

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

EMANUEL SHOULDERS,
Plaintiff,

vs.

Z. CHERRYHOLMES, *et al.*,
Defendants.

Case No. 1:17-cv-703

Barrett, J.
Bowman, M.J.

**ORDER AND REPORT
AND RECOMMENDATION**

Plaintiff, a prisoner at the Lebanon Correctional Institution, filed a pro se civil rights complaint in this Court against defendants Z. Cherryholmes, Gary Mohr, Tom Schwietzer, and Ms. Rutherford. By separate Order, plaintiff has been granted leave to proceed *in forma pauperis*. This matter is before the Court for a *sua sponte* review of the complaint 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 complaint, plaintiff alleges that on or about August 1, 2016, defendant Correctional Officer Z. Cherryholmes began to write false conduct reports against him as a means to punish him. (Doc. 1-1, Complaint at PageID 21–22). Plaintiff claims that he sought assistance from other staff members, who told him that “C/O. Cherryholmes does not like you and that staff will talk to him.” (*Id.* at PageID 22).

On or about January 14, 2017, plaintiff claims he began to have trouble with his cellmate, inmate Hope, who plaintiff claims was bullying him. According to plaintiff, Hope attempted to throw all his belongings out of the cell. Plaintiff claims that he reported the issue to defendant Unit Manager Rutherford and, although she was aware of the bullying, refused to move or otherwise assist plaintiff.

On January 25, 2017, plaintiff claims that Cherryholmes ordered him out of his cell for a cell search. During this time, plaintiff alleges that Cherryholmes read an informal complaint that plaintiff wrote requesting that he be moved from his cell due to his being bullied. Plaintiff further alleges that Cherryholmes informed inmate Hope about the informal complaint. As a result, plaintiff claims that Hope subsequently returned to their cell, stated that Cherryholmes told him that plaintiff “wrote a[n] Informal Complaint on [him],” and punched plaintiff “in a

violent rage.” (*Id.* at PageID 23). Plaintiff claims that he exited the cell, yelling for help. However, according to plaintiff, Cherryholmes ordered him to return to his cell despite the attack and then sprayed him with pepper spray. Plaintiff alleges that he was denied medical care and taken directly to segregation with the mace still in his eyes and on his skin. As a result of the incident, plaintiff claims he has suffered permanent eye damage, a hole in his left ear, and mental and emotional damages. (*Id.* at PageID 24).

Plaintiff unsuccessfully sought relief through the prison grievance system. Plaintiff claims defendant Warden Schweitzer refused to resolve the matter and “appears to condone such illegal acts of his staff such as beating on the inmates he supervises.” (*Id.* at PageID 25). Plaintiff generally alleges that the prison staff refused to investigate his complaints or satisfactorily respond to his grievances.

Plaintiff seeks declaratory, injunctive, and monetary relief. (*Id.* at PageID 19).

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 Eighth Amendment failure to protect claims against defendants Cherryholmes and Rutherford. Plaintiff may also proceed with his First Amendment and excessive force claims against Cherryholmes. However, plaintiff’s remaining claims should be dismissed. *See* 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b).

Plaintiff’s allegations that defendant Cherryholmes wrote false conduct reports against him are also subject to dismissal for failure to state a claim upon which relief may be granted. Erroneous or even fabricated allegations of misconduct by an inmate, standing alone, do not constitute a deprivation of a constitutional right. *See, e.g., Reeves v. Mohr*, No. 4:11cv2062, 2012 WL 275166, at *2 (N.D. Ohio Jan. 31, 2012) (and cases cited therein) (holding that the prisoner failed to state a claim upon which relief may be granted to the extent that he claimed he

had “a constitutional right to be free from false accusations”). “A constitutional violation may occur, if as a result of an accusation, the Plaintiff was deprived of a liberty interest without due process.” *Reeves, supra*, 2012 WL 275166, at *2 (citing *Sandin v. Conner*, 515 U.S. 472, 485 (1995)). However, plaintiff’s allegations are insufficient to trigger constitutional concerns because he has not alleged any facts even remotely suggesting that he was deprived of a protected liberty interest.

The complaint should be dismissed against defendants Warden Thomas Schweitzer and Gary Mohr. Plaintiff’s sole allegation against defendant Mohr is that as Director of the Ohio Department of Corrections, “he is legally responsible for the overall operation of the Department and each institution under its jurisdiction, including Lebanon Correctional Institution where plaintiff is confined.” (Doc. 1-1, Complaint at PageID 21). Plaintiff similarly seeks to hold Warden Schweitzer liable for his responsibility for operations at Lebanon Correctional Institution. However, to the extent plaintiff seeks to hold these defendants liable because of their supervisory positions, 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). With respect to Schweitzer, plaintiff also alleges that he appeared to condone the behavior of his subordinates in responding to plaintiff’s kite and generally alleges that prison officials failed to conduct an adequate investigation. Nevertheless, 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).

Furthermore, to the extent that plaintiff claims that the grievance procedure failed to produce the correct outcome, this cannot give rise to a § 1983 claim because “[p]rison inmates do not have a constitutionally protected right to a grievance procedure.” *Miller v. Haines*, No. 97–3416, 1998 WL 476247, at *1 (6th Cir. Aug.03, 1998) (citations omitted). 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).

Accordingly, in sum, plaintiff may proceed with his First and Eighth Amendment claims against defendants Cherryholmes and Rutherford. *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:

The complaint be **DISMISSED with prejudice** pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1), with the exception of plaintiff’s Eighth Amendment failure to protect claims against defendants Cherryholmes and Rutherford, and his First Amendment and excessive force claims against Cherryholmes.

IT IS THEREFORE ORDERED THAT:

1. The United States Marshal shall serve a copy of the complaint, summons, the Order granting plaintiff *in forma pauperis* status, and this Order and Report and Recommendation upon defendants Cherryholmes and Rutherford 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

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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).