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

DERRICK L. SMITH,

Plaintiff, OPINION AND ORDER

v. 12-cv-953-wmc

BOB DICKMAN,

Defendant.

State inmate Derrick L. Smith filed this civil action pursuant to 42 U.S.C. § 1983, concerning the conditions of his confinement at the Marathon County Jail. On November 25, 2013, the court denied Smith's request for leave to proceed *in forma pauperis* and dismissed the proposed complaint for failure to state a claim. With the court's permission, Smith then submitted an amended complaint. (Dkt. # 27). Pursuant to the Prison Litigation Reform Act, 28 U.S.C. § 1915A, the court must now screen the amended complaint and dismiss any portion that is legally 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 money damages. In considering any *pro se* litigant's pleadings, the court must read the allegations generously, reviewing them under "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). Even under this lenient standard and after being provided an opportunity to bolster his claim by amendment, Smith's request for leave to proceed must be denied for reasons set forth below. Accordingly, this case will once again be dismissed.

FACTS

Smith's record of criminal offenses in Marathon County and his confinement in the Marathon County Jail has been summarized previously and will not be repeated at length here. For purposes of this order, it is sufficient to note that Smith was taken into custody at the Marathon County Jail in June 2012, after being charged with several felony offenses in Marathon County Case No. 2012CF386. Following revocation of his parole and return to state prison in October 2012, Smith returned to custody at the Marathon County Jail in August 2013, where he is currently awaiting trial in Case No. 2012CF386.

In the present case, Smith has filed suit under 42 U.S.C. § 1983 against Marathon County Jail Administrator Bob Dickman. Smith reports that he has a skin condition that affects the skin on his face and head. The skin condition he describes is "pseudo folliculitis barbae" or PFB, which resembles folliculitis.[1] DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1542 (32nd ed. 2012). This condition involves primarily "the bearded region" of the neck and face and is usually seen in men of African descent or those who have very curly hair. *Id*. The usual cause of pseudo folliculitis barbae is ingrowth of the hair, which can lead to pinhead-sized pustules or lesions, pierced by a hair. *Id*.

Smith contends that shaving on a regular basis helps control and prevent skin irritation caused by pseudo folliculitis barbae. Smith claims that he was only allowed to shave sporadically from June through October 2012, which caused his skin to "break out" with "puss filled bumps" and become "permanently scarred." Smith further claims that jail inmates have a right to shave as a matter of state law, but that Dickman would not enforce his

[1] Folliculitis is described as "an inflammation of the hair follicle." STEDMAN'S MEDICAL DICTIONARY 754 (28th ed. 2006).

shaving privileges on unspecified dates when guards at the Jail refused to let him shave.[2]

OPINION

A complaint may be dismissed for failure to state a claim where the plaintiff alleges too little, failing to meet the minimal federal pleading requirements found in Rule 8 of the Federal Rules of Civil Procedure. Rule 8(a) requires a "'short and plain statement of the claim' sufficient to notify the defendants of the allegations against them and enable them to file an answer." *Marshall v. Knight*, 445 F.3d 965, 968 (7th Cir. 2006). While it is not necessary for a plaintiff to plead specific facts, he must articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In doing so, a plaintiff may plead herself out of court. *See Tamayo v. Blagojevich*, 526 F.3d 1074, 1086 (7th Cir. 2008); *see also Jackson v. Marion County*, 66 F.3d 151, 153-54 (7th Cir. 1995) ("[A] plaintiff can plead himself out of court by alleging facts which show that he has no claim, even though he was not required to allege those facts. Allegations in a complaint are binding admissions, and admissions can of course admit the admitter to the exit from the federal courthouse." (Citations omitted)). In that respect, when a plaintiff pleads facts showing that he does not have a claim, the complaint should be dismissed "without further ado." *Thomson v. Washington*, 362 F.3d 969, 970-71 (7th Cir. 2004).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that (1) he was deprived of a right secured by the Constitution or laws of the United States; and (2) the deprivation was visited upon him by a person or persons acting under color of state law. *Buchanan-Moore v. County of Milwaukee*, 570 F.3d 824, 827 (2009) (citing *Kramer v. Village of*

[2] Smith does not specify a specific state law governing shaving privileges. Presumably he refers to regulations on inmate "sanitation and hygiene" in jail facilities, which require a jail administrator to supply "toilet articles sufficient for the maintenance of inmate cleanliness and hygiene, including toothpaste and toothbrush, soap and a comb." WIS. ADMIN. CODE DOC § 350.08.

North Fond du Lac, 384 F.3d 856, 861 (7th Cir. 2004)). To demonstrate liability under § 1983, a plaintiff must allege sufficient facts showing that an individual personally caused or participated in the alleged constitutional deprivation. *See Zimmerman v. Tribble*, 226 F.3d 568, 574 (7th Cir. 2000); *Walker v. Taylorville Correctional Ctr.*, 129 F.3d 410, 413 (7th Cir. 1997) (noting that "personal involvement" is required to support a claim under § 1983).

Liberally construed, Smith claims that Marathon Jail Administrator Dickman failed to ensure that he could shave on a regular basis, which in turn caused him to suffer from pseudo folliculitis barbae. Other than pointing to Dickman's supervisory role at the Jail, however, Smith does not allege facts showing that he had any personal involvement with an alleged violation. Instead, Smith appears to blame unidentified guards at the Jail for interfering with his ability to shave on a regular basis.

Supervisors may not be vicariously liable for the conduct of their subordinates. *See Vance v. Rumsfeld*, 701 F.3d 193, 203 (7th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 2796 (2013). "[K]nowledge of subordinates' misconduct is not enough for liability. The supervisor must want the forbidden outcome to occur." *Id*. (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 676-77 (2009)). A supervisor may be liable under § 1983 for failing to stop others from committing unconstitutional acts, but only if that officer had a reasonable opportunity to prevent the misconduct. *George v. Smith*, 507 F.3d 605, 609-10 (7th Cir. 2007); *Harper v. Albert*, 400 F.3d 1052, 1064 (7th Cir. 2005); *Fillmore v. Page*, 358 F.3d 496, 505–06 (7th Cir. 2004).

Absent allegations that a supervisory official personally caused, participated in, or had a reasonable chance to stop the alleged harm from occurring, a plaintiff fails to establish liability on a the part of that supervisory official. *George*, 507 F.3d at 609. Because Smith's

allegations fail to establish the requisite personal involvement or knowledge on Dickman's part, his amended complaint fails to state a claim upon which relief can be granted.

In addition, Smith does not allege a constitutional violation. Smith's complaint arguably implicates the Fourteenth Amendment's Due Process Clause, which dictates that "a pretrial detainee may not be punished," *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979), and/or the Eighth Amendment's prohibition against "cruel and unusual punishment," which protects the rights of convicted state prisoners. *Brown v. Budz*, 398 F.3d 904, 910 (7th Cir. 2005) (quoting *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 259, n.1 (7th Cir. 1996)). The Seventh Circuit has recognized that the due process rights of a pre-trial detainee are "at least as great as the Eighth Amendment protections available to a convicted prisoner." *Brown*, 398 F.3d at 909 (internal citation and quotation omitted). Accordingly, § 1983 claims "brought under the Fourteenth Amendment are analyzed under the Eighth Amendment test." *Id.; see also Smego v. Mitchell*, 723 F.3d 752, 756 (7th Cir. 2013) (describing the right to adequate medical care under the Fourteenth Amendment as "functionally indistinguishable from the Eighth Amendment's protection for convicted prisoners").

To prevail on an Eighth Amendment claim, a plaintiff "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The indicia of a serious medical need are: (1) where failure to treat the condition could "result in further significant injury or the unnecessary and wanton infliction of pain"; (2) "existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment"; (3) "the presence of a medical condition that significantly affects an individual's daily activities"; or (4) "the existence of chronic and substantial pain." *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997) (internal quotation

marks omitted).

Smith does not allege facts showing that his skin condition constitutes a serious medical need. *See Northern v. Fuchs*, No. 07-cv-142-jcs, 2007WL 5325868, *2 (W.D. Wis. July 16, 2007) (describing pseudo folliculitis barbae as an "annoying skin condition," but not one that constitutes a serious medical condition); *see also Shabazz v. Barnauskas*, 790 F.2d 1536, 1538 (11th Cir. 1986) (state inmate's "pseudo folliculitis barbae" or "shaving bumps" is not a serious medical condition and shaving, even if required by prison officials when physician ordered otherwise, "does not rise to the level of the cruel and unusual punishment forbidden by the Eighth Amendment").

Assuming that infected hair follicles can pose a serious medical problem, the pustules associated with pseudo folliculitis barbae described in Smith's complaint actually result from "close shaving of very curly hair." STEDMAN'S MEDICAL DICTIONARY 1589 (28th ed. 2006). Because shaving is known to cause folliculitis, those who suffer from the condition typically seek an *exemption* from rules requiring them to be clean shaven. *See Adams v. City of Chicago*, 469 F.3d 609, 617 (7th Cir. 2006) (citing *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993)); *see also Fegans v. Norris*, 537 F.3d 897, 901 (8th Cir. 2008) (noting that inmates diagnosed with dermatological problems, such as pseudo folliculitis barbae, are allowed an exception to a prison grooming policy that prohibits facial hair other than a neatly trimmed mustache); *Bradley v. Pizzaco of Nebraska, Inc.*, 939 F.2d 510, 512-14 (8th Cir. 1991) (concerning claims that an employer's no-beard policy disproportionately excluded black males, who suffer from pseudo folliculitis, which prohibited black male applicants from shaving); *Stewart v. City of Houston Police Dep't*, 372 F. App'x 475 (7th Cir. 2010) (concerning a challenge to employer's no-beard policy by African-American male officers who suffer from

pseudo folliculitis barbae).

Under these circumstances, Smith's central allegation (that shaving controls or prevents pseudo folliculitis barbae) not only does not rise of the level of a serious medical need, it is not plausible.

ORDER

IT IS ORDERED that:

1. Plaintiff Derrick L. Smith's request for leave to proceed is DENIED and his amended complaint is DISMISSED with prejudice for failure to state a claim upon which relief may be granted.

2. The dismissal will count as a STRIKE for purposes of 28 U.S.C. § 1915(g).

3. The clerk of court is directed to close this case.

Entered this 19the day of May, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge