IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24-cv-00602-CNS-STV

RYAN JAMES GRIFFIN,

Plaintiff,

v.

APRIL ORTIZ,
JOLEENA PEACHEE,
ABDON VARGAS,
LEROY MORA,
NICHOLAS HOOVER,
MATTHEW MILLER, and
DILLON EVANS,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Scott T. Varholak

This matter comes before the Court on Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) (the "Motion") [#52], which has been referred to this Court [#53]. This Court has carefully considered the Motion and related briefing, the entire case file, and the applicable case law, and has determined that oral argument would not materially assist in the disposition of the Motion. For the following reasons, this Court respectfully **RECOMMENDS** that the Motion be **GRANTED IN PART** and **DENIED IN PART**.

I. FACTUAL BACKGROUND[1]

Plaintiff is a Colorado Department of Corrections ("CDOC") inmate who is currently housed at the Delta Correctional Center ("DCC). [#67] This action arises from incidents occurring while Plaintiff was incarcerated at the Colorado Territorial Correctional Facility ("CTCF"). [*See generally* #44]

In May 2023, Plaintiff was initially processed at CTCF Cell House No. 5 and was strip searched by a CTCF Officer. [*Id.* at ¶¶ 8-9] This area is monitored by one or more security video cameras. [*Id.* at ¶ 11] Nonetheless, the cameras are positioned so that they do not capture images or live feed the strip search. [*Id.* at ¶ 12]

On July 1, 2023, Plaintiff was employed in the CTCF's Food Service Department clearing trays and washing dishes. [*Id.* at ¶¶ 13-14] Sergeant Ramirez, a female CDOC employee, escorted Plaintiff from the kitchen to the Midway Security Building for a random strip search. [*Id.* at ¶¶ 15-16] The Midway Security Building has special rooms and barriers to ensure that the strip searches are not recorded for live viewing or recording. [*Id.* at ¶¶ 17-19] As a result, Plaintiff was not concerned about this strip search.[2] [*Id.* at ¶ 17] Indeed, prior to August 1, 2023, all of Plaintiff's strip searches were unrecorded. [*Id.* at ¶ 25]

On August 1, 2023, while Plaintiff was working in the CTCF's Food Service Department, he was again subjected to a random strip search. [*Id.* at ¶¶ 26, 32] The

[1] The facts are drawn from the allegations in Plaintiff's Second Amended Complaint (the "Complaint") [#44], which must be taken as true when considering a motion to dismiss. *Wilson v. Montano*, 715 F.3d 847, 850 n.1 (10th Cir. 2013) (citing *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir. 2011)).

[2] A similar, unrecorded strip search occurred on December 16, 2023, after Plaintiff left CTCF's visitation room. [*Id.* at ¶¶ 20-24]

strip search was "under the order, direction, and supervision" of Defendants Abdon Vargas and Leroy Mora, and pursuant to a standing order of Defendant Joleena Peachee. [*Id.* at ¶¶ 33-34] Rather than escorting Plaintiff to the Midway Security Building as in the past, Defendant Mora took Plaintiff and four other Food Service Department workers to the inmate restroom area of the CTCF kitchen. [*Id.* at ¶¶ 41-42] This restroom does not contain security video cameras. [*Id.* at ¶ 43] While the four other inmates were searched in the inmate restroom, Plaintiff was not. [*Id.* at ¶¶ 43, 45] Instead, Defendant Vargas advised Defendants Mora, Matthew Miller, and Dillon Evans to strip search Plaintiff in the CTCF kitchen's utility closet. [*Id.* at ¶ 46] When Plaintiff asked to be searched in the restroom or the Midway Security Building, Defendant Vargas told Plaintiff that the search would be conducted "as ordered" and Defendants Miller and Evans stated that those "orders" included strip searching Plaintiff in the CTCF utility closet. [*Id.* at ¶¶ 47-49] Because Plaintiff feared adverse consequences—including potential administrative punishment, criminal charges, or physical punishment—Plaintiff acquiesced to the strip search. [*Id.* at ¶¶ 54-57]

As he was removing his clothing, Plaintiff noticed a security video camera installed in the ceiling. [*Id*. at ¶ 58] Plaintiff felt physically ill and humiliated out of fear that the live feed could be seen by staff members of both genders, shared with staff members of both genders, and even accessed by inmates or placed on social media or pornographic websites. [*Id.* at ¶¶ 59-64] Prior to the search, either Defendant Evans or Defendant Miller commented that they were looking forward to seeing Plaintiff's Sarah Palin tattoo, which is on Plaintiff's butt. [*Id.* at ¶ 65] Defendants Evans and Miller conducted a thorough strip search during which Plaintiff heard laughter from these Defendants. [*Id.* at

¶¶ 66-72] For several weeks after this search, Plaintiff heard officers laugh amongst themselves and comment on Plaintiff's Sarah Palin tattoo. [*Id.* at ¶ 90]

The day after the recorded strip search, Plaintiff filed a Prison Rape Elimination Act ("PREA") complaint through the CDOC's administrative process. [*Id.* at ¶ 76] In the complaint, Plaintiff asserted that the recorded strip search constituted the use of excessive force, and was tantamount to sexual assault, because the CDOC regulations do not allow for the recording of a strip search. [*Id.* at ¶ 77] Plaintiff did not receive a response from the CTCF and so he sent a letter to Defendant April Ortiz, CTCF's PREA Compliance Manager, expressing his concerns and requesting that all evidence of the search be preserved. [*Id.* at ¶¶ 80-82] Defendant Ortiz responded that the strip search was conducted in a private location away from other offenders, that the strip search can be recorded at any time (based on the offender's actions), and that she believed the August 1 search fell within CTCF policy. [*Id.* at ¶ 83] Plaintiff alleges that Defendant Ortiz's statement is inconsistent with CTCF administrative regulations which only permit the recording of a strip search during a cell extraction or where the inmate is alleged to have ingested drugs, neither of which applied to Plaintiff's August 1 search. [*Id.* at ¶¶ 86-88]

In August 2023, after Plaintiff filed his PREA report, Defendant Mora stopped Plaintiff from attending a mental health appointment, stopped Plaintiff from attending a medical appointment, stopped Plaintiff from attending a library visit to record the reading of a children's book to Plaintiff's daughter, stopped Plaintiff from attending a law library appointment, and stopped Plaintiff from attending a CDOC Case Manager appointment to discuss early release. [*Id.* at ¶¶ 92-96] That same month, Defendant Mora filed an

official CDOC disciplinary "write-up" for Plaintiff's attendance at a previously scheduled medical appointment and physical therapy appointment. [*Id.* at ¶ 97] Plaintiff suspected that Defendant Mora was retaliating against Plaintiff for Plaintiff's filing of the PREA report, and Plaintiff therefore filed grievances against Defendant Mora. [*Id.* at ¶ 98]

On August 30, 2023, Defendant Mora approached Plaintiff during Plaintiff's kitchen shift and ordered Plaintiff to turn around so that Defendant Mora could place Plaintiff in handcuffs and have Plaintiff strip searched. [*Id.* at ¶¶ 100-01, 107] Because Defendant Mora had been involved in the August 1 strip search, Defendant Mora's order for Plaintiff to "cuff up" triggered Plaintiff's post-traumatic stress disorder ("PTSD"). [*Id.* at ¶¶ 103-07] The lingering trauma and humiliation from the August 1 strip search caused Plaintiff to be slow in taking his clothes off. [*Id.* at ¶ 108] Defendant Mora grew impatient and threatened to mace Plaintiff. [*Id.* at ¶ 109] Plaintiff quickly finished undressing and lay naked on his stomach with his hands behind his back. [*Id.* at ¶ 110] Sergeant Quintana, a female sergeant present at the time, hit an emergency button, after which Defendant Mora placed Plaintiff back into handcuffs. [*Id.* at ¶¶ 114-15] Defendant Mora escorted Plaintiff to another area of CTCF and Sergeant McFall conducted a complete strip search while wearing a body camera. [*Id.* at ¶¶ 115-16] Following the strip search, Plaintiff was taken to administrative segregation for five or six days of solitary confinement. [*Id.* at ¶ 117] Plaintiff was ultimately charged with "advocating or creating facility disruption" causing the Boulder Community Treatment Center to deny Plaintiff's application for community confinement. [*Id.* at ¶ 122-23] Based upon the August 30 incident, on February 29, 2024, Plaintiff filed a second PREA report with an outside PREA reporting agency in Olympia, Washington. [*Id.* at ¶ 124]

On March 5, 2024, another CTCF inmate, Nicholas Aurelio, told Plaintiff that he had been invited by a CTCF correctional officer to watch a recording of Plaintiff's August 30 strip search. [*Id.* at ¶ 125] According to Mr. Aurelio, this correctional officer showed the entire strip search to Mr. Aurelio and several other inmates. [*Id.* at ¶ 126] "On information and belief," the correctional officer who showed this footage was Defendant Nicholas Hoover, the correctional officer who provides security in the CTCF medical building. [*Id.* at ¶ 129] "On information and belief, on August 30, 2023, and for weeks or months thereafter, Defendant Hoover invited CTCF staff members[,] medical contractors [and inmates] to view the August 30, 2023 security camera footage of the . . . strip search." [*Id.* at ¶ 302-03] Upon learning of Defendant Hoover's sharing of the video, Plaintiff filed a third PREA report with the PREA reporting office in Olympia, Washington. [*Id.* at ¶ 130]

As a result of Defendants' actions, Plaintiff continues to suffer from PTSD and other psychological and physical symptoms, including fear of lights and noises, correctional officers, showers, and small rooms. [*Id.* at ¶¶ 134-35] Plaintiff has intermittent lack of appetite, uncontrollable sobbing, insomnia and panic attacks. [*Id.* at ¶¶ 135-36] Physically, Plaintiff remains chronically ill and experiences migraines, lower back pain, gastrointestinal upset, and a lower leg infection that will not heal. [*Id.* at ¶¶ 137-41] Plaintiff's physical and emotional issues have been exasperated by Defendant Mora's actions in refusing Plaintiff access with mental health care and medical treatment for Plaintiff's leg injury. [*Id.* at ¶ 141]

On January 24, 2024, Plaintiff was moved from CTCF to St. Thomas-More Hospital for emergency treatment to remove a steel rod from his left shin bone. [*Id.* at ¶ 142] The infection in Plaintiff's leg "had become septic after nearly 6 months of PTSD trauma." [*Id.*]

Plaintiff underwent a three-hour surgery to remove the steel rod and treat the infection in Plaintiff's leg. [*Id.* at ¶ 143] Plaintiff spent three days in the hospital before being transferred back to CTCF. [*Id.* at ¶¶ 144-45] Plaintiff remained in the CTCF infirmary for approximately three weeks, "receiving sub-standard medical care." [*Id.* at ¶ 146] Plaintiff continues to suffer chronic and debilitating pain in his leg, and he walks with a pronounced limp and the occasional use of a walker. [*Id.* at ¶ 147]

According to Plaintiff, CTCF did not conduct a fair and balanced investigation into his August 1, 2023 recorded strip search. [*Id.* at ¶¶ 175-81] Specifically, Plaintiff maintains that CTCF officials, including Defendants Ortiz and Vargas, did not interview inmates who witnessed the incident. [*Id.* at ¶¶ 175-81; 214-17, 260-63] And, according to the Complaint, Defendant Hoover cancelled two inmates' medical visits upon learning that they were assisting Plaintiff with his investigation. [*Id.* at ¶¶ 304-05]

Plaintiff asserts that he "learned from another inmate that the CTCF has a pattern and practice of subjecting Hispanic/Catholic inmates (like [Plaintiff]) to recorded strip searches in the CTCF kitchen utility closet." [*Id.* at ¶ 150] He further asserts that he learned that CTCF has a pattern and practice of not following PREA and retaliating against inmates who avail themselves of PREA's protections. [*Id.* at ¶¶ 151-52] Plaintiff provides an example of another inmate who filed a grievance asserting that he was strip searched in the CTCF kitchen without reasonable or individualized suspicion. [*Id.* at ¶¶ 153-62] That inmate filed a PREA complaint[3] and maintains that, after he filed that

[3] This complaint was filed in November 2022. [*Id.* at ¶ 196] Plaintiff maintains that Defendants Ortiz, Peachee, Vargas and Mora were aware of this report and therefore aware that CTCF officers could use the CTCF kitchen utility closet to record inmate strip searches. [*Id.* at ¶¶ 196-99, 229-31, 252, 274-77] Plaintiff maintains that these four Defendants condoned this activity and "failed to properly instruct [their] subordinates in

complaint, the video recording of his strip search was deleted. [*Id.* at ¶¶ 163-67] Once the PREA investigation was completed, the inmate was moved to the Sterling Correctional Facility ("SCF"), allegedly in retaliation for filing the PREA complaint. [*Id.* at ¶¶ 168-70]

Plaintiff initiated this action on March 4, 2024. [#1] Plaintiff's operative Second Amended Complaint asserts three causes of action, all brought pursuant to 42 U.S.C. § 1983: (1) retaliation, in violation of the First Amendment; (2) unreasonable search, in violation of the Fourth Amendment; and (3) excessive force, in violation of the Eighth Amendment. [#44 at 3, 29-30] Plaintiff seeks compensatory, exemplary, and punitive damages, as well as declaratory and injunctive relief. [*Id.* at 30]

On July 25, 2024, Defendants filed the instant Motion, seeking dismissal of all of Plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(6). [#52] Plaintiff has responded to the Motion [#91] and Defendants have replied [#95].

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint for a "failure to state a claim upon which relief can be granted." In deciding a motion under Rule 12(b)(6), a court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010) (alteration in original) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). Nonetheless, a plaintiff may not

procedures compliant with PREA and its regulations." [*Id.* at ¶¶ 203-04, 235-36, 255, 281-82]

rely on mere labels or conclusions, "and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

"To survive a 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 (2009) (quoting *Twombly*, 550 U.S. at 570). 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.'" *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). "The burden is on the plaintiff to frame a 'complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief." *Id.* (quoting *Twombly*, 550 U.S. at 556). The court's ultimate duty is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

"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 v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972)). "The *Haines* rule applies to all proceedings involving a pro se litigant." *Id.* at 1110 n.3. The court, however, cannot be a pro se litigant's advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

III. ANALYSIS

Defendants argue: (1) Plaintiff has failed to plausibly allege a First Amendment violation [#52 at 6-8]; (2) the strip searches were rationally related to legitimate

penological interests and therefore Plaintiff's unreasonable search claim fails [*id.* at 8-10]; (3) Plaintiff has failed to plausibly allege an excessive force claim [*id.* at 10-13]; (4) the Prison Litigation Reform Act ("PLRA") does not permit Plaintiff to recover compensatory damages because he has not alleged physical injury [*id.* at 13-14]; and (5) Defendants are entitled to qualified immunity [*id.* at 14-15]. The Court begins with an overview of the doctrine of qualified immunity, then turns to Defendants' specific arguments.

A. Qualified Immunity

"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." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation omitted). Once the defense of qualified immunity has been raised, "the onus is on the plaintiff to demonstrate '(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.'" *Quinn v. Young*, 780 F.3d 998, 1004 (10th Cir. 2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)).

"To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent" such that it is "settled law." *District of Columbia v. Wesby*, 583 U.S. 48, 56 (2018). The Supreme Court has "not yet decided what precedents—other than [its] own—qualify as controlling authority for purposes of qualified immunity." *Id.* at 66 n.8. The Tenth Circuit, however, has stated that "[o]rdinarily this standard requires either that there is a Supreme Court or Tenth Circuit decision on point, or that the 'clearly established weight of authority from other courts [has] found the law to

be as the plaintiff maintains.'" *Patel v. Hall*, 849 F.3d 970, 980 (10th Cir. 2017) (quoting *Klen v. City of Loveland*, 661 F.3d 498, 511 (10th Cir. 2011)).

