

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

JAY F. VERMILLION,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 1:15-cv-00605-RLY-DKL
)	
MARK E. LEVENHAGEN Superintendent,)	
SALLY NOWATZKE Case Counselor WCU,)	
BRETT MIZE Director of Op IDOC,)	
HOWARD MORTON Admin Asst ISP,)	
GARY BRENNAN Director of Op WCU,)	
)	
Defendants.)	

Entry Discussing Third Amended Complaint and Directing Further Proceedings

The third amended complaint is subject to the screening requirement of 28 U.S.C. § 1915A(b). Pursuant to this statute, “[a] complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show that plaintiff is not entitled to relief.” *Jones v. Bock*, 549 U.S. 199, 215 (2007). In determining whether the complaint states a claim, the Court applies the same standard as when addressing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *See Lagerstrom v. Kingston*, 463 F.3d 621, 624 (7th Cir. 2006). To survive dismissal under federal pleading standards,

[the] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. 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.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Thus, a “plaintiff must do better than putting a few words on paper that, in the hands of an imaginative reader, *might* suggest that something has

happened to [him] that might be redressed by the law.” *Swanson v. Citibank, N.A.*, 614 F.3d 400, 403 (7th Cir. 2010) (emphasis in original).

The third amended complaint names defendants Willard Plank, Dawn Buss, Charles Whelan, Ralph Carrasco, Mark Levenhagen, Brett Mize, Howard Morton, Sally Nowatzke, Gary Brennan and the Indiana Department of Correction as defendants. The **clerk is directed** to add Willard Plank, Dawn Buss, Charles Whelan, and Ralph Carrasco as defendants on the docket. The other defendants have already appeared by counsel in this action.¹

I. Claims Which Shall Proceed

The following claims shall proceed as submitted:

1. Vermillion claims that Willard Plank, Dawn Buss, Charles Whelan, Ralph Carrasco, Mark Levenhagen, Brett Mize, Howard Morton, Sally Nowatzke, and Gary Brennan retaliated against him for refusing to answer questions about escaped prisoners. Specifically, Mr. Vermillion claims that his placement in punitive segregation at Indiana State Prison (“ISP”), his transfer to the Maximum Control Segregation Unit at Westville Correctional Facility, and his confinement in segregation were punishments aimed at retaliating against him because he asserted his right to silence.

2. Vermillion claims that Willard Plank, Dawn Buss, Charles Whelan, Ralph Carrasco, Mark Levenhagen, Brett Mize, Howard Morton, Sally Nowatzke, and Gary Brennan violated his Eighth Amendment right to be free of cruel and unusual punishment by placing him

¹ The plaintiff’s motion to amend the title of this case is granted to the extent that Willard Plank will be added as a defendant on the docket. The motion is denied to the extent that the plaintiff requests that this action always be referred to as *Jay F. Vermillion v. Willard Plank, et al.* The reason for this ruling is that when this case was transferred Mark E. Levenhagen was listed as the first named defendant. The plaintiff’s suggestion that Willard Plank’s name should be first listed because he is the “ringleader” is not persuasive. The order in which the defendants are listed in the caption does not reflect culpability or level of responsibility.

at the Westville Control Unit Super Max Facility and leaving him in solitary confinement for 1,513 days.

3. Vermillion claims that Willard Plank, Dawn Buss, Charles Whelan, Ralph Carrasco, Mark Levenhagen, and Brett Mize transferred him from the Indiana State Prison (“ISP”) to department-wide administrative segregation at the Westville Correctional Facility (“Westville”) in violation of his due process rights.

4. Vermillion claims that Howard Morton confiscated Vermillion’s certified legal correspondence in violation of his due process and First Amendment rights.

II. Dismissal of Certain Claims

The following claims shall be dismissed.

1. The plaintiff lists as a separate claim that these same defendants **conspired** to retaliate against him. This claim, however, adds nothing and is **dismissed** because all of the defendants “are state actors, and thus amenable to suit under 42 U.S.C. § 1983, by virtue of their offices.” *Logan v. Wilkins*, 644 F.3d 577, 583 (7th Cir. 2011) (citing *Hoskins v. Poelstra*, 320 F.3d 761, 764 (7th Cir. 2003)). The Seventh Circuit has explained:

We need not conduct a separate analysis of the conspiracy claim outside of our treatment of Turley’s Eighth Amendment claims. As we noted in *Fairley v. Andrews*, 578 F.3d 518, 526 (7th Cir. 2009), the function of a conspiracy claim under 42 U.S.C. § 1985(3) is to “permit recovery from a private actor who has conspired with state actors.” When, as here, the defendants are all state actors, “a § 1985(3) claim does not add anything except needless complexity.” *Id.*

Turley v. Rednour, 2013 WL 3336713, 7 at fn. 2 (7th Cir. 2013).

2. Vermillion’s claim that Sally Nowatzke, and Gary Brennan falsified information and documentation to increase Vermillion’s security classification designation in violation of his due process rights is **dismissed**. The reason for this ruling is that Vermillion’s classification does not in and of itself implicate either a liberty or property interest. *See Lucien v. DeTella*, 141 F.3d

773, 774 (7th Cir. 1998) (“Classifications of inmates implicate neither liberty nor property interests. . . .”) (citing *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). As a practical matter, the claims that Nowatzke and Brennan retaliated against Vermillion and subjected him to unconstitutional conditions of confinement based on their actions (including their alleged falsification of information) are proceeding such that nothing could be gained by including this due process claim against them.

3. The Indiana Department of Corrections has been sued under the Indiana Tort Claims Act. These state law claims are **dismissed for lack of jurisdiction** for the following reasons. First, there are no federal claims alleged against the IDOC which could be the basis for this court’s supplemental jurisdiction. Second, Eleventh Amendment immunity bars suits in federal court against states and their agencies regardless of the relief sought, whether damages or injunctive relief. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 102 (1984).


III. Further Proceedings

The **clerk is designated**, pursuant to *Fed. R. Civ. P.* 4(c)(3), to issue and serve process on the defendants Willard Plank, Dawn Buss, Charles Whelan, and Ralph Carrasco in the manner specified by *Fed. R. Civ. P.* 4(d)(1). Process shall consist of the third amended complaint, applicable forms and this Entry.

Counsel for defendants who have appeared in this action shall have **through June 17, 2015**, in which to answer or otherwise respond to the third amended complaint.

IT IS SO ORDERED.

Date: 5/22/2015


RICHARD L. YOUNG, CHIEF JUDGE
United States District Court
Southern District of Indiana

Distribution:

Willard Plank
Indiana Department of Correction
E-334, 302 West Washington Street
Indianapolis, IN 46204

Dawn Buss
Indiana Department of Correction
E-334, 302 West Washington Street
Indianapolis, IN 46204

Charles Whelan
ISP IA Investigator
5501 S. 1100 W.
Westville, IN 46391

Ralph Carrasco
ISP IA Investigator
One Park Row
Michigan City, IN 46360

JAY F. VERMILLION
DOC # 973683
Pendleton Correctional Facility
Electronic Service Participant -- Court Only

All Electronically Registered Counsel