law claims and dismiss them for lack of subject matter jurisdiction.

9 We note that the district court could have also dismissed the state law claims in Count IV for lack of federal jurisdiction.

**III**

The judgment of the district court is AFFIRMED.

**All Citations**

416 Fed.Appx. 704, 2011 WL 971132

619 Fed.Appx. 774
United States Court of Appeals,
Tenth Circuit.

Dawn CANFIELD, Plaintiff–Appellant,
v.
DOUGLAS COUNTY, a public entity; Douglas County Department Of Human Services; Valerie Elson, individual and official capacity; Lesa Adame, individual and official capacity; Cheryl Caplecha, individual and official capacity; Tracy Mudget, individual and official capacity; Kristine Johnson, individual and official capacity; Nicole Becht, individual and official capacity; Patrick Sweeney, individual and official capacity; Sherry Hansen, individual and official capacity; Does 1 Through 10, inclusive, Defendants–Appellees.

No. 15–1014. | Sept. 29, 2015.

**Synopsis**

**Background:** Mother brought § 1983 action against county, county department of human services (DHS), several county social workers, and other employees of county and DHS, alleging that she was deprived of her constitutional rights as a parent when defendants presented false testimony and suppressed evidence during state juvenile-court proceedings, and which resulted in loss of custody to her children. Defendants moved to dismiss. The District Court for the District of Colorado, 2014 WL 7186749, granted motion. Mother appealed.

**Holdings:** The Court of Appeals, Harris L. Hartz, Circuit Judge, held that:

[1] mother's claim accrued, and Colorado's two-year statute of limitations began to run, when children were first ordered removed from her custody;

[2] mother was not entitled to leave to amend her complaint to state conspiracy claim on appeal;

[3] Colorado's two-year statute of limitations period for personal injury actions was not tolled by defendants' alleged wrongful conduct;

[4] continuing-violation doctrine did not apply; and

[5] Colorado's two-year statute of limitations period for personal injury actions was not tolled because mother was allegedly mentally incompetent.

Affirmed.

West Headnotes (5)

**[1] Limitation of Actions**
Civil rights

Mother knew or should have known that her right to familial association had been violated and her substantive-due-process § 1983 claims accrued, and Colorado's two-year statute of limitations began to run, when her children were first ordered removed from her custody, even though juvenile court had not yet entered its final order determining her parental rights. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983; West's C.R.S.A. § 13–80–102(1)(i).

Cases that cite this headnote

**[2] Federal Civil Procedure**
New cause of action in general

Mother was not entitled to leave to amend her § 1983 complaint against county, county department of human services (DHS), several county social workers, and other employees of county and DHS to state conspiracy claim on appeal, where mother made no specific request in district court to amend her complaint to state conspiracy claim, even after court had put her on notice that she had not stated such claim, she had counsel in district court, and she had already amended her complaint twice. 42 U.S.C.A. § 1983.

Cases that cite this headnote

**[3] Limitation of Actions**
Pendency of action on different cause or in different forum

Colorado's two-year statute of limitations period for personal injury actions was not tolled until state court entered its final order regarding custody of mother's children by alleged wrongful conduct of county, county department of human services (DHS), several county social workers, and other employees of county and DHS for allegedly discouraging and circumventing mother's efforts to pursue civil action, where it was unreasonable for mother to delay filing § 1983 action for fear that litigation would harm her in state proceedings given that mother alleged that she knew of defendants' false statements throughout state litigation, that she was continually at odds with defendants, and that defendants pursued action against her almost relentlessly. 42 U.S.C.A. § 1983; West's C.R.S.A. § 13–80–102(1)(i).

Cases that cite this headnote

**[4] Limitation of Actions**

Liabilities Created by Statute

Continuing-violation doctrine did not apply to mother's § 1983 action against county, county department of human services (DHS), several county social workers, and other employees of county and DHS, alleging that their wrongful conduct resulted in mother's loss of custody of her children; last affirmative act allegedly taken by defendants was when social workers testified at hearing on defendants' motion for allocation of parental responsibility, which was two years prior to mother's filing of lawsuit. 42 U.S.C.A. § 1983.

Cases that cite this headnote

**[5] Limitation of Actions**

Insanity or Other Incompetency

Colorado's two-year statute of limitations period for personal injury actions was not tolled because mother was allegedly mentally incompetent in mother's § 1983 action against county, county department of human services (DHS), several county social workers, and other employees of county and DHS; mother was appointed guardian ad litem (GAL) in state-court proceeding because she was mentally incompetent, GAL had two years under statute governing commencement of limitations periods for persons with disability to file action, but GAL failed to do so. 42 U.S.C.A. § 1983; West's C.R.S.A. §§ 13–80–102(1)(i), 13–81–103(1)(a).

Cases that cite this headnote

**Attorneys and Law Firms**

***775** Deborah Taussig, Taussig and Taussig, Boulder, CO, for Plaintiff–Appellant.

Sean Kelly Dunnaway, Castle Rock, CO, Defendants–Appellees.

Before HARTZ, PHILLIPS, and McHUGH, Circuit Judges.

**ORDER AND JUDGMENT** *

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

HARRIS L. HARTZ, Circuit Judge.

Dawn Canfield sued the defendants under 42 U.S.C. § 1983, alleging that they had deprived her of her constitutional rights as a parent by presenting false testimony and by suppressing evidence during state juvenile-court proceedings, thereby causing her to lose custody of her children. Her second amended complaint (the Complaint) also included several related claims under Colorado law. The district court dismissed her federal claims with prejudice for failure to state a claim ***776** because they were untimely on their face. [1] It declined to exercise supplemental jurisdiction over her state-law claims and dismissed them without prejudice. We affirm.

1 The parties consented to entry of final judgment by a United States Magistrate Judge. *See* 28 U.S.C. § 636(c).

## BACKGROUND

The Complaint sought damages from Douglas County, its Department of Human Services (DHS), and a number of social workers and others employed by Douglas County or the DHS. Because we are reviewing a dismissal on the pleadings, we set forth the facts as alleged in the Complaint.

In 2010 Ms. Canfield applied for a temporary restraining order against her husband. This matter was set for hearing on September 10, 2010. Before the hearing the defendant social workers interviewed her husband, who made false statements about her, characterizing her as mentally unstable and a threat to her children. The social workers failed to investigate Mr. Canfield's statements and improperly took them as true.

At the September 10 hearing Ms. Canfield was confronted by a DHS social worker who expressed concern about her mental health and the safety of her children. Either at that hearing or a later one (the Complaint is unclear) DHS social workers testified that Ms. Canfield was mentally unstable and recommended that her children be removed from her home and placed with her husband. In addition, the defendants initiated a dependency-and-neglect (D & N) proceeding on October 4, 2010. The social workers presented testimony and filed an assessment containing a false statement regarding Ms. Canfield's prior conduct. The court ordered her to relinquish custody to her husband, and allowed her only supervised visitation.

Over the course of a year and a half, DHS and its agents submitted false information and testimony to the court, presented false reports and findings concerning Ms. Canfield's parenting abilities, coerced her into agreeing to a stipulated adjudication that adversely affected her ability to regain custody of her children, required her to undergo examinations with biased examiners, interfered with her therapy, and ignored or covered up Mr. Canfield's inadequacies as a parent. Throughout the various proceedings, DHS agents promised Ms. Canfield that if she cooperated with DHS, her custodial rights would be restored. As a result of the defendants' actions, the state court entered a final Order of Allocation of Parental Responsibilities on February 24, 2012, which awarded Mr. Canfield "sole decision-making and allocation of parental responsibilities," Complaint, ¶ 51, and limited Ms. Canfield to supervised visitation in a professional facility. Ms. Canfield filed this action on February 21, 2014.

## DISCUSSION

"We review de novo the dismissal of an action under Rule 12(b)(6) based on the statute of limitations." *Braxton v. Zavaras,* 614 F.3d 1156, 1159 (10th Cir.2010). "We accept as true all well-pleaded factual allegations in the complaint and view them in the light most favorable to the [plaintiff]." *SEC v. Shields,* 744 F.3d 633, 640 (10th Cir.2014) (internal quotation marks omitted). "While the statute of limitations is an affirmative defense, when the dates given in the complaint make clear that the right sued upon has been extinguished, the plaintiff has the burden of establishing a ***777** factual basis for tolling the statute." *Aldrich v. McCulloch Props., Inc.,* 627 F.2d 1036, 1041 n. 4 (10th Cir.1980).

In § 1983 actions we apply the forum state's statute of limitations for personal-injury claims, *Wallace v. Kato,* 549 U.S. 384, 387, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007), and generally apply the forum state's tolling rules, *id.* at 394, 127 S.Ct. 1091. Colorado, the forum state here, provides a two-year statute of limitations for personal-injury claims. Colo.Rev.Stat. § 13–80–102. [2] For the accrual date, however, we look to federal law. *See Wallace,* 549 U.S. at 388, 127 S.Ct. 1091. Under federal law, "[a] civil rights action accrues when facts that would support a cause of action are or should be apparent." *Fratus v. DeLand,* 49 F.3d 673, 675 (10th Cir.1995) (internal quotation marks omitted).

2 The district court applied Colo.Rev.Stat. § 13–80–102(1)(g), which provides a two-year statute of limitations for "[a]ll actions upon liability created by a federal statute where no period of limitations is provided in said federal statute." But we rely on the residual statute of limitations in § 13–80–102(1)(i), which pertains to "[a]ll other actions of every kind for which no other period of limitations is provided." *See Blake v. Dickason,* 997 F.2d 749, 750–51 (10th Cir.1993) (adopting two-year residual limitations period in § 13–80–102(1)(i) for § 1983 actions); *Arnold v. Duchesne Cty.,* 26 F.3d 982, 985 n. 5 (10th Cir.1994) (explaining that this court has applied Colorado's residual statute of limitations, rather than its statute applicable to federal actions for which there is no limitations period, to § 1983 claims).

**[1]** We agree with the district court that Ms. Canfield's substantive-due-process claims accrued in 2010, when her

children were ordered removed from her custody, as she knew or should have known at that point that her right to familial association had been violated. Because Ms. Canfield did not file this action until February 21, 2014, the statute of limitations barred her federal civil-rights claims. She makes several arguments to salvage her claims, but they are not persuasive.

First, Ms. Canfield argues that her claims did not accrue until February 24, 2012, when the state juvenile court entered its final order determining her parental rights.[3] We disagree. Her relevant injury became evident when her children were first ordered removed from her custody—the first loss of parental rights that she attributes, at least in part, to the defendants. *Cf. Thomas v. Kaven*, 765 F.3d 1183, 1187–88, 1190, 1196 (10th Cir.2014) (parents stated claim for violation of the right to familial association after child's doctors and therapists placed medical hold on child and sought state-court order for involuntary residential treatment, even though defendants abandoned involuntary-treatment proceeding before court held hearing or entered any final order). The cause of action accrued at that time even though "the full extent of [her] injury [was] not then known or predictable." *Varnell v. Dora Consolidated Sch. Dist.*, 756 F.3d 1208, 1216 (10th Cir.2014) (internal quotation marks omitted). Nor was commencement of the limitations period delayed, as Ms. Canfield asserts, until the state court reached a final decision. *Cf. Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139, 146 (Colo.2007) (accrual date for bad-faith tort suit based on harmful tardiness in handling worker's compensation claim was not postponed until final resolution of worker's compensation claim). She did not need to await the final decision to know that her parental rights had been injured.

3 The defendants contend that she forfeited this argument by failing to raise it in district court. We disagree. She presented the argument sufficiently to preserve it for our review. *See* Aplt.App. at 136–37 (response to motion to dismiss).

***778** **[2]** Second, Ms. Canfield argues that her complaint includes a conspiracy claim and that for such a claim, "the statute of limitations accrues when the conspiracy is complete, not when it begins." Aplt. Opening Br. at 19. She contends that the conspiracy did not conclude until the juvenile court entered its final order allocating parental rights. But the district court properly determined that the Complaint did not assert a claim for conspiracy. Although Ms. Canfield cites three instances in her 38–page Complaint where she alleged that the defendant caseworkers had "conspired" against her, these passing references—which fail to particularize why it is plausible to believe that all the defendants entered into a common agreement, as opposed to engaging in parallel conduct—do not suffice to state a conspiracy claim. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (to plead a conspiracy claim, allegations of parallel conduct must be "placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action"). A conclusory allegation of conspiracy will not suffice. *See id.* Further, Ms. Canfield's response in district court to the defendants' motion to dismiss failed to argue that her purported conspiracy claim did not accrue until entry of the 2012 order. It says merely, "The statute of limitations runs in a conspiracy claim under § 1983 when the conspiracy claim accrued and not when the defendants commenced the conspiracy." Aplt.App. at 137. It was not the job of the district court to rescue Ms. Canfield's claim by making her legal arguments and factual allegations for her. In her reply brief, Ms. Canfield requests leave to amend her complaint to state a conspiracy claim if it fails to do so. But we deny this request, made for the first time in the reply brief, because (1) she made no specific request in district court to amend her complaint to state a conspiracy claim, even after the court had put her on notice that she had not stated such a claim; (2) she had counsel in district court; and (3) she had already amended her complaint twice.

**[3]** Third, Ms. Canfield argues that her claims should be equitably tolled until the state court entered its final order because the defendants' "wrongful conduct prevented [her] from pursuing ... her claim." Aplt. Opening Br. at 22. *See Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1096 (Colo.1996) (equitable tolling is appropriate "where the defendant's wrongful conduct prevented the plaintiff from asserting his or her claims in a timely manner."). The defendants' alleged wrongful conduct, which "discouraged and circumvented Ms. Canfield's efforts [to pursue] a civil action," consisted of "false promises to her that the fastest way to get her children back was to comply with their demands." Aplt. Opening Br. at 24. But the Complaint alleges that Ms. Canfield knew of the defendants' false statements throughout the state litigation, she was continually at odds with the defendants, and the defendants pursued action against her almost relentlessly. In this context it would have been unreasonable for her to delay filing this suit for fear that the litigation would harm her in the state proceedings.

**[4]** Fourth, Ms. Canfield argues that under the "continuing violation doctrine," her claims continued to accrue during the entire time period covered by her complaint. As the district court noted, however, this court has never held that the continuing-violation doctrine applies to § 1983 cases. And we have assumed that even if it does, "the doctrine is triggered by continual unlawful acts, not continual ill effects from the original violation." ***779** *Mata v. Anderson*, 635 F.3d 1250, 1253 (10th Cir.2011) (internal quotation marks omitted). Ms. Canfield does not allege any discrete unlawful acts that occurred during the two years before she filed this action. The last affirmative act taken by the defendants alleged in the complaint was in January 2012, when social workers testified at a hearing on the defendants' motion for allocation of parental responsibility. This act preceded the two-year period before Ms. Canfield filed suit. (The Complaint does allege that "Douglas County, through DHS, continues to this day to deny Plaintiff her parental rights by the fraudulent omissions of evidence and outright suppression of material exculpatory evidence, by and through its public employees." Aplt.App. at 179, ¶ 55. But this sentence fails to adequately allege additional wrongful acts. *See Pike v. City of Mission*, 731 F.2d 655, 660 (10th Cir.1984) (plaintiff could not rely on continuing-violation theory where he alleged that the defendants "continued to deny him reinstatement and a due process hearing" and to retain false information about him in their files during the limitations period, because "[t]hese acts are the natural result of the original employment decision," not new grounds for relief), *overruled on other grounds*, *Baker v. Board of Regents*, 991 F.2d 628, 633 (10th Cir.1993).) [4]

4 Although Ms. Canfield's Complaint includes a prayer for injunctive relief, and a claim for declaratory relief against Douglas County, her claim for such relief does not allege additional specific acts that occurred or were threatened during the limitations period. Nor does Ms. Canfield rely on her claim for declaratory or injunctive relief to support her continuing-violation argument.

**[5]** Finally, Ms. Canfield argues that the limitations period should have been tolled because she was "mentally incompetent." Aplt. Opening Br. at 28–29. She admits that she was not *really* mentally incompetent, but she argues that DHS cannot have it both ways—arguing that she was not competent to be a parent and needed a guardian ad litem (GAL), yet was competent enough to understand that her constitutional rights had been violated as of September 10, 2010. The statute on which she relies, which deals with commencement of limitations periods for persons under a disability, provides that if such a person is represented by a legal representative, the representative has until two years after his or her appointment to take action on behalf of the person under a disability, notwithstanding any earlier expiration of the limitations period. Colo.Rev.Stat. § 13–81–103(1)(a). Ms. Canfield states that she was appointed a GAL in the state-court proceeding on October 28, 2011. Assuming the statute applies, her GAL thus had two years from that date, or until October 28, 2013, to file this action. The GAL failed to do so.

## CONCLUSION

As the district court correctly determined, the allegations of Ms. Canfield's Complaint show that it was untimely filed. None of her arguments to the contrary has merit. We therefore affirm the judgment of the district court.

### All Citations

619 Fed.Appx. 774

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2015 WL 2148708
Only the Westlaw citation is currently available.
United States District Court,
D. Colorado.

Paul Matthew Cruz, Plaintiff,
v.
Rick Raemisch, in his official capacity as Executive Director of the Colorado Department of Corrections, Defendant.

Civil Action No. 14–cv–03021–WYD–KMT | Signed May 6, 2015

**Attorneys and Law Firms**

Robert Paul Borquez, Robert P. Borquez, Attorney at Law, Denver, CO, for Plaintiff.

Kristin A. Ruiz, Colorado Attorney General's Office, Denver, CO, for Defendant.

**ORDER ON MOTION TO DISMISS**

Wiley Y. Daniel, Senior United States District Judge

**I. *INTRODUCTION***

***1** THIS MATTER is before the Court on Defendant's Motion to Dismiss filed on January 9, 2015. The motion seeks to dismiss Plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). A response in opposition to the motion was filed on January 29, 2015, and a reply was filed on February 23, 2015. Thus, the motion is fully briefed. Also pending is Plaintiff's Opposed Motion for Leave to Join Parties and File Amended Complaint, which is fully briefed.

By way of background, this is a prisoner civil rights case wherein Plaintiff asserts a single claim for relief under the Fourteenth Amendment based on his assertions that the criteria for sex offender treatment as outlined in Administrative Regulation 700–19 violates his "substantive due process liberty interest in statutorily mandated sex offender treatment, because it makes such treatment conditional upon the inmate fitting into a particular DOC-imposed modality." (Compl., ¶ 1.) Thus, Plaintiff alleges that in September of 2002, he was sentenced to an indeterminate sentence of ten (10) years to life under the Colorado Life Time Supervision Act, also known as SOLSA. (*Id.*, ¶ 15.) Upon his incarceration in the Colorado Department of Corrections ["DOC"], Plaintiff sought and received sex offender treatment through the DOC's Sex Offender Treatment and Monitoring Program ("SOTMP"). (*Id.* at ¶ 17.) However, Plaintiff was subsequently terminated from the program after only one month due to his failure to attend group therapy sessions. (*Id.* at ¶ 18.)

The Complaint alleges that between December 11, 2002, and the filing of the Complaint, Plaintiff was not offered admission into SOTMP Phase I. (Compl., ¶ 19.) It further alleges that on April 13, 2010, Plaintiff "reached his initial Parole Eligibility Date but was not eligible for parole because he had not yet started SOTMP Phase 1 nor had he otherwise progressed sufficiently in treatment to make him eligible for parole." (*Id.*, ¶ 20.) In April 2012, Plaintiff completed the Phase 1 screening form and it was referred to SOTMP for screening and placement on the waiting list. (*Id.*, ¶ 21.) On July 25, 2012, Plaintiff "was placed on the waiting list, "awaiting re-entry into Phase 1." (*Id.*, ¶ 22.) When Plaintiff and his attorney asked about when Plaintiff would re-enter Phase I, they were told that he had to "wait to be called to join an active treatment", that he would be notified "when his name came up for placement" at which time he would be "called to the facility" that has an open space, and that the DOC could not give a specific time when he would be placed back in a group. (*Id.*, ¶¶ 23–26.) Plaintiff has still not been reinstated into the SOTMP. (*Id.*, ¶¶ 29–30.)

Plaintiff asserts that he "is entitled to treatment under §§ 18–1.3–1004(3) and 1611.7–105(1), C.R.S., without having to meet the above DOC-imposed modality." (Compl., ¶ 28.) He further asserts that "the DOC criteria on its face limits sex offender treatment just to those offenders who comply with the DOC criteria, and in the Plaintiff's case, the application of that unlawful criteria has denied and continues to deny Mr. Cruz the treatment that he is entitled to under Colorado law, in violation of his liberty interest in said treatment as protected by the Fourteenth Amendment to the U.S. Constitution." (*Id.*, ¶ 33.) He asks the Court to declare A.R. 700–19, § IV(E) "Treatment Participation Requirements and Prioritization" of SOTMP null and void, to reinstate Plaintiff into sex offender treatment, and for an award of attorney's fees and costs.

***2** On March 24, 2015, Plaintiff filed a Motion for Leave to Join Parties and File Amended Complaint. It states that the Executive Director of the DOC who was the only Defendant initially sued does not manage and control the SOTMP without delegating responsibilities to subordinates.

Thus, Plaintiff seeks to join Leonard Woodson, the SOTMP Unit Manager of the DOC, and Ivette Ruiz, the SOTMP Coordinator for the Arkansas Valley Correctional Facility, and to file the Amended Complaint attached as Exhibit A to the motion.

## II. *ANALYSIS*

### A. *Motion to Dismiss*

#### 1. *Standard of Review*

Defendant's motion is filed pursuant to Fed. R. Civ. P. 12(b)(1) and (b)( (6). Under Rule 12(b)(1), a complaint may be dismissed for lack of subject matter jurisdiction. A facial attack on the complaint's allegations as to subject matter jurisdiction, as in this case, "questions the sufficiency of the complaint." *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). In reviewing a facial attack, the Court "must accept the allegations in the complaint as true." *Id.*

As to a motion to dismiss filed under that Rule 12(b)(6), the court must "accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Jordan–Arapahoe, LLP v. Bd. of County Comm'rs of Cnty. of Arapahoe*, 633 F.3d 1022, 1025 (10th Cir. 2011). Plaintiff "must allege that 'enough factual matter, taken as true, [makes] his claim for relief ... plausible on its face.' " *Id.* (quotation and internal quotation marks omitted). "A claim has facial plausibility when the [pleaded] factual content [ ] allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' " *Id.* (quotation omitted).

#### 2. *The Merits of the Motion to Dismiss*

Defendant first argues that Plaintiff's Complaint is barred by the two year statute of limitations applicable to civil rights claims brought pursuant to 42 U.S.C. § 1983. In Colorado, a two year statute of limitations applies to Section 1983 claims. Colo. Rev. Stat. § 13–80–102; *Depineda v. Hemphill*, 25 F.3d 1056 (10th Cir. 1994). A § 1983 claim accrues when the plaintiff knows or has reason to know of the injury that is the basis of the action. *Workman v. Jordan*, 32 F.3d 475, 482 (10th Cir. 1994); *see also Fratus v. Deland*, 49 F.3d 673, 675 (10th Cir. 1995) ("a civil rights action accrues when 'facts that would support a cause of action are or should be apparent' ") (quotation omitted).

Defendant asserts that the gravamen of Plaintiff's Complaint centers on the application of the treatment criteria outlined in Administrative Regulation 700–19 in determining Plaintiff's eligibility for treatment, as well as his priority order on the Phase I STOMP wait list. He asserts that Plaintiff was subject to the alleged unlawful criteria in July of 2012. Therefore, Defendant argues that Plaintiff knew or had reason to know of the injury that forms the basis of this lawsuit by that time frame. Plaintiff did not file this action until November 2014, several months after the statute of limitations had expired. Thus, Defendant contends that the Complaint must be dismissed as time-barred.

In response, Plaintiff asserts that the argument that the cause of action accrued in July 2012 is faulty because Defendant has been engaging in a continuing violation of Plaintiff's constitutional rights. He argues that application of the continuing violations doctrine is a fact-intensive exception to the statute of limitations, and cannot be cannot be resolved by a motion to dismiss under Rule 12.

***3** I find that the motion to dismiss must be granted because the case is time-barred. Plaintiff does not dispute Defendant's contention that his claim accrued at the latest in July 2012 when he was subjected to the alleged unlawful criteria. He further does not dispute that his Complaint was filed more than two years after that. While Plaintiff relies on the continuing violations doctrine, the Tenth Circuit has stated that this doctrine does not apply to § 1983 claims. *Mercer–Smith v. New Mexico Children, Youth and Families Dept.*, 416 Fed.Appx. 704, 712 (10th Cir. 2011) (citing *Hunt v. Bennett*, 17 F.3d 1263, 1265 (10th Cir. 1994) (holding that the doctrine of continuing violations does not "extend[ ] ... to a § 1983 claim"); *Thomas v. Denny's Inc.*, 111 F.3d 1506, 1514 (10th Cir. 1997) (the doctrine of continuing violations applies to Title VII claims because "of the need to file administrative charges," but does not apply to claims that do "not require [the] filing of such charges before a judicial action may be brought.")). [1]

1 While the *Hunt* court indicated that the continuing violations doctrine might apply to a conspiracy claim under § 1983, 17 F.3d at 1266, no such claim is implicated here.

Moreover, I agree with Defendant that even if a continuing violation exception could be applied to claims under § 1983, it would not be applicable here. That exception is triggered by a continuous series of unlawful acts, not by the continuing effects of the original violation. *Mata v. Anderson*, 635 F.3d

1250, 1253 (10th Cir. 2011). Here, Plaintiff challenges the application of AR 700–19–IV–E for purposes of determining his eligibility for placement on the wait list and his priority order on the same. The Complaint makes clear that the alleged unlawful criterion was applied in July of 2012, when Plaintiff was screened for treatment and placed on the treatment wait list. While Plaintiff may continue to feel the effects of this initial act, no new act occurred thereafter and the continuing violation doctrine is not triggered by the continuing effects of the original violation. Since I have found that Plaintiff's claim is time-barred, I need not address the merits of the substantive due process claim

**B.** ***Motion to Join Parties and Amend Complaint***

I also deny Plaintiff's Opposed Motion for Leave to Join Parties and File Amended Complaint on grounds of futility. *See Frank v. U.S. West,* 3 F.3d 1357, 1365 (10th Cir. 1993). A proposed amendment is futile if the complaint, as amended, would be subject to dismissal for any reason. *Watson ex rel. Watson v. Beckel,* 242 F.3d 1237, 1239–40 (10th Cir. 2001); *see also Gohier v. Enright,* 186 F.3d 1216, 1218 (10th Cir. 1999) ("The futility question is functionally equivalent to the question whether a complaint may be dismissed for failure to state a claim...."). Here, the Amended Complaint as proposed would be subject to dismissal for the same reasons as the original Complaint. The Amended Complaint does not impact the accrual of the cause of action in July 2012, and the two year statute of limitations would bar the claims against the new Defendants.

**III.** ***CONCLUSION***

Based upon the foregoing, it is

ORDERED that Defendant's Motion to Dismiss (ECF No. 8) is **GRANTED**. It is

FURTHER ORDERED that Plaintiff's Opposed Motion for Leave to Join Parties and File Amended Complaint (ECF No. 19) is **DENIED** as futile.

**All Citations**

Not Reported in F.Supp.3d, 2015 WL 2148708

2015 WL 156777
Only the Westlaw citation is currently available.
United States District Court,
D. Colorado.

Edward **Allen** aka Edward Clutts, Plaintiff,
v.
Warden **Falk** of Sterling
Correctional Facility, Defendant.

Civil Action No 14–cv–01176–RBJ–MJW | Signed January 12, 2015

**Attorneys and Law Firms**

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## ORDER

R. Brooke Jackson, United States District Judge

***1** This matter is before the Court on the December 18, 2014 Recommendation [ECF No. 45] of Magistrate Judge Michael J. Watanabe that the Court grant Defendant's Motion to Dismiss Plaintiff's Amended Complaint or Alternatively, Motion for Summary Judgment [ECF No. 25]; deny Plaintiff's Second Motion Persent [*sic*] FRCP 65 [ECF No. 27]; and deny Plaintiff's Motion for Joinder of Parties [ECF No. 42]. [1] The Recommendation is incorporated herein by reference. *See* 28 U.S.C. § 636(b)(1)(B); Fed.R.Civ.P. 72(b).

1 The Court converts Judge Watanabe's recommendation on the motion for joinder of parties into an order, as it is a non-dispositive pretrial motion. *See Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1462 (10th Cir.1988). The Court has reviewed the order for clear error and, finding none, affirms it. *See* 28 U.S.C. § 636(b)(1)(A).

## BACKGROUND

A detailed summary of the procedural and factual background of this case was provided in the Recommendation. As a brief overview, Plaintiff Edward Allen (aka Edward Clutts) is an inmate at the Colorado Territorial Correctional Facility ("CTCF") in Canon City, Colorado. Mr. Allen filed this lawsuit pursuant to 42 U.S.C. § 1983 claiming violations of a number of his constitutional rights against a number of defendants. Presently only one defendant and one claim remain, namely an Eighth Amendment claim against Warden Falk of Sterling Correctional Facility ("SCF"), a facility where Mr. Allen was previously (but no longer is) held. The defendant moved to dismiss this claim, or alternatively for judgment as a matter of law. Upon a thorough review, Judge Watanabe recommended that the claim be dismissed or, alternatively, that judgment be entered in favor of the defendant as a matter of law. Meanwhile, Mr. Allen moved for injunctive relief, seeking an order barring his transfer to another facility for the duration of this case. Judge Watanabe recommended denying the motion. Judge Watanabe also denied Mr. Allen's motion for joinder of parties, which he liberally construed as a motion for leave to amend the pleadings.

The Recommendation advised the parties that specific written objections were due within fourteen (14) days after being served with a copy of the Recommendation. Mr. Allen filed a timely objection on December 28, 2014. [ECF No. 46].

Following the issuance of a magistrate judge's recommendation on a dispositive matter, the district court judge must "determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed.R.Civ.P. 72(b)(3). The district judge is permitted to "accept, reject, or modify the recommended disposition; receive further instruction; or return the matter to the magistrate with instructions." *Id.* "In the absence of timely objection, the district court may review a magistrate ... [judge's] report under any standard it deems appropriate." *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir.1991) (citing *Thomas v. Arn*, 474 U.S. 140, 150 (1985) ( "It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings.")).

***2** The Court has reviewed the relevant filings surrounding the Recommendation, in particular the Complaint, the pending motions, the briefs on the motions, and the objection. The Court has conducted a de novo review of the Recommendation in response to the plaintiff's timely-filed objection. Based on this review, the Court concludes that Judge Watanabe's analyses and recommendations are correct. The Court therefore ADOPTS the Recommendation

of the United States Magistrate Judge as the findings and conclusions of this Court.

Though it need not, the Court pauses to address some of Mr. Allen's concerns raised in his objection. First and foremost, this Court is limited in its powers. The fact that all of Mr. Allen's previous lawsuits have been dismissed on procedural grounds is not a choice that the Court makes; the Court is not free to hear the merits of a case if the procedural requirements have not been met. However, Judge Watanabe did address the merits of Mr. Allen's claim, and found that it should be dismissed even if it did not suffer from procedural defects. *See* [ECF No. 45 at 15–18]. Second, Warden Falk cannot be sued for injunctive relief in this case, as Mr. Allen maintains. Because Mr. Allen is no longer housed at SCF, Warden Falk has no control over Mr. Allen's living conditions. Therefore, no relief can come from an injunction. Third, though he insists otherwise, Mr. Allen has not exhausted his administrative remedies. Under prison regulations, Mr. Allen was required to file a grievance within 30 days of his alleged attack. He failed to do so, and he did not request to file a grievance for approximately two years after the incident occurred. The Prison Litigation Reform Act ("PLRA") therefore bars this suit. Fourth, Mr. Allen's "pattern of misconduct" theory is misplaced. As indicated by the authority Mr. Allen cites, this theory is used to make out a claim of municipal liability. *See* [ECF No. 32 at 1–2, 5]. Mr. Allen, however, has not sued a municipality. Finally, Judge Babcock—the original Judge assigned to this case—never found that Mr. Allen's claim had a likelihood of success on the merits; he merely found that the claim was "not legally frivolous" and therefore not subject to *sua sponte* dismissal. *See* [ECF No. 16 at 8]. The two are far from the same.

**ORDER**

Accordingly, it is ORDERED that the Recommendation of the United States Magistrate Judge [ECF No. 45] is AFFIRMED, and it is ADOPTED. It is further ORDERED that Defendant's Motion to Dismiss Plaintiff's Amended Complaint or Alternatively, Motion for Summary Judgment [ECF No. 25] is GRANTED; Plaintiff's Second Motion Persent [*sic*] FRCP 65 [ECF No. 27] is DENIED; and Plaintiff's Motion for Joinder of Parties [ECF No. 42] is DENIED.

**RECOMMENDATION ON**

**(1) DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT (DOC. 12) OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT (Docket No. 25);**

**(2) PLAINTIFF'S SECOND MOTION PERSENT [sic] FRCP [sic] 65 (Docket No. 27);**

**and**

**(3) PLAINTIFF'S MOTION FOR JOINDER OF PARTIES (Docket No. 42)**

MICHAEL J. WATANABE, United States Magistrate Judge

This case is before the undersigned pursuant to an Order of Reference to United States Magistrate Judge entered by Judge R. Brooke Jackson on October 24, 2014 (Docket No. 31).

***PLAINTIFF'S ALLEGATIONS***

The pro se incarcerated plaintiff raised three claims against thirteen defendants in his Amended Complaint brought pursuant to 42 U.S.C. § 1983. (Docket No. 12). However, following an Order issued by Judge Lewis T. Babcock (Docket No. 16 at 10), only one defendant and one claim remain, namely, plaintiff's Eighth Amendment claim against Defendant Warden Falk of Sterling Correctional Facility (claim three) (Docket No. 12 at 9; see Docket No. 24 amending caption to reflect Falk's name) in which plaintiff alleges the following.

***3** In July 2004 plaintiff was sentenced to three concurrent terms of ten years to life, and the sentencing court stated that it could not order the plaintiff to take sex offender treatment. On or about August 15, 2004, plaintiff's case manager Mr. Jones informed plaintiff he was recommending the sex offender treatment program, and if plaintiff did not cooperate, plaintiff would be moved to a place where "things can be done." In 2005 the sex offender treatment program sent plaintiff a form which required him to confess a crime, which he refused to sign. He was thus deemed to be in denial and non-compliant with sex offender treatment.

Over the past ten years, plaintiff has been placed in several facilities where security threat group (STG) prisoners have threatened, beaten, and attempted to extort and kill him. On July 31, 2009, he arrived at Sterling Correctional Facility ("SCF"). He had already filed a civil case (Case No. 08–cv–02506–ZLW–BNB) about the violence he had already experienced, which was ultimately dismissed as frivolous. In that case, Magistrate Judge Boland conducted a hearing during which plaintiff informed the court he was still living under the threat of violence. After the hearing, plaintiff was moved to Living Unit 4 ("LU4") by the Warden/Designee of SCF. Plaintiff was housed in a cell with an inmate who informed him that if he stayed in that cell without a fight with the plaintiff, his boys would beat him down. That inmate was moved to another cell. Then inmate Zamora was moved in, and he also had gang affiliations. Plaintiff went to Sergeant Buckner on several occasions, but Buckner refused to move plaintiff. Zamora came back into the cell and starting hitting plaintiff until a voice came over the speaker stating, "Zamora you and Clutts stop your shit and you pack up your [sic] moving." On August 12, 2011, prisoner Edward Douglas snuck up behind the plaintiff with a lock in a sock and beat the plaintiff. On April 25, 2012, inmate Windschel attacked plaintiff in the "gang pod" where plaintiff was being housed.

Since 2008, after the hearing held by Judge Boland, plaintiff has suffered scars on his face, a broken rib, and a lost tooth. The Attorney General's Office has refused to do anything about the threats of violence. The Warden/Designee has gone out of his way to place plaintiff in with STG prisoners. Plaintiff has been told he will be protected from STG prisoners if he takes sex offender treatment. It violates plaintiff's Eighth Amendment right to not protect him from other prisoners. It is common knowledge that sex offenders are attacked, beaten, extorted, and killed by STG prisoners.

Plaintiff seeks injunctive relief in the form of a restraining order preventing the CDOC from placing him in a facility with STG prisoners. He also seeks declaratory relief and punitive and compensatory damages.

***PENDING MOTIONS***

Now before the court for a report and recommendation are the following three motions: (1) Defendant's Motion to Dismiss Plaintiff's Amended Complaint (Doc. 12) or Alternatively, Motion for Summary Judgment (Docket No. 25); (2) Plaintiff's Second Motion Persent [sic] FRCP [sic] 65 (Docket No. 27); and (3) Plaintiff's Motion for Joinder of Parties (Docket No. 42). Responses have been filed with respect to the first two motions (Docket Nos. 32 and 35). Defendant filed a reply in support of his motion (Docket No. 37). Plaintiff just filed an untimely reply in support of his motion for a temporary restraining order ("TRO") (Docket No. 44). The court has considered these motions, the responses thereto, the replies, and applicable case law and statutes. In addition, the court has taken judicial notice of the court file and plaintiff's other civil actions in this court. The court now being fully informed makes the following findings, conclusions of law, and recommendations.

***Defendant's Motion to Dismiss or for Summary Judgment***

***4** Defendant moves to dismiss the Amended Complaint (Docket No. 12) pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6) on the following grounds: (1) plaintiff failed to exhaust his administrative remedies and his claim should thus be dismissed pursuant to the Prison Litigation Reform Act ("PLRA"), (2) his claim is largely time-barred, (3) Falk is entitled to Eleventh Amendment immunity, (4) plaintiff fails to allege personal participation on behalf of Falk, (5) plaintiff fails to state an Eighth Amendment claim; (6) Falk is entitled to qualified immunity, and (7) plaintiff fails to state a claim for damages. The only argument alternatively brought pursuant to Fed.R.Civ.P. 56 is number 1, the non-exhaustion argument.

Rule 12(b)(1):

> empowers a court to dismiss a Complaint for "lack of jurisdiction over the subject matter." Fed.R.Civ.P. 12(b)(1). As courts of limited jurisdiction, federal courts may only adjudicate cases that the Constitution and Congress have granted them authority to hear. *See* U.S. CONST. art. Ill, § 2; *Morris v. City of Hobart*, 39 F.3d 1105, 1110 (10th Cir.1994). Statutes conferring jurisdiction on federal courts are to be strictly construed. *See F & S Constr. Co. v. Jensen*, 337 F.2d 160, 161 (10th Cir.1964). A Rule 12(b)(1) motion to dismiss "must be determined from the allegations of fact in the complaint, without regard to mere conclusionary allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir.1971). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *See Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir.1974).
>
> Motions to dismiss pursuant to Rule 12(b)(1) may take two forms. First, if a party attacks the facial sufficiency of the complaint, the court must accept the allegations of the complaint as true. *See Holt v. United States*, 46 F.3d

1000, 1002–03 (10th Cir.1995). Second, if a party attacks the factual assertions regarding subject matter jurisdiction through affidavits and other documents, the court may make its own findings of fact. *See id.* at 1003. A court's consideration of evidence outside the pleadings will not convert the motion to dismiss to a motion for summary judgment under Rule 56. *See id.*

*Cherry Creek Card & Party Shop, Inc. v. Hallmark Marketing Corp.*, 176 F.Supp.2d 1091, 1094–95 (D.Colo.2001).

Under Rule 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). A motion to dismiss pursuant to Rule 12(b)(6) alleges that the complaint fails "to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). "A complaint must be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) if it does not plead 'enough facts to state a claim to relief that is plausible on its face.' " *Cutter v. RailAmerica, Inc.*, 2008 WL 163016, at *2 (D.Colo. Jan. 15, 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974 (2007)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, ... 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 will not do ...." *Bell Atlantic Corp.*, 550 U.S. at 555 (citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* "[A] plaintiff must 'nudge [ ][his] claims across the line from conceivable to plausible' in order to survive a motion to dismiss.... Thus, the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir.2007) (quoting *Bell Atlantic Corp.*, 127 S.Ct. at 1974).

***5** The Tenth Circuit Court of Appeals has held "that plausibility refers 'to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.' " *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir.2012). The Circuit court has further "noted that '[t]he nature and specificity of the allegations required to state a plausible claim will vary based on context.' " *Id.* The court thus "concluded the *Twombly/Iqbal* standard is 'a wide middle ground between heightened fact pleading, which is expressly rejected, and allowing complaints that are no more than labels and conclusions or a formulaic recitation of the elements of a cause of action, which the Court stated will not do.' " *Id.*

For purposes of a motion to dismiss pursuant to Rule 12(b)(6), the court must accept all well-pled factual allegations in the complaint as true and resolve all reasonable inferences in the plaintiff's favor. *Morse v. Regents of the Univ. of Colo.*, 154 F.3d 1124, 1126–27 (10th Cir.1998); *Seamons v. Snow*, 84 F.3d 1226, 1231 –32 (10th Cir.1996). However, "when legal conclusions are involved in the complaint 'the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to [those] conclusions' ...." *Khalik*, 671 F.3d at 1190 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009)). "Accordingly, in examining a complaint under Rule 12(b)(6), [the court] will disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable." *Id.* at 1191.

Rule 56(a) provides that summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). "A party seeking summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, interrogatories, and admissions on file together with affidavits, if any, which it believes demonstrate the absence of genuine issues for trial." *Robertson v. Board of County Comm'rs of the County of Morgan*, 78 F.Supp.2d 1142, 1146 (D.Colo.1999) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir.1992)). "Once a properly supported summary judgment motion is made, the opposing party may not rest on the allegations contained in the complaint, but must respond with specific facts showing the existence of a genuine factual issue to be tried.... These facts may be shown 'by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings by themselves.' " *Southway v. Central Bank of Nigeria*, 149 F.Supp.2d 1268, 1273 (D.Colo.2001), *aff'd*, 328 F.3d 1267 (10th Cir.2003).

"Summary judgment is also appropriate when the court concludes that no reasonable juror could find for the non-moving party based on the evidence presented in the motion and response." *Id.* "The operative inquiry is whether, based

on all documents submitted, reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict.... Unsupported allegations without 'any significant probative evidence tending to support the complaint' are insufficient ... as are conclusory assertions that factual disputes exist." *Id.*; *Robertson,* 78 F.Supp.2d at 1146 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); quoting *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir.1995)). "Evidence presented must be based on more than 'mere speculation, conjecture, or surmise' to defeat a motion for summary judgment." *Southway,* 149 F.Supp.2d at 1274. "Summary judgment should not enter if, viewing the evidence in a light most favorable to the non-moving party and drawing all reasonable inferences in that party's favor, a reasonable jury could return a verdict for that party." *Id.* at 1273.

***6** Since the plaintiff is not an attorney, his pleading and other papers have been construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. *See Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir.1991) (citing *Haines v. Kerner,* 404 U.S. 519, 520–21 (1972)). Therefore, "if the court can reasonably read the pleadings to state a claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements.... At the same time, ... it is [not] the proper function of the district court to assume the role of advocate for the pro se litigant." *Id.*

***Statute of Limitations.*** Plaintiff's § 1983 claim is governed by the two-year statute of limitations contained in § 13–80–102, C.R.S. *See Workman v. Jordan,* 32 F.3d 475, 482 (10th Cir.1994); *Merrigan v. Affiliated Bankshares of Colo., Inc.*, 775 F.Supp. 1408, 1411–12 (D.Colo.1991). Federal law, rather than state law, determines when a federal claim accrues. The statute of limitations begins to run when the plaintiff knows or has reason to know of the existence and cause of injury which is the basis of his action. *Industrial Constructors Corp. v. United States Bur. of Reclamation,* 15 F.3d 963, 969 (10th Cir.1994). Dismissal under Fed.R.Civ.P. 12(b)(6) is proper when the Complaint indicates on its face that the statute of limitations has expired. *See Aldrich v. McCulloch Props. Inc.*, 627 F.2d 1036, 1041 n.4 (10th Cir.1980).

Here, the original Complaint was dated April 15, 2014 (Docket No. 1 at 13), and was filed on April 25, 2014. Under the prison "mailbox rule," the Complaint should be deemed "filed" at the moment of its delivery to prison authorities for forwarding to the District Court. *See Houston v. Lack,* 487 U.S. 266, 275 (1988). Plaintiff avers therein and in the Amended Complaint that he had conflicts with other inmates on four separate occasions—two occurred sometime between July 31, 2009 and August 12, 2011, then next was on August 12, 2011, and the fourth was on April 25, 2012—and defendant failed to protect him. (Docket No. 12 at 9). Defendant asserts that plaintiff's claim was not timely filed with respect to all incidents other than the alleged altercation on April 25, 2012, because this action was not commenced within two years of the date these earlier claims occurred since at the time of the incidents, plaintiff knew or had reason to know of the injury which was the basis of his action.

In response, plaintiff essentially argues that the continuing violation doctrine should be applied to his claims. "Under this doctrine, a plaintiff may avoid the statute of limitations when the defendant has acted pursuant to a pattern or longstanding policy or practice of constitutional violations." *Mercer–Smith v. New Mexico Children, Youth and Families Dep't,* 416 Fed.Appx. 704, 712 (10th Cir. Mar. 21, 2011). Plaintiff's argument, however, fails because "the doctrine of continuing violations does not apply to § 1983 claims." *Id.* (citing *Hunt v. Bennett,* 17 F.3d 1263, 1265 (10th Cir.1994) (holding that the doctrine of continuing violations does not "extend [ ] ... to a § 1983 claim")). *See Bartowsheski v. Topless,* 2014 WL 3606989, at *2 n.2 (D.Colo. July 21, 2014) (same).

The court finds that plaintiff knew of the existence and cause of any injuries from the incidents that occurred more than two years before he commenced this action. Furthermore, plaintiff is not an inexperienced litigator, as evidenced by the many previous civil actions he has brought in this court, including at least two others which also involved Eighth Amendment claims concerning his being housed with gang members. *See, e.g.*, Civil Action Nos. 08–cv–02506–ZLW–BNB (Docket No. 3); 09–cv–02325–CMA–BNB (Docket No. 3 at 8). Nevertheless, here he failed to bring his claims concerning the first three incidents in a timely manner, and he has established no basis for tolling the statute of limitations. Therefore, plaintiff's claims based on the first three alleged incidents are time barred, and the only timely claim which remains concerns the alleged April 2012 incident.

***7** ***Exhaustion.*** The PLRA provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until

such administrative remedies are available are exhausted." 42 U.S.C. § 1997e(a). The PLRA requires exhaustion as a "precondition" to bringing litigation and requires dismissal where a litigant has failed to complete exhaustion before initiating a suit. *See Fitzgerald v. Corrections Corp. of Am.*, 403 F.3d 1134, 1140–41 (10th Cir.2005). This exhaustion requirement "is mandatory, and the district court [is] not authorized to dispense with it." *Beaudry v. Corrections Corp. of Am.*, 331 F.3d 1164, 1167 n.5 (10th Cir.2003). Section "1997e(a)'s exhaustion requirement applies to all prisoners seeking redress for prison circumstances or occurrences." *Porter v. Nussle*, 534 U.S. 516, 520 (2002). The "failure to exhaust is an affirmative defense under the PLRA, and ... inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Jones v. Bock*, 549 U.S. 199, 216 (2007). As an affirmative defense, "the burden of proof for the exhaustion of administrative remedies in a suit governed by the PLRA lies with the defendant." *Roberts v. Barreras*, 484 F.3d 1236, 1241 (10th Cir.2007).

"When raising an affirmative defense in a motion for summary judgment, '[t]he defendant ... must demonstrate that no disputed material fact exists regarding the affirmative defense asserted.' ... 'If the defendant meets this initial burden, the plaintiff must then demonstrate with specificity the existence of a disputed material fact.' ... 'If the plaintiff fails to make such a showing, the affirmative defense bars his claim, and the defendant is entitled to summary judgment as a matter of law.' " *Sparks v. Foster*, 241 Fed.Appx. 467, 472, 2007 WL 1748509, at *4 (10th Cir.2007) (quoting *Hutchinson v. Pfeil*, 105 F.3d 562, 564 (10th Cir.1997)). This court finds that the plaintiff has not made such a showing.

The Colorado Department of Corrections ("CDOC") has a multi-step administrative grievance process available to inmates set forth in its regulations which entails first a written informal grievance and then a formal three-step written grievance procedure. *See* CDOC Administrative Regulation 850–4. The Tenth Circuit has found that an inmate must appeal his grievance through all available channels to exhaust his administrative records fully. *See Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir.2002) ("An inmate who begins the grievance process but does not complete it is barred from pursuing a § 1983 claim under PLRA for failure to exhaust his administrative remedies."). Here, defendant has shown that despite plaintiff's familiarity with the grievance process, plaintiff failed to avail himself of it with respect to his claim that defendant failed to protect him from an incident which allegedly occurred on or about April 25, 2012.

In response, plaintiff asserts he has exhausted the administrative remedies available because case managers allegedly have refused grievances on this matter twice. In support of this assertion, plaintiff references Exhibit A–4 from Civil Action No. 08–cv–02506–ZLW–BNB, and the Nature of Case section of his Complaint in this action. The court reviewed the docket sheet in Civil Action No. 08–cv–02506–ZLW–BNB and did not find any link or mention of Exhibit A–4 in any of the 205 docket entries. The court did not open and search through the documents filed in that earlier case because it is not the court's responsibility to track down plaintiff's exhibits. With respect to the plaintiff's Nature of the Case section in the original Complaint in this action, plaintiff stated in pertinent part, "On March 19, 2014 the plaintiff went to his case manager Mr. Cantin and asked him for grievance process forms for the following issues. Mr. Cantin informed the plaintiff that these issues were non-grivable [sic] an [sic] must be taken to court." (Docket No. 1 at 6). Plaintiff made a similar claim in his Response. (Docket No. 32 at 2–3). Plaintiff further contends in his Response that the issue of guards placing him in harm was grieved (citing Exhibit I), again demonstrating indifference about placing him with STG prisoners. He claims he did not file another grievance because he was not allowed to do so. (Docket No. 32 at 3). Furthermore, he contends if a prisoner is unable to obtain grievance forms, no administrative remedy is "available," the prisoner may file in court, and defendant cannot claim plaintiff has not exhausted administrative remedies that are not available.

***8** The court notes that plaintiff's Exhibit I referenced by plaintiff in his Response is a Grievance Form dated June 26, 2009. That grievance concerns a claim by plaintiff that he was being forced into a violent situation by four CDOC employees, and he requested therein that he be removed from that violent facility and be given an apology by the four officers who assaulted him. (Docket No. 32 at 16). This Exhibit has no relevance to the issue of whether plaintiff exhausted his administrative remedies with respect to his claim of having been assaulted in April 2012, almost three years after Exhibit I was submitted.

There is a recognized exception to the exhaustion requirement when an inmate has been prevented from filing a grievance. *See Jernigan*, 304 F.3d at 1032. "When prison officials block a prisoner's access to the grievance process, the administrative remedies are not 'available' to the prisoner and, therefore, do not need to be exhausted prior to initiation of [an] ...

action." *Main v. Martin,* 2009 WL 215404, *5 (D.Colo. Jan. 22, 2009). Plaintiff, however, has provided no more than his unsupported, unsworn conclusory allegation that he was not permitted to file a grievance concerning the claims raised in this civil action. Moreover, as correctly noted by defendant in the Reply, pursuant to the plain language of the administrative regulation concerning grievances, inmates must file their first grievance (step 1) "within 30 days of the discovery of the issue or complaint ...." AR 850–04. Therefore, plaintiff should have filed his Step I Grievance at the latest by on May 25, **2012,** yet in his Response he indicates he did not even attempt to do so until almost two years later on March 19, **2014.** Therefore, even if plaintiff did in fact ask for a grievance form in 2014, his claim is not saved. Plaintiff thus has not created a genuine issue of material fact so as to defeat defendant's summary judgment motion. *See White v. Tharp,* 2008 WL 596156, *10 (D.Colo. Feb. 29, 2008) (Inmate plaintiff never provided copies of his grievances to the court or any actual evidence that would allow the court to conclude that they were filed. Plaintiff provided no more than his unsupported conclusory allegations regarding defendants' alleged obstruction of his use of the administrative process, which were not sufficient to create a genuine issue of material fact.); *Brooks v. Johnson,* 2008 WL 906130 (D.Colo. Feb. 15, 2008) (Inmate plaintiff merely stated in his response that he did file an appeal and that grievance forms are frequently lost, misplaced, or destroyed. The absence of any evidence, other than plaintiff's allegation in his response, was insufficient.), adopted by 2008 WL 906839 (D.Colo. Mar. 31, 2008), *aff'd,* 307 Fed.Appx. 247 (10th Cir. Jan. 16, 2009), *cert. denied,* 558 U.S. 854 (2009).

"Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(e), except the mere pleadings themselves ....." *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). The absence of any evidence, other than plaintiff's allegation in his response, is insufficient. *See Sparks v. Foster,* 241 Fed.Appx. at 474 (inmate plaintiff was required to go beyond his pleadings and set forth specific facts to show he was denied grievance forms or was prevented from exhausting available administrative remedies); *Maclary v. Carroll,* 142 Fed.Appx. 618, 2005 WL 1883843 (3rd Cir. Aug. 9, 2005) (In response to an affidavit stating the inmate plaintiff filed no grievances concerning the conditions at issue, the inmate merely responded that he filed unanswered and unprocessed grievances and letters to prison officials, but he did not offer any support for those bare assertions. Court found his opposition to defendants' summary judgment motion did not create a genuine issue for trial.); *Brooks v. Conway,* 2007 WL 951521, at *4 (W.D.N.Y. Mar. 28, 2007) (Inmate plaintiff's "bald and conclusory assertions" that the defendants lost his grievance papers were, without more, insufficient to avoid summary judgment on plaintiff's claim based on failure to exhaust.). *See Sparks v. Rittenhouse,* 2007 WL 987473, at *6 (D.Colo. Mar. 29, 2007) (Court cannot consider the factual assertions by the plaintiff in his brief for purposes of determining whether he can establish a constitutional violation.), *aff'd,* 314 Fed.Appx. 104 (10th Cir. Sept. 16, 2008). *See also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986) ("[W]hen a properly supported motion for summary judgment is made, the adverse party 'must set forth *specific* facts showing that there is a genuine issue for trial.' ") (emphasis added); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158 n.17 (1970) (unsworn statement submitted in support of a motion for summary judgment does not meet the requirements of Fed.R.Civ.P. 56(e)). To find otherwise would permit any inmate to circumvent the exhaustion requirement merely by making bald allegations of denial of grievance forms or other purported acts of obstruction of the administrative process.

***9** Despite this finding, the court will proceed to address the merits of plaintiff's Eighth Amendment claim below.

***Official Capacity.*** Defendant correctly assert that to the extent the plaintiff is suing him in his official capacity for damages, defendant is entitled to immunity pursuant to the Eleventh Amendment. It is well established that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983," *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71 (1989), and that "the Eleventh Amendment precludes a federal court from assessing damages against state officials sued in their official capacities because such suits are in essence suits against the state." *Hunt v. Bennett,* 17 F.3d 1263, 1267 (10th Cir.1994). Therefore, to the extent that the plaintiff's claim against the defendant is against defendant in his official capacity for monetary damages, such relief is barred by the Eleventh Amendment, and summary judgment should enter for the defendant on any such claim.

***Eighth Amendment Claim.*** Defendant asserts that there was no violation of the plaintiff's Eighth Amendment rights. "[T]he treatment a prisoner receives in prison and the conditions under which he is confined are subject to the scrutiny of the Eighth Amendment." *Farmer v. Brennan,* 511 U.S. 825, 832 (1994) (citation omitted). The Eighth

Amendment prohibits the infliction of "cruel and unusual punishments." U.S. CONST. Amed. VIII. Certain conditions of confinement, if they inflect pain unnecessarily and wantonly, may constitute cruel and unusual punishment under the Eighth Amendment. *Whitley v. Albers*, 475 U.S. 312. 319 (1986). "An inmate making a direct challenge to conditions of confinement under the 8 th Amendment, must show that, judged by contemporary standards of decency, the conditions either involve the wanton and unnecessary infliction of pain, that they are grossly disproportionate to the severity of the crime, or that they entail serious deprivation of basic human needs." *Georgacarakos v. Wiley*, 2010 WL 1291833, at *11 (D.Colo. Mar. 30, 2010) (internal quotation marks and citation omitted). "Prison officials must ... take reasonable measures to guarantee those inmates' safety." *Id.* (citation omitted). "[P]rison officials have a duty ... to protect prisoners from violence at the hands of other prisoners." *Farmer*, 511 U.S. at 833 (internal quotation marks and citation omitted). "It is not, however, every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim's safety." *Id.* at 834.

"An Eighth Amendment claim includes both an objective component, whether the deprivation of a basic human need is sufficiently serious, and a subjective component, whether the officials acted with a sufficiently culpable state of mind." *Matthews v. Wiley*, 744 F.Supp.2d 1159, 1176 (D.Colo.2010). The objective component addresses whether plaintiff is "incarcerated under conditions posing a substantial risk of serious harm," *Farmer*, 511 U.S. at 834, which includes "official conduct that is sure or very likely to cause serious injury at the hands of other inmates." *Benefield v. McDowall*, 241 F.3d 1267, 1272 (10th Cir.2001) (internal quotation marks and citation omitted.). "The subjective component follows from the principle that only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." *Matthews*, 744 F.Supp.2d at 1176 (quotations omitted).

***10** The court finds that plaintiff has not shown an Eighth Amendment claim against defendant for deliberate indifference to an objectively serious risk to his safety. Plaintiff alleges that over a period of about five years, he had isolated conflicts with four individuals. Plaintiff does not allege that these individuals or the incidents were connected, nor does he allege that he had any pre-existing concerns regarding any of these four individuals other than having a general concern about potential violence by STG inmates. Moreover, he does not allege that he ever reported any concerns about these individuals or specific STG groups to the defendant or that defendant was otherwise apprised of any substantial risk of serious harm to plaintiff to which defendant was subsequently deliberately indifferent. "Being subjected to the mere possibility of assault from another inmate is not sufficiently serious to give rise to an Eighth Amendment violation." *Bingaman v. Torrez*, 2012 WL 6762218, at *5 (D.Colo. Nov. 5, 2012), adopted by 2013 WL 50428 (D. Colo. Jan 3, 2013). An Eighth Amendment claim is not stated by alleging generally that as "a sex offender, [plaintiff] faced 'serious risks of intimidation, threats, and violence shared by all sex offenders while in prison.' " *Id. See Pacheco v. Timme*, 2012 WL 4049833, at *9 (D.Colo. Aug. 1, 2012) ("Plaintiff alleges that his life and well-being are being placed in jeopardy by his sex offender classification.... Because Plaintiff has not identified any actual threats, this is not a valid Eighth Amendment Claim."), adopted by 2012 WL 4049831 (D.Colo. Sept. 13, 2012) (citing *Riddle v. Mondragon*, 83 F.3d 1197 (10th Cir.1996) (plaintiff failed to allege any specific threat to his personal safety, much less conditions that pose "a substantial risk of serious harm")).

Based upon the finding above, summary judgment should enter for the defendant on plaintiff's Eighth Amendment claim.

***Plaintiff's Second Motion Pursuant to Rule 65***

Plaintiff moves pursuant to Fed.R.Civ.P. 65 "to maintaine [sic] status quo." (Docket No. 27). He asks the court "for a preliminary injuction [1] [sic] preventing the defendants from transferring the plaintiff to another facility or transfer station for the intire [sic] duration of this case." (Docket No. 27).

1 In his Reply, plaintiff indicates that he is seeking a TRO. (Docket No. 44 at 1).

"A [TRO] or preliminary injunction is extraordinary relief." *Statera, Inc. v. Hendrickson*, 2009 WL 2169235, *1 (D.Colo. July 17, 2009). Injunctive relief should be granted only when the moving party clearly and unequivocally demonstrates its necessity. *See Schrier v. University of Colo.*, 427 F.3d 1253, 1258 (10th Cir.2005). In the Tenth Circuit, the party requesting injunctive relief must establish that: (1) the party will suffer irreparable injury unless the injunction issues; (2) the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood of success on the merits. *Id.* "In addition to the foregoing factors, a party seeking a[TRO] also must demonstrate clearly, with specific

factual allegations, that immediate and irreparable injury will result absent a[TRO].” *Statera*, 2009 WL 2169235, *1.

Furthermore, “[b]ecause the limited purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held, ... [the Tenth Circuit has] identified the following three types of specifically disfavored preliminary injunctions ... (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that [he] could recover at the conclusion of a full trial on the merits.” *Schrier*, 427 F.3d at 1258–59 (citation and quotations omitted). “Such disfavored injunctions ‘must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course.’ ” *Id.* at 1259.

Here, this court finds that the plaintiff has not made the requisite showing. “A presumption of irreparable injury exists where constitutional rights are infringed.” *Bomprezzi v. Hoffman*, 2014 WL 6617096, at *4 (D.Colo. Nov. 21, 2014) (citing *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir.2001)). Based upon the findings above, however, plaintiff has failed to establish a likelihood of success on his Eighth Amendment claim. As a result, he is not entitled to a presumption of irreparable injury. “Determining whether irreparable harm exists can be a difficult and close question.” *Id.* (citing *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1263 (10th Cir.2004)). “[T]he concept of irreparable harm does not readily lend itself to definition, nor is it an easy burden to fulfill. In defining the contours of irreparable harm, case law indicates that the injury must be both certain and great, and that it must not be merely serious or substantial.” *Id.* (internal quotations and citations omitted). Injunctive relief is issued “to prevent existing or presently threatened injuries.” *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931). Such relief “will not be granted against something merely feared as liable to occur at some indefinite time in the future.” *Id.*

***11** Plaintiff has made no showing in his motion that he is currently threatened with immediate and irreparable injury. Furthermore, in his Response (Docket No. 35), defendant states that at the present time, plaintiff is in a facility which houses no known custody issues of plaintiff, that there are STG members at every prison in the state, [2] and thus there are no “STG–Free” facilities in which plaintiff could be housed. In addition, plaintiff's failure to identify a particular STG or gang makes it difficult to determine who, in particular, may pose a risk to him as alleged. (Docket No. 3 at ¶ 22).

2 Defendant states that there are approximately 83 different identified major STG groups known within the CDOC, and of those groups there are approximately 190 different sub-groups which may congregate around issues of race and ethnicity. Furthermore, there are currently approximately 3,100 identified STG members throughout CDOC's facilities, and that number increases to approximately 8,000 offenders when associates and suspected members are accounted for. (Docket No. 35 at 2).

Because the plaintiff has failed to establish that there is a substantial likelihood that he will prevail on the merits and that he will suffer irreparable injury unless the injunction issues, I need not address the remaining requirements for injunctive relief.

***Plaintiff's Motion for Joinder of Parties***

Plaintiff moves pursuant to Fed.R.Civ.P. 19 for joinder of several parties. He notes that he seeks injunctive relief to restrain the CDOC from placing him with STG prisoners in the same facility, and defense counsel responded that Warden Falk has no authority to provide such relief. Therefore, plaintiff asks that the CDOC and Executive Director Rick Ramish [sic] be joined as parties who can grant relief. In addition, plaintiff asks for joinder of Paul Hollenbeck, Associate Director of Offender Service, who has stated he is responsible for plaintiff's classification and overall management and has personally approved plaintiff's placement with STG prisoners. Next, plaintiff asks for the joinder of Warden Designees # 1,2, and 3, who are employees of the CDOC working at SCF, for their personal participation in placing and allowing plaintiff to be attacked by STG prisoners.

Rule 19, however, “is not the mechanism which would afford [plaintiff] the relief he seeks. The Tenth Circuit has explained that, in circumstances where a party seeking affirmative relief (i.e. a plaintiff ...) seeks to add a party-defendant, Rule 19 is ‘inapplicable, because while it provides for the Joinder of Persons Needed for Just Adjudication, ... it does not provide a joinder mechanism for plaintiffs.’ ” *Unit Petroleum Co. v. Frost*, 2013 WL 1398987, at *1 (N.D.Okla. Apr. 5, 2013) (quoting *Shaw v. AAG Eng'g & Drafting Inc.*, 138 Fed.Appx. 62, 66 (10th Cir.2005)) (internal quotations omitted). Rule 19 “is not a means by which a plaintiff can join a truly liable defendant....” *Birmingham v. Experian Info. Solutions, Inc.*,

633 F.3d 1006, 1021 (10th Cir.2011). *See Glancy v. Taubman Centers, Inc.*, 373 F.3d 656, 669 (6th Cir.2004) ("Rule 19 is the tool of the defendant, as the plaintiff has the power to choose which parties it wishes to sue and generally has ample freedom to amend its complaint to add a party."). *See also* Fed.R.Civ.P. 12(b)(7) (referring to "defense" of "failure to join a party under Rule 19").

"Rule 15(a) governs the addition of a party ... because it is actually a motion to amend." *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 31 F.3d 1015, 1018 (10th Cir.1994). Pursuant to Fed.R.Civ.P. 15(a)(2), "[t]he court should freely give leave [to amend] when justice so requires." "Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." *Bylin v. Billings*, 568 F.3d 1224, 1229 (10th Cir.2009) (quoting *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir.1993)). Here, based upon the findings above, this court finds that plaintiff's motion should be denied on the basis of futility of amendment.

***12 WHEREFORE,** for the foregoing reasons, it is hereby

**RECOMMENDED** that Defendant's Motion to Dismiss Plaintiff's Amended Complaint (Doc. 12) or Alternatively, Motion for Summary Judgment (Docket No. 25) be **granted.** It is further

**RECOMMENDED** that Plaintiff's Second Motion Persent [Sic] Frcp [Sic] 65 (Docket No. 27) be **denied.** It is further

**RECOMMENDED** that Plaintiff's Motion for Joinder of Parties (Docket No. 42) be denied.

**NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed.R.Civ.P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve and file specific written objections to the above recommendation with the District Judge assigned to the case. A party may respond to another party's objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific objections waives *de novo* review of the recommendation by the District Judge, *Thomas v. Arn*, 474 U.S. 140, 148–53 (1985), and also waives appellate review of both factual and legal questions. *Makin v. Colorado Dep't of Corrections*, 183 F.3d 1205, 1210 (10th Cir.1999); *Talley v. Hesse*, 91 F.3d 1411, 1412–13 (10th Cir.1996).**

Date: December 18, 2014

**All Citations**

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**End of Document**

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United States District Court,
D. Kansas.

David VAUGHAN, Plaintiff,
v.
ELLIS COUNTY and its Representatives, the Board of County Commissioners of Ellis County; and Ed Harbin, in his individual capacity, Defendants.

Signed No. 13–2283–CM. | March 10, 2014.

**Attorneys and Law Firms**

Kelly J. Trussell, Kori C. Trussell, Kauffman & Eye, Topeka, KS, for Plaintiff.

Allen G. Glendenning, Watkins Calcara, Chtd., Great Bend, KS, for Defendants.

***MEMORANDUM AND ORDER***

CARLOS MURGUIA, District Judge.

***1** From 2004 to 2011, plaintiff David Vaughan worked for the Ellis County Sheriff's Department under Sheriff Ed Harbin. In March 2011, plaintiff reported an incident between a jailer and an inmate, detailing the jailer's repeated use of physical force and a stun gun. After this report, plaintiff claims that Sheriff Harbin retaliated against plaintiff by violating the Americans with Disabilities Act ("ADA") when plaintiff requested a reasonable accommodation at work. Plaintiff also claims that he was constructively discharged from his job in September 2011. Represented by counsel, plaintiff filed the instant case and brought a number of claims, including a First Amendment claim under 42 U.S.C. § 1983 against Sheriff Harbin and an ADA claim against Ellis County and its Representatives, the Board of County Commissioners of Ellis County.

The matter is before the court on defendants' Motion to Dismiss. (Doc. 15.) Defendants ask the court to grant their motion to dismiss on multiple grounds. Plaintiff concedes several of defendants' arguments and/or clarifies that he did not, in fact, intend to bring such claims. Based on plaintiff's representations in his response, the court dismisses any claim under the ADA against defendant Harbin personally, plaintiff's common law whistleblower claim, and plaintiff's § 1983 claim against defendant Ellis County and its Representatives, the Board of County Commissioners of Ellis County.

Several arguments remain before the court. First, defendants argue that the Board of County Commissioners is not a proper defendant, requiring dismissal of the ADA claim against it. Second, defendants contend that plaintiff's § 1983 claim against defendant Harbin is time-barred. And third, defendants alternatively claim that qualified immunity protects defendant Harbin against § 1983 liability. For the following reasons, the court denies defendants' motion to dismiss in part and grants it in part.

## I. FACTUAL BACKGROUND

The following timeline shows the events relevant to resolution of this motion:

| Date | Event(s) |
|---|---|
| August 2009 | Plaintiff informed his employer about his diabetes and depression. (Doc. 12 at 2.) |
| March 2011 | Plaintiff submitted a voluntary statement regarding an incident between a jailer and an inmate. In that statement, plaintiff alleged that the jailer used unnecessary force on the inmate. (*Id.*) |
| April 2011 | Plaintiff requested a reasonable accommodation for his disabilities. (*Id.*) |
| Sometime before May 19, 2011 [1] | "Defendant" (1) denied plaintiff's request for reasonable accommodation; (2) responded to the request in a "retaliatory, |

threatening, and/or harassing manner"; and (3) improperly asked for protected medical information. (*Id.;* Doc. 7–1 at 2.)

But plaintiff has been deliberate in his naming of this defendant: Instead of merely naming the Board, he has named "Ellis County and its Representatives, the Board of County Commissioners of Ellis County."This designation appears to be an attempt to comply with Kan. Stat. Ann. § 19–105, which provides that all suits against a county should be brought against the Board of County Commissioners. Plaintiff claims that Ellis County is his employer—responsible for ADA violations—but has recognized that instead of naming the county, Kansas statute provides that he should name the Board.

In light of Kan. Stat. Ann. § 19–105, the court concludes that plaintiff has properly named defendant Ellis County and its Representatives, the Board of County Commissioners of Ellis County, in this lawsuit. It does not appear that plaintiff has any other option, as he must name his employer under the ADA —not an individual defendant. The court denies this portion of defendants' motion.

**B. Timeliness of § 1983 Claim**

Defendants next contend that plaintiff's § 1983 claim against defendant Harbin is untimely because he alleges retaliatory acts in March–May 2011, but he did not file his claim until June 2013. Plaintiff clarifies in his response that his § 1983 claim is for constructive discharge (which did not occur until September 21, 2011)—not the underlying acts of retaliation that led to the discharge. According to plaintiff, he only listed those acts as evidence of retaliatory intent.

Constitutional claims pursuant to 42 U.S.C. § 1983 are subject to Kansas's two-year statute of limitations set forth in Kan. Stat. Ann. § 60–513(a)(4).*Seifert,* 2012 WL 2448932, at *4. Federal courts look at federal law to decide when the claim accrues. *Delatorre v. Minner,* 238 F.Supp.2d 1280, 1286 (D.Kan.2002). Under federal law, civil rights claims accrue when the plaintiff knows or should know that his constitutional rights have been violated. *Id.* (citing *Beck v. City of Muskogee Police Dep't,* 195 F.3d 553, 557 (10th Cir.1999)); *Dockery v. Unified Sch. Dist. No. 231,* 382 F.Supp.2d 1234, 1243 (D.Kan.2005). Generally, the claim accrues when the alleged unlawful employment practice occurs-not necessarily when the consequences of the practice become most painful. *Delatorre,* 238 F.Supp.2d at 1286. In the context of a constructive discharge, ordinarily the date

1 The dates of these alleged actions are absent from plaintiff's amended complaint. But they are identified in plaintiff's Kansas charge of discrimination. (Doc. 7–1 at 2.) Although plaintiff did not attach the charge to his complaint, he refers to his Equal Employment Opportunity Commission ("EEOC") charge in the complaint, which in turn refers to the Kansas charge. Because exhaustion of administrative remedies is required before filing suit, the charges are integral to the claims before the court. The court can therefore consider the Kansas charge of discrimination in ruling on the motion to dismiss. *See GFF Corp. v. Associated Wholesale Grocers, Inc.,* 130 F.3d 1381, 1384 (10th Cir.1997) ("[I]f a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss.").

| | |
|---|---|
| On or about Sept. 21, 2011 | Plaintiff alleges he was constructively discharged. (Doc. 12 at 3.) |
| June 11, 2013 | Plaintiff filed his complaint after timely requesting a right-to-sue letter from the EEOC. (*Id.*) |

**III. ANALYSIS**

**A. The Board and/or Ellis County: Proper Defendants?**

***2** Defendants contend that the Board of County Commissioners is not a proper defendant because a county board of commissioners has no oversight over a sheriff's department and therefore no vicarious liability for employment practices of the sheriff. *See Blume v. Meneley,* 283 F.Supp.2d 1171, 1175 (D.Kan.2003). The sheriff is an independently-elected state officer who has the ultimate responsibility for employment actions under Kansas statutes. *See Seifert v. Unified Gov't of Wyandotte Cnty./Kan. City, Kan.,* 11–2327–JTM, 2012 WL 2448932, at *6 (D. Kan. June 26, 2012) (explaining that while a board of county commissioners has the power to set policy, it doesn't supersede the sheriff's power to control his office). This law suggests that the court should dismiss the Board as a party.

of the plaintiff's resignation or announced resignation will control. *Id.* at 1288.But the employee must resign within a reasonable time period after the alleged harassment, or there was no constructive discharge. *Id.* (citing *Gonzalez Garcia v. Puerto Rico Elec. Power Auth.*, 214 F.Supp.2d 194, 204 (D. Puerto Rico 2002) (quoting *Landrau -Romero v. Banco Popular De P.R.*, 212 F.3d 607, 613 (1 st Cir.2000)); *see also Ulibarri v. Lopex*, No. 95–2291, 1996 WL 594281, at *2 (10th Cir. Oct. 17, 1996) (requiring "some additional act attributable to his employer-some straw that broke the camel's back").

***3** Plaintiff had knowledge of the substantial injury by May 2011. Although plaintiff alleges constructive termination on September 21, 2011, the claim accrued when plaintiff knew or should have known his rights were violated.[2] Assuming the facts as plaintiff alleges them, "defendant" refused plaintiff's request for reasonable accommodations in a retaliatory, threatening, and/or harassing manner sometime before May 19, 2011. In plaintiff's Kansas Human Rights Commission complaint, he alleged that Ellis County and its representatives committed additional retaliatory behavior from March 2011 to May 2011. Plaintiff alleged a series of retaliatory practices that suggest he knew or should have known his rights were violated well before his constructive termination. At the latest, then, plaintiff knew or should have known his rights were violated by May 2011.

[2] Plaintiff does not argue for an exception under the continuing violation doctrine, which applies when a defendant has committed a longstanding practice of constitutional violations. But even if plaintiff did argue for the exception, the argument would fail. The continuing violation doctrine does not apply to § 1983 claims. *Mercer–Smith v. N.M. Children, Youth & Families Dep't*, 416 F. App'x 704, 712 (10th Cir.2011).

Because plaintiff knew by at least May 2011 that his rights had been violated, the statute of limitations on the § 1983 claim began running then and ran out in May 2013. The § 1983 claim filed in June 2013 is untimely and the court dismisses it.

**C. Qualified Immunity**

Even if plaintiff's claim could survive a statute of limitations attack, it cannot withstand the assertion of qualified immunity. Qualified immunity protects government officials from individual liability under § 1983 unless their conduct "violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Schroeder v. Kochanowski*, 311 F.Supp.2d 1241, 1250 (D.Kan.2004) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). When a defendant raises qualified immunity, the plaintiff must show that (1) the defendant's actions violated a constitutional or statutory right and (2) the right violated was clearly established at the time of the conduct in issue. *Id.* If the plaintiff fails to meet the first prong, the analysis ends there and the defendant retains qualified immunity. *Id.* The court requires the complaint to contain specific allegations of fact to demonstrate that the official's actions were not objectively reasonable in light of clearly established law. *Id.*;*Van Cleave v. City of Marysville, Kan.*, 185 F.Supp.2d 1212, 1215 (D.Kan.2002).

The court first decides whether plaintiff has alleged a deprivation of a constitutional right. *Eaton v. Meneley*, 379 F.3d 949, 954 (10th Cir.2004). A First Amendment violation requires that the defendant's action had a deterrent effect on the plaintiff's speech. *Id.* The objective standard focuses on whether the harm is the type that "would chill a person of ordinary firmness from continuing to engage in the protected speech."*Id.*

Defendant Harbin does not challenge that plaintiff engaged in protected activity by filing the complaint against the jailer. (Doc. 20 at 5.) Rather, defendant Harbin argues plaintiff has not shown that defendant Harbin took any adverse employment action contemporaneous with or subsequent to the protected activity. Defendant Harbin argues that plaintiff has not sufficiently alleged a deprivation of a constitutional right. The court agrees.

***4** Generally, a plaintiff's factual allegations in his complaint must be "more than labels, conclusions and a formulaic recitation of the elements of a cause of action."*In re Motor Fuel Temperature Sales Practices Litig.*, 534 F.Supp.2d 1214, 1216 (D.Kan.2008). The court makes all reasonable inferences in favor of plaintiffs but does not have to accept legal conclusions as true.*Id.* The standard is even higher in § 1983 claims against an official who is entitled to qualified immunity, where " '[t]he *Twombly* standard may have a greater bite ... appropriately reflecting the special interest in resolving the affirmative defense of qualified immunity at the earliest possible stage of litigation.' " *Carnell v. Carr*, No. 12–3020–SAC, 2012 WL 6156419, at *1 (D.Kan. Dec. 11, 2012) (quoting *Robbins v. Oklahoma*, 519 F.3d 1242, 1249 (10th Cir.2008)).

Specifically, in § 1983 claims, plaintiffs must allege the violation of a constitutional right and must allege that the defendant caused the deprivation of the constitutional right. *Meyer v. City of Russell, Kan. Police Dep't,* No. 12–1178–SAC, 2012 WL 4867379, at *4 (D.Kan. Oct. 15, 2012). This requires "specific, nonconclusory factual allegations" to allow the court to determine whether qualified immunity ought to be imposed. *Id.* In § 1983 actions, the court is particularly concerned with "who is alleged to have done what to whom."*Carnell,* 2012 WL 6156419, at *2. Because of the higher standard, § 1983 claims are more likely to fail for plausibility. *Lee v. City of Topeka,* No. 10–4126–CM, 2011 WL 720191, at *2 (D.Kan. Feb. 22, 2011).

Here, plaintiff has not specifically identified adverse actions. Plaintiff merely asserts that "defendant" refused plaintiff's request for reasonable accommodation, with no explanation as to why the refusal was inappropriate. (Doc. 12 at 2.) The complaint does not even specify whether defendant Harbin was involved in the refusal. Further, plaintiff asserts that "defendant" "improperly requested protected medical information." (*Id.*) But plaintiff does not explain who requested the information, why the request was improper, or why the information was protected. Finally, plaintiff alleges that he was constructively terminated from his employment on or around September 21, 2011, without explaining why or how the working conditions were so difficult that he had to resign. Later in plaintiff's complaint, he references "[d]efendant Harbin's employment retaliation actions," but he still does not specify what those actions are.

Because of the generic language used in plaintiff's complaint, plaintiff fails to meet the plausibility standard required under § 1983 and fails to show a deprivation of a constitutional right. Qualified immunity therefore protects defendant Harbin from the § 1983 claim.

## V. CONCLUSION

The court denies defendants' motion as it relates to plaintiff's ADA claim against defendant Ellis County and its Representatives, the Board of County Commissioners of Ellis County. The § 1983 claim against defendant Harbin, however, is dismissed as untimely. Alternatively and independently, the court finds that defendant Harbin is entitled to qualified immunity on the claim. All other claims are dismissed as agreed by the parties.

***5 IT IS THEREFORE ORDERED** that defendants' Motion to Dismiss (Doc. 15) is denied in part and granted in part.

### All Citations

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United States District Court,
D. Kansas.

Gary L. MATTHEWS, Plaintiff,
v.
Elizabeth RICE, et al., Defendants.

No. 11–3221–RDR. | Sept. 18, 2013.

**Attorneys and Law Firms**

Gary Matthews, Hutchinson, KS, pro se.

John Wesley Smith, Whitney L. Casement, Office of Attorney General, Topeka, KS, for Defendants.

**MEMORANDUM AND ORDER**

RICHARD D. ROGERS, District Judge.

***1** This matter is presently before the court upon defendants' motion to dismiss plaintiff's claims under 42 U.S.C. § 1983 as barred by the statute of limitations. Plaintiff is an inmate in the custody of the Kansas Department of Corrections (KDOC) and is incarcerated at the Hutchinson Correctional Facility in Hutchinson, Kansas. The defendants are the KDOC and various state officials employed by the KDOC. Proceeding *pro se*, plaintiff contends that the defendants have erroneously classified him as a sex offender. He further claims that the defendants knew he did not meet the requirements of a sex offender and continued to classify him as such based upon a KDOC policy that all inmates charged with sex offenses, whether convicted or not, shall be registered as sex offenders. He asserts claims under § 1983, contending that the actions of the defendants have violated his rights under the First Amendment, substantive due process, procedural due process and equal protection. He seeks compensatory and punitive damages along with injunctive and prospective relief.

**I.**

In his complaint, plaintiff alleges that in 1996 he was charged with aggravated kidnapping and rape. He was acquitted of rape, but convicted of aggravated kidnapping. He was incarcerated with the KDOC. After incarceration, he was designated by the KDOC as a sex offender. He requested sex offender override in 2004. This request was denied on January 13, 2004. He was released from prison on November 29, 2006.

In 2007, he was charged with robbery and ultimately convicted. He was sentenced in 2008 and again placed in the custody of the KDOC. Subsequently, in 2010, he was notified that he would be treated again as a sex offender. He again requested sex offender override in 2010, and this request was denied on September 9, 2010. Plaintiff did not dispute either the 2004 or the 2010 final order.

Plaintiff once again sought sex offender override in 2011, and this request was denied on June 1, 2011. Following that order, he filed a petition with the Reno County District Court on July 13, 2011 challenging the decision made by the KDOC. The state district court dismissed plaintiff's complaint, finding that plaintiff's failure to exhaust the administrative process by challenging the 2004 order deprived the court of subject matter jurisdiction. The court further noted that even if the "2004 override denial did not work that effect, petitioner's subsequent failure to appeal the 2010 denial and untimely effort to appeal the 2011 denial would similarly deprive the court of jurisdiction."Plaintiff filed the instant case on December 20, 2011.

**II.**

The defendants contend that plaintiff's claims are barred by the applicable statute of limitations, which is two years. They argue that plaintiff's delay in waiting seven years to challenge the KDOC's original denial of sex offender override in 2004 renders the instant claims barred by the statute of limitations.

*Pro se* complaints are held to "less stringent standards than formal pleadings drafted by lawyers."*Haines v. Kerner*, 404 U.S. 519, 520 (1972). A *pro se* litigant is entitled to a liberal construction of his pleadings. *See Trackwell v. U.S. Gov't*, 472 F.3d 1242, 1243 (10th Cir.2007)("Because Mr. Trackwell proceeds pro se, we review his pleadings and other papers liberally and hold them to a less stringent standard than those drafted by attorneys."). If a court can reasonably read a pro se complaint in such a way that it could state a claim on which it could prevail, it should do so despite "failure to cite proper legal authority ... confusion of various legal theories ... or [plaintiff's] unfamiliarity with pleading requirements."*Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir.1991). But it is

not the proper role of a district court to "assume the role of advocate for the pro se litigant."*Id.* As it relates to motions to dismiss generally, "the court accepts the well-pleaded allegations of the complaint as true and construes them in the light most favorable to the plaintiff."*Ramirez v. Dept. of Corr., Colo.*, 222 F.2d 1238, 1240 (10th Cir.2000). "Well-pleaded" allegations are those that are facially plausible such that "the court [can] draw the reasonable inference that the defendant is liable for the misconduct alleged."*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

***2** While the statute of limitations is generally an affirmative defense, it may also sometimes "be appropriately resolved on a Fed.R.Civ.P. 12(b) motion."*Aldrich v. McCulloch Prop., Inc.*, 627 F.2d 1036, 1041 n. 4 (10th Cir.1980). Specifically, "when the dates given in the complaint make clear that the right sued upon has been extinguished, the plaintiff has the burden of establishing a factual basis for tolling the statute."*Id.* The "length of the limitations period" is a question governed by state law. *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). The Tenth Circuit Court of Appeals has ruled that § 1983 civil right complaints "should be characterized as actions for injury to the rights of another" and are therefore governed by K.S.A. § 60–513(a)(4).*Hamilton v. City of Overland Park, Kan.*, 730 F.2d 613, 614 (10th Cir.1984). The applicable length of time, according to the statute, is two years. *See*K.S.A. § 60–513(a)(4). Additionally, for the purpose of the statute of limitations, § 1983 claims accrue " 'when the plaintiff knows or has reason to know of the injury which is the basis of his action."*Johnson v. Johnson Cnty. Comm'n Bd.*, 925 F.2d 1299, 1301 (10th Cir.1991) (quoting *Bireline v. Seagondollar*, 632 F.2d 185, 191 (2nd Cir.1980)).

**III.**

The defendants point to *Romero v. Lander*, 461 Fed.Appx. 661 (10th Cir.), *cert. denied*,133 S.Ct. 212 (2012) for support. In *Romero*, the Tenth Circuit ruled that plaintiff's challenge under § 1983 to his sex offender classification accrued when he was classified as a sex offender following an administrative hearing in 2000, not when the KDOC notified him in 2009 that it had reviewed his sex offender treatment and monitoring program file and determined to reimpose the sex offender classifications. *Romero*, 461 Fed.Appx. at 668. The Court noted that plaintiff's alleged injuries stemmed from the original 2000 designation. *Id.* at 669.Accordingly, the Court found that plaintiff's claims were barred by the statute of limitations. *Id.*

The court agrees with the defendants and finds that the reasoning of *Romero* controls. Here, plaintiff knew or should have known of the alleged constitutional violations giving rise to his claims at the time when he was first classified as a sex offender. He requested sex offender override in 2004 and failed to take any action concerning the denials of his requests until 2011 when he filed a petition in state court. His efforts to challenge the classification came long after the expiration of the two-year statute of limitations.

Plaintiff has suggested that the continuing violation doctrine should apply to his claims. This court is not persuaded that the continuing violation doctrine is applicable to claims under § 1983. *See Mercer–Smith v. New Mexico Children, Youth and Families Dept.*, 416 Fed.Appx. 704, 712 (10th Cir.2011). However, even if it applies, the exception is triggered by a continuous series of unlawful acts, not by the continuing effects of the original violation. *See Parkhurst v. Lampert*, 264 Fed.Appx. 748, 749 (10th Cir.2008). In this case, plaintiff is alleging the same ill effects from the first denial of his request for sex offender status override in 2004. The constitutional claims asserted by plaintiff all arise from the KDOC's 2004 decision. Accordingly, the court does not find that the continuing violation doctrine applies. Accordingly, the court must dismiss plaintiff's claims because they are barred by the two-year statute of limitations.

***3 IT IS THEREFORE ORDERED** that defendants' motion to dismiss (Doc. # 36) be hereby granted. Plaintiff's claims are barred by the statute of limitations.

**IT IS SO ORDERED.**

**All Citations**

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**End of Document**

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See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Third Circuit LAR, App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7)
United States Court of Appeals,
Third Circuit.

Akhi Raheem MUHAMMAD, Appellant
v.
COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA; Commonwealth Court of Pennsylvania; Supreme Court of Pennsylvania; Pennsylvania Superior Court.

No. 11–3669. | Submitted Pursuant to Third Circuit LAR 34.1(a) May 11, 2012. | Opinion Filed: May 15, 2012.

**Synopsis**

**Background:** Vision-impaired plaintiff brought action against Pennsylvania court defendants, alleging that they violated Americans with Disabilities Act (ADA), and the Rehabilitation Act by repeatedly failing to reasonably accommodate his impaired vision at various stages during his numerous state court lawsuits. Adopting report and recommendation of a United States Magistrate Judge, 2011 WL 4368394, the United States District Court for the Western District of Pennsylvania, Joy Flowers Conti, J., 2011 WL 4368724, dismissed the complaint, and plaintiff appealed.

**Holdings:** The Court of Appeals held that:

[1] defendants' repeated denials of accommodations did not amount to a series of continuing violations bringing all such conduct within the limitations period for bringing plaintiff's civil rights claims, and

[2] plaintiff stated failure-to-accommodate claims against Pennsylvania court defendants under Americans with Disabilities Act (ADA).

Affirmed in part, vacated in part, and remanded.

West Headnotes (2)

**[1] Limitation of Actions**
Liabilities Created by Statute

Pennsylvania court defendants' repeated denials of accommodations did not amount to a series of continuing violations bringing all such conduct within the limitations period for bringing plaintiff's civil rights claims; each refusal to accommodate plaintiff's impaired vision at various stages during his numerous state court lawsuits was a complete and independent act of which plaintiff was aware, thereby triggering running of statute of limitations. 42 U.S.C.A. § 1983; 42 Pa.C.S.A. § 5524.

5 Cases that cite this headnote

**[2] Civil Rights**
Particular Causes of Action

Because vision-impaired plaintiff was only required to allege that he was unable to meaningfully participate in his state court cases because he did not receive accommodations to enable him to participate in the manner of a non-visually impaired individual, plaintiff stated failure-to-accommodate claims against Pennsylvania court defendants under Americans with Disabilities Act (ADA). Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

11 Cases that cite this headnote

***759** On Appeal from the United States District Court for the Western District of Pennsylvania, (D.C. Civil Action No. 09–cv–01255), District Judge: Honorable Joy Flowers Conti.

**Attorneys and Law Firms**

Akhi Raheem Muhammad, Beverly Hills, CA, pro se.

Mary E. Butler, Esq., Geri R. St. Joseph, Esq., Supreme Court of Pennsylvania Administrative Office of Pennsylvania

Courts, Philadelphia, PA, for Court of Common Pleas of Allegheny County, Pennsylvania; Commonwealth Court of Pennsylvania; ***760** Supreme Court of Pennsylvania; Pennsylvania Superior Court.

Before: SLOVITER, SMITH and COWEN, Circuit Judges.

**OPINION**

PER CURIAM.

****1** Appellant Akhi Raheem Muhammad, proceeding pro se, appeals from the District Court's order granting the defendant-appellees' motion to dismiss Muhammad's complaint under 42 U.S.C. § 1983. For the reasons that follow, we will affirm in part, vacate in part, and remand for further proceedings.

**I**

In July 2008, Muhammad—an experienced litigant—filed in the United States District Court for the Eastern District of Pennsylvania a complaint under 42 U.S.C. § 1983, alleging that some 200 defendants violated his civil rights. He sought, inter alia, permanent injunctive relief requiring the Pennsylvania state courts to address the needs of disabled litigants, as well as damages and court costs. As Judge Padova of the Eastern District noted, Muhammad's second amended complaint, which was nearly 70 pages long, stemmed from at least seven discrete series of occurrences, including:

> (1) a 2004 automobile accident in Pittsburgh and related litigation in Allegheny County from 2004 to 2007; (2) the issuance of two traffic citations in Millvale, Pennsylvania[,] in 2005, and related litigation in Allegheny County from 2005 to 2007; (3) a legal malpractice lawsuit initiated in Allegheny County in July 2005, and related litigation there from 2005 to 2007; (4) a second legal malpractice lawsuit initiated in Allegheny County in September 2005 and related litigation there from 2005 to 2008; (5) the revocation of [Muhammad's] car insurance and related litigation from 2007 to 2008; (6) the forced removal of [Muhammad's] kufi, a religious head covering, at legal proceedings in the courtrooms of various Allegheny County judges ... between 2004 and 2008; and (7) a 2009 lawsuit against Allegheny County Adult Probation and Parole over some money [Muhammad] paid them to secure the release of his incarcerated nephew.

D. Ct. Doc. No. 88, 2–3 (internal citations omitted).

In particular, Muhammad alleged that most of the defendants, including the Allegheny County Court of Common Pleas, the Pennsylvania Commonwealth Court, the Pennsylvania Superior Court, and the Pennsylvania Supreme Court (collectively, "the Pennsylvania court defendants"), violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, *et seq.*, and the Rehabilitation Act ("RA"), 29 U.S.C. § § 791, *et seq.*, by repeatedly failing to reasonably accommodate his impaired vision at various stages during his numerous state court lawsuits. [1] Muhammad asked the courts to provide him with a device which could magnify and project small text. According to his complaint, Muhammad was unable to meaningfully participate in his Pennsylvania state court hearings or review records at the courthouses because, with only a few exceptions, he was not afforded equipment that would allow him to read documents relevant to his case.

1 Muhammad's complaint and his various other filings are riddled with invectives, and he accuses all defendants of being racist, corrupt, asinine, anti-Islamic, and prejudiced against the disabled.

Because Muhammad was proceeding in forma pauperis, Judge Padova screened ***761** his complaint for legal sufficiency pursuant to 28 U.S.C. § 1915(e), and concluded that Muhammad's ADA and RA claims against the four Pennsylvania state court defendants sufficiently stated claims upon which relief could be granted. Muhammad's ADA and RA claims against the Pennsylvania state court defendants were then transferred to the United States District Court for the Western District of Pennsylvania, where venue was proper. [2]

2 The Eastern District then dismissed all other claims against the remaining defendants, save for Muhammad's ADA and RA claims against the Pennsylvania

Department of Insurance. Thereafter, the Pennsylvania Department of Insurance filed a motion for summary judgment, which the District Court granted. *See* E.D. Pa. Civ. No. 08–cv–03616 (order entered December 13, 2010). Muhammad appealed that decision, but his appeal was dismissed for failure to file a brief. *See* C.A. No. 11–1075 (order entered April 27, 2011).

****2** Upon transfer to the Western District, the Pennsylvania court defendants filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). The Magistrate Judge prepared a report and recommendation concluding that all of Muhammad's claims based on conduct occurring before July 30, 2006, i.e., more than two years before he filed his complaint, were time-barred, and that he had not demonstrated a series of continuing violations that would operate to toll the statute of limitations. The report and recommendation further stated that, notwithstanding Judge Padova's earlier analysis, Muhammad's complaint failed to state a claim upon which relief could be granted. The District Court agreed, adopted the Magistrate Judge's report and recommendation, and granted the motion to dismiss over Muhammad's objections. Muhammad then timely filed a notice of appeal.

## II

We have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over the District Court's decision to dismiss Muhammad's complaint. *See Dique v. N.J. State Police,* 603 F.3d 181, 188 (3d Cir.2010). "In deciding a motion to dismiss, all well-pleaded allegations of the complaint must be taken as true and interpreted in the light most favorable to the plaintiffs, and all inferences must be drawn in favor of them." *McTernan v. City of York,* 577 F.3d 521, 526 (3d Cir.2009) (internal citation and quotation marks omitted). To withstand a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

At the outset, we note that, in his brief, Muhammad challenges a number of orders issued by Judge Padova while his complaint was before the Eastern District. Muhammad had the opportunity to challenge those decisions in his appeal at C.A. No. 11–1075, but he failed to pursue that appeal. He may not now take a second bite at that apple.

Turning to the District Court's decision, the District Court first concluded that all of Muhammad's claims arising from conduct occurring before July 30, 2006, were time-barred. We agree. In § 1983 cases, federal courts apply the state personal injury statute of limitations, which is two years in Pennsylvania. *See Smith v. Holtz,* 87 F.3d 108, 111 & n. 2; 42 Pa. Cons.Stat. Ann. § 5524 (West 2004). "A [§ ] 1983 cause of action accrues when the plaintiff knew or should have known of the injury upon which its action is based." ***762** *Sameric Corp. of Del. v. City of Phila.,* 142 F.3d 582, 599 (3d Cir.1998). The determination of the time at which a claim accrues is an objective inquiry; the relevant question is what a reasonable person should have known. *See Barren v. United States,* 839 F.2d 987, 990 (3d Cir.1988). As a general matter, a cause of action accrues at the time of the last event necessary to complete the tort, usually at the time the plaintiff suffers an injury. *See United States v. Kubrick,* 444 U.S. 111, 120, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979). However, the "continuing violations doctrine" constitutes an "equitable exception to the timely filing requirement." *West v. Phila. Elec. Co.,* 45 F.3d 744, 754 (3d Cir.1995). Under this doctrine, "when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period; in such an instance, the court will grant relief for the earlier related acts that would otherwise be time barred." *Brenner v. Local 514, United Bhd. of Carpenters and Joiners of Am.,* 927 F.2d 1283, 1295 (3d Cir.1991). To benefit from the doctrine, a plaintiff must establish that the defendant's conduct is "more than the occurrence of isolated or sporadic acts," *West,* 45 F.3d at 755, and the doctrine "does not apply when plaintiffs are aware of the injury at the time it occurred." *Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C.,* 331 F.3d 406, 417 n. 6 (3d Cir.2003).

****3** **[1]** In this case, the District Court noted that Muhammad filed his complaint on July 30, 2008, and concluded that the statute of limitations barred his claims related to conduct occurring before July 30, 2006. However, Muhammad argued that the Pennsylvania court defendants' repeated denials of accommodations amounted to a series of continuing violations bringing all such conduct within the limitations period. We agree with the District Court, as Muhammad's allegations make clear that he was aware at the time that each of his requests for an accommodation was denied—beginning as early as 2004—that the absence of accommodations would adversely affect his ability to represent himself. The District Court correctly reasoned

that "[e]ach refusal to provide [Muhammad] with the accommodations to which he claims entitlement was a complete and independent act," D. Ct. Doc. No. 101, 12, and concluded that the continuing violations doctrine did not apply because Muhammad should have been aware of each act's negative impact at the time it occurred.

**[2]** We disagree, however, with the District Court's decision insofar as it dismissed Muhammad's ADA claims regarding the defendants' purported failures to reasonably accommodate him after July 30, 2006. Under Title II of the ADA, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. To establish a violation of Title II of the ADA, a plaintiff must allege that: (1) he is a qualified individual with a disability; (2) he was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability. *See id.; Robertson v. Las Animas Cnty. Sheriff's Dep't,* 500 F.3d 1185, 1193 (10th Cir.2007). The requirements for a claim under § 504 of the Rehabilitation Act, 29 U.S.C. § 794, are the same as those under the ADA, *see Helen L. v. DiDario,* 46 F.3d 325, 330 n. 7 (3d Cir.1995), with the additional requirement that a plaintiff alleging a violation of the ***763** RA demonstrate that the violation was committed by a program or activity receiving "Federal financial assistance."[3] § 794(a). Further, a plaintiff can assert a failure to accommodate as an independent basis for liability under the ADA and RA. *See Wis. Cmty. Servs., Inc. v. City of Milwaukee,* 465 F.3d 737, 751 (7th Cir.2006) (en banc). To make out such a claim, a plaintiff must show that the accommodation he seeks is reasonable, *see Oconomowoc Residential Programs v. City of Milwaukee,* 300 F.3d 775, 783 (7th Cir.2002), i.e., that it is "necessary to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7).

3 Although we disagree with the District Court's analysis of Muhammad's ADA claims, the District Court properly dismissed Muhammad's RA claims, as he failed to allege any facts showing that the Pennsylvania court defendants receive federal funding.

With regard to the first element under § 12132, the District Court assumed that Muhammad is a qualified individual with a disability, based on his averment that he suffers from impaired vision as a complication of his diabetes, though the District Court expressed some skepticism about the severity of his impairment. Regardless of the District Court's concerns, viewing Muhammad's complaint in the light most favorable to him, he alleged sufficient facts to support his claim that his vision is impaired to the extent that he cannot read small text, which appears to satisfy the requirement of the ADA that he be a qualified individual with a disability. *See* 28 C.F.R. § 35.104 (defining a disability as, inter alia, visual impairments).

****4** Muhammad was next required to demonstrate that he was excluded from the benefits of some public entity's services, programs, or activities. The District Court's analysis with respect to this prong is flawed in several respects. First, the District Court stated that Muhammad "failed to allege facts establishing that litigation in the state courts constitutes a program or activity within the meaning of the ADA." D. Ct. Doc. No. 101, 14. It is not clear what "facts" the District Court expected Muhammad to allege in that regard, as courts have recognized a due process right to meaningfully participate in civil litigation, the violation of which is actionable under the ADA. *See, e.g., Lane v. Tenn.,* 315 F.3d 680, 682 (6th Cir.2003) ("Among the rights protected by the Due Process Clause of the Fourteenth Amendment is the right of access to the courts.... Parties in civil litigation have [a] ... due process right to be present in the courtroom and to meaningfully participate in the process unless their exclusion furthers important governmental interests."), *aff'd,* 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004).

Next, the District Court faulted Muhammad for "failing to allege facts establishing that the absence of [the requested] equipment was unreasonable in the circumstances, or that it impaired his ability to litigate effectively." The District Court's analysis is problematic because Muhammad was not required to make any showing that the denial of the requested accommodations was unreasonable. Rather, he bore the initial burden of demonstrating that his requested accommodations were reasonable, i.e., necessary to permit his meaningful participation; upon making such a showing, the burden shifted to the defendants to demonstrate that the requested accommodations were unreasonable. *See Oconomowoc,* 300 F.3d at 783 (citing *Lapid–Laurel, L.L.C. v. Zoning Bd. of Adjustment of Twp. of Scotch Plains,* 284 F.3d 442, 457 (3d Cir.2002)).

The District Court's latter point—that Muhammad failed to allege sufficient facts showing how he was excluded from meaningful ***764** participation—is only partially correct.

The District Court correctly pointed out that Muhammad offered no facts to support his contention that he was not able to meaningfully participate in certain motions hearings that did not appear to involve reading, such as a motion to compel discovery, and that those allegations were therefore insufficient under *Iqbal*. However, the District Court's reasoning does not appear to hold water with regard to some of Muhammad's other allegations, such as his inability to review records on appeal so as to prepare arguments and filings. Even if his pro se complaint did not spell out the impact of each denial of an accommodation, the complaint makes clear that, on at least some occasions, Muhammad was unable to participate in the manner a non-visually impaired individual could because he was not provided with an assistive device. [4]

4 Relatedly, the District Court noted that Muhammad's argument that his ability to litigate was impaired was undercut by his statement that he has successfully litigated on his own behalf for more than 20 years. However, the District Court read his statement out of context, as it was intended to show that Muhammad has successfully litigated in other states' courts, where he was provided assistance to compensate for his visual impairment, in contrast to his experience in Pennsylvania's courts, where his inability to receive accommodations has purportedly stymied his ability to litigate effectively. *See* D. Ct. Doc. No. 99, ¶¶ 3–4; D. Ct. Doc. No. 103, 5.

The District Court also faulted Muhammad for failing to "articulate any theory that would impose liability on the Courts as institutional defendants." D. Ct. Doc. No. 101, 16. However, the ADA imposes liability on any "public entity," § 12131, which is defined as "any State or local government; [or] any department, agency, special purpose district, or other instrumentality of a State or States or local government...." § 12131(1). Thus, the plain language of the ADA subjects state courts to liability for violations of the statute. *Accord Galloway v. Super. Ct. D.C.*, 816 F.Supp. 12, 19 (D.D.C.1993) ("The Superior Court and the District of Columbia are public entities within the meaning of the [Americans with Disabilities] Act.").

****5** Finally, the District Court determined that Muhammad's complaint failed to include sufficient facts to demonstrate that he was excluded from participating in his state court proceedings "by reason of" his disability. A failure-to-accommodate claim differs from other ADA claims in that the ADA does not require a failure-to-accommodate plaintiff to show that his injury was the result of purposeful discrimination. *See Good Shepherd Manor Found., Inc. v. City of Momence*, 323 F.3d 557, 561–62 (7th Cir.2003). Rather, the ADA's "by reason of" language requires a showing of causation: the plaintiff must demonstrate that, but for the failure to accommodate, he would not be deprived of the benefit he seeks. *See id.* In this case, the District Court concluded that because Muhammad failed to allege facts showing that he was the victim of intentional discrimination, he failed to state a claim upon which relief could be granted. Because Muhammad was only required to allege that he was unable to meaningfully participate in his cases because he did not receive accommodations—a requirement that he appears to have satisfied—the District Court's rationale and conclusion appear incorrect.

In sum, although the District Court correctly concluded that a number of Muhammad's claims were time-barred or failed to state a claim upon which relief could be granted, the District Court erred in dismissing Muhammad's ADA claims for purported ***765** violations occurring on or after July 30, 2008.

Accordingly, we will affirm in part, vacate in part, and remand for further proceedings. The District Court may wish, on remand, to revisit Muhammad's request for appointment of counsel.

**All Citations**

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**End of Document**

414 Fed.Appx. 103
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See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)
United States Court of Appeals,
Tenth Circuit.

Patrick WOOD, Plaintiff–Appellant,
v.
Kevin MILYARD, Assistant/Associate Warden; Rebecca Rodenbeck, Administrative Head; Lt. Thomas Beneze, Intelligence Officer; Lt. Ken Topliss, Hearing Officer; Olathe Murphy, Case Manager; Randy Foshee, Associate Warden; Major Linda Maifeld, Administrative Head or Designee; Custody/Control Manager; Major Terry Bartruff, Administrative Manager; Lieutenant Robert Fazzino, Disciplinary Officer or Shift Commander; Colorado Department of Corrections; Colorado Territorial Correctional Facility; Sterling Correctional Facility, Defendants–Appellees.

No. 10–1169. | Jan. 13, 2011.

**Synopsis**
**Background:** Colorado inmate brought action under § 1983 against various officials of Colorado Department of Corrections. The United States District Court for the District of Colorado, Wiley Y. Daniel, Chief District Judge, dismissed complaint with prejudice, 2010 WL 1235660, and inmate appealed.

**Holdings:** The Court of Appeals, Paul J. Kelly, Jr., Circuit Judge, held that:

[1] sovereign immunity deprived federal district court of subject matter jurisdiction over pro se inmate's suit under § 1983, and

[2] action was barred by two-year limitations period.

Affirmed.

West Headnotes (2)

**[1] Federal Courts**
Prisons and jails

Sovereign immunity deprived federal district court of subject matter jurisdiction over pro se inmate's suit under § 1983 against Colorado Department of Corrections against prison officials in their official capacity. U.S.C.A. Const.Amend. 11; 42 U.S.C.A. § 1983.

6 Cases that cite this headnote

**[2] Limitation of Actions**
Liabilities Created by Statute

Colorado inmate's cause of action under § 1983 against various Department of Corrections officials based on alleged civil rights violations accrued, and two-year limitations period began to run on date of last alleged constitutional violation. 42 U.S.C.A. § 1983.

3 Cases that cite this headnote

**Attorneys and Law Firms**

***104** Patrick Wood, Sterling, CO, pro se.

Chris Alber, Attorney General for the State of Colorado, Denver, CO, for Defendants–Appellees.

Before KELLY, McKAY, and LUCERO, Circuit Judges. [*]

[*] After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R.App. P. 34(a); 10th Cir. R. 34.1(G). The cause is therefore ordered submitted without oral argument.

**ORDER AND JUDGMENT** [**]

** 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.

PAUL KELLY, JR., Circuit Judge.

**1 Plaintiff–Appellant Patrick Wood, an inmate appearing pro se, appeals from the district court's dismissal of his civil rights complaint and action with prejudice. The complaint, brought under 42 U.S.C. § 1983, alleges that various Defendants, including several employees of the Colorado Department of Corrections ("CDOC") and the CDOC itself, violated Mr. Wood's constitutional rights. 1 R. 8. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

### *Background*

The parties are familiar with the facts so we need not restate them here. Suffice it to say that Mr. Wood was convicted of fraud in a prison disciplinary proceeding in connection with the validity of a marriage certificate. 1 R. He successfully appealed to the Colorado Court of Appeals, and upon remand, he was found not guilty. *Id.* 7–8. He sought reimbursement of fees and costs and restoration of privileges lost. *Id.* 8. The trial court ordered the warden to comply with an administrative regulation concerning restoration, and Mr. Wood was awarded some fees and costs, though not all he requested. *Id.* 8, 34–38.

On April 8, 2009, Mr. Wood filed his complaint against the CDOC and various employees of the CDOC. *Id.* 4. He contends that various Defendants violated his right to due process and equal protection and to be free from harassment (retaliation). *Id.* 8–12. The complaint did not specify whether the individual Defendants were sued in their official or individual capacities. *Id.* 4. Mr. Wood sought monetary damages, reimbursement for various fees and costs, reinstatement of privileges in accordance with Colorado administrative regulation and the Colorado Court of Appeals decision, and "any other relief allowable under law." *Id.* 13. The latest of the allegedly retaliatory actions identified in the complaint occurred on January 20, 2006. *Id.* 9.

The magistrate judge recommended that the complaint be dismissed because claims against the CDOC and individual Defendants in their official capacities are barred by Eleventh Amendment immunity and because all other claims were barred by the applicable two-year statute of limitations. *Wood v. Milyard,* 2010 WL 1235653, at *5–9 (D.Colo. Jan. 6, 2010). Over Plaintiff's objections, the district court adopted the recommendation and dismissed the complaint and action for substantially the same reasons. *Wood v. Milyard,* 2010 WL 1235660, *2–4 (D.Colo. Mar. 19, 2010).

We review de novo the district court's decision to dismiss the complaint. *Butler v. Kempthorne,* 532 F.3d 1108, 1110 (10th Cir.2008) (dismissals under Rule 12(b)(1)); ***105** *United States ex rel. Lemmon v. Envirocare of Utah, Inc.,* 614 F.3d 1163, 1167 (10th Cir.2010) (dismissals under Rule 12(b)(6)).

### *Discussion*

**A.** ***Sovereign Immunity***

**[1]** The Eleventh Amendment, and the concept of sovereign immunity it embodies, bars suits against states absent an express and unambiguous waiver or abrogation by Congress. *See, e.g., Edelman v. Jordan,* 415 U.S. 651, 662–63, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). State sovereign immunity is more than immunity from liability—it actually deprives federal courts of subject-matter jurisdiction. *Id.* at 678, 94 S.Ct. 1347. The Eleventh Amendment does permit suits for prospective injunctive relief against state officials for violations of federal law, but not for retrospective relief such as money damages. *Frew ex rel. Frew v. Hawkins,* 540 U.S. 431, 437, 124 S.Ct. 899, 157 L.Ed.2d 855 (2004).

**2 Sovereign immunity is not confined to suits in which the State is named as defendant, *Edelman,* 415 U.S. at 663, 94 S.Ct. 1347; state agencies partake in the State's immunity if they are "arms of the state," *Ambus v. Granite Bd. of Educ.,* 995 F.2d 992, 994 (10th Cir.1993) (en banc) (internal quotation marks and citation omitted). The CDOC is such an agency. *See Griess v. Colorado,* 841 F.2d 1042, 1044–45 (10th Cir.1988). Sovereign immunity also extends to state officials sued in their official capacities for retrospective relief. *Edelman,* 415 U.S. at 664–67, 94 S.Ct. 1347.

Here, Plaintiff brought suit against the CDOC itself, as well as several state officials. 1 R. 4. The complaint does not identify whether the individual Defendants are sued in their official or individual capacities, and it seeks retrospective relief in the form of damages; any prospective relief sought appears to be based upon state law (state administrative regulations and a Colorado Court of Appeals decision) rather than federal. 1

R. 4, 13. § 1983 does not abrogate state sovereign immunity —indeed, states are not even "persons" within the meaning of § 1983, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), and Plaintiff does not argue that Colorado has consented to this suit. Therefore, Colorado's sovereign immunity deprives us of subject-matter jurisdiction over the claims against the CDOC and the official-capacity claims for retrospective relief against the individual Defendants. To the extent that Plaintiff's claims for prospective relief are premised on state law, they are not cognizable under § 1983. *Jones v. City and Cnty. of Denver, Colo.*, 854 F.2d 1206, 1209 (10th Cir.1988).

**B. *Statute of Limitations***

**[2]** The district court affirmed and adopted the magistrate judge's recommendation that the remaining claims be dismissed as time-barred under the applicable two-year statute of limitations. *See Milyard*, 2010 WL 1235660, at *3–4; *Milyard*, 2010 WL 1235653, at *6–7. In so doing, the district court noted that "all of the specific, discrete actions detailed in the Complaint" occurred before April 7, 2007 —more than two years before this suit was commenced. *Milyard*, 2010 WL 1235660, at *3. The court noted that because Plaintiff failed to allege any ongoing violations, his claims would be time-barred even if the "continuing violation" doctrine—under which a claim is not time-barred if the plaintiff shows a series of related acts, one of which occurred before the limitations period ran, or that the defendant maintained a violative policy both during and after the limitations period, *see Davidson v. America Online, Inc.*, 337 F.3d 1179, 1184 (10th Cir.2003) (citation ***106** omitted) —applied to suits brought under § 1983. *Milyard*, 2010 WL 1235660, at *3.

On appeal, Plaintiff argues that the district court made two errors: (1) in holding that he failed to allege ongoing violations, and (2) in implying that the continuing violation doctrine does not apply to § 1983 suits. Aplt. Br. 9–10. These arguments are unavailing.

****3** Contrary to Plaintiffs' assertions, the complaint does not allege an ongoing conspiracy or actions that constitute continuing constitutional violations. Rather, it identifies a series of discrete actions on the part of each Defendant, the latest of which occurred on January 20, 2006. R. 9. Therefore, the district court was correct in holding that Plaintiff's cause of action accrued upon the date of the last alleged violation— in this case, January 20, 2006. *Id.* The suit was commenced on April 8, 2009, more than two years after the cause of action accrued. Because § 1983 claims brought in Colorado are subject to a two-year statute of limitations, *see Blake v. Dickason*, 997 F.2d 749, 750–51 (10th Cir.1993), Plaintiff's claims are time-barred.

We do not reach the question of whether the continuing violation doctrine applies to suits brought under § 1983. However, even if it did, it would be of no help to Plaintiff here: "a continuing violation claim fails if the plaintiff knew, or through the exercise of reasonable diligence would have known, [he] was being discriminated against at the time the earlier events occurred." *Davidson*, 337 F.3d at 1184 (internal quotation marks and citations omitted). Through the exercise of reasonable diligence, Plaintiff would have been aware at the outset that Defendants' actions were— in his view—retaliatory. Therefore, even if the continuing violation doctrine were to apply to § 1983 suits, it would not be applicable in this case.

AFFIRMED. We GRANT leave to proceed IFP and remind Mr. Wood that he is obligated to continue making partial payments until the entire filing fee has been paid.

**All Citations**

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448 Fed.Appx. 862
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See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Tenth
Circuit Rule 32.1. (Find CTA10 Rule 32.1)
United States Court of Appeals,
Tenth Circuit.

James Kevin RUPPERT, Plaintiff–Appellant,
v.
Phil ARAGON, Captain, Guadalupe County
Correctional Facility, Defendant–Appellee,
and
Erasmo Bravo, Warden; J. Torello, Job Coordinator;
Rodgers, Ms., Lieutenant, Grievance Officer,
Disciplinary Officer; Justin Rodgers, Mr.,
Lieutenant, Grievance Officer; Disciplinary
Officer; Karen Jaramillo, Ms., Education Director;
designated staff for legal assistance, Defendants.

No. 11–2144. | Feb. 9, 2012.

**Attorneys and Law Firms**

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Patrick D. Allen, Esq., April D. White, Esq., Yenson, Lynn, Allen & Wosick, P.C., Albuquerque, NM, for Defendant–Appellee.

Before O'BRIEN, McKAY, and TYMKOVICH, Circuit Judges.

## ORDER AND JUDGMENT [*]

[*] The parties have waived oral argument. *See* Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). This case is submitted for decision on the briefs.

This order and judgment is an unpublished decision, not binding precedent. 10th Cir. R. 32.1(A). Citation to unpublished decisions is not prohibited. Fed. R.App. 32.1. It is appropriate as it relates to law of the case, issue preclusion and claim preclusion. Unpublished decisions may also be cited for their persuasive value. 10th Cir. R. 32.1(A). Citation to an order and judgment must be accompanied by an appropriate parenthetical notation-(unpublished). *Id.*

TERRENCE L. O'BRIEN, Circuit Judge.

****1** James Ruppert appeals from a summary judgment in favor of Phil Aragon, a captain at the New Mexico Department of Corrections prison where Ruppert is incarcerated. Ruppert claims Aragon threatened to punish him for filing a lawsuit, a violation of his First Amendment rights to file grievances. Following review of the administrative record, the district court concluded Ruppert had not exhausted available remedies as required by the Prison Litigation Reform Act (PLRA) and dismissed the suit without prejudice. We affirm.

Ruppert had initially filed a more extensive suit, with a long list of defendants and constitutional claims. After screening under 28 U.S.C. § 1915, however, he was left with only his retaliation claim, which had earlier been dismissed without prejudice, thereby permitting him to further develop his pleadings. Ruppert filed an amended complaint alleging, as relevant here, that Aragon threatened to place him in administrative segregation if he were to file a lawsuit against prison officials. Aragon was served with process and ordered to submit a *Martinez* report documenting Ruppert's exhaustion efforts. *See* ***863** *Martinez v. Aaron*, 570 F.2d 317, 319 (10th Cir.1978). He did so, with a request that the report be treated as a motion for summary judgment on exhaustion grounds.

After reviewing the *Martinez* report and Ruppert's response, the magistrate judge recommended summary judgment be entered for Aragon because Ruppert had failed to exhaust his administrative remedies. The magistrate identified two separate claims in Ruppert's amended complaint, one arising from an incident in 2008, a second from an incident in 2009. The first claim was a clear loser: Ruppert failed to file a grievance, foreclosing any possibility of judicial relief. The second claim presented a closer issue but in the end fared no better because, contrary to the PLRA's exhaustion rules, Ruppert brought his federal suit before the prison had finished its review of the 2009 incident. It mattered not, the magistrate explained, that the administrative review process had been completed by the time the case was ripe for decision. What mattered was that the process was incomplete when Ruppert filed suit. Since the PLRA makes exhaustion a precondition to *filing* a suit, an action brought before administrative remedies are exhausted must be dismissed without regard to concern for judicial efficiency. *See* 42 U.S.C. § 1997e(a); *Jernigan*

*v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir.2002); *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532, 534–35 (7th Cir.1999); *Alexander v. Hawk*, 159 F.3d 1321, 1327–28 (11th Cir.1998); *see also McNeil v. United States*, 508 U.S. 106, 113, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993) (interpreting similar exhaustion provision in the Federal Tort Claims Act); *Duplan v. Harper*, 188 F.3d 1195, 1199 (10th Cir.1999).

Ruppert also sought leave to again amend his complaint to add Eighth Amendment claims against several prison officials based on an incident that occurred while the suit was pending before the district court. Acknowledging that leave to amend should be freely granted, the magistrate nonetheless denied the request because the claim had arisen more than a year after Ruppert filed his lawsuit and from events unrelated to those described in the original complaint.

**2 Over Ruppert's objection, the district court adopted the magistrate's recommendation to deny leave to amend the complaint and to dismiss his remaining claims without prejudice. The court concluded the magistrate had properly applied the exhaustion rules in § 1997e(a) and had not abused his discretion in denying Ruppert an opportunity to add the unrelated claims.

After reviewing the record, we conclude the district court's decision was correct.

AFFIRMED.

**All Citations**

448 Fed.Appx. 862, 2012 WL 401524

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2011 WL 1518656
Only the Westlaw citation is currently available.
United States District Court,
D. Colorado.

Terry BLEVINS, Plaintiff,
v.
Jeff WELLS, Defendant.

Civil Action No. 09–cv–01531–WJM–KMT. | March 14, 2011.

**Attorneys and Law Firms**

Terry Blevins, Grand Junction, CO, pro se.

**RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

KATHLEEN M. TAFOYA, United States Magistrate Judge.

***1** This case comes before the court on "Defendant's Motion for Summary Judgment" (Doc. No. 64 [Mot.], filed October 18, 2010). Plaintiff filed his response on November 5, 2010 (Doc. No. 66 [Resp.] ), and Defendant filed his reply on November 18, 2010 (Doc. No. 67 [Reply].) The motion is ripe for the court's ruling and recommendation.

## *I. STATEMENT OF THE CASE*

The following facts are taken from Plaintiff's Amended Prisoner Complaint (Am.Compl.) and the parties' submissions with respect to this Recommendation. Plaintiff alleges claims of Cruel and Unusual Punishment and Retaliation against Defendant Wells, a Parole Officer employed by the Colorado Department of Corrections (CDOC). [1] (*See* Am. Compl. at 10–11.)

