IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

CHARLIE ANDREW MASSENGALE,	:	
Plaintiff,	:	
	:	**NO. 5:17-CV-00099-MTT-MSH**
VS.	:	
Warden BENJAMIN FORD, *et al.*,	:	
Defendants.	:	

ORDER AND RECOMMENDATION

Plaintiff Charlie Andrew Massengale, a prisoner at the Calhoun State Prison in Morgan, Georgia, has filed a *pro se* civil rights complaint under 42 U.S.C. § 1983. Plaintiff has also filed a motion for leave to proceed without prepayment of the filing fee (ECF No. 10) and a motion for injunctive relief (ECF No. 1). For the following reasons, the undersigned **GRANTS** Plaintiff's motion to proceed *in forma pauperis* and finds Plaintiff's failure-to-protect claims against Defendant Doe must proceed for further factual development. However, the undersigned **RECOMMENDS** that Plaintiff's remaining claims be **DISMISSED without prejudice** and that his motion for injunctive relief be **DENIED.**

I. Motion to Proceed *in forma pauperis*

District courts may authorize the commencement of a civil action without prepayment of the normally-required fees upon a showing that the plaintiff is indigent and financially unable to pay the filing fee. 28 U.S.C. § 1915. A prisoner seeking to proceed

in forma pauperis (IFP) under this section must provide the district court with both (1) an affidavit in support of his claim of indigence and (2) a certified copy of his prison "trust fund account statement (or institutional equivalent) for the 6-month period immediately preceding the filing of the complaint." § 1915(b).

The undersigned has reviewed Plaintiff's Motion to Proceed *in forma pauperis* (ECF No. 10) and, based on his submissions, finds that Plaintiff is presently unable to pre-pay any portion of the filing fee. The Court thus **GRANTS** Plaintiff's motion and assesses an initial partial filing fee of $0.00. Plaintiff is still obligated to pay the full $350.00 filing fee, in installments, as set forth in § 1915(b) and explained below. The district court's filing fee is not refundable, regardless of the outcome of the case, and must therefore be paid in full even if the Plaintiff's Complaint (or any part thereof) is dismissed prior to service. It is accordingly requested that the **CLERK** forward a copy of this **ORDER** to the business manager of the facility in which Plaintiff is incarcerated so that withdrawals from his account may commence as payment towards the filing fee.

A. Directions to Plaintiff's Custodian

The warden of the institution wherein Plaintiff is incarcerated, or the sheriff of any county wherein he is held in custody, and any successor custodians, shall each month cause to be remitted to the Clerk of this court twenty percent (20%) of the preceding month's income credited to Plaintiff's account at said institution until the $350.00 filing fee has been paid in full. In accordance with provisions of the Prison Litigation Reform Act ("PLRA"), Plaintiff's custodian is hereby authorized to forward payments from the

prisoner's account to the Clerk of Court each month until the filing fee is paid in full, provided the amount in the account exceeds $10.00. It is **ORDERED** that collection of monthly payments from Plaintiff's trust fund account shall continue until the entire $350.00 has been collected, notwithstanding the dismissal of Plaintiff's lawsuit or the granting of judgment against him prior to the collection of the full filing fee.

B. Plaintiff's Obligations Upon Release

Pursuant to provisions of the PLRA, in the event Plaintiff is hereafter released from the custody of the State of Georgia or any county thereof, he shall remain obligated to pay any balance due on the filing fee in this proceeding until said amount has been paid in full; Plaintiff shall continue to remit monthly payments as required by the PLRA. Collection from Plaintiff of any balance due on the filing fee by any means permitted by law is hereby authorized in the event Plaintiff is released from custody and fails to remit payments. Plaintiff's Complaint is subject to dismissal if he has the ability to make monthly payments and fails to do so.

II. Preliminary Screening

A. Standard of Review

The PLRA obligates district courts to conduct a preliminary screening of every complaint filed by a prisoner who seeks redress from a government entity, official, or employee. *See* 28 U.S.C. § 1915A(a). Screening is also required under 28 U.S.C. § 1915(e) when the plaintiff is proceeding IFP. Both statutes apply in this case, and the standard of review is the same. When conducting preliminary screening, the Court must

accept all factual allegations in the complaint as true. *Boxer X v. Harris*, 437 F.3d 1107, 1110 (11th Cir. 2006); *Hughes v. Lott*, 350 F.3d 1157, 1159-60 (11th Cir. 2003). *Pro se* pleadings, like the one in this case, are "held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Id.* (internal quotation marks omitted). Still, the Court must dismiss a prisoner's complaint if it "(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. §1915A(b).

A claim is frivolous if it "lacks an arguable basis either in law or in fact." *Miller v. Donald*, 541 F.3d 1091, 1100 (11th Cir. 2008) (internal quotation marks omitted). The Court may dismiss claims that are based on "indisputably meritless legal" theories and "claims whose factual contentions are clearly baseless." *Id.* (internal quotation marks omitted). A complaint fails to state a claim if it does not include "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 Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The factual allegations in a complaint "must be enough to raise a right to relief above the speculative level" and cannot "merely create[] a suspicion [of] a legally cognizable right of action." *Twombly*, 550 U.S. at 555 (first alteration in original). In other words, the complaint must allege enough facts "to raise a reasonable expectation that discovery will reveal evidence" supporting a claim. *Id.* at 556. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

To state a claim for relief under § 1983, a plaintiff must allege that (1) an act or omission deprived him of a right, privilege, or immunity secured by the Constitution or a statute of the United States; and (2) the act or omission was committed by a person acting under color of state law. *Hale v. Tallapoosa Cnty.*, 50 F.3d 1579, 1582 (11th Cir. 1995). If a litigant cannot satisfy these requirements or fails to provide factual allegations in support of his claim or claims, the complaint is subject to dismissal. *See Chappell v. Rich*, 340 F.3d 1279, 1282-84 (11th Cir. 2003).

B. Factual Allegations

Plaintiff's claims arise from his incarceration at the Calhoun State Prison. Compl. 5, ECF No. 7. Plaintiff alleges that in July of 2016, he became concerned that his housing assignment was unsafe. *Id.* Plaintiff accordingly refused his housing assignment, and "security" sent him to the J-1 cell block. *Id.* Plaintiff contends he was moved from cell to cell in J-1 but was unable to receive a safe assignment "due to [his] charges." *Id*. Plaintiff alleges that Defendant Doe, the "officer-in-charge of J-1" ultimately assigned him to a cell with an inmate named Taylor who threatened to beat Plaintiff "until his brain [was] scattered all over this cell." *Id.* Plaintiff alleges that he told Defendant Doe that he was scared of inmate Taylor "after all the comments he has made that he's going to kill whom ever [sic] goes into his cell," but Defendant Doe "disregard[ed his] pleadings." *Id.* Approximately two to three days later, inmate Taylor attacked Plaintiff, causing several injuries that required medical treatment. *Id.* at 5; Attach. 1 to Compl. at 1, ECF No. 7-1. Plaintiff further alleges that he still suffers severe headaches and nightmares as a result of

the attack. *Id.* Plaintiff contends Defendants' failure to protect him from this attack violated his constitutional rights, and he seeks compensatory and punitive damages as a result. *Id.* at 6.

C. Plaintiff's Claims

The crux of Plaintiff's Complaint is that Defendants failed to protect him from an attack by his cellmate. Such claims are generally cognizable under the Eighth Amendment to the United States Constitution. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 837 (1994). A prisoner asserting an Eighth Amendment failure-to-protect claim must allege (1) a substantial risk of serious harm; (2) the prison officials' deliberate indifference to that risk; and (3) causation. *Goodman v. Kimbrough*, 718 F.3d 1325, 1331 (11th Cir. 2013). To establish deliberate indifference in this context, a prisoner must show that prison officials subjectively knew of the substantial risk of serious harm and that the prison officials knowingly or recklessly disregarded that risk. *Id.* at 1332. Negligent failure to protect an inmate from attack will not support a § 1983 claim. *See id.*

1. Failure to Protect Claims against Defendant Doe

Taking Plaintiff's allegations as true, as the Court must at this stage, Plaintiff has alleged that Defendant Doe overheard inmate Taylor threaten Plaintiff and knew that inmate Taylor was angry that Defendant Doe was planning to house Plaintiff in his cell. Compl. 6, ECF No. 7; Attach. 1 to Compl. at 1, ECF No. 7-1. Plaintiff also alleges that he complained directly to Defendant Doe about his fear that inmate Taylor would attack him. Compl. 5, ECF No. 1. These allegations are sufficient to permit Plaintiff's claims against

Defendant Doe to proceed for further factual development.[1]

