

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

DARREYLL T. THOMAS,

Plaintiff,

OPINION AND ORDER

v.

13-cv-597-wmc

DEPUTY MICHAEL REESE, *et al.*,

Defendants.

State inmate Darreyll T. Thomas filed this proposed civil action pursuant to 42 U.S.C. § 1983, concerning the conditions of his confinement at the Dane County Jail. He has since filed an amended version of his complaint, see dkt. # 19, and seeks leave to proceed under the federal *in forma pauperis* statute. He has also paid an initial, partial filing fee as required by the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915(b)(1).

Because he is incarcerated, the PLRA requires the court to screen the 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. 28 U.S.C. § 1915A. In addressing any *pro se* litigant's complaint, 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). After considering all of Thomas's pleadings, the court will grant him leave to proceed with some, but not all, of his claims.

FACTS

For purposes of this order, the court accepts all well-pled allegations as true and assumes the following probative facts.¹

Plaintiff Darreyll Thomas is currently incarcerated by the Wisconsin Department of Corrections at the Columbia Correctional Institution in Portage. The named defendants include Dane County Sheriff Deputies Michael Reese, Robin Hampton, Robert Van Norman and Christopher Larsh. Thomas would also sue the Dane County Jail Administrator and five John Doe staff members at the Dane County Jail responsible for the health, safety and security of prisoners and pretrial detainees.

In July 2012, Thomas was in custody at the Dane County Jail for proceedings in Dane County Case No. 11CF1044. In that case, Thomas faced charges of second-degree sexual assault with use of force, strangulation and suffocation, substantial battery with intent to cause bodily harm, victim intimidation accompanied by property damage, disorderly conduct and theft.

Having served a six-month sentence at the Dane County Jail in 2010, Thomas believed that defendants knew or should have known that he was restricted to a lower bunk due to a pre-existing injury, which stemmed from a gunshot wound to the neck that Thomas sustained on July 4, 2010. Nevertheless, Thomas was escorted from Unit 3I to Unit 4K on July 28, 2012, where Deputy Reese assigned him to the top bunk. Advising Reese of his lower-bunk restriction, Thomas then asked to be transferred to the

¹ The court has supplemented the allegations in the complaint with dates and procedural information about plaintiff's underlying criminal cases from the electronic docket available at Wisconsin Circuit Court Access, <http://wcca.wicourts.gov> (last visited February 14, 2014).

segregation unit, where inmates were not assigned to bunk beds. Reese apparently refused Thomas' request and when he continued to object to his upper-bunk assignment, Reese summoned other officers for assistance.

Once other officers arrived, Deputies Reese and Hampton ordered Thomas to put his hands behind his back to be handcuffed for transportation to the segregation unit. Thomas refused that order, explaining he had a "front handcuff only" restriction. When Thomas forcefully resisted the officers attempting to handcuff him behind his back, Reese, Hampton, and Deputy Van Norman, who had been standing by, "slammed" Thomas into a wall and then onto the floor. While Thomas was on the floor, Reese reportedly continued to punch and kick him, kneeling him further in the back of the head. During this scuffle, the officers accused Thomas of spitting on them. Thomas admits screaming and using expletives, but denies spitting. Thomas had to be taken a local hospital for treatment for unspecified injuries sustained during this altercation.

Claiming violations of the Eighth and Fourteenth Amendments, Thomas asserts that: (1) Deputies Reese, Hampton and Van Norman used excessive force against him; or (2) Reese used excessive force while Hampton and Van Norman watched and failed to intervene. By attempting to force him to accept an upper-bunk assignment, Thomas asserts further that Reese, Hampton and Van Norman were "deliberately indifferent" to his medical restrictions. Thomas also claims that five other John Doe staff members failed to intervene on his behalf and that Deputy Larsh tried to cover-up the use of force by failing to investigate.

