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

ZACHARY LEE VANDERMUSS,

Plaintiff,

v.

SCOTT PARKS, MARATHON COUNTY ADULT DETENTION FACILITY, JOHN DOE 1-3, JANE DOE 1, and SUPERVISOR,

Defendants.

OPINION AND ORDER

13-cv-88-wmc

Plaintiff Zachary Lee Vandermuss is currently an inmate in the Wisconsin Department of Corrections at Columbia Correctional Institution. For all times relevant to this proposed civil action, however, Vandermuss was incarcerated at the Marathon County Adult Detention Facility, where all of the defendants are employed. Pursuant to 42 U.S.C. § 1983, Vandermuss alleges that the defendants failed to protect him from assault by another inmate. Vandermuss asks for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915. From the financial affidavit Vandermuss provided, the court concluded that he is unable to prepay the full fee for filing this lawsuit. Vandermuss has made the initial partial payment of $6.01 required of him under § 1915(b)(1), but because he is a prisoner, the court is also required by the Prison Litigation Reform Act to screen his 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. For the reasons provided below, the court will deny Vandermuss leave to proceed.

ALLEGATIONS OF FACT

In addressing any *pro se* litigant's pleading, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). In his complaint, Vandermuss alleges, and the court assumes for purposes of this screening order, the following facts:[1]

- Plaintiff Zachary Lee Vandermuss was incarcerated at the Marathon County Adult Detention Facility ("Marathon County Jail" of "Jail") for all times relevant to his complaint.
- On August 8, 2011, Vandermuss was taken to the Jail. At that time, he informed the first shift guards -- proposed defendants John Does 1-3 and Jane Doe 1 -- that he was a state prisoner and therefore was supposed to be housed apart from the jail prisoners because he had been convicted of a felony.
- The guard contacted the first shift supervisor (another proposed defendant) and relayed Vandermuss's concern. "The guard hung the phone up and told me word for word, 'As long as I'm in jail[,] I'm a county inmate.'" (Compl. (dkt. #1) 3-4.)
- Vandermuss alleges that he then told the guards "I know one of the guys in cell block C and I'm sure there will be problems." (*Id.* at 4.) The guards still placed Vandermuss in cell block C.

[1] Vandermuss has also filed two motions for leave to amend or supplement his complaint, seeking to assert a claim under both the Eighth and Fourteenth Amendments for failure to protect. (Dkt. ##7, 8.) The court grants Vandermuss's motions and has considered these supplements in screening his complaint. Though the standards under both constitutional amendments are the same, because Vandermuss alleges that he was serving a conviction at the time of the incident, it is the Eighth Amendment that applies. *McGee v. Adams*, 721 F.3d 474, 480 (7th Cir. 2013) (explaining that the Fourteenth Amendment applies to detainees and the Eighth Amendment to convicted prisoners).

- The next day, on August 9, 2011, at approximately 9:00 p.m., a county prisoner named Brendon Williams attacked Vandermuss. Vandermuss alleges that he slammed him on the back, causing pain and dizziness.

OPINION

Vandermuss alleges that defendants failed to protect him from a fellow inmate. The Eighth Amendment imposes a duty on prison officials to provide "humane conditions of confinement" by ensuring that inmates receive adequate food, clothing, shelter, and medical care, and that "reasonable measures" are taken to guarantee inmate safety. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citations omitted); *Santiago v. Walls*, 599 F.3d 749, 758 (7th Cir. 2010). Thus, the Eight Amendment imposes a duty on prison officials to protect inmates "from violence at the hands of other inmates." *Borello v. Allison*, 446 F.3d 742, 747 (7th Cir. 2006) (quoting *Washington v. LaPorte County Sheriff's Dep't*, 306 F.3d 515, 517 (7th Cir. 2002)).

To state a claim based on a failure to protect or prevent harm, an inmate must demonstrate that he has been incarcerated under conditions which, objectively, posed a "sufficiently serious" risk of harm. *Farmer*, 511 U.S. at 834 (citations omitted). In addition, a prison official must have a "sufficiently culpable state of mind." *Farmer*, 511 U.S. at 834 (citations omitted). The requisite state of mind is described as one of "'deliberate indifference' to inmate health or safety." *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 302-03 (1991)). This subjective element poses a "high hurdle" for a plaintiff to surmount. *Peate v. McCann*, 294 F.3d 879, 882 (7th Cir. 2002). Allegations of negligence do not amount to deliberate indifference and do not establish a constitutional violation. *Id*. (citing *Luttrell v. Nickel*, 129 F.3d 933, 936 (7th Cir. 1997)). To

demonstrate deliberate indifference, a prisoner must allege facts showing that the defendants "[knew] of and disregard[ed] an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837.

Vandermuss alleges that he notified all four guards working the first shift on August 8, 2011, that he knew one of the inmates in cell block C and that "there will be problems." (Compl. (dkt. #1) 4.) He did not mention Brendon Williams by name, though the court infers from the complaint that Vandermuss was referring to Williams at the time he made his statement to the guards.

More troubling is Vandermuss's failure to describe to the guards what those "problems" might be. A risk of serious harm is "substantial" when it is "so great" that it is "almost certain to materialize if nothing is done." *Brown v. Budz*, 398 F.3d 904, 911 (7th Cir. 2005). "[T]he conditions presenting the risk must be 'sure or very likely to cause . . . needless suffering,' and give rise to 'sufficiently imminent dangers.'" *Baze v. Rees*, 553 U.S. 35, 50 (2008) (quoting *Helling v. McKinney*, 509 U.S. 25, 33-35 (1993)).

A vague threat of an attack is *not* sufficient to make this showing. *See Santiago*, 599 F.3d at 756. Failure to protect an inmate constitutes an Eighth Amendment violation "only if deliberate indifference by prison officials to the inmate's welfare 'effectively condoned the attack' by allowing it to happen." *Santiago*, 599 F.3d at 756 (quoting *Lewis v. Richards*, 107 F.3d 549, 553 (7th Cir. 1997)). Stated another way, a prisoner must allege facts sufficient to show "that the defendants had actual knowledge

of an impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." *Id*. This, Vandermuss has failed to do.

In addition to the four guards, Vandermuss also names their supervisor as a defendant. According to Vandermuss's pleading, however, the supervisor was not even aware of Vandermuss's vaguely-asserted problems with Williams since the alleged call to the supervisor happened before Vandermuss's statement. In any event, his allegations are insufficient to establish supervisory liability.

Vandermuss also names the Marathon County Adult Detention Facility as a defendant, although presumably he means Marathon County. While a municipal entity, such as county, *may* be liable for a Section 1983 violation because of a custom or practice, *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 691 (1978), absent an underlying constitutional violation, Vandermuss cannot state a claim against Marathon County. *See Treece v. Hochstetler*, 213 F.3d 360, 361 (7th Cir. 2000) ("[A] municipality is not liable for a constitutional injury unless there is a finding that the individual officer is liable on the underlying substantive claim.") (quotation marks, internal citation and alterations omitted).

ORDER

IT IS ORDERED that:

1) Plaintiff Zachary Lee Vandermuss's motions to supplement and/or amend his complaint (dkt. ##7, 8) are GRANTED; and

2) Plaintiff'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 17th day of October, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge