

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ELLIOT O. CARLTON, III,

Plaintiff,

v.

DODGE CORRECTIONAL
INSTITUTION, CARLEY HEMMING,
and AMY KLUG,

Defendants.

ORDER

12-cv-695-wmc

State inmate Elliot O. Carlton, III, has filed a civil action under 42 U.S.C. § 1983, alleging that a nurse (Amy Klug) and a nurse's aide (Carley Hemming) assaulted him at the Dodge Correctional Institution on July 4, 2012. Carlton has requested leave to proceed *in forma pauperis* and has paid an initial partial filing fee in compliance with 28 U.S.C. § 1915(b)(1). Carlton also has filed motions for leave to amend the last page of his original complaint and to withdraw certain exhibits related to a non-party. Those motions will be granted.

Because Carlton is incarcerated, the Prison Litigation Reform Act of 1996 (the "PLRA") requires this court to screen the complaint and dismiss any portion that is frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for them. *See* 28 U.S.C. § 1915A. In addressing any *pro se* litigant's complaint, the court must read the allegations generously. *See Haines v. Kerner*, 404 U.S. 519, 521 (1972).

Carlton is a wheelchair-bound inmate who at all times relevant to the complaint

has been assigned to the Dodge Correctional Institution (“DCI”), where Klug and Hemming were employed by the Wisconsin Department of Corrections. Carlton alleges that, sometime after noon on July 4, 2012, he was “doing some work on the typewriter” in his cell when defendants Klug and Hemming arrived to give his cellmate a “sink bath.” When Carlton attempted to watch television, he contends that Klug pushed him out of the way on his “bad shoulder” when it was unnecessary to do so. When Carlton attempted to return to his typewriter, Hemming purportedly grabbed him roughly by the ankles and shoved him while “screaming at him at the top of her lungs.” Carlton contends that he was injured as a result of the force used by Klug and Hemming that day.

Accepting all well-pleaded allegations as true, as required at the pleading stage of the proceeding, Carlton’s primary claim is that Klug and Hemming used excessive force against him in violation of the Eighth Amendment, which prohibits conditions of confinement that “involve the wanton and unnecessary infliction of pain.” *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Because Carlton’s allegations appear sufficient to articulate a cause of action at this very early stage of the proceeding, albeit barely and with only a hint as to why the defendants may have acted so abruptly, if not forcefully, the court will allow Carlton to proceed with an excessive-force claim under the Eighth Amendment. Carlton should be aware, however, that to be successful on this claim he will have to prove that defendants used force “maliciously and sadistically for the very purpose of causing harm” instead of “in a good-faith effort to maintain or restore discipline.” *Hudson v. McMillian*, 503 U.S. 1, 6 (1992).

The court notes that Carlton seeks relief in the form of criminal assault charges against Klug and Hemming. The court will not allow Carlton to proceed with these claims because the decision to charge an individual with criminal violations is not vested within the courts, but is solely within the discretion of a prosecuting attorney. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (“[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”); *Doyle v. Oklahoma Bar Ass’n*, 998 F.2d 1559, 1566-67 (10th Cir. 1993) (private citizen has no standing to have lawyer disciplined or criminally charged); *Sattler v. Johnson*, 857 F.2d 224, 227 (4th Cir. 1988) (neither member of public at large nor victim has right to have another criminally prosecuted). Accordingly, Carlton’s allegations of criminal assault fail to state a claim for which relief can be granted under 42 U.S.C. § 1983.

In addition, the court notes that Carlton seeks damages from the “Dodge Correctional Institution,” which is named as a defendant in this case. As a correctional facility run by the Wisconsin Department of Corrections, the Dodge Correctional Institution appears to lack the requisite capacity to be sued. *See* FED. R. CIV. P. 17(b) (requiring every party to a lawsuit to have the capacity to “sue and be sued”). Assuming that Carlton intended to sue the Wisconsin Department of Corrections, state agencies are immune from a suit for damages under the Eleventh Amendment. *See Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (1989); *Arndt v. Wisconsin Dep’t of Corrections*, 972 F. Supp. 475, 477 (W.D. Wis. 1996). Accordingly, the court will not grant Carlton leave to proceed with his claims for monetary damages against the Dodge Correctional Institution or the Wisconsin Department of Corrections as a state agency.

ORDER

IT IS ORDERED that:

- 1) The motions filed by plaintiff Elliot O. Carlton, III, for leave to amend page five of the original complaint (Dkt. # 9) and to withdraw exhibits regarding a non-defendant (Dkt. # 11) are GRANTED.
- 2) Carlton's request for leave to proceed with an Eighth Amendment excessive-force claim against defendants Carley Hemming and Amy Klug is GRANTED. Leave to proceed with any other claim is DENIED.
- 3) For the time being, plaintiff must send the defendants a copy of every paper, pleading or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendants, he must serve the lawyer directly rather than the defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to the defendants or to their attorney.
- 4) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.
- 5) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendant. Under that agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for the defendant.

Entered this 9th day of May, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge