UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

JAY F. VERMILLION,

Plaintiff,

v.

WILLARD PLANK, CHARLES WHELAN, DAWN BUSS, RALPH CARRASCO, DAWN WALKER, BESSIE LEONARD, MARK LEVENHAGEN, MARK BRENNAN, SALLY NOWATZKE, LARRY WARG, CHARLES PENFOLD, BRETT MIZE, HOWARD MORTON, CRAIG TRAVIS, ERNESTINE COLE, CELIA BOBSON, LINDA LEONARD, DAVID DOMBROWSKY, DOUG BARNES, ROBERT JOHNSON, DAVID LEONARD, STEPHANIE ROTHENBERG, INDIANA DEPARTMENT OF CORRECTIONS, and GARY BRENNAN,

Defendants.

Civil Action No. 3:11-CV-280 JVB

ORDER

Jay Vermillion, a prisoner confined at the Westville Control Unit ("WCU"), sued under 42 U.S.C. § 1983 on a variety of claims that many Indiana Department of Correction ("IDOC") officials violated his federally protected rights in numerous respects. The Court struck the first complaint and allowed Plaintiff "to file an amended complaint containing only a single claim or related claims." (DE 8 at 3.) Plaintiff did file an amended complaint, but again sought to proceed against numerous defendants on unrelated claims. The Court then struck the amended complaint, and ordered Vermillion to file a second amended complaint "containing only a single claim or related claims arising at the same facility." (DE 13 at 3.)

Plaintiff's Second Amended Complaint names as defendants the IDOC, two deputy

attorneys general and twenty-one officials employed at the IDOC central office, at the WCU, and at the Indiana State Prison ("ISP"). Like its predecessors, the Second Amended Complaint attempts to initiate a multi-claim, multi-defendant suit, involving events that occurred at two different facilities over a period of years. Rhetorical paragraph A asserts that when Investigators Willard Plank, Dawn Buss, and Charles Whelan questioned Vermillion on July 29, 2009, about an escape by other inmates at the ISP, he "exercised [his] constitutionally protected right to terminate their questioning of [him] in their investigation of [the] escape." (DE 14 at 3.) Vermillion contends that all of the Defendants conspired to retaliate against from him from July 29, 2009, to the present, for exercising his Fifth Amendment right to remain silent on this occasion. (*Id.*)

The Court reviewed the Second Amended Complaint. Relying on *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007) and *Owens v. Hinsley*, 635 F.3d 950, 952 (7th Cir. 2011), the Court granted leave to proceed for damages only against Defendants Mark Levenhagen, Howard Morton, Mark Brennan, Bret Mize, and Sally Nowatzke in their individual capacities on Plaintiff's Fourteenth Amendment due process claim alleged in paragraphs E and F. That claim is that the Defendants transferred him from the ISP to the WCU without affording him due process. The Court dismissed all other claims Plaintiff attempted in the Second Amended Complaint, without prejudice to his right to replead them in other complaints. This case is now before the Court on Plaintiff's Motion to Reconsider, Alter and/or Amend Judgment, in which Plaintiff asks the Court to let him proceed on all of his claims against all of the Defendants named in the Second Amended Complaint.

The Second Amended Complaint alleges that all its disparate claims are related because

all the Defendants conspired to retaliate against Plaintiff. On pages 2 through 7 of the Motion to Reconsider, Plaintiff attempts to distinguish his complaint from the one in *George*. He concedes that his Second Amended Complaint named multiple defendants on multiple claims, but reasserts that his allegations were tied together by the theory that all Defendants conspired to retaliate against him. This would be a concerted effort by nearly two dozen state officials at different facilities, the IDOC Central Office, and the Indiana Attorney General's office, all inspired by Plaintiff's invocation of his Fifth Amendment right to refuse to answer questions during a disciplinary investigation in July 2009.

Plaintiff alleged in the Second Amended Complaint that this violated 42 U.S.C. 1985(2) and (3), but the Court screened out these claims for improper pleading. (DE 17 at 3–4.) The instant Motion to Reconsider concedes that Plaintiff stated no claim under §§ 1985 and 1986, and specifically withdraws those claims. (DE 19 at 8.) Now, however, Plaintiff says he wants to assert a general conspiracy claim under § 1983. (DE 19 at 9.)

> And while the court did state, as noted above, that nothing in my Second Amended Complaint suggests a plausible whiff of the alleged conspirators' assent, and that nothing in my submissions suggest that the defendants' actions were unlikely to have been undertaken in the absence of an agreement, at this juncture I can only assume that this of the court's assessments was exclusive to these secondary allegations of conspiracy under Sec. 1985, and for that reason, additional "screening" is necessary.

(*Id.*)

Plaintiff's assumption is wrong. It is as true of the § 1983 claim as it is of the claim under § 1985 that nothing in the Second Amended Complaint suggested a plausible whiff of an agreement, or that the Defendants' actions were unlikely to have been undertaken without an agreement. Even before *Twombly* and *Iqbal*, "mere conclusory allegations of a conspiracy [were] insufficient to survive a motion to dismiss." *Fries v. Helsper*, 146 F.3d 452, 457 (7th Cir. 1998).

Plaintiff emphasizes in his Motion to Reconsider that when screening a prisoner complaint, "a judge must accept as true all of the factual allegations contained in the complaint" (DE 19 at 4.) He posits that because he alleged in his complaint that all of the actions by all of the nearly two dozen individual Defendants were "the result of a continuous and ongoing series of inextricably related transactions and occurrences," (*id.*) the Court was required to accept his conspiracy claims. The Court fulfilled its obligation to give Plaintiff the benefit of the inferences to which he was entitled on his individual factual claims as to what the individual defendants did.

But Plaintiff has not raised plausible inferences of assent or agreement, whether overt or tacit. *See Amundsen v. Chi. Park Dist.*, 218 F.3d 712, 718 (7th Cir. 2000) (explaining requirements). As this Court ruled in its screening order, nothing in the Second Amended Complaint suggests a plausible "whiff of the alleged conspirators' assent," and nothing in Plaintiff's submissions suggests Defendants' actions were unlikely to have been undertaken in the absence of an agreement. Even giving Plaintiff the benefit of the inferences to which he is entitled at the pleadings stage, his Second Amended Complaint does not meet the requirements for a § 1983 conspiracy claim. The conspiracy and retaliation claims are simply implausible; the "plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Id.* at 555.

> Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has

alleged – but it has not shown – that the pleader is entitled to relief.

Ashcroft v. Iqbal, 556 U.S. 662, 680 (2009) (quotation marks, alteration, and citations omitted).

"[I]t is not plausible that two deputy attorneys general and twenty-one officials at the IDOC central office and two separate facilities conspired to retaliate against Vermillion over a period of years for invoking his Fifth Amendment right to refuse to answer questions on a single occasion that did not even result in a criminal prosecution." (DE 17 at 5.) Plaintiff argues this finding "has no factual basis and it amounts to nothing more than an articulation of the court's arbitrary refusal to acknowledge and/or accept the fact that IDOC officials have conducted themselves in the manner in which I have alleged." (DE 19 at 12.)

The Court has indeed accepted, for present purposes, the factual allegations of what the Defendants did, however whether a grand conspiracy was their motivation is another matter that the Court need not, and does not accept, without more particularity. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)). "[D]etermining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense." *Id*.

It is implausible that so many state actors in so many locations over such a length of time conspired to retaliate against Plaintiff for such a small act as invoking the Fifth Amendment during an internal investigation. This is the conclusion compelled by the Court's experience and common sense. Accordingly, the Court will not reinstate Vermillion's claim that all of the Defendants conspired to retaliate against him for exercising his Fifth Amendment right to remain

silent on July 29, 2009.

The screening order did allow Plaintiff to proceed on one individual claim — that some of the Defendants violated his Fourteenth Amendment due process rights when they transferred him from the ISP to the WCU, a super-max facility. In his Motion to Reconsider, Plaintiff appears to suggest that this Court selected the wrong individual claim on which to allow him to proceed. (DE 19 at 18.) While it will not grant the Plaintiff's request in his Motion to Reconsider that he be allowed to proceed on all of the claims in his Second Amended Complaint, the Court will let Plaintiff select another claim to proceed on in this case, if he wishes, subject to all other requirements of law. The Court cautions Plaintiff that he may select only a single claim or related claims arising at the same facility, and that the claim or claims must be plausible.

For the foregoing reasons, the Court:

(1) GRANTS Plaintiff's Motion to Reconsider, Alter and/or Amend Judgment (DE 19) in part and DENIES it in part;

(2) DENIES Plaintiff's request to reinstate his claim that all Defendants conspired to retaliate against him for invoking the Fifth Amendment during an ISP internal investigation in July 2009, and his request to proceed on all of his individual claims against all of the Defendants named in his Second Amended Complaint;

(3) GRANTS Plaintiff leave to select another individual claim or related claims and Defendant or set of Defendants upon which to proceed in this case if he wishes; and

(4) AFFORDS Plaintiff until December 7, 2012, to advise the Court whether he wishes to continue to proceed in this case on his claim that some IDOC officials violated his Fourteenth Amendment due process rights when they transferred him from the ISP to the WCU, or whether

he wishes to proceed against a Defendant or set of Defendants on one of the other claims presented in the Second Amended Complaint. If Plaintiff does not respond by December 7, 2012, the action will proceed only upon the claim regarding the alleged violation of Plaintiff's Fourteenth Amendment due process rights through his transfer from the ISP to the WCU.

SO ORDERED on November 5, 2012.

s/ Joseph S. Van Bokkelen
JOSEPH S. VAN BOKKELEN
UNITED STATES DISTRICT JUDGE