The Tenth Circuit has explained the "clearly established" prong of the qualified immunity analysis as follows:

> A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. Although plaintiffs can overcome a qualified-immunity defense without a favorable case directly on point, existing precedent must have placed the statutory or constitutional question beyond debate. The dispositive question is whether the violative nature of the *particular conduct* is clearly established. . . . Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.

Aldaba v. Pickens, 844 F.3d 870, 877 (10th Cir. 2016) (quotations and citations omitted). And the Supreme Court has "repeatedly stressed that courts must not define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Wesby*, 583 U.S. at 590 (quotation omitted).

Courts have "discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236. In *Pearson*, the Supreme Court recognized that "[w]hen qualified immunity is asserted at the pleading stage, the precise factual basis for the plaintiff's claim or claims may be hard to identify" and thus that the determination of the first prong of the qualified immunity analysis may be "an uncomfortable exercise," because "the answer [to] whether there was a violation may depend on a kaleidoscope of facts not yet fully developed." *Id.* at 238–39 (internal quotation omitted). The Supreme Court further acknowledged that, in certain cases, "a court will rather quickly and easily decide that there was no violation of clearly established law before turning to the more

difficult question whether the relevant facts make out a constitutional question at all." *Id.* at 239.

B. First Amendment Retaliation Claim

To state a First Amendment retaliation claim against a government official, a plaintiff must prove three elements:

> (1) that the plaintiff was engaged in constitutionally protected activity; (2) that the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct.

Shero v. City of Grove, 510 F.3d 1196, 1203 (10th Cir. 2007). Defendants challenge the second and third elements of Plaintiff's retaliation claim. [#52 at 7-8] Specifically, Defendants argue that Plaintiff has only alleged retaliatory conduct by Defendant Mora and, even with respect to Defendant Mora, Plaintiff has not alleged that Defendant Mora knew about Plaintiff's PREA reports or grievances. [*Id.*]

The Court agrees that Plaintiff has failed to allege any retaliatory action against him by any Defendant besides Defendant Mora. Plaintiff's response mentions a subsequent facility transfer but does not mention which, if any, of the current Defendants initiated the transfer. [#91 at 4] Indeed, it does not even clearly state that the facility transfer was initiated due to Plaintiff's PREA reports or grievances, instead suggesting that it may be related to another complaint regarding time computation—an issue not raised in Plaintiff's Complaint.[4] [*Id.*] Thus, the Court agrees that Plaintiff has failed to plausibly allege retaliation against any Defendant besides Defendant Mora.

[4] Plaintiff does allege that Defendant Hoover cancelled two inmates' medical visits upon learning that they were assisting Plaintiff with his investigation. [*Id.* at ¶¶ 304-05] But this would constitute retaliation against those individuals, not retaliation against Plaintiff.

With respect to Defendant Mora, however, the Court concludes that Plaintiff has plausibly alleged a retaliation claim. Plaintiff alleges that he filed a PREA complaint and grievances against Defendant Mora after the August 1, 2023 strip search.[5] [#44 at ¶ 98] That same month, Defendant Mora stopped Plaintiff from attending a mental health appointment, stopped Plaintiff from attending a medical appointment, stopped Plaintiff from attending a library visit to record the reading of a children's book to Plaintiff's daughter, stopped Plaintiff from attending a law library appointment, and stopped Plaintiff from attending a CDOC Case Manager appointment to discuss early release. [*Id.* at ¶¶ 92-96] Also that month, Defendant Mora filed an official CDOC disciplinary "write-up" for Plaintiff's attendance at a previously scheduled medical appointment and physical therapy appointment. [*Id.* at ¶ 97] The Court concludes that these actions—denying Plaintiff necessary medical treatment, denying Plaintiff law library access, and denying Plaintiff an opportunity to discuss early release—would be sufficient to chill a person of ordinary firmness from continuing to engage in the grievance process. *Lewis v. Clark*, 577 F. App'x 786, 799 (10th Cir. 2014) (denial of access to law library is sufficiently serious to chill a person of ordinary firmness from continuing to engage in that activity); *Parks v. Bd. of Cnty. Comm'ns of Okla Cnty.*, CIV-20-205-D, 2021 WL 9274560, at *10 (W.D. Okla. Apr. 23, 2021) (collecting cases for the proposition that "having medical care withheld would chill a person of ordinary firmness from continuing to engage in protected

[5] The first PREA report was filed on August 2, 2023, prior to any of the alleged retaliation. [#44 at ¶ 76, *id.* at 9 (section heading indicating that the retaliation occurred after the first PREA report)] The Complaint does not give the exact date that Plaintiff filed his grievances. But it does indicate that Plaintiff filed several grievances in response to various alleged acts of retaliation which occurred in August 2023 and alleges that retaliation continued after the filing of these grievances. [*Id.* at ¶¶ 92-99, 134; *id.* at 29]

activity"). Thus, Plaintiff has satisfied the second prong of his retaliation claim against Defendant Mora.

The Court concludes that Plaintiff has also satisfied the third prong of his retaliation claim against Defendant Mora. The PREA complaint was based upon a search involving Defendant Mora and the grievances were filed directly against Defendant Mora. One may plausibly infer that Defendant Mora was made aware of the PREA complaint and grievances, even if only as part of CTCF's routine investigation of inmate grievances. This inference is strengthened by the fact that, within weeks of the PREA complaint being filed and during the same time-frame as the grievances were lodged, Defendant Mora began stopping Plaintiff from attending appointments he had previously been able to attend and even issued a disciplinary "write-up" for an appointment that had previously been scheduled. Thus, Plaintiff has plausibly alleged that Defendant Mora was aware of the PREA complaint and/or grievances and retaliated against Plaintiff in the manner described above. *Cf. Pourya Shahmaleki v. Kansas State Univ.*, No. 15-7766-JAR, 2016 WL 3522040, at *6 (D. Kan. June 28, 2016) (in the analogous Title VII retaliation context, stating that six weeks between protected activity and adverse action may be sufficient to show causation (citing *Meiners v. Univ. of Kan.*, 359 F.3d 1222, 1231 (10th Cir. 2004)). Thus, Plaintiff has plausibly alleged the third prong of his retaliation claim against Defendant Mora.

The Court's conclusion that Plaintiff has plausibly alleged a First Amendment violation by Defendant Mora does not end the analysis. Defendant Mora has also raised a qualified immunity defense [#52 at 14-15] and, as a result, Plaintiff must also establish

that the right was "clearly established" at the time of the challenged conduct.[6] *Quinn*, 780 F.3d at 1004. Here, Plaintiff alleges that Defendant Mora retaliated against Plaintiff because he filed grievances and a PREA complaint. And it is well-established in the Tenth Circuit that prison officials cannot punish an inmate for exercising his First Amendment right to file a grievance. *See*, *e.g.*, *Williams v. Meese*, 926 F.2d 994, 998 (10th Cir. 1991). Thus, if Plaintiff's allegations are true, and the Court must presume that they are, then Defendant Mora would not be entitled to qualified immunity on Plaintiff's First Amendment retaliation claim.

Accordingly, the Court concludes that Plaintiff: (1) has stated a plausible First Amendment retaliation claim against Defendant Mora, (2) Defendant Mora is not entitled to qualified immunity at this stage on that claim, but (3) Plaintiff has not stated a plausible First Amendment retaliation claim against any other Defendant. The Court thus respectfully RECOMMENDS that Defendant's Motion be GRANTED to the extent it seeks dismissal of Plaintiff's First Amendment retaliation claim against Defendants Evans, Hoover, Miller, Ortiz, Peachee, and Vargas, but DENIED to the extent it seeks dismissal of Plaintiff's First Amendment retaliation claim against Defendant Mora.

C. Fourth Amendment Claim

"Although convicted prisoners are not entitled to the full protection of the Constitution, they 'do not forfeit all constitutional protections by reason of their conviction

[6] While Plaintiff bears the burden of demonstrating that the law was clearly established, *see Bledsoe v. Carreno*, 53 F.4th 589, 607 (10th Cir. 2022), the Tenth Circuit has recently instructed that a court should "use its full knowledge of its own [and other relevant] precedents" in engaging in a qualified immunity analysis. *Jordan v. Jenkins*, 73 F.4th 1162, 1174 n.10 (10th Cir. 2023) (quotation omitted). Thus, this Court has conducted its own review of precedent in analyzing the clearly established prong of Defendants' qualified immunity defense.

and confinement in prison.'" *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982) (quoting *Bell v. Wolfish*, 441 U.S. 520, 545 (1979)). With regard to the Fourth Amendment, "prisoners . . . retain a limited constitutional right to bodily privacy." *Hayes v. Marriott*, 70 F.3d 1144, 1146 (10th Cir. 1995). And it is well established that "a strip search is an invasion of personal rights of the first magnitude." *Farmer v. Perrill*, 288 F.3d 1254, 1259 (10th Cir. 2002) (quoting *Chapman v. Nichols*, 989 F.2d 393, 395 (10th Cir. 1993)). Nevertheless, "not all strip searches are unconstitutional." *Sweat v. Rickards*, 712 F. App'x 769, 782 (10th Cir. 2017). And a "practice impinging on an inmate's constitutional rights will be upheld where it is 'reasonably related to legitimate penological interests.'" *Id.* (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). Ultimately, in determining whether a strip search violates the Fourth Amendment, "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell*, 441 U.S. at 559.

To plead a constitutional violation, Plaintiff must plausibly allege that the strip search was not "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. Plaintiff's Amended Complaint thus "must include sufficient facts to indicate the plausibility that the actions of which he complains were *not* reasonably related to legitimate penological interests." *Gee v. Pacheco*, 627 F.3d 1178, 1188 (10th Cir. 2010) (emphasis in original). Although Plaintiff is not required to "identify every potential legitimate interest and plead against it," he must "plead facts from which a plausible inference can be drawn that the action was not reasonably related to a legitimate penological interest." *Id.* In determining whether the policy or conduct at issue is

reasonably related to legitimate penological interests, the Court must give "substantial deference" to prison authorities. *Frazier v. Dubois*, 922 F.2d 560, 562 (10th Cir. 1990). "Maintaining safety and order at detention centers is reasonably related to legitimate penological interests and requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to problems." *Sweat*, 712 F. App'x at 782.

Here, Plaintiff has alleged two very intrusive strip searches involving both a close inspection of Plaintiff's genitals and a cavity search. [#44 at ¶¶ 66-72, 113] But the Supreme Court has upheld such intrusive searches based upon institutional security. *Bell*, 441 U.S. at 558, 560 (upholding policy requiring inmates "to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution"); *see also Maryland v. King*, 569 U.S. 435, 462 (2013) ("A search of the detainee's person when he is booked into custody may involve a relatively extensive exploration including requiring at least some detainees to lift their genitals or cough in a squatting position." (quotations and citations omitted)). Moreover, the searches occurred at a time when Plaintiff was working as a kitchen employee, presumably with access to sharp items that could be used as a weapon. And, in any event, it does not appear that Plaintiff is arguing that the mere intrusive nature of the strip searches, by themselves, rendered them unconstitutional. Rather, the Complaint, taken as a whole, suggests that it was the recording of the strip searches (and sharing of those videos) that rendered Defendants' actions unconstitutional. [*See generally* ## 44; 91 at 3 (arguing that the recording and showing of the video violated Plaintiff's constitutional

rights)] The Court must thus determine whether those actions violated Plaintiff's constitutional rights.[7]

The Court cannot conclude that the mere recording of the strip search, even a strip search as intrusive as the one Plaintiff alleges, necessarily violates the Fourth Amendment. Indeed, the Court can easily conclude that a prison could rationally decide to record all strip searches to both protect inmates from sexual abuse by guards during the strip search (because the guards would know that the search was being recorded) and protect the guards from false claims of sexual abuse. And courts in this district and elsewhere have concluded that the mere recording of a prison strip search does not render the search unconstitutional. *Jones v. City and Cnty. of Denver*, No. 21-cv-00728-RMR-NRN, 2022 WL 2038057, at *6 (D. Colo. Apr. 12, 2022) (collecting cases), *report and recommendation adopted*, 2022 WL 20380589 (D. Colo. May 2, 2022). The Court thus concludes that Plaintiff has failed to state a plausible Fourth Amendment claim based upon either the nature of the strip searches or the fact that they were recorded. Since these are the only allegations made against Defendants Evans, Mora, Miller, Ortiz, Peachee, and Vargas, the Court concludes that Plaintiff has failed to plausibly allege a Fourth Amendment claim against these Defendants.

With respect to Defendant Hoover, however, Plaintiff alleges that Inmate Aurelio told Plaintiff that he had been invited by a CTCF correctional officer to watch a recording

[7] To the extent Plaintiff seeks to establish a constitutional violation by alleging a violation of CTCF or CDOC policy [#91 at 3], "a failure to adhere to administrative regulations does not equate to a constitutional violation." *Hovater v. Robinson*, 1 F.3d 1063, 1068 n.4 (10th Cir. 1993); *see also Sandin v. Conner*, 515 U.S. 472, 481-82 (1995) (finding that prison regulations are "primarily designed to guide correctional officials in the administration of a prison" and "not designed to confer rights on inmates").

of Plaintiff's August 30 strip search. [*Id.* at ¶ 125] According to Mr. Aurelio, this correctional officer showed the entire strip search to Mr. Aurelio and several other inmates. [*Id.* at ¶ 126] "On information and belief," the correctional officer who showed this footage was Defendant Hoover. [*Id.* at ¶ 129] "On information and belief, on August 30, 2023, and for weeks or months thereafter," Defendant Hoover "invited CTCF staff members[,] medical contractors [and inmates] to view the August 30, 2023 security camera footage of the . . . strip search." [*Id.* at ¶¶ 302-03]

The Court can discern no legitimate penological reason for Defendant Hoover's sharing of the strip search video with other inmates and staff,[8] and Defendants' Motion does not identify any such reason. [#52] Instead, Defendants argue that Plaintiff's allegations concerning Defendant Hoovers' sharing of the video are "conclusory and contradictory." [*Id.* at 10] The Court disagrees. Plaintiff provides detailed allegations about inmate Aurelio being invited to watch a recording of the video and attending such a viewing where several other inmates were present. [*Id.* at ¶¶ 125-26] While Plaintiff only alleges "on information and belief" that the correctional officer who showed the video was Defendant Hoover, he provides a basis for such information and belief, namely that Defendant Hoover is the correctional officer who provides security in the CTCF medical building. [*Id.* at ¶ 129] At this stage of the proceedings, where Plaintiff has not yet been provided the opportunity for discovery to test his claims, the Court finds that Plaintiff's allegations plausibly suggest that Defendant Hoover shared the video of the strip search

[8] The Complaint does not suggest that other staff needed to view the video for penological reasons, such as to investigate Plaintiff's claims. [*See generally* #44] Rather, the Complaint asserts Defendant Hoover shared the video "for the correctional officers' prurient interest, and for the added bonus of humiliating and endangering [Plaintiff] in front of CTCF inmates." [*Id.* at ¶ 128]

with other inmates and staff, and without any legitimate penological basis for doing so.[9] The Court thus finds that Plaintiff has plausibly alleged a Fourth Amendment violation against Defendant Hoover.

Having concluded that Plaintiff has stated a plausible Fourth Amendment claim against Defendant Hoover, the Court must once again determine whether the right was "clearly established" at the time of the challenged conduct. *Quinn*, 780 F.3d at 1004. The Court concludes that it was. The Tenth Circuit held in 2002 that an inmate has a "well established right . . . not to be subjected to a humiliating strip search in full view of several (or perhaps many) *unless the procedure is reasonably related to a legitimate penological interest*." *Farmer*, 288 F.3d at 1260 (emphasis in original). As explained above, Defendant Hoover has not offered any legitimate penological interest in sharing the video of Plaintiff's strip search to other inmates. And the Court does not find a meaningful distinction between subjecting an inmate to a humiliating strip search in full view of other inmates in the first instance and replaying a video of that same humiliating strip search to other inmates without a legitimate penological reason for doing so. Thus, the Court finds that the allegations, if true, demonstrate that Defendant Hoover violated Plaintiff's clearly established Fourth Amendment rights.

Accordingly, the Court concludes that Plaintiff: (1) has stated a plausible Fourth Amendment claim against Defendant Hoover, (2) Defendant Hoover is not entitled to

[9] Defendants also argue that Plaintiff's allegations are contradictory because he alleges that Defendant Hoover shared the video but also alleges that Defendants took no effort to retain evidence of Plaintiff's alleged PREA violations. [#52 at 10] The Court does not find such allegations to be necessarily inconsistent—Defendant Hoover could easily have showed the video to others then either destroyed the video or allowed it to be overwritten once he learned about Plaintiff's PREA claim.

qualified immunity at this stage on that claim, but (3) Plaintiff has not stated a plausible Fourth Amendment retaliation claim against any other Defendant. The Court thus respectfully RECOMMENDS that Defendant's Motion be GRANTED to the extent it seeks dismissal of Plaintiff's Fourth Amendment claim against Defendants Evans, Mora, Miller, Ortiz, Peachee, and Vargas, but DENIED to the extent it seeks dismissal of Plaintiff's Fourth Amendment claim against Defendant Hoover.

D. Eighth Amendment Claim

The Eighth Amendment to the United States Constitution protects a prisoner's right to "humane conditions of confinement guided by 'contemporary standards of decency.'" *Penrod v. Zavaras*, 94 F.3d 1399, 1405 (10th Cir. 1996) (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). As part of the guarantee to humane conditions of confinement, the Eighth Amendment proscribes cruel and unusual punishment, which is defined as the "unnecessary and wanton infliction of pain." *Hudson v. McMillian*, 503 U.S. 1, 5 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986)). In assessing an Eighth Amendment excessive force claim, 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." *Id.* at 7.

Ordinarily, an excessive force claim involves two prongs. *Smith v. Cochran*, 339 F.3d 1205, 1212 (10th Cir. 2003). The "objective prong . . . asks 'if the alleged wrongdoing was objectively harmful enough to establish a constitutional violation.'" *Id.* (quoting *Giron v. Corr. Corp. of Am.*, 191 F.3d 1281, 1289 (10th Cir. 1999)). The subjective prong, on the other hand, requires "the plaintiff [to] show that 'the officials act[ed] with a sufficiently culpable state of mind.'" *Id.* (second alteration in original).

The Tenth Circuit has held that to constitute an Eighth Amendment violation, a strip search must be conducted in an abusive fashion or with unnecessary force. *Jackson v. Cent. N.M. Corr. Fac.*, 976 F.2d 740, 1992 WL 236921, at *4 (10th Cir. Sept. 21, 1992) (unpublished Table decision); *Levoy v. Mills*, 788 F.2d 1437, 1439 (10th Cir. 1986). Here, as detailed above, though Plaintiff has alleged two intrusive searches, the Supreme Court has upheld the legality of similar searches and the Court cannot conclude that the searches themselves were either abusive or involved the unnecessary use of force. And while the allegations against Defendant Hoover plausibly allege a Fourth Amendment violation, Defendant Hoover was not involved in the search itself and there are no allegations that Defendant Hoover applied any force to Plaintiff. Thus, the Court concludes that Plaintiff has failed to plausibly allege an Eighth Amendment excessive force claim against any of the Defendants. Accordingly, the Court respectfully RECOMMENDS that the Motion be GRANTED to the extent it seeks to dismiss Plaintiff's Eighth Amendment claim.[10]

E. Compensatory Damages

Defendants next assert that Plaintiff cannot recover compensatory damages because he has failed to allege a physical injury. [#52 at 13] Under the PLRA, "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior

[10] Plaintiff provides some detail about his medical treatment at CTCF. [*See generally* #44] But the Complaint clearly identifies Plaintiff's third claim as an "excessive force/sexual assault/cruel and unusual punishment" claim. [*Id.* at 3, 29-30] The Court interprets Plaintiff's discussion of his medical treatment as supplementing the harm he received from the strip searches and retaliation, as opposed to bringing a separate deliberate indifference to medical care claim.

showing of physical injury." 42 U.S.C. § 1997e(e). "The statute limits the remedies available, regardless of the rights asserted, if the only injuries are mental or emotional." *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002).

Here, Plaintiff alleges that he continues to suffer from PTSD and other psychological symptoms, including fear of lights and noises, correctional officers, showers, and small rooms. [#44 at ¶¶ 134-35] He has intermittent lack of appetite, uncontrollable sobbing, insomnia and panic attacks. [*Id.* at ¶¶ 135-36] These are the type of mental injuries that are not compensable under the PLRA. Indeed, "even if those emotional injuries had a physical impact on Plaintiff's health"—such as loss of sleep—"physical manifestations of mental and emotional injuries are 'insufficient to withstand the "physical injury" requirement' of the PLRA." *Bueno v. Chekush*, 355 F. Supp. 3d 987, 1000 (D. Colo. 2018) (quoting *Hughes v. Colo. Dep't of Corrs.*, 594 F.Supp.2d 1226, 1238 (D. Colo. 2009)); *see also Hughes,* 594 F.Supp.2d at 1238-39 (noting that physical manifestations of depression and anxiety "cannot support claims for damages pursuant to 42. U.S.C. § 1997e(e)"); *Session v. Clements*, No. 14-cv-02406-PAB-KLM, 2018 WL 637461, at *10 (D. Colo. Jan. 31, 2018) ("While Plaintiff alleges that he suffered "physical injuries," those delineated by him are not distinct from any mental or emotional injuries that he may have suffered."), *report and recommendation adopted*, 2018 WL 1531685 (D. Colo. Mar. 29, 2018); *Folts v. Grady Cnty. Board of Cnty. Comm'r*, No. CIV-15-996-M, 2016 WL 7116184, at *8 (W.D. Okla. Nov. 2, 2016) (dismissing claim for compensatory damages under the PLRA where the plaintiff did not allege that the lack of mental health

treatment led to physical injury), *report and recommendation adopted*, 2016 WL 7116192 (W.D. Okla. Dec. 06, 2016).

But Plaintiff has also alleged physical injuries from Defendants' actions. He alleges that he remains chronically ill and experiences migraines, lower back pain, gastrointestinal upset, and a lower leg infection that will not heal. [#44 at ¶¶ 137-41] "Appeals courts confronting the issue have held that although a de minimis showing of physical injury does not satisfy the PLRA's physical injury requirement, an injury need not be significant to satisfy the requirement." *Clifton v. Eubank*, 418 F. Supp. 2d 1243, 1245 (D. Colo. 2006), *order clarified on other grounds on reconsideration*, 2006 WL 893600 (D. Colo. Apr. 5, 2006). And severe headaches—which are not merely manifestations of mental or emotional distress—satisfy the physical injury requirement of the PLRA. *See Wagner v. Hartley (Wagner I)*, No. 10-cv-02501-WYD-KLM, 2012 WL 1079185, at *7 (D. Colo. Mar. 30, 2012) (refusing to conclude "that Plaintiff's allegations of severe and frequent headaches are merely a *de minimis* injury as a matter of law" and finding allegations of severe migraines and/or other headaches, coupled with muscle atrophy and joint pain, sufficient to satisfy physical injury requirement); *see also Murray v. Edwards Cty. Sheriff's Dep't*, 248 F. App'x 993, 996–97 (10th Cir. 2007) (assuming, without deciding, that Plaintiff's "headaches and tooth pain are 'physical injuries' sufficient to permit him to recover damages for mental or emotional injury under § 1997e(e)"). Similarly, Plaintiff has plausibly alleged that Defendant Mora denied Plaintiff medical care in retaliation for Plaintiff filing his grievance and PREA claim. If that denial of medical care led to the worsening infection in Plaintiff's leg, that would constitute physical injury. Accordingly, at this stage of the proceedings, the Court cannot conclude that Plaintiff

cannot demonstrate physical injury from Defendants' actions. As a result, the Court respectfully RECOMMENDS that the Motion be DENIED to the extent it seeks to dismiss Plaintiff's claim for compensatory damages.

IV. CONCLUSION

For the foregoing reasons, this Court respectfully **RECOMMENDS** that the Motion to Dismiss [#52] be **GRANTED IN PART** and **DENIED IN PART**. Specifically, the Court **RECOMMENDS** that the Motion be:

(1) **GRANTED** to the extent it seeks to dismiss Plaintiff's First Amendment retaliation claim against Defendants Evans, Hoover, Miller, Ortiz, Peachee, and Vargas;

(2) **GRANTED** to the extent it seeks to dismiss Plaintiff's Fourth Amendment claim against Defendants Evans, Mora, Miller, Ortiz, Peachee, and Vargas;

(3) **GRANTED** to the extent it seeks to dismiss Plaintiff's Eighth Amendment claim against all Defendants;

(4) **DENIED** to the extent it seeks to dismiss Plaintiff's First Amendment retaliation claim against Defendant Mora;

(5) **DENIED** to the extent it seeks to dismiss Plaintiff's Fourth Amendment claim against Defendant Hoover; and

(6) **DENIED** to the extent it seeks to dismiss Plaintiff's claim for compensatory damages.[11]

[11] Within fourteen days after service of a copy of this Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings of fact, legal conclusions, 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); *Griego v. Padilla (In re Griego)*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put

DATED: January 6, 2025

BY THE COURT:

s/Scott T. Varholak
United States Magistrate Judge

---

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. 2121 East 30th Street*, 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 of fact, legal conclusions, 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 of fact, legal conclusions, and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (holding that the district court's decision to review magistrate judge's recommendation *de novo* despite lack of an objection does not preclude application of "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (finding that cross-claimant waived right to appeal certain portions of magistrate judge's order by failing to object to those portions); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (finding that plaintiffs waived their right to appeal the magistrate judge's ruling by failing to file objections). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (holding that firm waiver rule does not apply when the interests of justice require review).