

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

---

**WILLIAM FRANCISCO COUNTS,**

**Plaintiff,**

**v.**

**Case No. 13-cv-518**

**EDWARD F. WALL, WILLIAM POLLARD,  
TONY MELI, JESSE SCHNEIDER,  
BRIAN GREFF, SHANE WALLER,  
MATTHEW BURNS, JEFF D. GILL,  
JEREMY L. STANIEC, and JUSTEN S. KITZMAN,**

**Defendants.**

---

**ORDER**

---

The plaintiff, William Francisco Counts, who is incarcerated at Waupun Correctional Institution (Waupun), filed a pro se civil rights complaint under 42 U.S.C. § 1983, alleging that his civil rights were violated during and after a cell extraction on January 10, 2013. He has paid the full filing fee.

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the matter arises under federal statutes. The case was assigned to the court according to the random assignment of civil cases pursuant to 28 U.S.C. § 636(b)(1)(B) and General Local Rule 72 (E.D. Wis.), and the plaintiff has consented to United States magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c) and General Local Rule 73 (E.D. Wis.).

Regardless of the plaintiff's fee status, the court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental

entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b).

To state a cognizable claim under the federal notice pleading system, the plaintiff is required to provide a "short and plain statement of the claim showing that [he] is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). It is not necessary for the plaintiff to plead specific facts and his statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). However, a complaint that offers "labels and conclusions" or "formulaic recitation of the elements of a cause of action will not do." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 555). To state a claim, a complaint must contain sufficient factual matter, accepted as true, "that is plausible on its face." Id. (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). The complaint allegations "must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555 (citation omitted).

In considering whether a complaint states a claim, courts should follow the principles set forth in Twombly by first, "identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Iqbal, 556 U.S. at 679. Legal conclusions must be supported by factual allegations. Id. If there are well-pleaded factual allegations, the court must,

second, “assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” Id.

To state a claim for relief under 42 U.S.C. § 1983, a plaintiff must allege that: 1) he was deprived of a right secured by the Constitution or laws of the United States; and 2) the deprivation was visited upon him by a person or persons acting under color of state law. Buchanan-Moore v. County of Milwaukee, 570 F.3d 824, 827 (7th Cir. 2009) (citing Kramer v. Village of North Fond du Lac, 384 F.3d 856, 861 (7th Cir. 2004)); see also Gomez v. Toledo, 446 U.S. 635, 640 (1980). The court is obliged to give the plaintiff’s pro se allegations, “however inartfully pleaded,” a liberal construction. See Erickson v. Pardus, 551 U.S. 89, 94 (2007) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

#### **1. Complaint Averments**

On January 10, 2013, the plaintiff was housed in the Health & Segregation Complex at Waupun. At approximately 11:00 a.m., while lunch trays were being picked up, a correctional officer who is not named as a defendant was passing out “current events,” a collection of papers on world topics. The correctional officer purposely passed the plaintiff’s door and said to the plaintiff, “you don’t get shit.” (Complaint at 4). The plaintiff’s trap door was open due to the collection of lunch trays, and the plaintiff stuck his arm out of the trap and did not allow defendant Correctional Officer Matthew Burns to close the trap door. The plaintiff told Burns that he wanted to see the sergeant and that he wanted a copy of the current events like everyone else.

Shortly after that, the plaintiff heard staff preparing an observation room for occupancy. Then defendants Shane Waller and Jesse Schneider arrived in front of the plaintiff’s door, along with defendant Brian Greff and other staff members. Lieutenant Schneider asked the plaintiff to place

his hands out of the trap to be cuffed from behind. The plaintiff did not comply and tried to explain his issue about the current events. Sergeant Waller said that current events are not a right, they are a privilege. Lt. Schneider insisted that the plaintiff put his hands out of the trap to be cuffed from behind, saying “c’mon, c’mon.” (Complaint at 4). Lt. Schneider then tried to cuff the plaintiff’s left wrist to the door with the tether cuff that was connected to the door. The plaintiff quickly pulled his arm inside. Lt. Schneider then directed staff to close the shutters on the other cell doors so that other inmates could not see what was about to unfold.

Lt. Schneider asked the plaintiff if he was coming out, and the plaintiff responded, “of course, I’m just going to pack my property real quick.” (Complaint at 5). Lt. Schneider told the plaintiff that he would not be seeing his property for awhile because he was going on “control status.” Id. The plaintiff objected that he was not out of control and that people do not go on control status for holding their traps. Lt. Schneider responded, “Well you are.” Id. The plaintiff objected, “That’s against policy,” and quoted the Wisconsin Administrative Code provision on the proper handling of controlled segregation. Id. Lt. Schneider then said, “oh you’re refusing, that’s what I thought,” and walked away. Id. The plaintiff packed up all his property in three brown paper bags. Plaintiff never said that he was not coming out or that an extraction team would be necessary.

