nthony C. Green, Plaintiff - Appellant v. Kelly Lake, Carlton County Sheriff; Kevin Moser, MSOP Facility Director; Steve Sayovitz, MSOP A-Team Supervisor; Ann Zimmerman, MSOP Administrator; Nicole Marvel, MSOP A-Team; Greg Swenson, Security Counselor; Elizabeth Barbo, MSOP - Former Assistant Clinical Director; Anthony Bastien, Carlton County Deputy Sheriff; Jesse Peterson, Carlton County Deputy Sheriff; Amanda Schaller, Security Counselor, Defendants - Appellees

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

2020 U.S. App. LEXIS 4293

No. 19-2001

January 31, 2020, Submitted

February 12, 2020, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2020 U.S. App. LEXIS 1}Appeal from United States District Court for the District of Minnesota.Green v. Lake, 2019 U.S. Dist. LEXIS 48762 (D. Minn., Mar. 25, 2019)

Counsel Anthony C. **Green**, Plaintiff - Appellant, Pro se, Moose **Lake**, MN.

For Kelly **Lake**, Carlton County Sheriff, Anthony Bastien, Carlton County Deputy Sheriff, Jesse Peterson, Carlton County Deputy Sheriff, Defendants - Appellees: Susan Marie Tindal, Andrew A. Wolf, IVERSON & REUVERS, Bloomington, MN.

For Kevin Moser, MSOP Facility Director, Steve Sayovitz, MSOP A-Team Supervisor, Ann Zimmerman, MSOP Administrator, Nicole Marvel, MSOP A-Team, Greg Swenson, Security Counselor, Defendants - Appellees: James H. Clark, III, Assistant Attorney General, ATTORNEY GENERAL'S OFFICE, Saint Paul, MN.

Judges: Before SHEPHERD, STRAS, and KOBES, Circuit Judges.

Opinion

PER CURIAM.

Anthony Green, who is civilly committed to the Minnesota Sex Offender Program, appeals the district court's 1 dismissal of his pro se 42 U.S.C. § 1983 action. Upon careful de novo review, see Montin v. Moore, 846 F.3d 289, 292, 293 (8th Cir. 2017) (standard of review), we find no error in the district court's well-reasoned decision. We agree that Green did not state a claim for constitutional violations stemming from the use of force, see Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473, 192 L. Ed. 2d 416 (2015) (in excessive-force claim, detainee must show that force purposely used against him was objectively unreasonable);**{2020 U.S. App. LEXIS 2}** Folkerts v. City of Waverly, 707 F.3d 975, 980 (8th Cir. 2013) (substantive due process claim requires that defendants violated plaintiff's fundamental right and that their conduct shocked conscience); the conduct of strip searches, see Bell v. Wolfish, 441 U.S. 520, 558-59, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (in determining reasonableness of search, court considers scope of intrusion, manner and location in which search is conducted, and

justification for search); Folkerts, 707 F.3d at 980; or his placement in the High Security Area, see Wong v. Minn. Dep't of Human Servs., 820 F.3d 922, 935 (8th Cir. 2016) (plaintiff failed to state procedural due process claim where complaint made clear that he had opportunity to be heard at meaningful time and in meaningful manner); Folkerts, 707 F.3d at 980. We also find that the district court did not abuse its discretion in denying Green leave to file a second amended complaint. See Pet Quarters, Inc. v. Depository Tr. & Clearing Corp., 559 F.3d 772, 782 (8th Cir. 2009).

The judgment is affirmed. See 8th Cir. R. 47B.

Footnotes

1

The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota, adopting the report and recommendations of the Honorable Steven E. Rau, late United States Magistrate Judge for the District of Minnesota.

Anthony C. Green, Plaintiff, v. Kelly Lake, Carlton County Sheriff; Kevin Moser, MSOP Facility Director; Steven Sayovitz, MSOP A-Team Supervisor; Ann Zimmerman, MSOP Administrator; Nicole Marvel, MSOP A-Team Supervisor; Greg Swenson, Security Counselor; Amanda Schaller, Security Counselor; Elizabeth Barbo, MSOP-Former Assistant Clinical Director; Anthony Bastien, Carlton County Deputy Sheriff; and Jesse Peterson, Carlton County Deputy Sheriff; in their individual and official capacities, Defendants.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

2019 U.S. Dist. LEXIS 48762

Civil No. 14-1056 ADM/SER

March 25, 2019, Decided

March 25, 2019, Filed

Editorial Information: Subsequent History

Affirmed by **Green** v. **Lake**, 2020 U.S. App. LEXIS 4293 (8th Cir. Minn., Feb. 12, 2020)

Editorial Information: Prior History

Green v. **Lake**, 2019 U.S. Dist. LEXIS 49244 (D. Minn., Jan. 30, 2019)

Counsel **{2019 U.S. Dist. LEXIS 1}**Anthony C. **Green**, Pro se.

Susan M. Tindal, Esq., Iverson Reuvers Condon, Bloomington, MN, on behalf of Defendants Kelly **Lake**, Jesse Peterson, and Anthony Bastien.

James H. Clark, III, Esq., Assistant Minnesota Attorney General, Minnesota Attorney General's Office, St. Paul, MN, on behalf of Defendants Kevin Moser, Steven Sayovitz, Ann Zimmerman, Nicole Marvel, and Greg Swenson.

Daniel P. Kurtz, Esq., League of Minnesota Cities, St. Paul, MN, on behalf of Defendant Bryce Bogenholm.

Judges: ANN D. MONTGOMERY, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: ANN D. MONTGOMERY

Opinion

MEMORADUM OPINION AND ORDER

I. INTRODUCTION

This matter is before the undersigned United States District Judge for a ruling on Defendants Kelly **Lake**, Jesse Peterson, and Anthony Bastien's (the "Carlton County Defendants") Objection [Docket No. 95] to Magistrate Judge Steven E. Rau's January 30, 2019 Report and Recommendation [Docket No. 94] ("R&R"). Also before the Court is Plaintiff Anthony C. Green's ("**Green**") Motion to Accept Late Submission [Docket No. 96] and Green's Objection [Docket No. 97] to the R&R.

In the R&R, Judge Rau recommends granting the two motions to dismiss filed by Defendants Kevin Moser, Steven Sayovitz, Ann Zimmerman, Nicole Marvel,**{2019 U.S. Dist. LEXIS 2}** and Greg Swanson (collectively, the "MSOP Defendants") in their official and individual capacities [Docket Nos.

22, 53]; granting the motion to dismiss filed by Defendant Bryce Bogenholm1 [Docket No. 35]; and granting the motion to dismiss or for summary judgment filed by the Carlton County Defendants [Docket No. 66]. The R&R also recommends dismissing Green's Amended Complaint [Docket No. 14] with prejudice. For the reasons stated below, the Carlton County Defendants' Objection is sustained, Green's Motion to Accept Late Submission is granted, and Green's Objection is overruled.

II. BACKGROUND

The background is set forth in the R&R and is incorporated by reference. Briefly, **Green** is a civilly committed detainee at the Minnesota Sex Offender Program in Moose **Lake**, Minnesota ("MSOP"). Am. Compl. [Docket No. 14] ¶ 7. The MSOP Defendants are all MSOP employees. Id. ¶ 8. The Carlton County Defendants are employed with the Carlton County Sheriff's Office. Id. Defendant Bryce Bogenholm is the Moose **Lake** Police Chief. Id.

Green filed this 42 U.S.C. § 1983 lawsuit on April 11, 2014. **Green** alleges that Defendants violated his rights under the Fourth and Fourteenth Amendments to the U.S. Constitution. The allegations as taken from Green's Amended Complaint are**{2019 U.S. Dist. LEXIS 3}** as follows.

On September 28, 2010, the MSOP Defendants handcuffed **Green** and secured him in an observation cell in MSOP's High Security Area ("HSA"). Am. Compl. ¶ 11. Pursuant to MSOP policy, **Green** was required to submit to an unclothed visual body strip search ("UVBSS") upon being placed in HSA. Id. ¶ 43. If a detainee does not consent to the UVBSS, MSOP's policy requires staff to ask the detainee every 30 minutes for consent to the search. Id. ¶ 44. If the detainee still refuses to consent after four hours, MSOP staff may obtain authorization to perform a non-consenting search that includes cutting the detainee's clothing off with a scissors. Id. **Green** refused to consent to a UVBSS. Id. ¶ 11. After four hours, MSOP staff cut and removed Green's clothing to allow a search for contraband. Id.

On March 24, 2011, MSOP employees attempted to prevent **Green** from entering the MSOP dining room. Id. ¶ 18. MSOP Defendant Greg Swenson ("Swenson") attacked **Green** from behind and shoved him from behind into another MSOP staff member. Id. ¶¶ 18-19. During the altercation, MSOP Defendant Nicole Marvel ("Marvel") twisted Green's handcuffs while trying to remove his shoes and "Do Rag" and "did damage**{2019 U.S. Dist. LEXIS 4}** to [Green's] wrists." Id. ¶ 23. The same day as the March 24 altercation, **Green** was again placed in HSA. Id. ¶ 12. This time, he consented to the UVBSS search. Id.

On June 13, 2012, Carlton County Defendants Anthony Bastien ("Deputy Bastien") and Jesse Peterson ("Deputy Peterson") served **Green** with an arrest warrant at the MSOP facility. Id. ¶ 26. The deputies were escorting **Green** in handcuffs from the facility when MSOP Defendant Steve Sayovitz ("Sayovitz") informed MSOP Defendant Elizabeth Barbo ("Barbo") that Sayovitz intended to be granted approval for a UVBSS of **Green**. Id. ¶¶ 26, 28. Deputy Bastien told Sayovitz that he did not agree with the UVBSS being conducted while **Green** was in Carlton County's custody and that the UVBSS should have been performed prior to the deputies' arrival. Id. ¶¶ 29, 32, 34. While Deputy Bastien was advising his supervisor of his concerns, Deputy Peterson removed the handcuffs from **Green**. Id. ¶¶ 32, 34. MSOP Defendants then placed MSOP's handcuffs on **Green** and, without Deputy Bastien's knowledge, conducted a UVBSS on **Green** in front of a female staff member. Id. ¶ 27, 32.

In addition to these incidents, **Green** alleges that MSOP's placement policy authorized**{2019 U.S. Dist. LEXIS 5}** MSOP staff to place **Green** in HSA for extended periods exceeding 24 hours without due process protections. Id. ¶ 13.

Green asserts a claim against the MSOP Defendants for violation of his procedural and substantive

due process rights under the 14th Amendment (Count I), a claim against all Defendants for illegal search and seizure in violation of the Fourth Amendment (Count II), and a claim against all Defendants for excessive force in violation of the Fourth Amendment (Count III). **Green** also alleges that MSOP's client search and protective isolation policies are unconstitutional. Am. Compl. ¶¶ 50, 57.

The R&R recommends dismissing all of Green's claims for failure to state a plausible claim for relief. R&R at 12-21.

III. DISCUSSION

A. Standard of Review

In reviewing a magistrate judge's report and recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C); see also D. Minn. L.R. 72.2(b). A district judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." Id.

B. Carlton County Defendants' Objection

The Carlton County Defendants ask the Court to adopt the R&R with one modification.**{2019 U.S. Dist. LEXIS 6}** In addressing Green's claims that he was subjected to an unlawful UVBSS on June 13, 2012, the R&R states, "**Green** does not allege that the search itself was done by a female staff member; he admits Peterson, the male Deputy Carlton County Sheriff performed the search." R&R at 17. The Carlton County Defendants argue that the record establishes Deputy Peterson did not conduct the search and did not allow staff from the MSOP to perform the search while Carlton County's handcuffs were on **Green**. The Carlton County Defendants thus request that this Court remove any reference to Deputy Peterson conducting the search.

The Court agrees with the Carlton County Defendants that the Amended Complaint and the record lack any indication that Deputy Peterson conducted the search. Paragraph 27 of the Amended Complaint alleges that staff from MSOP, rather than Deputy Peterson, performed the alleged search:

> Defendant Peterson assisted the strip search by removing [Carlton County's] handcuffs and allowing MSOP Defendants to place their handcuffs on Plaintiff and conducted the forced unclothed full body cavity strip search in front of female staff and an MSOP nurse. MSOP Defendants held Plaintiff down and forcibly**{2019 U.S. Dist. LEXIS 7}** cut his clothes off, humiliating him in the presence of female staff.Further, **Green** clarifies in his opposition to the Carlton County Defendants' Motion to Dismiss that the "Carlton County [Defendants] did not participate in the strip search," and that "they called their supervisor because they disagreed with MSOP Defendants conducting a strip search." See Pl.'s Reply Mem. Law Resp. Carlton County Defs.' Reply [Docket No. 78] at 2. Thus, the findings in the R&R are modified to remove any reference to Deputy Peterson conducting the search.

C. Green's Motion to Accept Late Submission

Green asks the Court to accept his tardily filed Objection to the R&R. The R&R was entered on Wednesday, January 30, 2019. **Green** states that he received the R&R in the mail on Monday, February 4, 2019. Under Federal Rules of Civil Procedure 6(a)(1)(C) and 72(b)(2), **Green** had until February 19, 2019 to mail his Objection. **Green** did not mail his Objection until February 20, 2019. Defendants do not argue that they were prejudiced by the one-day delay in filing. The Court grants the motion to accept Green's tardily filed Objection.

D. Green's Objection

Green objects to the portions of the R&R that conclude he has failed to state a claim for excessive force, procedural{**2019 U.S. Dist. LEXIS 8**} due process, and substantive due process. Obj. at 5-17. **Green** also argues that the R&R incorrectly concludes that Defendants are entitled to qualified immunity. Id. at 19-20. **Green** alternatively requests leave to amend the Amended Complaint to cure any deficiencies. Id. at 4-5, 17-19.

1. Excessive Force Claims

Green argues that the R&R erroneously concluded the Amended Complaint fails to state a claim for excessive force. **Green** contends that the case must proceed so that the record can be developed regarding whether Defendants' actions were objectively reasonable.

Excessive force claims brought by civilly committed individuals are analyzed under the same standard as pre-trial detainees. Andrews **v.** Neer, 253 F.3d 1052, 1061 (8th Cir. 2001). To bring a claim for excessive force under § 1983, "a pretrial detainee must show . . . that the force purposely or knowingly used against him was objectively unreasonable." Kingsley **v.** Hendrickson, 135 S. Ct. 2466, 2473, 192 L. Ed. 2d 416 (2015); Ryan **v.** Armstrong, 850 F.3d 419, 427 (8th Cir. 2017). Whether the force used was objectively unreasonable "turns on the facts and circumstances of each particular case." Kingsley, 135 S. Ct. at 2473 (quotations omitted). Relevant factors include the relationship between the need for force and the amount of force used, the extent of the plaintiff's injury, efforts by the officer to limit the amount of force, the severity of the security problem, the threat{**2019 U.S. Dist. LEXIS 9**} reasonably perceived by the officer, and whether the plaintiff was resisting. Id. "A court must also account for the legitimate interests that stem from the government's need to manage the facility in which the individual is detained, appropriately deferring to policies and practices that in the judgment of jail officials are needed to preserve internal order and discipline and to maintain institutional security." Id. (internal quotations and alterations omitted).

The reasonableness of the force used "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham **v.** Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that . . . officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." Id. at 396-97 (internal citation omitted). Because § 1983 liability is personal, each defendant's conduct must be independently assessed. Wilson **v.** Northcutt, 441 F.3d 586, 591 (8th Cir. 2006).

The Amended Complaint alleges that Defendants Swenson and Marvel{**2019 U.S. Dist. LEXIS 10**} used excessive force on **Green** during the March 2011 altercation when Swenson shoved **Green** from behind into another MSOP staff member, and Marvel twisted Green's handcuffs while trying to remove his Do Rag and shoes. Am. Compl. ¶¶ 18-20, 23. The R&R concluded that these actions did not rise to the level of an excessive force claim because **Green** did not allege painful or lasting injuries from the actions. R&R at 12-13.