2. Failure to Protect Claims against Defendants Ford, Williams, Cross, and Hollman

Plaintiff also names as Defendants in this case Ford, the prison warden; Williams, the deputy warden of security; Cross, the deputy warden of care and treatment; and Hollman, the unit manager of the prison. The basis for Plaintiff's claims against these Defendants is unclear. Plaintiff makes no allegation that any of these Defendants personally participated in the decision to house Plaintiff with inmate Taylor or knew that inmate Taylor posed a specific threat to Plaintiff. To the extent Plaintiff is seeking to hold these Defendants responsible for personally failing to protect Plaintiff from inmate Taylor, his claims therefore fail to state a claim upon which relief may be granted. *See, e.g.*, *Carter v. Galloway*, 352 F.3d 1346, 1350 (11th Cir. 2003) (per curiam) (affirming grant of summary judgment to defendant prison officials on failure to protect claims where prisoner failed to establish that defendants "had a subjective awareness of a substantial risk of

[1]Generally, "fictitious party pleading is not permitted in federal court." *Richardson v. Johnson*, 598 F.3d 734, 738 (11th Cir. 2010) (per curiam). The one exception to this rule is when the plaintiff's description of the defendant is so specific that the party may be identified for service even though his actual name is unknown. *See id.* (citing *Dean v. Barber*, 951 F.2d 1201, 1215-16 (11th Cir. 1992)). Therefore, to proceed against an unnamed defendant, a plaintiff must provide a "description of some kind which is sufficient to identify the person involved so that process can be served." *Dean*, 951 F.2d at 1216. In this case, Plaintiff has provided a reasonably specific description of Defendant Doe such that ordering service is appropriate. *See Moulds v. Bullard*, 345 F. App'x 387, 390 (11th Cir. 2009) (per curiam) (noting that a description of a Doe defendant may be sufficient where the prisoner "provide[s] a job title that … seem[s] to correspond to a particular position at the jail").

serious physical threat to Plaintiff").

To the extent Plaintiff is attempting to sue these Defendants in their supervisory capacities, a supervisor who did not personally participate in the allegedly unconstitutional conduct can only be held liable under § 1983 if there is some other causal connection between their actions and the alleged constitutional violation. *See, e.g., Hendrix v. Tucker*, 535 F. App'x 803, 805 (11th Cir. 2013) (per curiam). This causal connection can be established if the plaintiff shows that

> (1) a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation and he fail[ed] to do so; (2) the supervisor's improper custom or policy le[d] to deliberate indifference to constitutional rights; or (3) facts support an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so.

Id. "The standard by which a supervisor is held liable in her individual capacity for the actions of a subordinate is extremely rigorous." *Id.* (internal quotation marks omitted). Plaintiff does not allege that the attack in this case was more than an isolated incident, that any of these Defendants had any customs or policies that implicated Plaintiff's constitutional rights, or that they directed any of their subordinates to act unlawfully or knew they were doing so and failed to stop them. *See Hendrix*, 535 F. App'x at 805; *see also Depew v. City of St. Marys*, 787 F.2d 1496, 1499 (11th Cir. 1986) ("Normally random acts or isolated incidents are insufficient to establish a custom or policy."). The undersigned therefore **RECOMMENDS** that the failure to protect claims against Defendants Ford, Williams, Cross, and Hollman be **DISMISSED without prejudice.**

3. Remaining Claims

Plaintiff mentions in his Complaint that after the attack, he advised Defendant Hollman that he needed medical attention and a transfer, but he was "ignored." Compl. 4, ECF No. 7. Although the failure to adequately treat an inmate's serious medical needs can be actionable under § 1983, *see, e.g.*, *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003), Plaintiff has not provided enough information to state a claim upon which relief may be granted. Plaintiff does not state how long his medical needs were "ignored" by Defendant Hollman, and Plaintiff acknowledges that he did, in fact, receive medical treatment at the prison. Attach. 1 to Compl. at 1, ECF No. 7-1; *see McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999) (noting that while prison officials may act with deliberate indifference by delaying needed medical care, "the reason for the delay and the nature of the medical need is relevant in determining what type of delay is constitutionally intolerable").

Plaintiff has also filed documents suggesting that he has had difficulty exhausting the prison's grievance process. *See, e.g.*, Attach. 1 to Am. Compl. at 1, ECF No. 9-1.[2] Such allegations likewise fail to state a claim upon which relief may be granted. Prisoners have no constitutionally-protected liberty interest in accessing a prison's grievance procedure. *Bingham v. Thomas*, 654 F.3d 1171, 1177 (11th Cir. 2011) (per curiam);

[2]Plaintiff has filed a second Complaint (ECF No. 9) that the undersigned has construed as an Amended Complaint. *See* Fed. R. Civ. P. 15(a). The substantive allegations of the Amended Complaint mirror those made in the original Complaint, but the Amended Complaint contains several additional attachments that primarily show Plaintiff's efforts to exhaust his grievances at the prison.

Thomas v. Warner, 237 F. App'x 435, 438 (11th Cir. 2007) (per curiam) ("Plaintiff's allegations that prison officials failed to comply with the prison's voluntary grievance procedures does not state a due process claim.").

Finally, Plaintiff has filed a separate motion for injunctive relief (ECF No. 1). In this motion, Plaintiff seeks "injunctive relief against coercive or retaliatory conduct" by prison officials "to include retaliatory transfer." Mot. Injunctive Relief 1, ECF No. 1. To the extent Plaintiff's motion can be construed as one for preliminary injunctive relief, Plaintiff has failed to demonstrate that he is presently entitled to that remedy. A preliminary injunction is a drastic remedy used primarily to preserve the status quo rather than to grant most or all of the substantive relief sought in the complaint. *See, e.g.*, *Cate v. Oldham*, 707 F.2d 1176, 1185 (11th Cir. 1983); *Fernandez-Roque v. Smith*, 671 F.2d 426, 429 (11th Cir. 1982). A preliminary injunction is appropriate where the movant demonstrates (1) there is a substantial likelihood of success on the merits; (2) the preliminary injunction is necessary to prevent irreparable injury; (3) the threatened injury outweighs the harm the preliminary injunction would inflict on the non-movant; and (4) the preliminary injunction would not be adverse to the public interest. *See Parker v. State Bd. of Pardons & Paroles*, 275 F.3d 1032, 1034-35 (11th Cir. 2001) (per curiam).

Plaintiff does not clearly address these factors in his motion, and at this juncture the facts have not been sufficiently developed to conclude that there is a substantial likelihood that Plaintiff will ultimately prevail on the merits. *See S. Monorail Co. v. Robbins & Myers, Inc.*, 666 F.2d 185, 186 (5th Cir. Unit B 1982) ("A preliminary injunction may not

issue unless the movant carries the burden of persuasion as to all four prerequisites."). This is particularly true given that the courts are generally reluctant to interfere with state prison decisions such as the assignment of a prisoner to a specific facility. *See, e.g.*, *Freeman v. Fuller*, 623 F. Supp. 1224, 1227 (S.D. Fla. 1985) (finding that the placement of inmates inside a prison "is a matter peculiarly within the province of prison authorities' administrative duties" and that federal courts "accord great deference to administrative decisions rendered by prison authorities and will not interfere except in extreme cases"). In addition, the relief Plaintiff seeks in his motion for injunctive relief is primarily an instruction from the Court to have Defendants obey the law; this type of injunction is impermissible in this circuit. *Elend v. Basham*, 471 F.3d 1199, 1209 (11th Cir. 2006) ("It is well-established in this circuit that an injunction demanding that a party do nothing more specific than 'obey the law' is impermissible.").

For these reasons, the undersigned **RECOMMENDS** that any claims related to denial of adequate medical care or the lack of access to the grievance procedure be **DISMISSED without prejudice.** The undersigned further **RECOMMENDS** that Plaintiff's motion for injunctive relief (ECF No. 1) be **DENIED.**

III. Conclusion

Based on the foregoing, the undersigned **GRANTS** Plaintiff's motion to proceed *in forma pauperis* (ECF No. 10) and concludes Plaintiff has alleged facts sufficient to raise a colorable failure-to-protect claim against Defendant Doe. That claim shall therefore proceed for further factual development. The undersigned **RECOMMENDS**, however,

that Plaintiff's remaining claims be **DISMISSED without prejudice** and that Plaintiff's motion for injunctive relief (ECF No. 1) be **DENIED.**

OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to these recommendations with the Honorable Clay D. Land, Chief United States District Judge, **WITHIN FOURTEEN (14) DAYS** after being served with a copy of this Recommendation. The parties may seek an extension of time in which to file written objections, provided a request for an extension is filed prior to the deadline for filing written objections. Failure to object in accordance with the provisions of § 636(b)(1) waives the right to challenge on appeal the district judge's order based on factual and legal conclusions to which no objection was timely made. *See* 11th Cir. R. 3-1.

ORDER FOR SERVICE

Having found that Plaintiff has made colorable constitutional violation claims against Defendant Doe, it is accordingly **ORDERED** that service be made on Defendant and that he files an Answer, or such other response as may be appropriate under Rule 12, 28 U.S.C. § 1915, and the Prison Litigation Reform Act. Defendant is reminded of the duty to avoid unnecessary service expenses, and of the possible imposition of expenses for failure to waive service pursuant to Rule 4(d).

DUTY TO ADVISE OF ADDRESS CHANGE

During the pendency of this action, all parties shall keep the Clerk of this Court and

all opposing attorneys and/or parties advised of their current address. Failure to promptly advise the Clerk of a change of address may result in the dismissal of a party's pleadings.

DUTY TO PROSECUTE ACTION

Plaintiff is also advised that he must diligently prosecute his Complaint or face the possibility that it will be dismissed under Rule 41(b) of the Federal Rules of Civil Procedure for failure to prosecute. Defendant is similarly advised that he is expected to diligently defend all allegations made against him and to file timely dispositive motions as hereinafter directed. This matter will be set down for trial when the Court determines that discovery has been completed and that all motions have been disposed of or the time for filing dispositive motions has passed.

FILING AND SERVICE OF MOTIONS, PLEADINGS, AND CORRESPONDENCE

It is the responsibility of each party to file original motions, pleadings, and correspondence with the Clerk of Court. A party need not serve the opposing party by mail if the opposing party is represented by counsel. In such cases, any motions, pleadings, or correspondence shall be served electronically at the time of filing with the Court. If any party is not represented by counsel, however, it is the responsibility of each opposing party to serve copies of all motions, pleadings, and correspondence upon the unrepresented party and to attach to said original motions, pleadings, and correspondence filed with the Clerk of Court a certificate of service indicating who has been served and where (i.e., at what address), when service was made, and how service was accomplished.

DISCOVERY

Plaintiff shall not commence discovery until an answer or dispositive motion has been filed on behalf of the Defendant from whom discovery is sought by the Plaintiff. The Defendant shall not commence discovery until such time as an answer or dispositive motion has been filed. Once an answer or dispositive motion has been filed, the parties are authorized to seek discovery from one another as provided in the Federal Rules of Civil Procedure. The deposition of the Plaintiff, a state/county prisoner, may be taken at any time during the time period hereinafter set out provided prior arrangements are made with his custodian. **Plaintiff is hereby advised that failure to submit to a deposition may result in the dismissal of his lawsuit under Rule 37 of the Federal Rules of Civil Procedure.**

IT IS HEREBY ORDERED that discovery (including depositions and the service of written discovery requests) shall be completed within 90 days of the date of filing of an answer or dispositive motion by the Defendant (whichever comes first) unless an extension is otherwise granted by the court upon a showing of good cause therefor or a protective order is sought by the defendant and granted by the court. This 90-day period shall run separately as to Plaintiff and Defendant beginning on the date of filing of Defendant's answer or dispositive motion (whichever comes first). The scheduling of a trial may be advanced upon notification from the parties that no further discovery is contemplated or that discovery has been completed prior to the deadline.

Discovery materials shall not be filed with the Clerk of Court. No party shall be

required to respond to any discovery not directed to him/her or served upon him/her by the opposing counsel/party. The undersigned incorporates herein those parts of the **Local Rules** imposing the following limitations on discovery: except with written permission of the court first obtained, **interrogatories** may not exceed TWENTY-FIVE (25) to each party, **requests for production of documents and things** under Rule 34 of the Federal Rules of Civil Procedure may not exceed TEN (10) requests to each party, and **requests for admissions** under Rule 36 of the Federal Rules of Civil Procedure may not exceed FIFTEEN (15) requests to each party. No party shall be required to respond to any such requests which exceed these limitations.

REQUESTS FOR DISMISSAL AND/OR JUDGMENT

The Court shall not consider requests for dismissal of or judgment in this action, absent the filing of a motion therefor accompanied by a brief/memorandum of law citing supporting authorities. Dispositive motions should be filed at the earliest time possible, but in any event no later than one hundred - twenty (120) days from when the discovery period begins unless otherwise directed by the Court.

SO ORDERED this 20th day of October, 2017.

/s/ Stephen Hyles
UNITED STATES MAGISTRATE JUDGE