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

TORRIE D. SMITH,

Plaintiff,

v.

EAU CLAIRE COUNTY JAIL, TEROME THOMPSON, EAU CLAIRE SHERIFF DEPARTMENT, EAU CLAIRE COUNTY JAIL SERGEANTS AND OFFICERS, and LT. CHRISTIANSON,

Defendants.

OPINION & ORDER

12-cv-955-wmc

Plaintiff Torrie D. Smith claims defendants acted with deliberate indifference to danger he faced from another inmate in the Eau Claire County Jail. Smith is eligible to proceed *in forma pauperis* and has made an initial partial payment toward the full filing fee for this lawsuit. *See* 28 U.S.C. § 1915(b)(1). Because Smith is incarcerated, however, the court must also screen the complaint as required by the Prison Litigation Reform Act ("PLRA") to determine whether it (1) is frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). For reasons set forth below, the court will deny Smith leave to proceed because: (1) most of the named defendants are not subject to suit under 42 U.S.C. § 1983; (2) he has not alleged facts sufficient for the court to infer that any of the remaining defendants behaved with deliberate indifference toward the risk he alleges; (3) any due process claim he may have intended to plead fails to state a claim on which relief can be granted; and (4) the court lacks supplemental jurisdiction over his state law claims.

ALLEGATIONS OF FACT

In addressing a *pro se* litigant's pleadings, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For the purpose of this order, the court accepts plaintiff's well-pled allegations as true and assumes the following facts:

Torrie Smith is currently an inmate at Stanley Correctional Institution, but was incarcerated at Eau Claire County Jail on H Block during the relevant time at issue here. Sometime before December 2012, Smith asked unnamed employees of the Eau Claire County Jail to move a state inmate, Terome Thompson, because he had become a problem for Smith and other inmates.[1] Thompson, a known member of the Black Gangster Disciples, would verbally assault and attack prison officers as they entered the Block; as a result, whenever Smith or another inmate needed something from the officers, "it would take all day because they didn't want to deal" with Thompson. Thompson's own requests to be moved also produced no results.

On December 11 or 12, Thompson attacked Smith, hitting him in the mouth twice, and in the face and back of the head approximately three times each. He also spit bloody saliva in Smith's face and mouth. As a result of the attack, Smith sustained an injury to his shoulder that caused him constant pain. In defending himself, Smith also injured his hands and back, for which the nurse allegedly did nothing. Instead, Smith was "put in the hole" for 30 days, allegedly as punishment for defending himself.

After getting into a fight with a known member of the Black Gangster Disciples, Smith further alleges that he is now afraid for his safety and for his family's safety. Smith

[1] Although Smith also alleges that Thompson threatened to kill him and his family, it appears from the pleading that these threats did not occur until after the physical attack giving rise to his claim. *See* Compl. (dkt. #1) 5 (alleging that Terome Thompson "assault/attacked me and told me that he is going to kill me and my family").

also alleges that he and his family will have to live "the rest of [his] life looking over [his] shoulder" because the Eau Claire County Jail failed to do its job correctly the first time around. He seeks $300,000 in damages.

OPINION

As a preliminary matter, plaintiff attempts to sue various government entities, including the Eau Claire County Sheriff's Department and the Eau Claire County Jail. Although Wisconsin municipalities may be sued, *see* Wis. Stat. § 62.25, agencies and departments may not. *See Best v. City of Portland*, 554 F.3d 698, 698 n.1 (7th Cir. 2009) (noting that "a police department is not a suable entity under § 1983"); *Buchanan v. City of Kenosha,* 57 F. Supp. 2d 675, 678 (E.D. Wis. 1999) (collecting cases). To the extent that the Eau Claire County Sheriff's Department and the Eau Claire County Jail form a part of the county government that they serve, they are not "legal entit[ies] separable from the county government," so they are not subject to suit. *Whiting v. Marathon Cnty. Sheriff's Dep't*, 382 F.3d 700, 704 (7th Cir. 2004). The court will, therefore, dismiss the claims against these defendants.[2]

Additionally, Smith asserts claims against Terome Thompson, the inmate who allegedly attacked and injured him. Section 1983 only allows for a cause of action against a defendant who has acted under color of state law. *See* 42 U.S.C. § 1983. This means that

[2] Even if Smith intended to name Eau Claire County itself as a defendant, he has still not demonstrated a basis for § 1983 liability, since counties and other municipalities may not be held vicariously liable for employee actions under that statute. *Gayton v. McCoy*, 593 F.3d 610, 622 (7th Cir. 2010). As a result, the county would not be liable unless Smith demonstrated that the alleged deprivations were performed in keeping with "an official policy, widespread custom, or deliberate act of a county decision-maker of the municipality or department." *Grieveson v. Anderson*, 538 F.3d 763, 771 (7th Cir. 2008) (internal quotation omitted). Smith has not alleged facts that support any of these theories.

"the party charged with the deprivation must be a person who may fairly be said to be a state actor" or, in other words, a state official who "has acted with or has obtained significant aid from state officials," or one whose "conduct is otherwise chargeable to the State." *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 937 (1982). As Smith's complaint indicates, Thompson is a fellow inmate, not a state actor. Accordingly, Smith's constitutional claim against Thompson is dismissed for failure to state a claim upon which relief can be granted.

This leaves Smith's constitutional claims against Lt. Christianson and the other unnamed sergeants and officers of the Eau Claire County Jail, as well as his state law claims. Smith's basic claim is that the jail officials failed to protect him from harm. For prisoners already found guilty and serving a sentence, this claim is analyzed under the Eighth Amendment. In contrast, pretrial detainees are protected by the Fourteenth Amendment, which dictates that "a pretrial detainee may not be punished." *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). Here, it is unclear whether Smith was a prisoner or a pretrial detainee at the time the alleged events took place. Since the Seventh Circuit has recognized that the due process rights of a pretrial detainee are "at least as great as the Eighth Amendment protections available to a convicted prisoner," *Brown v. Budz*, 398 F.3d 904, 909 (7th Cir. 2005) (internal citation and quotation omitted), the protection that the Fourteenth Amendment affords a pretrial detainee is "functionally indistinguishable from the Eighth Amendment's protection for convicted persons." *Smego v. Mitchell*, 2013 WL 3765295 (7th Cir. July 19, 2013). Thus, regardless of whether Smith was a pretrial detainee or a prisoner at the time, the analysis remains the same.

Under the Eighth Amendment, while prison officials must take reasonable measures to protect prisoners from assault by other inmates, this does not mean they are liable for every injury suffered by one prisoner at the hands of another. *Farmer v. Brennan*, 511 U.S. 825, 832-34 (1994). Rather, a prison official violates the Eighth Amendment for failure to protect an inmate when two requirements are met. *First*, "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Id.* at 834. *Second*, the prison official must be deliberately indifferent to that risk, meaning that he or she must "know[] of and disregard[] an excessive risk to inmate health or safety." *Id.* at 837. "[O]rdinary negligence by prison officials is not enough to show an Eighth Amendment violation." *Washington v. LaPorte Cnty. Sheriff's Dep't*, 306 F.3d 515, 518 (7th Cir. 2002).

In this case, Smith has alleged *no* facts allowing the court to infer that prison officials *actually* knew of and disregarded a substantial risk to his safety, the second requirement for a failure-to-protect claim. In fact, Smith alleges that the Eau Claire County Jail "neglected" to keep him safe, which alone does not amount to a failure under the Eighth Amendment to protect an inmate from harm. *See Fisher v. Lovejoy*, 414 F.3d 659, 662 (7th Cir. 2005) ("Proving deliberate indifference, however, requires more than a showing of negligent or even grossly negligent behavior."); *Washington*, 306 F.3d at 518. The only fact Smith does provide regarding the guards' knowledge is that he and other inmates had asked prison officials to move Thompson. That request alone indicates, at most, that Smith and others did not wish to be in the same area as Thompson; it does not suggest that the officials knew that Thompson was a substantial *danger* to Smith. While some circumstances might make such a risk so obvious that actual knowledge may be inferred, Smith pleads no such facts. *See Farmer*, 511 U.S. at 842-43 ("For example, if an Eighth Amendment plaintiff presents

evidence showing that a substantial risk of inmate attacks was 'longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk."). In fairness, Smith does allege that Thompson would verbally assault and attack prison *officers*, but without more, that has little bearing on whether the officers knew Thompson posed a substantial risk of serious harm to *Smith* or other inmates. Smith has, therefore, failed to state an Eighth Amendment failure to protect claim.

Smith also states that he was "put in the hole" for 30 days because of the assault. To the extent that he may have intended to state a claim under the Fourteenth Amendment, he has failed to do so. Smith also does not indicate whether he received some kind of hearing before receiving his punishment, but his reference to having "a new case for fighting when [he] got assault[ed]/attack[ed]" suggests that he did receive some kind of disciplinary process. A prisoner challenging the process he was afforded in a prison disciplinary proceeding must show that: (1) he has a life, liberty or property interest with which the state has interfered; and (2) the procedures he was afforded in that deprivation were constitutionally deficient. *Scruggs v. Jordan*, 485 F.3d 934, 939 (7th Cir. 2007). Typically, a placement in segregation must extend for several months before a liberty interest arises, and even then only when conditions in segregation are quite harsh. *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 697 (7th Cir. 2009); *see also Sandin v. Conner*, 515 U.S. 472 (1995) (thirty days of disciplinary segregation "did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest"); *Whitford v. Boglino*,

63 F.3d 527, 533 (7th Cir. 1995) (six months of segregation not an extreme term). Smith has alleged only thirty days of segregation and has not indicated at all that any procedures he may have received were deficient. Without more, Smith does not state a procedural due process claim under the Fourteenth Amendment either.[3]

Finally, Smith also alleges state law claims for "intentional tort" and "other personal injury." Having determined that Smith states no claim for relief under the Constitution or federal law, the court will not exercise supplemental jurisdiction over these claims. *See* 28 U.S.C. § 1367(c)(3) (district court may decline to exercise supplemental jurisdiction when it has dismissed all claims over which it has original jurisdiction). Thus, the court will dismiss the state law claims without prejudice to Smith pursuing them in state court.

ORDER

IT IS ORDERED that plaintiff Torrie D. Smith's motion for leave to proceed is DENIED, and plaintiff's complaint is dismissed for failure to state a claim upon which relief may be granted.

Entered this 30th day of April, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge

[3] As previously noted, it is unclear whether Smith was a prisoner or a pretrial detainee at the time these events took place. "[A]lthough it is permissible to punish a pretrial detainee for misconduct while in pretrial custody, that punishment can be imposed only after affording the detainee some sort of procedural protection." *Rapier v. Harris*, 172 F.3d 999, 1005 (7th Cir. 1999). In contrast, for sentenced prisoners, "much institutional punishment can be considered to be within the parameters of the imposed sentence of confinement." *Id.* at 1003. This distinction does not make a difference here, however, since Smith has not alleged that he was denied any procedural protection.