As a result of his altercation with Reese, Hampton and Van Norman, the State of Wisconsin charged Thomas with assault by a prisoner, resisting or obstructing an officer

and disorderly conduct in Dane County Case No. 12CF1488. On September 10, 2012, Thomas pled guilty to the several of the charges (strangulation and suffocation, substantial battery and victim intimidation) against him in Case No. 11CF1044 and received an 8-year prison sentence. The charges against Thomas in Case No. 12CF1488 were dismissed that same day. Arguing that the assault charges filed against him in the latter case were false and filed “in a retaliatory manner,” Thomas seeks compensatory and punitive damages, as well as declaratory relief.

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). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements” are insufficient to establish a plausible claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2007) (citing *Twombly*, 550 U.S. at 555) (observing that courts “are not bound to accept as true a legal conclusion couched as a factual allegation”).

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 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). Dismissal is proper “if the complaint fails to set forth ‘enough facts to state a claim to relief that is plausible on its face.’” *St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616, 625 (7th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Thomas’s status at Dane County Jail is not entirely clear. Assuming that Thomas was confined at the Jail solely for the purpose of facing criminal charges in Case No. 2011CF1044, his complaint 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). To the extent Thomas was being held based on previous convictions, his complaint implicates the Eighth Amendment’s prohibition against “cruel and unusual punishment,” which otherwise 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)). Since 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 ... § 1983 claims brought under the Fourteenth Amendment are analyzed under the Eighth Amendment

test.” *Brown*, 398 F.3d at 909 (internal citation and quotation omitted).

In cases involving the claimed use of excessive force, “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.” *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (citation omitted). Taking Thomas’s allegations as true, which the court must do at this stage of the proceeding, he states a claim against Reese, Hampton and Van Norman for the use of excessive force. He also states a claim against the five John Doe staff members for failure to intervene, *see Sanchez v. City of Chicago*, 700 F.3d 919, 926 (7th Cir. 2012) (noting that “it is possible to hold a named defendant liable for his failure to intervene vis-à-vis the excessive force employed by another officer), and against Deputy Larsh for refusing to document the use of force in an attempt to cover-up that incident.

Thomas claims the charges against him in Case No. 12CF1488 were false and filed in “retaliation” by Reese after Thomas threatened to sue him for the use of force. To state a claim for retaliation, a plaintiff must: (1) identify a constitutionally protected activity in which he was engaged; (2) identify one or more retaliatory actions taken by defendant that would likely deter a person of “ordinary firmness” from engaging in the protected activity in the future; and (3) allege sufficient facts that would make it plausible to infer that plaintiff’s protected activity was a motivating factor in defendant’s decision to take retaliatory action. *Bridges v. Gilbert*, 557 F.3d 541, 555-56 (7th Cir. 2009) (citing *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008)). To the extent that Reese initiated criminal charges against him after Thomas threatened to exercise his right to access the courts, Thomas appears to have stated a claim of retaliation against Reese.

Thomas does not state a claim of deliberate indifference with respect to his bunk assignment. As Thomas concedes, he refused the upper-bunk assignment and was returned to the segregation unit where there are no bunk beds. Thomas does not allege facts showing that the upper bunk assignment aggravated his medical restrictions or caused any physical injury. Absent a showing that the bunk assignment itself resulted in physical injury, as opposed to precipitated excessive force and retaliation, the PLRA precludes a cause of action. *See* 42 U.S.C. § 1997(e) (“No 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 showing of physical injury.”). Accordingly, the court will deny Thomas’s request for leave to proceed against any of the defendants regarding his bunk assignment.

Likewise, Thomas does not establish how the Dane County Jail Administrator was responsible for causing the alleged harm. In that respect, 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). Accordingly, the court will also deny Thomas’s request for leave to proceed against the Dane County Jail Administrator.

ORDER

IT IS ORDERED that:

1. Plaintiff Darreyll T. Thomas’s request for leave to proceed with claims of excessive-force and/or failure to intervene against defendants Michael Reese, Robin Hampton, Robert Van Norman, Christopher Larsh and John Does I

through five is GRANTED. The clerk's office will prepare summons and the U.S. Marshal Service shall effect service upon these individual defendants, although summons will not issue against John Doe defendants until plaintiff discovers the real names of these parties and amends his complaint accordingly.

2. Thomas's request for leave to proceed with any of his remaining claims is DENIED.
3. For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' 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.

Entered this 6th day of May, 2014.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge