UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHNNIE D. COOK,
Plaintiff,

vs.

RYAN WOODARD, et al,
Defendants.

Case No. 1:17-cv-532

Black, J.
Bowman, M.J.

ORDER AND REPORT AND RECOMMENDATION

Plaintiff, a prisoner at the Southern Ohio Correctional Facility (SOCF), filed a pro se civil rights complaint in this Court against defendants Ryan Woodard, William Cool, and Roger Weaks. (Doc. 3). On September 11, 2017, the undersigned issued an Order and Report and Recommendation, finding that plaintiff should be permitted to proceed with his Eighth Amendment claim against defendant Woodard, but that the remaining claims should be dismissed for failure to state a claim upon which relief may be granted. (Doc. 4).

Plaintiff subsequently filed a motion to amend/correct his complaint and an amended complaint, adding defendant Larry Greene and setting forth additional factual allegations against defendant Cool. (Doc. 6, 10). The Court construes plaintiff's motion to amend/correct as a motion to supplement his original complaint, rather than as a motion to file an amended complaint supplanting the original complaint. Plaintiff's motion amend/correct the complaint (Doc. 6) is hereby **GRANTED.**

Also before the Court is defendant Woodard's motion to dismiss the amended complaint as to defendant Woodard on the ground that the amended complaint does not contain any factual allegations against him. (Doc. 11). Although Woodard correctly argues that the amended complaint does not contain factual allegations against him, the Court has construed the filing as

being a supplement to the original complaint. The undersigned therefore recommends that the motion to dismiss the amended complaint be denied.

This matter is now before the Court for a *sua sponte* review of the complaint, as amended/corrected, to determine whether the complaint, or any portion of it, should be dismissed because it is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief. *See* Prison Litigation Reform Act of 1995 § 804, 28 U.S.C. § 1915(e)(2)(B); § 805, 28 U.S.C. § 1915A(b).

In enacting the original *in forma pauperis* statute, Congress recognized that a "litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits." *Denton v. Hernandez*, 504 U.S. 25, 31 (1992) (quoting *Neitzke v. Williams*, 490 U.S. 319, 324 (1989)). To prevent such abusive litigation, Congress has authorized federal courts to dismiss an *in forma pauperis* complaint if they are satisfied that the action is frivolous or malicious. *Id.*; *see also* 28 U.S.C. §§ 1915(e)(2)(B)(i) and 1915A(b)(1). A complaint may be dismissed as frivolous when the plaintiff cannot make any claim with a rational or arguable basis in fact or law. *Neitzke v. Williams*, 490 U.S. 319, 328-29 (1989); *see also Lawler v. Marshall*, 898 F.2d 1196, 1198 (6th Cir. 1990). An action has no arguable legal basis when the defendant is immune from suit or when plaintiff claims a violation of a legal interest which clearly does not exist. *Neitzke*, 490 U.S. at 327. An action has no arguable factual basis when the allegations are delusional or rise to the level of the irrational or "wholly incredible." *Denton*, 504 U.S. at 32; *Lawler*, 898 F.2d at 1199. The Court need not accept as true factual allegations that are "fantastic or delusional" in reviewing a complaint for frivolousness. *Hill v. Lappin*, 630 F.3d 468, 471 (6th Cir. 2010) (quoting *Neitzke*, 490 U.S. at 328).

Congress also has authorized the *sua sponte* dismissal of complaints that fail to state a claim upon which relief may be granted. 28 U.S.C. §§ 1915 (e)(2)(B)(ii) and 1915A(b)(1). A complaint filed by a *pro se* plaintiff must be "liberally construed" and "held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). By the same token, however, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Hill*, 630 F.3d at 470-71 ("dismissal standard articulated in *Iqbal* and *Twombly* governs dismissals for failure to state a claim" under §§ 1915A(b)(1) and 1915(e)(2)(B)(ii)).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). The Court must accept all well-pleaded factual allegations as true, but need not "accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Although a complaint need not contain "detailed factual allegations," it must provide "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557. The complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson*, 551 U.S. at 93 (citations omitted).

In the amended complaint, plaintiff first brings a claim of retaliation against defendant William Cool. Plaintiff claims that during the discovery phase of a prior lawsuit filed in this Court,[1] he sent three subpoenas to Warden Ron Erdos, Medical Administrator Mrs. Warren, and defendant Cool. According to plaintiff, Cool retaliated against him by writing a false conduct report stating that plaintiff had forged the subpoenas. In preparation for contesting the conduct report before the Rules Infraction Board, plaintiff claims that he requested Cool, Erdos, and Warren as witnesses. However, on July 7, 2017, he claims he was told that Erdos and Warren would not be called as witnesses and that "I needed to dismiss my civil action or suffer consequences even possibly lose my life." (*Id.* at PageID 52). During the hearing, plaintiff claims that Cool told the RIB chairperson "to find me guilty to show me who's in charge and that I have no rights at all." (*Id.* at PageID 54). Plaintiff was ultimately found guilty by the RIB and sentenced to twenty days in disciplinary control. (*Id.* at PageID 54).

Plaintiff unsuccessfully appealed the result of the RIB hearing to defendant Larry Greene on the ground that his procedural due process rights were violated and that he presented sufficient evidence to overturn the RIB's decision. (*Id.* at PageID 55).

Next plaintiff complains that his television was broken during the course of a cell search on July 6, 2017. Plaintiff claims that he requested the name of the responsible prison official from Mrs. Tackett but was not provided with the information. Plaintiff alleges that he submitted an informal complaint to Sgt. Terry and a grievance to the institutional inspector. Plaintiff claims that Sgt. Brabson showed him an email stating that if plaintiff wished to receive

[1] On March 13, 2017, plaintiff filed a complaint in this Court in Case No. 1:17-cv-161 (Dlott, J.; Bowman, M.J.), raising the same factual allegations as in the original complaint filed in this case. By Order issued April 10, 2017, the undersigned ordered service on the named defendant Claude Woodard. On July 3, 2017, plaintiff filed a motion to voluntarily dismiss the case "so that he can file his civil action against the correct person responsible for his injuries." (Doc. 15). Plaintiff subsequently filed a "motion to dismiss case due to retaliation from prison official." (Doc. 16). On September 12, 2017—after initiating this action against Ryan Woodard—the undersigned issued a Report and Recommendation to grant plaintiff's voluntarily motion to dismiss filed in case number 1:17-cv-161.

reimbursement for his television, he would need to turn it in to Brabson. According to plaintiff, he turned in the television but never received a replacement or reimbursement. Plaintiff unsuccessfully submitted an appeal to the Chief Inspector.[2]

Finally, plaintiff claims that while working as a porter "a prison official" made a comment about his civil suit against his co-worker. (*Id.* at PageID 56). Plaintiff claims that the prison official falsely accused him of having sexual conduct with another inmate. Plaintiff further claims that the accusation was used to fire him from his position as a porter, which he claims was done in retaliation for filing a civil action against the prison official's co-worker. According to plaintiff he was reclassified by case manager Mr. Anderson "as a porter 5 known as 'no job allowed, restricted to cell.'" (*Id.* at PageID 56).[3] With respect to his allegations regarding his television and job as a porter, plaintiff claims "prison officials violated my Fourteenth Amendment rights to be free from cruel and unusual punishment in the form of campaign harassment." (*Id.* at PageID 56).

For relief, plaintiff seeks a declaratory judgment and monetary damages. (*Id.* at PageID 53).

At this stage in the proceedings, without the benefit of briefing by the parties to this action, the undersigned concludes that plaintiff may proceed with his retaliation claim against defendant William Cool, as stated in the amended complaint. As ordered in the Court's September 11, 2017 Order and Report and Recommendation, plaintiff may also proceed in this action with his Eighth Amendment claim of excessive force against defendant Woodard as set forth in his original complaint. (*See* Doc. 4). However, plaintiff's remaining claims should be dismissed. *See* 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b).

[2] Plaintiff does not name Mrs. Tacket, Sgt. Brabson, or the Chief Inspector as defendants to this action.

[3] Mr. Anderson is not named as a party to this action.

Larry Greene should be dismissed as a party to this action for plaintiff's failure to state a claim upon which relief may be granted against him. Plaintiff seeks to hold Greene liable in connection with his RIB appeal. Plaintiff claims that Greene violated his Fourteenth Amendment rights when he acted in bad faith and "approved the unconstitutional conduct of the Rule[s] Infraction Board." (Doc. 10, Amended Complaint at PageID 54). However, plaintiff fails to state a viable constitutional claim under the Fourteenth Amendment because the challenged disciplinary action did not amount to a deprivation of a constitutionally protected liberty interest.

In *Sandin v. Conner*, 515 U.S. 472 (1995), the Supreme Court held that the Fourteenth Amendment confers on prisoners only a "limited" liberty interest "to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," or which "will inevitably affect the duration of his sentence." *Sandin*, 515 U.S. at 484, 487; *see also Jones v. Baker*, 155 F.3d 810, 812 (6th Cir. 1998); *Williams v. Wilkinson*, 51 F. App'x 553, 556 (6th Cir. 2002). The Sixth Circuit has held that confinement in segregation generally does not rise to the level of an "atypical and significant" hardship implicating a liberty interest except in "extreme circumstances, such as when the prisoner's complaint alleged that he is subject to an *indefinite* administrative segregation" or that such confinement was excessively long in duration. *Joseph v. Curtin*, 410 F. App'x 865, 868 (6th Cir. 2010) (citing *Harden-Bey v. Rutter*, 524 F.3d 789, 795 (6th Cir. 2008)) (emphasis in original); *see also Harris v. Caruso*, 465 F. App'x 481, 484 (6th Cir.) (holding that the prisoner's 8-year confinement in segregation was of "atypical duration" and thus "created a liberty interest that triggered his right to due process"), *cert. denied*, 133 S.Ct. 429 (2012). *Cf. Wilkinson v. Austin*, 545 U.S. 209, 223-24 (2005) (ruling that an inmate's transfer to Ohio's "supermax" prison

"imposes an atypical and significant hardship" given the combination of extreme isolation of inmates, prohibition of almost all human contact, indefinite duration of assignment, and disqualification for parole consideration of otherwise eligible inmates).

Here, plaintiff has not alleged that the challenged disciplinary proceeding resulted in the lengthening of his prison sentence, the withdrawal of good-time credits, or the deprivation of any necessities of life. Moreover, plaintiff has not alleged any facts to suggest that he was subjected to a lengthy disciplinary placement amounting to an atypical or significant hardship that would trigger constitutional concerns. Accordingly, because plaintiff does not have a protected liberty interest under the circumstances alleged herein, any claim against the named defendants for their conduct in the disciplinary proceedings fails to state a cognizable federal claim under the Fourteenth Amendment's Due Process Clause.[4]

To the extent that plaintiff claims that Greene acted in retaliation his claim is conclusory and subject to dismissal. "[N]ot every claim of retaliation by a disciplined prisoner, who either has had contact with, or has filed a lawsuit against prison officials, will state a cause of action for retaliatory treatment. Rather, the prisoner must allege a chronology of events from which retaliation may plausibly be inferred." *Cain v. Lane*, 847 F.2d 1139, 1143 n.6 (7th Cir. 1988) (citing *Benson v. Cady*, 761 F.2d 335, 342 (7th Cir. 1985) (noting that "alleging merely the ultimate fact of retaliation is insufficient")). In this case, plaintiff has failed to allege a chronology of events from which the Court could reasonably infer retaliation on the part of defendant Greene. For example, plaintiff fails to allege that Greene was aware of the lawsuit or any other fact suggesting he was motivated by it. Plaintiff's conclusory allegation that Greene denied his appeal in retaliation without any "further factual enhancement" is

[4] The undersigned's recommendation is not altered by plaintiff's conclusory allegation that Greene deprived him of a liberty interest "created by statutory language in the policy which directs a mandatory duty to comply with and not discretionary authority." (*Id.* at PageID 54).

simply insufficient to state an actionable claim for relief. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–57 (2007). *Cf. Brow v. Carpenter*, 889 F.Supp. 1028, 1034 (W.D. Tenn. 1995) ("A plaintiff cannot bootstrap a frivolous complaint with a conclusory allegation of retaliation."). Accordingly, defendant Greene should be dismissed as a party to this action.

To the extent that plaintiff seeks to hold defendants Greene or Cool liable based on their supervisory capacity these claims must also be dismissed. In the relief section of the complaint, plaintiff seeks monetary damages against these defendants in their individual and supervisory capacities. (*See* Doc. 10 at PageID 53). However, it is well-settled that the doctrine of *respondeat superior* does not apply in § 1983 lawsuits to impute liability onto supervisory personnel. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009); *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978); *Hill v. Marshall*, 962 F.2d 1209, 1213 (6th Cir. 1992). Prison officials whose only roles "involve their denial of administrative grievances and their failure to remedy the alleged [unconstitutional] behavior'" cannot be liable under § 1983. *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999). Nor does a prison official's alleged failure to adequately investigate claims of misconduct rise to the level of "encouragement" that would make the official liable for such misconduct. *Knop v. Johnson*, 977 F.2d 996, 1014 (6th Cir. 1992); *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984).

Plaintiff's claims regarding the destruction of his television should also be dismissed. To the extent plaintiff alleges he was deprived of his television without due process of law, his allegations are insufficient to state an actionable § 1983 claim. In order to assert such a claim, plaintiff must first "plead . . . that state remedies for redressing the wrong are inadequate." *Vicory v. Walton*, 721 F.2d 1062, 1066 (6th Cir. 1983). *See also Hudson v. Palmer*, 468 U.S. 517 (1984); *Parratt*, 451 U.S. 527 (1981). "If satisfactory state procedures are provided in a

procedural due process case, then no constitutional deprivation has occurred despite the injury." *Jefferson v. Jefferson County Pub. Sch. Sys.*, 360 F.3d 583, 587-88 (6th Cir. 2004). Accordingly, in order to state a procedural due process claim under section 1983 "the plaintiff must attack the state's corrective procedure as well as the substantive wrong." *Meyers v. City of Cincinnati*, 934 F.2d 726, 731 (6th Cir. 1991) (quoting *Vicory*, 721 F.2d at 1066). A plaintiff "may not seek relief under Section 1983 without first pleading and proving the inadequacy of state or administrative processes and remedies to redress [his] due process violations." *Jefferson*, 360 F.3d at 588.

Plaintiff has not alleged any facts even remotely indicating that his remedies under Ohio law to redress the wrong of which he complains are inadequate. Plaintiff's complaint fails to explain why a state tort remedy for conversion would not suffice to address his claim. *See Fox v. Van Oosterum*, 176 F.3d 342, 349 (6th Cir. 1999). Therefore, he fails to state a due process claim that is actionable in this § 1983 proceeding.

Finally, plaintiff claims regarding the false allegations leading to his termination from his job as a porter should be dismissed. As noted above, plaintiff alleges that he was fired and reclassified in retaliation for having filed a lawsuit. He also generally alleges that "prison officials" are subjecting him to cruel and unusual punishment in the form of campaign harassment. However, plaintiff makes no allegations against the named defendants in connection with his termination. Plaintiff further fails to name the prison officials who made the allegation or otherwise retaliated against him and only includes allegations against individuals who are not defendants to this action. Plaintiff's claims relating to his television and job termination should therefore be dismissed.

Accordingly, in sum, plaintiff may proceed with his Eighth Amendment claim of excessive force against defendant Ryan Woodard, as stated in the original complaint and his retaliation claim against defendant Cool set forth in the amended complaint. *See* 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b).

Having found that plaintiff's remaining claims fail to state a claim upon which relief may be granted, these claims should be dismissed.

IT IS THEREFORE RECOMMENDED THAT:

1. The complaint, as amended, be **DISMISSED with prejudice** pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1), with the exception of the following claims, which may proceed: Eighth Amendment claim of excessive force against defendant Ryan Woodard, as stated in the original complaint and plaintiff's retaliation claim against defendant Cool, as stated in the amended complaint. *See* 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b).

2. Defendant's motion to dismiss the amended complaint as to defendant Woodard (Doc. 11) be **DENIED.**

IT IS THEREFORE ORDERED THAT:

1. The United States Marshal shall serve a copy of the original and amended/corrected complaints (Doc. 3, 10), summons, the Order granting plaintiff *in forma pauperis* status, and this Order and Report and Recommendation upon defendants Woodard and Cool as directed by plaintiff, with costs of service to be advanced by the United States.

2. Plaintiff shall serve upon defendants or, if appearance has been entered by counsel, upon defendants' attorney(s), a copy of every further pleading or other document submitted for consideration by the Court. Plaintiff shall include with the original paper to be filed with the Clerk of Court a certificate stating the date a true and correct copy of any document was mailed

to defendants or defendants' counsel. Any paper received by a district judge or magistrate judge which has not been filed with the Clerk or which fails to include a certificate of service will be disregarded by the Court.

3. Plaintiff shall inform the Court promptly of any changes in his address which may occur during the pendency of this lawsuit.

s/ Stephanie K. Bowman
Stephanie K. Bowman
United States Magistrate Judge

UNITED STATES DISTRICT COURT
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NOTICE

Pursuant to Fed. R. Civ. P. 72(b), **WITHIN 14 DAYS** after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. This period may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based in whole or in part upon matters occurring on the record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon, or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections **WITHIN 14 DAYS** after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).