1 The remaining claims and defendants were dismissed by Senior Judge Zita L. Weinshienk on October 20, 2009. (*See* Doc. No. 12.)

Plaintiff states on March 12, 2009, Defendant Wells arrested him for a parole violation. (*Id.* at 5.) Plaintiff alleges while he was being escorted in handcuffs from the Veterans Administration Medical Center, where he was being treated at the time, Plaintiff advised Defendant Wells that he had previously obtained a shoulder injury from being placed in handcuffs. (*Id.*) According to Plaintiff, Defendant Wells told Plaintiff that he would switch the handcuffs to Plaintiff's front side when they reached the car. (*Id* .) Plaintiff then advised Defendant Wells that "unfortunately [Defendant Wells] would be added to plaintiff's lawsuit."(*Id.*) Plaintiff alleges when Plaintiff and Defendant Wells reached the car, Defendant Wells did not switch the cuffs, "since [Plaintiff] was going to sue him why not go all the way."(*Id.*) Plaintiff alleges the failure to change the position of the handcuffs inflicted injury to Plaintiff. (*Id.* at 10, 11.)Plaintiff alleges Defendant Wells subjected Plaintiff to needless pain and cruel and usual punishment. (*Id.* at 10.)Plaintiff also contends Defendant Wells failed to change the position of the cuffs in retaliation for Plaintiff's statement that Plaintiff was going to sue Defendant Wells. (*Id.* at 11.)Plaintiff seeks compensatory damages and punitive damages. (*Id.* at 15.)

## *II. LEGAL STANDARDS*

### *A.* Pro Se *Plaintiff*

Plaintiff is proceeding *pro se*.The court, therefore, "review[s] his pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys."*Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir.2007) (citations omitted).*See also Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (holding allegations of a *pro se* complaint "to less stringent standards than formal pleadings drafted by lawyers"). However, a *pro se* litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based."*Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir.1991). A court may not assume that a plaintiff can prove facts that have not been alleged, or that a defendant has violated laws in ways that a plaintiff has not alleged. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).*See also Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir.1997) (court may not "supply additional factual allegations to round out a plaintiff's complaint"); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir.1991) (the court may not "construct arguments or theories for the plaintiff in the absence of any discussion of those issues"). The plaintiff's *pro se* status does not entitle him to application of different rules. *See Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir.2002).

### *B. Summary Judgment Standard*

***2** Summary judgment is appropriate if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact

and that the movant is entitled to judgment as a matter of law."Fed.R.Civ.P. 56(c). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)."Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter."*Concrete Works of Colo., Inc. v. City & Cnty. of Denver*, 36 F.3d 1513, 1518 (10th Cir.1994) (citing *Celotex*, 477 U.S. at 325). The nonmoving party may not rest solely on the allegations in the pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial."*Celotex*, 477 U.S. at 324;*see also*Fed.R.Civ.P. 56(e)(2). A disputed fact is "material" if it might affect the outcome of the suit under the governing law; the dispute is "genuine" if the evidence is such that it might lead a reasonable jury to return a verdict for the nonmoving party. *Allen v. Muskogee, Okla.*, 119 F.3d 837, 839 (10th Cir.1997) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

When ruling on a motion for summary judgment, a court may consider only admissible evidence. *See Johnson v. Weld Cnty., Colo.*, 594 F.3d 1202, 1209–10 (10th Cir.2010). The factual record and reasonable inferences therefrom are viewed in the light most favorable to the party opposing summary judgment.*Concrete Works*, 36 F.3d at 1517.At the summary judgment stage of litigation, a plaintiff's version of the facts must find support in the record. *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1312 (10th Cir.2009)."When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."*Scott v. Harris*, 550 U.S. 372, 380 (2007); *Thomson*, 584 F.3d at 1312.

### *III. ANALYSIS*

#### *A. Failure to Exhaust Administrative Remedies*

Defendant moves for summary judgment based upon Plaintiff's failure to exhaust his administrative remedies, as required by the Prison Litigation Reform Act (PLRA), Title 42 U.S.C. § 1997e(a). (Mot. at 12–13.) Prior to filing this civil action, Plaintiff was required to exhaust administrative remedies pursuant to PLRA. *Booth v. Churner*, 532 U.S. 731, 741 (2001).Section 1997e(a) provides: "No action shall be brought with respect to prison conditions under § 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."In *Jones v. Bock*, 549 U.S. 199 (2007), the United States Supreme Court that failure to exhaust administrative remedies is an affirmative defense under the PLRA, and prison inmates are not required to plead or demonstrate exhaustion in their complaints. *Id.*, 199 U.S. at 216.

***3** In his Complaint, Plaintiff acknowledges that he has not exhausted his available administrative remedies. (Compl. at 14.) However, Plaintiff argues that the "[d]efense does not state where such a grievance should have been filed."(Resp. at 3.) Plaintiff also argues that the he filed this lawsuit while he "was a parolee on the streets."(*Id.*) However, the Court's docket shows that Plaintiff filed his "Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915" on June 16, 2009, and the court docketed Plaintiff's original Prisoner Complaint on June 30, 2009, while Plaintiff was in the custody of the Limon Correctional Facility (LCF) of the CDOC. (Doc. Nos.1, 3.) Moreover, the Statement of Account Activity attached to Plaintiff's motion to proceed under § 1915 reflects that Plaintiff had been in the custody of the CDOC since at least May 4, 2009. (*Id.* at 3.)

Defendant submits with his motion the Affidavit of Tasha Dobbs, another CDOC Parole Officer. (Mot., Ex. A–2 [Dobbs Aff.], ¶ 2.) Ms. Dobbs explains that the Regulation provides that a parolee may file a grievance with his parole officer under the CDOC's Administrative Regulation (AR) 850–04. (*Id.* at ¶ 8.) The Regulation also states that the grievance procedure is available to offenders sentenced to the CDOC, including offenders who have been released to parole, community, or ISP supervision. AR 850–04 at Section IV.A.2. Therefore, AR 850–04 applies to Plaintiff whether he was a parolee or back in CDOC custody.

The AR also states that, "[u]pon entry in the Department of Corrections, each offender shall receive written notification and oral explanation of the grievance procedure."AR 850–04, § IV.A.1.[2] The inmate must submit any grievance on a CDOC grievance form and must follow the three-step procedure outlined in the Regulation. *See* AR 850–04. The Regulation provides details on grievance-filing procedures. *Id.* Plaintiff does not argue that he did not receive the AR upon his entry into the CDOC or that he was unaware of the requirement for exhaustion of his administrative remedies. Moreover, this court notes that Plaintiff is a sophisticated plaintiff who has filed six civil cases in this Court, all while he was an inmate with the CDOC.

2 Here, the court takes judicial notice of AR 850–04, as that regulation is found in its entirety on the CDOC website at http:// www.doc.state.co.us/index.html.

This court determines there is no genuine issue of material fact as to Plaintiff's failure to comply with his obligations under the PLRA to exhaust his administrative remedies as set forth in the CDOC's administrative remedies under AR 850–04, and summary judgment is properly granted in favor of Defendant.

Because the issue of Plaintiff's failure to exhaust his administrative remedies is clear, this court need not address Defendant's remaining arguments for summary judgment.

WHEREFORE, for the foregoing reasons, this court respectfully

**RECOMMENDS** that "Defendant's Motion for Summary Judgment" (Doc. No. 64) be GRANTED, for Plaintiff's failure to exhaust his administrative remedies.

**ADVISEMENT TO THE PARTIES**

***4** Within fourteen days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72(b); *In re Griego,* 64 F.3d 580, 583 (10th Cir.1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review."*United States v. One Parcel of Real Prop. Known As 2121 East 30th Street, Tulsa, Okla.,* 73 F.3d 1057, 1060 (10th Cir.1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *See Vega v. Suthers,* 195 F.3d 573, 579–80 (10th Cir.1999) (a district court's decision to review a magistrate judge's recommendation *de novo* despite the lack of an objection does not preclude application of the "firm waiver rule"); *One Parcel of Real Prop.,* 73 F.3d at 1059–60 (a party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Ref. Sys., Inc.,* 52 F.3d 901, 904 (10th Cir.1995) (by failing to object to certain portions of the magistrate judge's order, cross-claimant had waived its right to appeal those portions of the ruling); *Ayala v. United States,* 980 F.2d 1342, 1352 (10th Cir.1992) (by their failure to file objections, plaintiffs waived their right to appeal the magistrate judge's ruling); *but see, Morales–Fernandez v. INS,* 418 F.3d 1116, 1122 (10th Cir.2005) (firm waiver rule does not apply when the interests of justice require review).

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See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Tenth
Circuit Rule 32.1. (Find CTA10 Rule 32.1)
United States Court of Appeals,
Tenth Circuit.

James SIMMONS, Plaintiff–Appellant,
v.
Jon STUS, Deputy, Crawford County
Sheriff Department; Donny (LNU), Deputy,
Crawford County Sheriff Department;
Troy (LNU), Deputy, Crawford County
Sheriff Department, Defendants–Appellees.

No. 10–3070. | Nov. 9, 2010.

**Synopsis**
**Background:** State prisoner brought § 1983 action against jailers, alleging that jailers used excessive force when prisoner was beaten by three correctional officers. The United States District Court for the District of Kansas, Crow, Senior District Judge, dismissed prisoner's claim. Prisoner appealed.

**Holding:** The Court of Appeals, Deanell Reece Tacha, Circuit Judge, held that prisoner failed to exhaust administrative remedies.

Affirmed.

West Headnotes (1)

**[1] Civil Rights**
Criminal law enforcement; prisons

Kansas state prisoner failed to exhaust administrative remedies with respect to his claim for excessive force, as required under Prison Litigation Reform Act (PLRA), before bringing § 1983 action against jailers, even though prisoner was unaware of grievance procedure, where there was grievance procedure in place at jail, and prisoner did not file administrative grievance concerning alleged excessive-force incident. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983; Prison Litigation Reform Act of 1995, § 101(a), 42 U.S.C.A. § 1997e(a).

3 Cases that cite this headnote

**Attorneys and Law Firms**

***380** James Simmons, Hutchinson, KS, pro se.

Terelle Ashley Mock, J. Steven Pigg, Fisher, Patterson, Sayler & Smith, LLP, Topeka, KS, for Defendants–Appellees.

Before TACHA, ANDERSON, and KELLY, Circuit Judges.

**ORDER AND JUDGMENT** *

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

DEANELL REECE TACHA, Circuit Judge.

****1** James Simmons, a Kansas prisoner proceeding pro se and in forma pauperis, appeals ***381** the district court's dismissal of his excessive-force claim, brought pursuant to 42 U.S.C. § 1983, for failure to exhaust available administrative remedies. We take jurisdiction under 28 U.S.C. § 1291 and affirm.

***Background***

Mr. Simmons filed suit complaining about the conditions of his confinement at the Crawford County Jail in Girard,

Kansas, from August 7, 2006 to May 22, 2007. The district court dismissed all of his claims for failure to state a constitutional violation except the excessive-force claim. [1] Mr. Simmons alleged that jailers used excessive force on December 19, 2006, when he was beaten by three correctional officers. The district court dismissed the claim for failure to exhaust administrative remedies.

1 Mr. Simmons has waived his claims other than the excessive-force claim by failing to argue them on appeal. *See Ruiz v. McDonnell,* 299 F.3d 1173, 1182 n. 4 (10th Cir.2002) (holding issues not argued to appellate court are deemed waived).

Mr. Simmons concedes that he did not file an administrative grievance concerning the alleged excessive-force incident. He further concedes that there was a grievance procedure in place at the jail. Instead, he argues that he was unaware of the grievance procedure. [2]

2 Mr. Simmons also asserts that the district court erred in stating that (1) he was assigned to a one-man holding cell for protection; (2) he claimed the beating occurred in his cell, rather than outside it; and (3) he had submitted grievances prior to the alleged beating. These disputes are not relevant to the issue of whether he exhausted administrative remedies relative to the alleged beating.

### *Analysis*

The Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. § 1997e(a), provides that a prisoner confined in any jail, prison or correctional facility may not bring any action under any federal law regarding prison conditions "until such administrative remedies as are available are exhausted." This "exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle,* 534 U.S. 516, 532, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002). "We review de novo the district court's finding of failure to exhaust administrative remedies." *Jernigan v. Stuchell,* 304 F.3d 1030, 1032 (10th Cir.2002). Because Mr. Simmons is proceeding pro se, we construe his filings liberally. *See Erickson v. Pardus,* 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam); *Van Deelen v. Johnson,* 497 F.3d 1151, 1153 n. 1 (10th Cir.2007).

"There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court." *Jones v. Bock,* 549 U.S. 199, 211, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007). In an unpublished decision, this court addressed whether a prisoner may avoid the exhaustion requirement if he was unaware of the jail's grievance procedures. *Gonzales–Liranza v. Naranjo,* 76 Fed.Appx. 270 (10th Cir.2003). Although *Gonzales–Liranza* is not binding precedent, we agree with its reasoning, given its factual similarity to this case. In each, the prisoner claimed he had not been informed how to file a grievance or given an inmate ***382** handbook describing the procedure, and neither claimed that the respective correctional facility "did anything to frustrate or prevent him from utilizing [the grievance] procedures," *id.* at 273. Accordingly, we hold that "even accepting plaintiff's allegation that he was unaware of the grievance procedures, there is no authority for waiving or excusing compliance with PLRA's exhaustion requirement." *Id.*; *see also Griffin v. Romero,* 399 Fed.Appx. 349 at 351, 2010 WL 4069460, at *2 (10th Cir.2010) (unpublished) (affirming dismissal for failure to exhaust administrative remedies even though prisoner claimed that jail officers did not make grievance process available to him).

### *Conclusion*

****2** The district court granted Mr. Simmons leave to proceed on appeal in forma pauperis. He is reminded that he must continue to make partial payments until the entire balance of the filing fee is paid. The judgment of the district court is AFFIRMED.

**All Citations**

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76 Fed.Appx. 270
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)
United States Court of Appeals,
Tenth Circuit.

Francisco GONZALES-LIRANZA, Plaintiff-Appellant,
v.
Sergeant Johnny NARANJO, Defendant-Appellee.

No. 02-2110. | Oct. 2, 2003.

State prisoner filed pro se § 1983 action against correctional officer and others, alleging that officer failed to take prompt measures to ensure his safety. The United States District Court for the District of New Mexico granted summary judgment in favor of officer. Prisoner appealed. The Court of Appeals, 211 F.3d 1278, 2000 WL 488476, Seymour, Circuit Judge, reversed and remanded. On remand, the District Court dismissed for failure to exhaust administrative remedies. Prisoner again appealed. The Court of Appeals, Tymkovich, Circuit Judge, held that dismissal of action was warranted for failure to exhaust administrative remedies.

Affirmed.

West Headnotes (1)

**[1] Civil Rights**
Criminal Law Enforcement; Prisons

Dismissal of pro se state prisoner's § 1983 action against correctional officer was warranted for failure to exhaust administrative remedies, as required by Prison Litigation Reform Act (PLRA), even if prisoner was not informed of prison's grievance process, where prison had grievance process available, prisoner admitted that he did not exhaust that procedure, and prison did nothing to frustrate or prevent prisoner from utilizing procedure. Civil Rights of Institutionalized Persons Act, § 7(a), 42 U.S.C.A. § 1997e(a).

40 Cases that cite this headnote

**Attorneys and Law Firms**

***270** Jose R. Coronado, Las Cruces, NM, for Plaintiff-Appellant.

Jeffrey L. Baker, Albuquerque, NM, for Defendant-Appellee.

Before HARTZ, Circuit Judge, BRORBY, Senior Circuit Judge, and TYMKOVICH, Circuit Judge.

***271 ORDER AND JUDGMENT** *

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

TYMKOVICH, Circuit Judge.

****1** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Francisco Gonzales Liranza appeals the district court's dismissal without prejudice of his 42 U.S.C. § 1983 civil rights complaint for failure to exhaust available administrative remedies. We have jurisdiction pursuant to 28 U.S.C. § 1291, *see Yousef v. Reno*, 254 F.3d 1214, 1218-19 (10th Cir.2001), and we affirm.

Plaintiff, a New Mexico prisoner in the custody of the Bernalillo County Detention Center (BCDC) at the time of the incident in question, filed a pro se § 1983 complaint in August 1998 against defendant Sergeant Johnny Naranjo,

a correctional officer at BCDC.[1] Plaintiff alleged that, in August 1996, while he was a pre-trial detainee at BCDC, plaintiff told Sgt. Naranjo he was having problems with certain inmates and feared for his safety. He alleged that Sgt. Naranjo failed to take prompt measures to ensure his safety and, one hour later, he was severely beaten by these same inmates, resulting in serious and permanent injuries.

1 Plaintiff named other defendants in his complaint, but they were *sua sponte* dismissed by the district court, and plaintiff has not challenged their dismissal.

Pursuant to the Prison Litigation Reform Act of 1995 (PLRA), prisoners bringing suit under § 1983 must first exhaust available administrative remedies before seeking relief in federal court. *See* 42 U.S.C. § 1997e(a) ( "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."). This exhaustion requirement is mandatory. *Porter v. Nussle,* 534 U.S. 516, 524, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002) ( "[a]ll 'available' remedies must now be exhausted; those remedies need not meet federal standards, nor must they be plain, speedy, and effective." (quotation omitted)).

Plaintiff acknowledged in his complaint that he had not exhausted administrative remedies. In response to a question on the complaint form asking whether he had sought informal or formal relief from the appropriate administrative officials regarding the acts complained of, plaintiff checked the box marked "No." R. Doc. 1, at 4. He also marked "No" in response to a question asking whether he had exhausted available administrative remedies. *Id.* at 5. Plaintiff stated in his complaint, however, that, "[t]here are no administrative remedies that Plaintiff is aware of ... [and] [p]laintiff was [not] advised that he could file anything administratively for the inactions that occurred." *Id.*

Sergeant Naranjo filed a motion for summary judgment in March 1999, seeking a dismissal of the complaint based on plaintiff's failure to exhaust administrative remedies. In his motion, Sgt. Naranjo presented evidence that BCDC had a grievance procedure and policy in effect at the time of the events in question. He attached a copy of the prison's grievance ***272** policy and an affidavit from a BCDC prison official stating that the prison records indicated plaintiff had not filed any form of grievance regarding the incident in question.

****2** Before ruling on the exhaustion issue, however, the district court requested defendant file a *Martinez* report to investigate the incidents forming the basis of plaintiff's complaint. *See Martinez v. Aaron,* 570 F.2d 317, 319 (10th Cir.1978) (holding that report may be necessary to determine certain preliminary issues). After Sgt. Naranjo filed a *Martinez* report, the district court dismissed the complaint, ruling on the merits that the alleged conduct of Sgt. Naranjo did not rise to the level of a constitutional violation. This court reversed that dismissal on appeal, however, ruling that plaintiff had been denied a proper opportunity to respond to Sgt. Naranjo's motion for summary judgment and the *Martinez* report. *Gonzalez-Liranza v. Naranjo,* No. 99 2302, 2000 WL 488476 (10th Cir. Apr. 26, 2000) (unpublished disposition).

On remand, Sgt. Naranjo filed a motion to dismiss for failure to exhaust the available prison administrative remedies. In response, plaintiff, now represented by counsel, reasserted his allegation in the complaint that he was unable to avail himself of the prison grievance procedures because he was never advised by BCDC that there were any such procedures. Plaintiff did not dispute that the prison had a grievance policy, but he attached his affidavit stating that when he was taken to BCDC, he was never informed that the prison had a grievance process nor was he given any written materials informing him of his right to file a complaint or initiate a grievance procedure. He also stated in his affidavit that he informed a prison guard shortly after the incident in question that he wished to file a complaint, and this official took notes and said he would investigate the matter, but did not tell plaintiff he had to fill out a complaint form.

After a request by the court for supplemental briefing, Sgt. Naranjo presented evidence that BCDC provides an inmate handbook, written in both English and Spanish, to all newly admitted inmates during an admission orientation, that the prison's grievance procedures are included in the handbook and that the contents of the handbook are explained to all inmates during the orientation. Sergeant Naranjo also presented evidence that plaintiff had been housed in BCDC on seven different occasions and would have received a copy of the inmate handbook each time.

The district court ruled that plaintiff did not exhaust his administrative remedies as required by § 1997e(a), but because there was a factual dispute as to whether plaintiff was aware of the available grievance procedures, it dismissed the

complaint without prejudice and ordered BCDC to provide plaintiff with a copy of its grievance procedures.

On appeal, plaintiff contends the district court erred in dismissing the complaint because there was a factual dispute whether the prison had informed him of its grievance procedures. "We review de novo a dismissal for failure to exhaust administrative remedies." *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir.2002).

****3** The district court correctly dismissed plaintiff's complaint for failure to exhaust BCDC's grievance procedure. The district court did not resolve any factual dispute between the parties, and, as a matter of law, any factual dispute between the parties as to whether or not plaintiff was ever advised or informed of the prison's grievance procedures was not relevant. This court has previously rejected a prisoner's assertion that the government ***273** should have advised him of the need to follow prison administrative procedures. *Yousef*, 254 F.3d at 1221 (rejecting argument as lacking any authority). "The statutory exhaustion requirement of § 1997e(a) is mandatory, and the district court [is] not authorized to dispense with it." *Beaudry v. Corr. Corp. of Am.*, 331 F.3d 1164, 1167 n. 5 (10th Cir.2003). As the Supreme Court has broadly stated: "[W]e stress the point ... that we will not read futility *or other exceptions* into [PLRA's] statutory exhaustion requirement [ ]." *Booth v. Churner*, 532 U.S. 731, 741, n. 6, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001) (emphasis supplied).

"Section 1997e(a) says nothing about a prisoner's subjective beliefs, logical or otherwise, about the administrative remedies that might be available to him. The statute's requirements are clear: If administrative remedies are available, the prisoner must exhaust them." *Chelette v. Harris*, 229 F.3d 684, 688 (8th Cir.2000). "Congress intended to save courts from spending countless hours, educating themselves in every case, as to the vagaries of prison administrative processes, state or federal" and "did not intend for courts to expend scarce judicial resources examining how and by whom a prison's grievance procedure was implemented." *Concepcion v. Morton*, 306 F.3d 1347, 1354 (3d Cir.2002) (quotation omitted).

It is undisputed that BCDC had a written grievance procedure and it is undisputed that plaintiff did not exhaust that procedure. Plaintiff does not allege that BCDC did anything to frustrate or prevent him from utilizing those procedures. *See Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir.2003) (holding district court erred in failing to consider prisoner's claim that he was unable to file a grievance, and therefore lacked available administrative remedies, because prison officials refused to provide him with the necessary grievance forms). Plaintiff's claim that he told a prison guard he wished to file a complaint and was not told about the administrative remedies is unavailing. Giving notice of his claims by means other than the prison's available grievance process does not satisfy PLRA's exhaustion requirement. *See Jernigan*, 304 F.3d at 1032.

Thus, even accepting plaintiff's allegation that he was unaware of the grievance procedures, there is no authority for waiving or excusing compliance with PLRA's exhaustion requirement. Accordingly, the judgment of the district court is AFFIRMED.

**All Citations**

76 Fed.Appx. 270, 2003 WL 22255886

**End of Document**

2012 WL 1313412
Only the Westlaw citation is currently available.
United States District Court,
M.D. Pennsylvania.

Charles Sims AFRICA, Plaintiff
v.
Lt. DUKES, Defendant.

Civil No. 1:10–1838. | April 17, 2012.

**Attorneys and Law Firms**

Charles Sims Africa, Hunlock Creek, PA, pro se.

Travis S. Anderson, Chief Counsel's Office, Mechanicsburg, PA, for Defendant.

***MEMORANDUM***

SYLVIA H. RAMBO, District Judge.

**I. *Background***

***1** Before the court is a February 8, 2012, report of the magistrate judge (Doc. 62) to whom this matter is referred in which addresses the only remaining claim in the captioned action—an Eighth Amendment failure to protect claim against Defendant Dukes. Dukes filed a motion for summary judgment. The report of the magistrate judge recommends that the motion for summary judgment be granted on the basis that Plaintiff failed to exhaust available administrative remedies. Plaintiff has filed objections to the report and recommendation, and claims that (1) there is an exception to the DOC policy of exhaustion; and (2) the PLRA unfairly imposes an unreasonable burden on a pro se litigant. Dukes has filed a response to Plaintiff's objections and the matter is ripe for disposition.

**II. *Discussion***

Exhaustion of all available administrative remedies is a mandatory prerequisite to filing prison conditions litigation in a federal court. 42 U.S.C. § 1997e(a); *Woodford v. Ngo*, 548 U.S. 81, 85, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006). (Def.'s Response to Pltf.'s Objs., Doc. 72, at p. 4.) Defendant's summary judgment motion is premised on Plaintiff's failure to exhaust his administrative remedies through DC–ADM 804. Plaintiff, however, claims there is an exception to DC–ADM 804. At section 1, paragraph 7 of that policy, appears the following:

> A grievance ***directly related to a specific inmate misconduct charge or a specific disciplinary sanction and/or reasons for placement in administrative custody*** will not be addressed through the inmate Grievance process and must be addressed through department policy ***DC–ADM 801, "Inmate Discipline" and/or DC–ADM 802, "Administrative Custody Procedures."***

(Emphasis in original.) Defendant notes that this version did not go into effect until December 28, 2011 and is not applicable to Plaintiff's situation. The version of DC–ADM 804 that applies to Plaintiff is a June, 2010 version. (*See* Doc. 49, Ex. B, ¶ 3.) As Defendant notes, Plaintiff did not raise this issue in his briefs in opposition to Defendant's motion for summary judgment nor in his statement of material facts. (Doc. 72 n. 2.)

The grievance here does not involve a specific inmate misconduct or disciplinary sanction or placement in administrative custody. Therefore, DC–ADM 801 is not the proper method for challenging constitutional violations unrelated to misconduct proceedings. *See Mayfield v. SCI Cresson*, 2011 U.S. Dist. LEXIS 89285 (M.D.Pa., Aug. 11, 2011).

Plaintiff's argument about the unfairness of the exhaustion requirement under the PLRA is a claim of ignorance of that provision in the PLRA. Ignorance of the law, however, is no excuse.

**III. *Conclusion***

The court will adopt the report and recommendation of Magistrate Judge Smyser. An appropriate order will be issued.

***ORDER***

For the reasons set forth in accompanying memorandum, **IT IS HEREBY ORDERED THAT:**

1) The court adopts the report and recommendation of Magistrate Judge Smyser (Doc. 62).

***2** 2) Defendant Duke's motion for summary judgment is **GRANTED.**

3) The Clerk of Court shall enter judgment in favor of Defendant Duke and against Plaintiff and close the file.

4) It is certified that any appeal from this order will be deemed frivolous and not taken in good faith.

**All Citations**

Not Reported in F.Supp.2d, 2012 WL 1313412

**End of Document**

104 F.3d 368
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a
"Table of Decisions Without Reported
Opinions" appearing in the Federal Reporter.
See CTA 10 Rule 32.1 before citing.)
United States Court of Appeals, Tenth Circuit.

Tyrone Mcdaniel YAHWEH, Plaintiff-Appellant,
v.
Aristedes ZAVARAS, Administrations
and Staffs, Defendant-Appellee.

No. 95-1515. | Dec. 23, 1996.

## ORDER AND JUDGMENT [*]

[*] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before PORFILIO, ALARCON, [**] and LUCERO, Circuit Judges.

[**] Honorable Arthur L. Alarcon, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

LUCERO, Circuit Judge.

**1** In this case, [1] plaintiff challenges the district court's dismissal of his civil rights suit as legally frivolous pursuant to former 28 U.S.C. § 1915(d). [2] We conclude the complaint is not frivolous. Accordingly, we reverse and remand for further proceedings.

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

[2] Section 1915 was substantially amended in April of 1996 the Prison Litigation Reform Act, Pub.L. No. 104-134, 110 Stat. 1321 (1996), as discussed further herein. Prior to that date, § 1915(d) provided in part that the district court "may dismiss the case ... if satisfied that the action is frivolous or malicious."

Plaintiff, a prisoner, filed a pro se suit in district court pursuant to 42 U.S.C. § 1983, contending that he was being denied access to the courts because prison authorities refused him physical access to the law library. The district court ordered a *Martinez* report. The *Martinez* report set out the prison's policies with regard to access to legal materials, which show that the prison provides several alternatives to physical access to a library, such as borrowing books and other reference materials, and seeking help from a legal assistant or an available "access attorney." Plaintiff filed a pleading entitled "Motion for Summary Judgment," which the district court construed as his response to the *Martinez* report. The district court considered both the *Martinez* report and plaintiff's response in reviewing the complaint's legal sufficiency. *See Hall v. Bellmon*, 935 F.2d 1106, 1112-13 (10th Cir.1991) (holding that court may consider *Martinez* report as attached to plaintiff's complaint and noting plaintiff's response).

"It is now established beyond doubt that prisoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). Nonetheless, physical access to a prison law library is not a right. *See Penrod v. Zavaras*, 94 F.3d 1399, 1403 (10th Cir.1996) (quoting *Lewis v. Casey*, 116 S.Ct. 2174, 2180 (1996)). The right of access to the courts may be satisfied by alternative means that allow a prisoner "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Bounds*, 430 U.S. at 825.

Quoting the *Martinez* report, the district court noted the availability of alternative means, and stated that plaintiff did not deny the existence of the policies and the facts as set out in the report. The court recognized plaintiff's allegations that the access attorney was not a reasonable alternative to physical access to the library, but characterized them as dissatisfaction "with the manner in which he can obtain legal materials or assistance from persons trained in the law." The district court then dismissed plaintiff's complaint as frivolous under 28 U.S.C. § 1915, apparently because it concluded plaintiff had not challenged the prison's alternative means of access. We review the district court's dismissal of the action for abuse of discretion. *Green v. Seymour*, 59 F.3d 1073, 1077 (10th Cir.1995).

"A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall*, 935 F.2d at 1110 (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)). Although a liberal reading of plaintiff's pro se pleadings does not free him of the obligation to plead sufficient facts, "[n]ot every fact must be described in specific detail." *Id.* Our review of the record on appeal demonstrates that, while plaintiff did not challenge the availability of alternatives to physical access to the library, he did challenge the adequacy of those alternatives. Further, we cannot conclude that his allegations are vague or merely conclusory. *Cf. Hall*, 935 F.2d at 1110 (standards afforded pro se pleadings do not relieve plaintiff of burden to allege sufficient facts); *Frazier v. Dubois*, 922 F.2d 560, 562 n. 1 (10th Cir.1990) (conclusory allegations insufficient to state a claim).

***2** In his response to the *Martinez* report, plaintiff made the following statements: "The access attorney limits his visit with an inmate to 15 minutes per session and no more than 4 session [sic] per month. The access attorney will not perform legal research for inmates. The access attorney will not prepare legal documents for inmates." Standing alone, these factual allegations may not necessarily state a claim for relief. However, plaintiff also alleges that "the access attorney is not a reasonable alternative to the access to the prison law library." His citation to various legal authorities denouncing other prisons' book loan policies constitutes a challenge to the adequacy of that alternative as well. We conclude that plaintiff's complaint set out a challenge to the prison's policies with regard to access to the courts that should have survived summary dismissal for legal frivolousness. Hence, the district court abused its discretion in sua sponte dismissing plaintiff's complaint on that basis.

REVERSED and REMANDED for further proceedings. [3]

[3] On remand, the district court should consider whether the amendments to 28 U.S.C. § 1915 apply to this case and, if so, how they interrelate with Fed.R.Civ.P. 15 and the lenient standards afforded pro se pleadings.

**All Citations**

104 F.3d 368 (Table), 1996 WL 734652, 97 CJ C.A.R. 46

376 Fed.Appx. 815
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Tenth
Circuit Rule 32.1. (Find CTA10 Rule 32.1)
United States Court of Appeals,
Tenth Circuit.

Lawrence L. MAYES, Petitioner-Appellant,
v.
Greg PROVINCE, Warden, Respondent-Appellee.

No. 10-6021. | April 23, 2010.

**Synopsis**

**Background:** State prisoner, who pleaded guilty in New Mexico state court to robbery with dangerous weapon after former conviction of two or more felonies and was sentenced to 20 years in prison, filed pro se federal habeas petition after unsuccessfully petitioning Oklahoma courts for post-conviction relief. The United States District Court for the Western District of Oklahoma, J., 2010 WL 148418, dismissed prisoner's petition and denied his application for certificate of appealability (COA).

**Holding:** Prisoner sought COA. The Court of Appeals, Neil M. Gorsuch, Circuit Judge, held that issuance of certificate of appealability (COA) was not appropriate.

Request denied, and appeal dismissed.

West Headnotes (1)

**[1] Habeas Corpus**
Certificate of probable cause

Issuance of certificate of appealability (COA) was not appropriate for prisoner to appeal district court order denying habeas relief based on ineffective assistance of trial counsel in his state court prosecution for robbery with dangerous weapon, since jurists of reason would not find it debatable that district court was correct in ruling that prisoner's habeas petition was time-barred; although Antiterrorism and Effective Death Penalty Act (AEDPA) required motions to vacate conviction to be made within one year from date on which conviction became final, prisoner did not file any such state court motion until almost four years after conviction became final, and prisoner did not show how Oklahoma state prison purportedly deprived him of resources necessary to access judicial system as required to toll one-year filing requirement of AEDPA, especially given that prisoner filed many other post-conviction motions in Oklahoma state courts during period when he was allegedly deprived of resources. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. §§ 2244, 2254.

9 Cases that cite this headnote

**Attorneys and Law Firms**

***815** Lawrence L. Mayes, Hominy, OK, pro se.

Stephanie D. Jackson, Attorney General for the State of Oklahoma, Oklahoma City, OK, for Respondent-Appellee.

Before MURPHY, GORSUCH, and HOLMES, Circuit Judges.

**ORDER DENYING CERTIFICATE OF APPEALABILITY** *

* This order 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.

NEIL M. GORSUCH, Circuit Judge.

****1** Lawrence L. Mayes pleaded guilty in New Mexico state court to robbery with a dangerous weapon after former conviction of two or more felonies. He was sentenced on July 22, 2005, to 20 years in prison. After failing to file a direct appeal, Mr. Mayes petitioned the Oklahoma courts

for post-conviction relief, arguing that his trial counsel was constitutionally ineffective. The state courts rejected his petition on procedural grounds.

Mr. Mayes then turned his efforts to federal court, filing a *pro se* federal habeas ***816** petition under 28 U.S.C. § 2254 on October 13, 2009. While he admitted that his petition was filed after the expiration of 28 U.S.C. § 2244's one-year limitations period, Mr. Mayes argued that state-created impediments statutorily tolled the statute of limitations. *See* 28 U.S.C. § 2244(d)(1)(B). The district court rejected that argument, dismissed the petition as time-barred, and denied Mr. Mayes's application for a certificate of appealability ("COA").

Mr. Mayes now renews before us his request for a COA in order to appeal the district court's order. We may issue a COA only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court dismisses a § 2254 petition on procedural grounds, as it did in this case, we may issue a COA only if "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Based on our independent review of the record in this case, and affording solicitous consideration to Mr. Mayes's *pro se* court filings, *see Van Deelen v. Johnson*, 497 F.3d 1151, 1153 n. 1 (10th Cir.2007), we agree with the district court that Mr. Mayes has not met this threshold.

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), motions to vacate a conviction under § 2254 must typically be made within one year from the date on which the conviction became final. 28 U.S.C. § 2244(d)(1)(A). Mr. Mayes's judgment and conviction became final on August 1, 2005, when the time period for seeking to withdraw his guilty plea expired. Although the one-year limitations period is tolled during the pendency of a prisoner's state court motion for post-conviction relief, 28 U.S.C. § 2244(d)(2), Mr. Mayes didn't file any such state court motion until May 14, 2009-almost four years after his conviction became final. R. at 16. Accordingly, Mr. Mayes's § 2254 petition was well outside the one-year limitations period.

Mr. Mayes, for his part, does not dispute this conclusion. R. at 13. Instead, he argues that the State of Oklahoma prevented him from filing a timely federal habeas petition and that we shouldn't start the clock running until after that "impediment" was removed. *See* 28 U.S.C. § 2244(d)(1)(B) (tolling the statute of limitations when an "impediment to filing an application created by State action in violation of the Constitution or laws of the United States ... prevented [prisoner] from filing" his petition). Specifically, he contends that Oklahoma failed to provide him with "an adequate law library" and "physical access to the prison law library" in violation of the U.S. Constitution. *See* Opening Br. at 2A; *id.* at 3A.

****2** The United States Constitution, however, does not guarantee prisoners "an abstract, freestanding right to a law library or legal assistance," *Lewis v. Casey*, 518 U.S. 343, 351, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996), but rather a "right of *access to the courts*," *id.* at 350, 116 S.Ct. 2174. *Cf. Smith v. Shawnee Library Sys.*, 60 F.3d 317, 323 (7th Cir.1995) ("There is no 'right to browse' [a prison library]."). In order to establish a violation of the constitutional right of access, an inmate must demonstrate, among other things, how the alleged shortcomings in the prison actually "hindered his efforts to pursue a legal claim." *Lewis*, 518 U.S. at 351, 116 S.Ct. 2174. It follows that, to invoke § 2244(d)(1)(B)'s tolling provision-to show that an "impediment ... created by State action in violation of the Constitution ... prevented" the filing of a timely petition-an inmate must explain how the prison's alleged constitutional deficiencies hindered ***817** his efforts to pursue his claim within the prescribed statute of limitations. *See Miller v. Marr*, 141 F.3d 976, 978 (10th Cir.1998) (denying relief where petitioner "provided no specificity regarding the alleged lack of access" and how it impacted his delay, explaining that "[i]t is not enough to say that the [prison] facility lacked all relevant statutes and case law or that the procedure to request specific materials was inadequate"); *Garcia v. Hatch*, 343 Fed.Appx. 316, 318 (10th Cir.2009) (unpublished) (same); *Weibley v. Kaiser*, 50 Fed.Appx. 399, 403 (10th Cir.2002) (unpublished) (holding petitioner's claim "insufficient because he does not allege specific facts that demonstrate how his alleged denial of [legal] materials impeded his ability to file a federal habeas petition" in a timely manner); *cf. United States v. Martinez*, 303 Fed.Appx. 590, 596 (10th Cir.2008) (unpublished) (refusing equitable tolling because petitioner "has not provided this Court with specific details regarding what restrictions actually were placed on his access to legal materials or how such restrictions hindered his ability to file his § 2255 motion" in a timely manner).

Mr. Mayes has not attempted such a showing. Instead, he merely complains about the adequacy of the library facilities and arrangements, making no effort to explain how

these deficiencies hindered his ability to file a timely post-conviction motion. Indeed, he admits in his filings that he could "submit a written request for legal materials[,] and a prison guard would hand deliver the legal materials to his cell." R. at 13. And it appears that Mr. Mayes filed many other post-conviction motions in the Oklahoma state courts during the period when he was allegedly deprived of the resources necessary to access the judicial system. *See Mayes v. Province*, 353 Fed.Appx. 100, 105 (10th Cir.2009) (unpublished) (denying COA in response to same argument made by Mr. Mayes when he sought to challenge another, apparently separate and distinct robbery conviction). In these circumstances, although Mr. Mayes's allegations might suggest that additional resources could have been of greater assistance to him, "there is no basis in the record before us to believe that [he] was incapable of filing a timely habeas petition given the resources available." *Garcia*, 343 Fed.Appx. at 319. [1]

[1] Mr. Mayes does argue for the first time on appeal that he was denied a copy of AEDPA and thus couldn't have known of the procedural rules he was required to follow. However, we do not normally consider arguments raised for the first time on appeal, and we accordingly decline to pass upon whether such a denial would invoke the § 2244(d)(1)(B) exception. *See Dockins v. Hines*, 374 F.3d 935, 940 (10th Cir.2004) (declining to consider challenge to prison library made for first time on appeal).

****3** Because reasonable jurists could not debate that Mr. Mayes's petition is time-barred, the request for a COA is denied, and this appeal is dismissed. We grant Mr. Mayes's motion to proceed *in forma pauperis.*

**All Citations**

376 Fed.Appx. 815, 2010 WL 1632905

**End of Document**