Although Green's failure to allege more than *de minimis* injury is not dispositive,2 it suggests that the force used by Swenson and Marvel was *de minimis*. See Chambers **v.** Pennycook, 641 F.3d 898, 907 (8th Cir. 2011) ("A *de minimis* use of force is insufficient to support a claim, and it may well be that most plaintiffs showing only *de minimis* injury can show only a corresponding *de minimis* use of force.") (internal citation omitted). Additionally, the facts alleged do not suggest that the amount of force used was unreasonable in relation to the force required. Swenson shoved **Green** from behind into another person while attempting to deny **Green** access to the dining hall. Marvel twisted Green's

handcuffs, but did so while trying to maintain security by removing Green's shoes and head wear. Thus the allegations in the Amended Complaint, assumed**{2019 U.S. Dist. LEXIS 11}** as true, do not establish that the particular force used by Swenson and Marvel under the circumstances was objectively unreasonable.

Even if **Green** could state a plausible claim against Swenson or Marvel for excessive force, they would be entitled to qualified immunity. "An officer enjoys qualified immunity and is not liable for excessive force unless he has violated a clearly established right, such that it would have been clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Kingsley, 135 S. Ct. at 2474 (quotations omitted). Prior to the Eighth Circuit's June 2011 decision in Chambers v. Pennycook, "[i]t was not clearly established . . . that an officer violated the rights of an arrestee [or detainee] by applying force that caused only *de minimis* injury." 641 F.3d at 908. The force used by Swanson did not cause any injury, and the force used by Marvel caused only *de minimis* injury. Thus, at the time of the March 2011 incident alleged by **Green**, it would not have been clear to a reasonable officer that the force used by Swanson and Marvel was unlawful.

Green also appears to allege an excessive force claim against Defendant Sayovitz based on Sayovitz's informing MSOP Defendant**{2019 U.S. Dist. LEXIS 12}** Barbo on June 13, 2012 that Sayovitz intended to be given approval to conduct a UVBSS on **Green**. Am. Compl. ¶ 28. This allegation does not state a claim for excessive force because "[v]erbal threats are not constitutional violations cognizable under § 1983." Martin v. Sargent, 780 F.2d 1334, 1338 (8th Cir. 1985).

2. Unreasonable Search and Seizure Claims

Green also objects to the R&R's recommended dismissal of his unreasonable search and seizure claims. **Green** contends that the facts must be developed to determine whether the unclothed visual searches were conducted in a reasonable manner, and whether it was reasonable to confine **Green** to HSA and handcuff him for four hours while in HSA.

The Court agrees with the conclusion in the R&R that the facts alleged in the Amended Complaint do not establish that the searches and seizures were unreasonable. MSOP's policy requires unclothed body searches when a detainee enters a new security area within MSOP or leaves the MSOP facility. Am. Compl. ¶ 43. This policy advances the interests of institutional security and public safety by ensuring that a detainee is not smuggling drugs, weapons, or other contraband. See Beaulieu v. Ludeman, 690 F.3d 1017, 1030 (8th Cir. 2012) ("[T]he MSOP's policy of performing unclothed body searches of patients before they leave the**{2019 U.S. Dist. LEXIS 13}** secure perimeter is not unreasonable."); Story v. Foote, 782 F.3d 968, 971 (8th Cir. 2015) (stating that "detention facilities are fraught with serious security dangers," and "correctional institutions have a strong interest in preventing and deterring the smuggling of money, drugs, weapons, and other contraband").

Green has not alleged any facts to suggest that the searches were conducted unreasonably. Although MSOP staff cut off his clothes with a scissors when performing the September 2010 and June 2012 searches, the actions were reasonable and appropriate because **Green** refused to comply with the searches. Am. Compl. ¶¶ 11, 34. Additionally, although the June 2012 search was allegedly conducted in front of female staff, this allegation does not render the search unreasonable. See Story, 782 F.3d at 972 (upholding reasonableness of body cavity search that may have been viewed by a female correctional officer through a security camera).3

Green also fails to alleged facts suggesting that his placement in HSA or remaining in handcuffs for four hours amounted to unreasonable seizures. The decision to place a civilly committed individual in HSA is presumptively valid if made by a professional. Youngberg v. Romeo, 457 U.S. 307, 323, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982). "[L]iability may be imposed only when the decision by the**{2019**

U.S. Dist. LEXIS 14} professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." Id. **Green** alleges no facts to show that his confinement in HSA was a departure from accepted practice or was not based on professional judgment. Thus, his confinement in HSA was not an unreasonable seizure.

Green's allegation that he was handcuffed for four hours on September 28, 2010 also does not amount to an unreasonable seizure. During this time, MSOP employees were waiting for **Green** to consent to a UVBSS. Am. Compl. ¶ 44. While **Green** refused to submit to a UVBSS, it was reasonable for MSOP staff to keep him handcuffed until he could be examined for weapons or other contraband.

To the extent that **Green** alleges an unlawful seizure claim against the Carlton County Defendants based on their arrest of **Green** on June 13, 2012, this claim fails because the Amended Complaint states that the Carlton County Defendants served **Green** with an arrest warrant. Am. Compl. ¶ 13. "An arrest executed pursuant to a facially valid warrant generally does not give rise to a cause of action under 42 U.S.C. § 1983 against**{2019 U.S. Dist. LEXIS 15}** the arresting officer." Fair v. Fulbright, 844 F.2d 567, 569 (8th Cir. 1988).

3. Procedural Due Process Claims

Green next objects to the R&R's recommended dismissal of his procedural due process claims. **Green** argues that his confinement in HSA for more than 24 hours and being handcuffed for four hours implicate protected liberty interests.

"To set forth a procedural due process violation, a plaintiff, first, must establish that his protected liberty or property interest is at stake. Second, the plaintiff must prove that the defendant deprived him of such an interest without due process of law." Schmidt v. Des Moines Pub. Sch., 655 F.3d 811, 817 (8th Cir. 2011).

In determining whether an official action has deprived a confined person of a protected liberty interest, a court must inquire whether the official action imposed an "atypical and significant hardship on the [confined person] in relation to the ordinary incidents of [confined] life." Wilkinson v. Austin, 545 U.S. 209, 223, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005) (quoting Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995)). Civilly committed persons are entitled to "more considerate treatment and conditions of confinement" than prisoners, but a civilly committed person's liberty interests are "considerably less than those held by members of free society." Senty-Haugen v. Goodno, 462 F.3d 876, 886 (8th Cir. 2006). Green's placement in HSA for more than 24 hours and being handcuffed for four hours did not impose a significant and**{2019 U.S. Dist. LEXIS 16}** unusual hardship in relation to the ordinary incidents of life at a secured facility such as MSOP.

Additionally, even if **Green** had sufficiently alleged a that he was deprived of a protected liberty interest, he does not allege any facts to show that he received less process than was due. For example, he does not allege that he invoked MSOP's grievance procedure to challenge his HSA placement. See Am. Compl. ¶ 45 (outlining MSOP's grievance procedure for challenging placement in HSA).

4. Substantive Due Process Claims

Green also objects to the R&R's recommendation that his substantive due process claims be dismissed. To plead a claim for substantive due process, a plaintiff must allege facts showing the defendant's actions were "conscious shocking" and violated a "fundamental liberty interest." See Karsjens v. Piper, 845 F.3d 394, 408 (8th Cir. 2017) (specifying standard for substantive due process

claim). The R&R correctly applied this standard and concluded that **Green** has not alleged conduct by Defendants that shocked the conscience.

5. Constitutional Challenge to MSOP Policies

The R&R recommends dismissing with prejudice Green's claim that MSOP's UVBSS policy is unconstitutional. **Green** requests that the R&R be modified to dismiss the claim**{2019 U.S. Dist. LEXIS 17}** without prejudice so that he may have an opportunity to cure the deficiencies in the Amended Complaint. This request is denied because **Green** does not specify what additions or corrections he would or could make that would cure the deficiencies.

6. Qualified Immunity

Green generically argues that Defendants are not entitled to qualified immunity because he has alleged facts supporting his claims that Defendants' conduct violated his clearly established constitutional rights. This argument fails because the Amended Complaint does not allege sufficient facts to establish that Green's constitutional rights were violated by any Defendant.

7. Request to File Second Amended Complaint

Finally, **Green** requests leave to amend the Amended Complaint to give him an opportunity to "correct any deficiencies." Obj. at 19. Rule 15(a) of the Federal Rules of Civil Procedure instructs that leave to amend the complaint be given freely if justice so requires. Fed. R. Civ. P. 15(a). However, a court has discretion to deny leave to amend under any of the following circumstances: "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment,**{2019 U.S. Dist. LEXIS 18}** [or] futility of [the] amendment." Foman **v.** Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962).

Green has already amended his Complaint once, and there is no indication that he will be able to cure the deficiencies in the Amended Complaint by amending his Complaint a second time. **Green** does not identify what, if any, additional facts he would allege that would be sufficient to "state a claim to relief that is plausible on its face." Bell Atl. Corp. **v.** Twombly, 550 U.S. 544, 555, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Based on Green's pleadings thus far, it appears that a second amended complaint would be futile. Although the Court recognizes Green's pro se status, justice does not require leave to once again amend the Complaint.

IV. CONCLUSION

Based upon the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendants Kelly **Lake**, Jesse Peterson, and Anthony Bastien's Objection [Docket No. 95] to the R&R is **SUSTAINED**;

2. Plaintiff Anthony C. Green's Motion to Accept Late Submission [Docket No. 96] is **GRANTED**;

3. Green's Objection [Docket No. 97] to the R&R is **OVERRULED**;

4. The Report and Recommendation [Docket No. 94] is **ADOPTED IN PART** and **MODIFIED IN PART** as stated above;

5. Defendants' Motions to Dismiss [Docket Nos. 22, 35, 53, and 66] are **GRANTED**; and

6. The Amended Complaint [Docket**{2019 U.S. Dist. LEXIS 19}** No. 14] is **DISMISSED WITH PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

/s/ Ann D. Montgomery

ANN D. MONTGOMERY

U.S. DISTRICT JUDGE

Dated: March 25, 2019.

Footnotes

1

The caption of the First Amended Complaint [Docket No. 14] does not include Bryce Bogenholm as a named defendant, but Paragraph 8(j) of the First Amended Complaint lists "Bryce Bogenhol [sic]" as a defendant in this case.

2

In June 2011, the Eighth Circuit Court of Appeals clarified that "there is no uniform requirement that a plaintiff show more than *de minimis* injury to establish an application of excessive force." Chambers v. Pennycook, 641 F.3d 898, 907 (8th Cir. 2011). The Chambers Court reasoned that "[t]he degree of injury should not be dispositive, because the nature of the force applied cannot be correlated perfectly with the type of injury inflicted. Some plaintiffs will be thicker-skinned than others, and the same application of force will have different effects on different people." Id. at 906. However, the degree of injury is relevant to show the amount and type of force used. Id.

3

To the extent that Green alleges a claim against the Carlton County Defendants for failure to prevent the June 2012 search, the claim fails because the search itself was constitutional. See Anderson v. City of Hopkins, 805 F. Supp. 2d 712, 721 (D. Minn. 2011) ("[A] claim against an officer under § 1983 for failure to intervene or prevent harm necessarily assumes another officer violated plaintiff's constitutional rights."). Further, the Carlton County Defendants lacked the means to prevent the search from occurring because the search was performed on a MSOP detainee in an MSOP facility by MSOP staff pursuant to MSOP policy.

Anthony C. Green, Plaintiff, v. Kelly Lake, Kevin Moser, Steven Sayovitz, Ann Zimmerman, Nicole Marvel, Greg Swenson, Elizabeth Barbo, Bryce Bogenhol, Anthony Bastien, Jesse Peterson, Jesse Berglund, Amanda Shaller, in their individual and official capacities, Defendants.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA
2019 U.S. Dist. LEXIS 49244
Case No. 14-cv-1056 (ADM/SER)
January 30, 2019, Decided
January 30, 2019, Filed

Editorial Information: Subsequent History

Modified by, in part, Adopted by, in part, Objection sustained by, in part, Objection overruled by, Dismissed by Green v. Lake, 2019 U.S. Dist. LEXIS 48762 (D. Minn., Mar. 25, 2019)

Counsel. **{2019 U.S. Dist. LEXIS 1}** Anthony C. Green, Pro se.

For Kelly Lake, Anthony Bastien, and Jesse Peterson, Defendant: Susan M. Tindal, Iverson Reuvers Condon.

For Kevin Moser, Steven Sayovitz, Ann Zimmerman, Nicole Marvel, and Greg Swenson, Defendants: James H. Clark III, Minnesota Attorney General's Office.

For Bryce Bogenhol, Defendant: Daniel P. Kurtz, League of Minnesota Cities.

Judges: Steven E. Rau, United States Magistrate Judge.

Opinion

Opinion by: Steven E. Rau

Opinion

REPORT AND RECOMMENDATION

STEVEN E. RAU, United States Magistrate Judge

This matter is before the Court on Defendants' motions to dismiss Plaintiffs' Amended Complaint.1 (ECF Nos. 22, 35, 53, 65). This matter was referred for the resolution of pretrial matters pursuant to 28 U.S.C. § 636 and District of Minnesota Local Rule 72.2. For the reasons stated below, this Court recommends Defendants' motions be granted and this matter be dismissed with prejudice.

I. BACKGROUND

A. Procedural Background

Plaintiff Anthony C. Green is civilly committed to the Minnesota Sex Offender Program ("MSOP") in Moose Lake, Minnesota. He initiated this lawsuit on April 11, 2014 asserting various constitutional claims against numerous defendants. (ECF No. 1). This case was then stayed pending resolution of a motion for class certification**{2019 U.S. Dist. LEXIS 2}** by individuals civilly committed to MSOP. (ECF No. 5). Upon court order, Green amended his complaint on July 8, 2016. (ECF Nos. 13, 14). Green's amended complaint asserted the same claims, added further supporting facts, and removed some

defendants. (Am. Compl., ECF No. 14). The stay was lifted on April 14, 2016 and Defendants Bogenhol, Bastien, **Lake** Peterson, Moser, Linkert, Marvel, Swenson, and Sayowitz filed motions to dismiss. (ECF Nos. 12, 13, 22, 35, 53, 66). The case was stayed again on June 30, 2017 because it was deemed sufficiently related to *Karsjens, et al. v. Piper, et al.*, Case No. 11-cv-3659 (DWF/TNL). (ECF No. 79). The new stay was lifted on October 22, 2018. (ECF No. 86). The Court permitted the parties to file supplemental briefing addressing any changes in law that may affect the Court's analysis of the already-submitted motions to dismiss. (ECF No. 87). The parties submitted their supplemental briefs and the motions are ripe for determination. (ECF Nos. 89, 90, 91, 93).2

B. Factual Allegations

1. Unreasonable Search and Seizure

Green claims he was subjected to illegal searches and seizures on multiple occasions at MSOP. On September 28, 2010,**{2019 U.S. Dist. LEXIS 3}** **Green** claims he was forcibly subjected to an unclothed visual body strip search ("UVBSS")3 in an observation cell for contraband, which was never found. (Am. Compl., at 5). He claims another UVBSS was performed again on March 24, 2011 by MSOP officers in full riot gear. (Am. Compl., at 5). **Green** alleges that unidentified MSOP employees "allowed A-Team members and unit staff to attack Plaintiff without cause or provocation" and that he was thrown to the ground and choked by an MSOP employee. (Am. Compl., at 8). **Green** claims he refused the UVBSS during the first incident and had his clothes forcibly cut off, and claims he disagreed with the UVBSS but complied in the second incident. (Am. Compl., at 5).

On June 13, 2012, **Green** claims MSOP employees again forced an UVBSS on him while the Carlton County Sheriff effected Green's arrest. (Am. Compl., at 10). He claims this search, "humiliate[ed] him in the presence of female staff." (Am. Compl., at 11). **Green** states MSOP employees "stormed into the visiting room in full riot gear and attacked plaintiff from behind" while he was handcuffed. (Am. Compl., at 12). **Green** claims Defendant Barbo, an MSOP Assistant Director, "had no reasonable suspicion**{2019 U.S. Dist. LEXIS 4}** or justification to approve the unconstitutional strip search" and that **Green** was not resisting, was not fighting back, and not threatening" during the entire incident. (Am. Compl., at 11-12).

Green also claims his placement in Protective Isolation/Administrative Restriction ("AR status") for extended periods of time over twenty-four hours violates his Fourth Amendment rights.4

2. Unconstitutional Policies

Green's complaint repeatedly states that MSOP policies were applied to him unconstitutionally, failed to support a legitimate government interest, and did not provide him proper procedural protections. He identifies "Relevant MSOP Policies" and summarizes the contents of these policies. (*See* Am. Compl., at 16-19). **Green** explains that an individual at MSOP may be placed on AR status in the High Security Area ("HSA"), that an individual on AR status has a right to appeal this status and her/his conditions during that time, and under what circumstances AR status must be discontinued. (Am. Compl., at 16-19). **Green** also explains MSOP's policy on UVBSS: the manner in which they should be performed, and the steps MSOP must follow if an individual refuses an UVBSS. (Am. Compl., at 18). Finally, **Green** explains**{2019 U.S. Dist. LEXIS 5}** that MSOP policy does not allow individuals to call their attorneys. (Am. Compl., at 19).

3. Due Process and Excessive Force

Green argues MSOP staff placed him in HSA for extended periods of time without due process protections. (Am. Compl., at 6). He claims he should have had some form of hearing before being placed in HSA because it violated his liberty interests. (Am. Compl., at 7).

Green claims Defendant Marvel used excessive force when restraining him during the March 24, 2010 incident. (Am. Compl., at 9). Green states that "Marvel, while trying to remove Plaintiff's Do Rag and shoes, twisted the handcuffs and did damage to Plaintiff's wrists." (Am. Compl., at 9).

4. Other Concerns

Green argues his Fourth and Fourteenth Amendment rights were violated when he was denied access to his property while in HSA. (Am. Compl., at 6). Green argues the following restrictions while he was in HSA were illegal: only being allowed one book at a time, being served meals in his cells, not being allowed to participate in any off unit activities, and being restricted to one thirty-minute period outside his cell per day. (Am. Compl., at 6).

C. Specific Factual Allegations Against Defendants

1. Defendants Berglund, Moser, Zimmerman,{2019 U.S. Dist. LEXIS 6} Lake, Bogenhol

Green states Moser is the Director of MSOP, Zimmerman is the Program Manager for MSOP, Lake is the Carlton County Sheriff, and Bogenhol is the Moose Lake Police Chief. (Am. Compl., at 3-4). Aside from being listed as a party to the lawsuit, none of these Defendants are mentioned anywhere in the complaint. The Court does not address the complaint for claims against these Defendants because Green does not allege they were personally involved or responsible for any constitutional violations.5

2. Defendant Sayovitz

Green states Sayovitz was an A-Team Supervisor at MSOP. (Am. Compl., at 4). Green claims Sayovitz "informed Assistant director [sic] Defendant Barbo about his intention to be granted approval for the unclothed visual body search." (Am. Compl., at 11). Green also states Defendant Sayovitz told him "Anthony you brought this on yourself. We're going to remove the Police cuffs, and place our cuffs on you." (Am. Compl., at 32). Green alleges Defendant Sayovitz "implemented, retained, and carried out policies that violated the constitutional rights of Plaintiff." (Am. Compl., at 11).

3. Defendant Marvel

Green states Marvel is an A-Team member at MSOP. (Am. Compl., at 4).**{2019 U.S. Dist. LEXIS 7}** Green claims Marvel filed a false incident report "accusing Plaintiff of pushing her into a brick wall and sustaining injuries." (Am. Compl., at 9). He claims Marvel used excessive force to cause harm to him, such as when Marvel "twisted the handcuffs and did damage to Plaintiff's wrists." (Am. Compl., at 9). Green alleges that Marvel implemented, retained, and carried out policies that violated the constitutional rights of Plaintiff." (Am. Compl., at 8).

4. Defendant Swenson

Green states Swenson is a Security Counselor at MSOP. (Am. Compl., at 4). Green alleges Swenson "attacked Plaintiff from behind" and "shoved Plaintiff from behind" on March 24, 2010. (Am. Compl., at 8). He also alleges Swenson filed a false report on the March incident by stating Green was out of control. (Am. Compl., at 8). Green finally alleges Swenson "implemented, retained, and carried out policies that violated the constitutional rights of Plaintiff." (Am. Compl., at 8).

5. Defendant Schaller

Green states Schaller is a security counselor at MSOP. (Am. Compl., at 4). Green claims Schaller "omitted the attack by Defendant Swenson" in her report of the incident that happened on March 24, 2010. (Am. Compl., at 9).**{2019 U.S. Dist. LEXIS 8}** Green alleges Schaller "implemented, retained, and carried out policies that violated the constitutional rights of Plaintiff." (Am. Compl., at 9).

6. Defendant Bastien

Green states Bastien is a Deputy Carlton County Sheriff. (Am. Compl., at 4). **Green** alleges Bastien refused to "file criminal charges against MSOP employees for sexually assaulting him." (Am. Compl., at 23-24). **Green** claims "Defendant Bastien never booked Plaintiff into the jail under the booking and fingerprinting process." (Am. Compl., at 15). **Green** alleges Bastien "implemented, retained, and carried out policies that violated the constitutional rights of Plaintiff." (Am. Compl., at 15).

7. Defendant Peterson

Green states Peterson is a Deputy Carlton County Sheriff. (Am. Compl., at 4). **Green** alleges Peterson removed Green's handcuffs so MSOP staff could place handcuffs on **Green**, and that Peterson "picked up the phone and stated: 'Ok, I understand, alright.'" (Am. Compl., at 13). **Green** alleges Peterson "implemented, retained, and carried out policies that violated the constitutional rights of Plaintiff." (Am. Compl., at 13).

8. Defendant Barbo

Green states defendant Barbo is an "Assistant Director" at MSOP. (Am. Compl., at **{2019 U.S. Dist. LEXIS 9}** 11). **Green** claims Barbo "approved the forcible unclothed visual body strip search of Plaintiff" without any "reasonable suspicion or justification to approve the unconstitutional strip search . . ." (Am. Compl., at 11). **Green** also claims that "[d]espite Defendant Barbo's knowledge that Plaintiff was already in the lawful custody of the Carlton County Sheriff's office, Defendant Barbo authorized MSOP employees . . . to suit-up in full riot gear . . . using excessive force on Plaintiff . . . ." (ECF No. 12, at 12). **Green** alleges Barbo "implemented, retained, and carried out policies that violated the constitutional rights of Plaintiff." (Am. Compl., at 13).

II. LEGAL STANDARD

When determining a Rule 12(b)(1) motion, courts "must distinguish between a 'facial attack' and a 'factual attack' on jurisdiction." *Carlsen* **v.** *GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016) (quoting *Osborn* **v.** *United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990)). In a facial attack, like that at issue here, 'the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6).'" *Carlsen*, 833 F.3d at 908 (quoting *Osborn*, 918 F.2d at 729 n.6).

In deciding a Rule 12(b)(6) motion, a court accepts as true all well-pleaded factual allegations and then determines "whether they plausibly give rise to an entitlement to**{2019 U.S. Dist. LEXIS 10}** relief." *Ashcroft* **v.** *Iqbal*, 556 U.S. 662, 664, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). The court must draw reasonable inferences in the plaintiff's favor. *Zink* **v.** *Lombardi*, 783 F.3d 1089, 1098 (8th Cir. 2015) (citation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Sletten & Brettin Orthodontics* **v.** *Cont'l Cas. Co.*, 782 F.3d 931, 934 (8th Cir. 2015) (quoting *Bell Atlantic Corp.* **v.** *Twombly*, 550 U.S. 544, 547, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)); *accord Zink*, 783 F.3d at 1098. Facial plausibility of a claim exists "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, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 555). Although a complaint need not be detailed to be sufficient, it must contain "[f]actual allegations . . . enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (citation omitted); *see id.* ("The pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion of a legally cognizable right of action." (quotations and citation omitted)). Additionally, complaints are insufficient if they contain "naked assertions devoid of further factual

enhancement." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 557 (internal quotation marks omitted)).

In assessing a *pro se* complaint, the court applies "less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (per curiam) (quotation and citation omitted);**{2019 U.S. Dist. LEXIS 11}** *accord Jackson v. Nixon*, 747 F.3d 537, 541 (8th Cir. 2014). "If the essence of an allegation is discernible," then the court, in applying a liberal construction to *pro se* complaints, "should construe the complaint in a way that permits the layperson's claim to be considered within the proper legal framework." *Solomon v. Petray*, 795 F.3d 777, 787 (8th Cir. 2015) (quoting *Stone v. Harry*, 364 F.3d 912, 914 (8th Cir. 2004)). Despite the liberal construal of such complaints, the *pro se* plaintiff "still must allege sufficient facts to support the claims advanced." *Stringer v. St. James R-1 Sch. Dist.*, 446 F.3d 799, 802 (8th Cir. 2006) (quoting *Stone*, 364 F.3d 912, 914 (8th Cir. 2004)). Thus, *pro se* litigants "must set a claim forth in a manner which, taking the pleaded facts as true, states a claim as a matter of law." *Stringer*, 446 F.3d at 802 (quoting *Cunningham v. Ray*, 648 F.2d 1185, 1186 (8th Cir. 1981)).

III. ANALYSIS

Green asks the Court to declare Defendants' actions illegal and unconstitutional; to order the Defendants "to cease the use of Protective Isolation/Administrative Restriction, the use of excessive force, unclothed visual body strip searches, [and] illegal searches and seizures without justification(s)"; to enjoin Defendants from "engaging in the same or similar practices [listed above]"; for actual or nominal damages; and the costs of the suit. (Am. Compl., at 22-23). Green's claims fail for multiple reasons. Some of Green's requested relief for injunctive relief and money damages is barred by the Eleventh Amendment. **Green** also**{2019 U.S. Dist. LEXIS 12}** fails to state plausible, legally cognizable claims on excessive force, unreasonable search and seizure, procedural and substantive due process, and unconstitutional policies.

A. Some of Green's Requested Relief is Barred

Green sues all Defendants in their official and individual capacities. **Green** seeks declaratory and injunctive relief, as well as monetary damages, but does not differentiate how the relief sought applies to Defendants.

The Eleventh Amendment bars suit against a state, absent a state's consent to filing of such a suit. *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978) (per curiam). This immunity applies to claims against officials sued in their official capacities. *See, e.g., Will v. Mich. Dep't of State* Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). A federal court lacks jurisdiction over claims barred by the Eleventh Amendment. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 121, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). Thus, "Section 1983 plaintiffs may sue individual-capacity defendants only for money damages and official-capacity defendants only for injunctive relief." *Brown v. Montoya*, 662 F.3d 1152, 1161 n.5 (10th Cir. 2011) (citing *Hafer v. Melo*, 502 U.S. 21, 30, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991)); *Greenawalt v. Indiana Dept. of Corr.*, 397 F.3d 587, 589 (7th Cir. 2005) ("[S]ection 1983 does not permit injunctive relief against state officials sued in their individual as distinct from their official capacity."); *Wolfe v. Strankman*, 392 F.3d 358, 360 n.2 (9th Cir. 2004) (noting that injunctive and equitable relief are not available in § 1983 individual-capacity suits). To the extent **Green** seeks injunctive relief against Defendants in their individual capacities, the Court**{2019 U.S. Dist. LEXIS 13}** recommends dismissal. And to the extent **Green** seeks monetary relief against Defendants in their official capacities, the Court also recommends dismissal.

B. Excessive Force Claims

The Eighth Amendment prohibits government authorities from using excessive force against prisoners. *Andrews* **v.** *Neer*, 253 F.3d 1052, 1061 (8th Cir. 2001). While **Green** is not a prisoner, federal courts consistently hold that Eighth Amendment principles apply to non-prisoners in government custody, like pre-trial detainees and civilly committed individuals. *See id*; *Serna* **v.** *Goodno*, 567 F.3d 944, 948-49 (8th Cir. 2009). Excessive force claims have two requirements. "The first requirement tests whether, viewed objectively, the deprivation of rights was sufficiently serious. The second requirement is subjective and requires that the inmate prove that the prison officials had a sufficiently culpable state of mind." *Irving* **v.** *Dormire*, 519 F.3d 441, 446 (8th Cir. 2008).

The Court first evaluates Green's excessive force claim against Marvel. **Green** claims Marvel used excessive force when restraining him on March 24, 2010. (Am. Compl., at 9). **Green** states that "Marvel, while trying to remove Plaintiff's Do Rag and shoes, twisted the handcuffs and did damage to Plaintiff's wrists." (Am. Compl., at 9). **Green** also states that Marvel did not apply force "in an effort to maintain or restore discipline, but instead**{2019 U.S. Dist. LEXIS 14}** . . . to harm Plaintiff." (Am. Compl., at 9). The Eighth Circuit has established that the application of handcuffs, without evidence of a more permanent injury, is insufficient to support an excessive force claim. *See Crumley* **v.** *City of St. Paul*, 324 F.3d 1003, 1008 (8th Cir. 2003) ("[F]or the application of handcuffs to amount to excessive force there must be something beyond allegations of minor injuries."); *Foster* **v.** *Metro. Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990) ("We do not believe that . . . allegations of pain as a result of being handcuffed, without some evidence of more permanent injury, are sufficient to support [a] claim of excessive force."). Viewed objectively, Marvel cuffing **Green** is not a sufficiently serious deprivation of rights to meet the first requirement of an excessive force claim. *See Serna*, 567 F.3d at 948-49. Because Green's claim against Marvel does not meet the first requirement of an excessive force claim, the Court does not reach the second requirement. **Green** does not present a plausible excessive force claim against Marvel, nor does he cite any caselaw or arguments against this Eighth Circuit precedent. *See Iqbal*, 556 U.S. at 678-81. The Court recommends dismissing Green's excessive force claim against Marvel.

The Court next evaluates Green's excessive force claims against Swenson and Sayovitz. **Green** alleges Swenson "attacked**{2019 U.S. Dist. LEXIS 15}** Plaintiff from behind" and "shoved Plaintiff from behind" on March 24, 2010. **Green** alleges Sayovitz "informed Assistant Director Defendant Barbo about his intention to be granted approval for the 'unclothed visual body search'" and told **Green** that he would place handcuffs on **Green**. (Am. Compl., at 11). **Green** does not allege any painful effects or lasting injury from Swenson's actions. Sayovitz's actions at most amount to verbal threats, which "are not constitutional violations cognizable under § 1982." *Martin* **v.** *Sargent*, 780 F.2d 1334, 1338 (8th Cir. 1985). Viewed objectively, Green's claim against Sayovitz is not a sufficiently serious deprivation of his rights to meet an excessive force claim. *See Serna*, 567 F.3d at 948-49. Because Green's claim against Sayovitz does not meet the first requirement of an excessive force claim, the Court does not reach the second requirement. Even when taking Green's allegations in the light most favorable to him, the Court does not find a plausible excessive force claim against either Defendant. To the extent **Green** alleges any excessive force claims against Swenson and Sayovitz, the Court recommends dismissal.

Finally, the Court notes that **Green** claims that Cory Vargason, an A-Team member at MSOP, jumped on Green's back and began choking**{2019 U.S. Dist. LEXIS 16}** him. (Am. Compl., at 8). The Court does not address this allegation for an excessive force claim because Cory Vargason is not a named defendant in this suit.

C. Unreasonable Search and Seizure Claims

"Involuntarily committed civil detainees have a Fourth Amendment right to be free from unreasonable searches and seizures similar to that of pretrial detainees." *Evenstad* **v.** *Herberg*, 994 F. Supp. 2d 995, 1002 (D. Minn. 2014) (citing *Serna*, 567 F.3d at 948). Whether the search or seizure of a civilly committed MSOP individual is reasonable depends on whether a legitimate government interest outweighs the invasion of personal rights involved. *Serna*, 567 F.3d at 949. To determine reasonableness, "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* (quoting *Bell* **v.** *Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)).

Green alleges Defendants violated the Fourth Amendment by placing him in HSA for extended periods of time. (Am. Compl., at 5-6). A decision to place a civilly committed individual in HSA "if made by a professional, is presumptively valid . . . [and] liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible**{2019 U.S. Dist. LEXIS 17}** actually did not base the decision on such a judgment." *Youngberg* **v.** *Romeo*, 457 U.S. 307, 323, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).

Green has a constitutionally protected interest in reasonably non-restrictive confinement conditions. *See id.* at 324. But the decision to place **Green** into HSA temporarily is presumptively valid and the complaint contains no allegation of facts that support a reasonable inference that Defendants involved in this decision did not base it on accepted professional judgment. **Green** states he was placed in HSA for over twenty-four hours on September 28, 2010 and on March 24, 2011 but does not specify how long in either instance. (Am. Compl., at 5-6). His allegations lack facts about the scope, manner, and justification of this HSA placement. He gives no explanation as to why his extended stays in HSA were unreasonable. Even liberally construing Green's amended complaint, taking all the facts pled as true and making all reasonable inferences in Green's favor, the factual allegations on Green's HSA placements do not nudge the claim "across the line from conceivable to plausible." *Iqbal*, 556 U.S. at 678-81. The complaint lacks factual allegations to support a facially plausible claim that Green's HSA placements violated his Fourth Amendment rights. The Court recommends dismissing this**{2019 U.S. Dist. LEXIS 18}** claim.

Green also alleges Defendants violated the Fourth Amendment by subjecting him to UVBSS on September 28, 2010 and March 24, 2011. (Am. Compl. at 5, 11). What constitutes an unreasonable search is a fact-specific inquiry but the Supreme Court has found that visual body searches of prisoners and pretrial detainees, while affecting the privacy interests of inmates, are legal if conducted in a reasonable manner. *Bell* **v.** *Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). Even though civilly committed individuals are not prisoners, courts have consistently found their rights to be similar to that of pretrial detainees. *See e.g., Serna*, 567 F.3d at 948-49. **Green** alleges he was searched in two instances after being placed into HSA and stated one of these searches was for contraband that was not found. (ECF No. 5, at 23). **Green** states his clothes were forcibly cut off the first time and he only complied the second time because he did not want to repeat his first experience. (Am. Compl., at 5).

The Court does not find that **Green** has pled facts showing these searches to be unreasonable under the Fourth Amendment. The government interest in safe and orderly prisons is significant and the Supreme Court has taken judicial notice of the unauthorized use of drugs that plague our prison**{2019 U.S. Dist. LEXIS 19}** systems. *See Block* **v.** *Rutherford*, 468 U.S. 576, 590, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984). While MSOP is not a prison, it is a treatment facility that faces some of the same safety concerns. MSOP has legitimate concerns in conducting an UVBSS when an individual at MSOP enters a new area, such as when **Green** entered HSA in both instances. MSOP is promoting

the security of its facility by ensuring that individuals are not concealing drugs or weapons when leaving and entering new areas of the facility. *See e.g. Goff* **v.** *Nix*, 803 F.2d 358, 366-67 (8th Cir. 1986) (finding UVBSS constitutional under the Fourth Amendment because prisons have legitimate safety concerns). **Green** has not pled any facts about these two instances suggesting the searches were conducted unreasonably. While **Green** states his clothes were forcibly cut off in the first instance, MSOP has to unclothe an individual to conduct an UVBSS and **Green** refused to undress. (Am. Compl., at 5). **Green** does not plead any facts suggesting either of these searches were conducted in an abusive, offensive, or otherwise unreasonable manner. This Court recommends dismissal of Green's Fourth Amendment claims concerning the searches on September 28, 2010 and March 24, 2011.

Green further alleges that a search on June 13, 2012 was unlawful. According to **Green**, he was subjected to an UVBSS while he**{2019 U.S. Dist. LEXIS 20}** was served with an arrest warrant by the Carlton County Sheriff's Department. (Am. Compl., at 10-11). **Green** claims this particular search was "humiliating" because it was done in the presence of female staff and an MSOP nurse. (Am. Compl., at 11). Given what the Supreme Court has said about the strong institutional interests in maintaining security, and the unusual circumstances here, Green's allegation of a body cavity search in front of female staff by itself does not state a claim for violating the Fourth Amendment. *See Story* **v.** *Foote*, 782 F.3d 968, 971 (8th Cir. 2015). **Green** does not allege that the search itself was done by a female staff member; he admits Peterson, the male Deputy Carlton County Sheriff performed the search. (Am. Compl., at 11); *see Richmond* **v.** *City of Brooklyn Center*, 490 F.3d 1002, 1008 (8th Cir. 2007) ("[S]trip searches should be conducted by officials of the same sex as the individual to be searched."). Here, the presence of the Carlton County Sheriff and the circumstances of effecting an arrest warrant on **Green** implies an emergency situation, or at the very least a heightened security situation, where MSOP had to take additional measures to ensure security. (*See* Am. Compl., at 11). In heightened security circumstances, the presence or participation of female officers during a UVBSS of a male**{2019 U.S. Dist. LEXIS 21}** inmate have been found constitutional. *See* 28 C.F.R. § 511.16 ("Visual searches may be conducted by staff members of the opposite sex in emergency situations with the Warden's authorization [in a prison]."); *see e.g., Story*, 782 F.3d at 972 (finding constitutional the circumstances of a female officer that may have observed a male inmate's UVBSS through surveillance video). **Green** does not allege facts suggesting the search was performed in front of female staff for an illegitimate interest, unrelated to MSOP's security interests. The Court does not find that **Green** alleges a plausible claim and recommends dismissal.

D. Procedural Due Process

To establish a procedural due process violation, "a plaintiff, first must establish that his protected liberty or property interest is at stake. Second, the plaintiff must prove that the defendant[s] deprived him of such an interest without due process of the law." *Schmidt* **v.** *Des Moines Pub. Sch.*, 655 F.3d 811, 817-18 (8th Cir. 2011). If there is a protected interest at stake, the Court should "then consider what process is due by balancing the specific interest that was affected, the likelihood that the [MSOP] procedures would result in erroneous deprivation and the [MSOP's] interest in providing the process that it did, including the administrative costs**{2019 U.S. Dist. LEXIS 22}** and burdens of providing additional process." *Senty-Haugen* **v.** *Goodno*, 462 F.3d 876, 886 (8th Cir. 2006).

Green argues he "was denied due process by MSOP Defendants due to his confinement in HSA." (Am. Compl., at 20). As a person civilly committed to MSOP, **Green** enjoys a protected but not unlimited liberty interest in freedom from unnecessary bodily restraint. *See Youngberg*, 457 U.S. at 319-20. Therefore, **Green** arguably had a protected liberty interest at stake when he was placed in HSA, which affords him some measure of due process.

But, even if placement in HSA implicates protected interests, the amended complaint contains no factual allegations that show **Green** received less than the process he was due. **Green** provides conclusory allegations that the policy was unconstitutional, that it did not support a legitimate government interest, and that he did not receive any due process protections. (Am. Compl., at 7). But he makes no mention of whether he invoked MSOP's grievance process to challenge his HSA placement to a review panel. (*See* Am. Compl., at 19 (outlining MSOP's grievance procedure when an individual is placed in HSA)). In fact, **Green** does not claim he attempted to report his placement or that his complaints were denied in any form by MSOP employees. Even construed **{2019 U.S. Dist. LEXIS 23}** broadly, Green's complaint does not plead sufficient facts to present a facially plausible claim that he was denied procedural due process. To the extent **Green** brings a claim that the procedure by which was placed into and kept in HSA violated his procedural due process rights, the Court recommends dismissal for failure to state a claim upon which relief may be granted.

E. Substantive Due Process

"To establish a substantive due process violation, the [Plaintiff] must demonstrate that a fundamental right was violated and that [the Defendants'] conduct shocks the conscience." *Folkerts v. City of Waverly, Ia.*, 707 F.3d 975, 980 (8th Cir. 2013). "Only in the rare situation when the state action is truly egregious and extraordinary will a substantive due process claim arise. *Strutton v. Meade*, 668 F.3d 549, 557 (8th Cir. 2012). The question is "whether the extent or nature of the restraint . . . is such as to violate due process." *Youngberg*, 457 U.S. at 320. To determine the answer, the Court must balance Green's "liberty interest[] against the relevant state interests." *Id.* at 321. Furthermore, when deciding whether a civilly committed person's liberty interest in freedom from unreasonable restraint, "courts must show deference to the judgement exercised by a qualified professional." *Youngberg*, 457 U.S. at 322. As stated above, that decision is "presumptively valid" **{2019 U.S. Dist. LEXIS 24}** and liability is only imposed when the professional substantially departs from professional judgment or practice. *Id.* at 322.

Green alleges his due process rights were violated when he was confined in HSA. (Am. Compl., at 20). Under *Youngberg*, **Green** has a constitutionally protected interest in reasonably nonrestrictive confinement conditions. *Id.* at 324. But the decision to temporarily place **Green** into HSA is presumptively valid and the complaint contains no allegations of facts supporting a reasonable inference that the Defendants involved in this decision did not base it on accepted professional judgment. **Green** failed to plead sufficient facts to withstand a motion to dismiss and the Court recommends dismissal of this claim.

Green also claims the "acts and omissions of Defendants constitute a violation of the due process clause. . . ." (Am. Compl., at 20). He alleges Marvel "twisted the handcuffs and did damage to Plaintiff's wrists," that Swenson "attacked Plaintiff from behind" and "shoved Plaintiff from behind," and that Sayovitz "informed Assistant Director Defendant Barbo about his intention to be granted approval for the unclothed visual body search." (Am. Compl., at 11). None of these actions rise to behavior that **{2019 U.S. Dist. LEXIS 25}** is "truly egregious" or that "shocks the conscience." *Strutton*, 668 F.3d at 557; *Folkerts*, 707 F.3d at 980. **Green** does not plead any facts that rise to a substantive due process violation. The Court recommends dismissal of this claim.

F. Unconstitutional Policies

Green claims MSOP's policies on UVBSS are unconstitutional and asks the court to "order Defendants to cease the use [of these searches]." (Am. Compl., at 22). **Green** alleges that MSOP employees forcibly cut his clothes off after he refused to an UVBSS and that MSOP employees forced an UVBSS in the presence of female staff. (Am. Compl., at 10-11). But **Green** does not identify what

parts of the UVBSS policy at MSOP are unconstitutional or how they are unconstitutional. As explained above, MSOP has legitimate security concerns in performing these searches and the Eighth Circuit previously found MSOP's UVBSS searches constitutional in different settings. *See e.g. Goff*, 803 F.2d at 366-67 (finding UVBSS constitutional under the Fourth Amendment because prisons have legitimate safety concerns); *Beaulieu v. Ludeman*, 690 F.3d 1017, 1030 (8th Cir. 2012) ("[T]he MSOP's policy of performing unclothed body searches of patients before they leave the secure perimeter is not unreasonable."). Because **Green** makes conclusory statements on MSOP's use of UVBSS as unconstitutional without sufficient**{2019 U.S. Dist. LEXIS 26}** factual or legal explanation, the Court recommends dismissal of this claim.

Green also repeatedly states MSOP's policies were unconstitutionally applied to him and he summarizes certain MSOP policies. (Am. Compl., at 16-19). But, again, **Green** does not plead any facts explaining which sections of MSOP's policies his claims are aimed against, why these sections are unconstitutional, or how they have been applied to him unconstitutionally. Because **Green** fails to plead any plausible claim about the constitutionality of MSOP's policies, the Court recommends dismissal.

G. Other Concerns

Green asserts a number of other claims. **Green** argues his Fourth and Fourteenth Amendment rights were violated when he was denied access to his property while in HSA. (Am. Compl., at 6). **Green** did not identify the property MSOP supposedly deprived him. Without providing that information, he cannot claim that MSOP deprived him of a protected property interest. **Green** fails to state a claim upon which relief may be granted. Similarly, for the claim that MSOP unlawfully denied **Green** his property, **Green** has not alleged he was treated differently from other similarly situated individuals based on a prohibited form of discrimination. **Green** fails**{2019 U.S. Dist. LEXIS 27}** to state a violation of his Fourteenth Amendment equal protection rights.

Green argues the following restrictions while he was in HSA were illegal: only being allowed one book at a time, being served meals in his cells, not being allowed to participate in any off unit activities, and being restricted to one thirty-minute period out of his cell per day. (Am. Compl., at 6). **Green** does not state what laws these restrictions violated or provide any caselaw to support his allegations of MSOP's restrictions being illegal. Green's claims do not establish plausible claims and the Court recommends dismissing these claims.

H. Qualified Immunity

"Qualified immunity shields government officials from liability unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would know." *Ferguson v. Short*, 840 F.3d 508, 510 (8th Cir. 2016). Courts examine "(1) whether the facts alleged or shown, construed most favorably to the plaintiffs, establish a violation of a constitutional right, and (2) whether that constitutional right was clearly established at the time of the alleged misconduct, such that a reasonable official would have known that the acts were unlawful." *Small v. McCrystal*, 708 F.3d 997, 1003 (8th Cir. 2013).

Here, Green's claims either do not establish constitutional**{2019 U.S. Dist. LEXIS 28}** violations or **Green** has failed to meet his pleading burden. To the extent no constitutional violation is established, Defendants are entitled to qualified immunity. To the extent **Green** failed to meet his pleading burden, his pleading deficiencies deprive the Court of the ability to analyze the claims fully, including whether Defendants are entitled to qualified immunity on those particular claims.

IV. RECOMMENDATION

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY RECOMMENDED** as follows:

1. Defendants' Motions to Dismiss, (ECF Nos. 22, 35, 53, 66), be **GRANTED**.

2. Green's Amended Complaint (ECF No. 14), be **DISMISSED WITH PREJUDICE**.

Date: January 30, 2019

/s/ Steven E. Rau

Steven E. Rau

United States Magistrate Judge

District of Minnesota

***Green v. Lake**, et al.*

Case No. 14-cv-1056 (ADM/SER)

Footnotes

1

Defendant Bogenhol filed a motion to dismiss; Defendants Bastien, **Lake**, and Peterson filed a motion to dismiss; and Defendants Moser, Linkert, Marvel, Swenson, and Sayovitz filed two motions to dismiss: one in their official capacities and one in their individual capacities. While the other Defendants listed have not filed motions to dismiss, the Court's Report and Recommendation applies to all Defendants because Green's complaint asks for relief against all Defendants.

2

Defendants argue Green's claims are precluded by a ruling in the class-action litigation of *Karsjens v. Jesson*, where the Court found MSOP's policies constitutional. 336 F. Supp. 3d 974, 998-98 (D. Minn. 2018). While this Court agrees that *Karsjens* is relevant to the analysis here, the Court "emphasize[d] that its conclusions solely address Plaintiffs' classwide claims of systematic constitutional violations"-and did not foreclose individual claims on alleged constitutional violations. *Id.* at 997. Accordingly, the Court finds it appropriate to address Green's claims with respect to the specific enforcement of those policies as applied to **Green**.

3

The Court uses UVBSS to refer to both the singular and plural versions (unclothed visual body strip search and unclothed visual body strip searches).

4

Administrative Restriction "means any measure utilized by MSOP to maintain safety and security, protect possible evidence and prevent the continuation of suspected criminal acts." (ECF No. 26, at 3) (quoting MSOP Policy No. 301.084). This includes "increased monitoring of the client, limiting programming accessibility, reduction in or loss of privileges, restricted access to and use of possessions, and separation of a client from the normal living environment." (ECF No. 26, at 3) (quoting MSOP Policy No. 301.084). While Administrative Restriction is not defined in the complaint, the Court may consider MSOP Policy defining it because regulations of an agency are public record. *Taradejna v. General Mills, Inc.*, 909 F. Supp. 2d 1128, 1133 n.4 (D. Minn. 2012).

5

A plaintiff must allege Defendants' personal involvement or responsibility for the constitutional violations to state a § 1983 claim. *Ellis v. Norris*, 179 F.3d 1078, 1079 (8th Cir. 1999). Here, the complaint only pleads actions by Defendants Sayovitz, Marvel, Swenson, Barbo, Bastien, Peterson, and Shaller. **Green** does not allege any personal involvement by Defendants Berglund, Moser, Zimmerman, **Lake**, and Bogenhol. The only time these Defendants are named is when **Green** states the positions of the Defendants he is suing. (Am. Compl., at 3-4). **Green** fails to state a claim against Defendants Berglund, Moser, Zimmerman, **Lake**, and Bogenhol, and the Court recommends dismissing any claims against these Defendants.