Less than seven minutes later, several staff members returned wearing cell extraction padding gear. The cell extraction team consisted of defendants Burns, Kitzman, Gill, and Staniec. They were supervised by Lt. Schneider, and defendants Waller and Greff also were there.

Lt. Schneider directed the plaintiff to place his hands out of the trap behind him to be cuffed. The plaintiff complied. He was cuffed and shackled and wore only a paper gown while he was escorted to the strip cage to be stripped. Staff then removed the plaintiff’s paper gown, and he was

naked. Staff insisted on performing a staff assisted strip search even though the plaintiff was already naked and could not have concealed contraband while wearing a paper gown. Staff spread the plaintiff's buttocks and lifted his scrotum while he was cuffed to the strip cage door. The plaintiff was given nothing to wear but a towel around his waist as he would be completely naked on control status.

The staff members then led the plaintiff to an observation cell. The plaintiff was cuffed from behind and had shackles on his feet. He also had a tether restraint cuffed to his left wrist above the handcuffs, which was cuffed to the door. The plaintiff was told to kneel down. It was difficult for the plaintiff to kneel down and, as he went to kneel down, the tether cuff bit into his arm and caused pain. The plaintiff was able to get his right knee down, but he could not get the left knee to touch the ground for removal of the shackles. The plaintiff did not resist in any way, but he was in restraints and he wanted the shackles off. The plaintiff told the officers that he could not get his knee down and screamed, "I can't, I can't." (Complaint at 6).

Lt. Schneider threatened the plaintiff with a tazer and placed the tazer against the plaintiff's rib cage. Other officers screamed, "Kneel down, kneel down!" Id. Officers jumped on the plaintiff's back and forced his left knee to make contact with the ground. By this time, the towel had come off and the plaintiff was completely naked. The weight of the officers and being forced to kneel down caused the tether cuff to cut into the plaintiff's arm, and he began to scream in pain. Officers pulled the plaintiff's legs out from under him and added even more weight to the cuff cutting into the plaintiff's arm. He was now hanging from the door with his arms behind his back. The officers removed the plaintiff's shackles while he was in this position, which was very painful.

The plaintiff was howling and screaming in pain. Officers raised the plaintiff up, placed him in the cell, and removed the rest of the restraints through the trap opening.

Lt. Schneider had a brief talk with the plaintiff about control status, and the plaintiff immediately informed Lt. Schneider that he needed to see a nurse due to the injuries he sustained in this incident.

Nurse D. Young came to the plaintiff's door. The plaintiff was in so much pain and humiliation that he was crying as he showed his injuries to the nurse. The plaintiff had a deep indentation on his forearm that was purple in color. He also had two open wounds that were bleeding, one on each knee, from being jumped on from behind while cuffed and naked. The plaintiff told the nurse exactly what had happened and asked her for medical attention. The plaintiff requested ice for the swelling of his arm, which had doubled in size, and aspirin and bandaids for his wounds. The plaintiff was denied these items due to his control status placement. Lt. Schneider took plaintiff off control status approximately seven hours later.

The plaintiff was not able to see a nurse again until almost four days later. The nurse made note of the plaintiff's injuries and cleaned them. The plaintiff suffered nerve damage in his left hand from the incident, and the cuff cut so deep into the plaintiff's arm that it left a permanent scar. The plaintiff also scars on both of his knees.

## **2. Analysis**

First, the plaintiff asserts that the defendants (no specific mention of which ones) used excessive force in violation of the plaintiff's Eighth Amendment rights. The core judicial inquiry when a prisoner alleges that prison officers used excessive force against the prisoner is not whether a certain quantum of injury was sustained, but rather whether force was applied in a good-faith effort

to maintain or restore discipline, or maliciously or sadistically to cause harm. Wilkins v. Gaddy, 559 U.S. 34, 37 (2010). The plaintiff's complaint sets forth Eighth Amendment excessive force claims against Lt. Schneider and the members of the cell extraction team, defendants Burns, Kitzman, Gill, and Staniec. Although the plaintiff refers generally to staff while relating what happened to him, it is understandable that, at this stage, he may not know which role each defendant played. The plaintiff's back was to at least some of the defendants, and he was facing the floor while they acted from behind.

With regard to defendants Waller and Greff, who also were present, the plaintiff also may proceed on Eighth Amendment excessive force claims. If someone else has committed the act that resulted in the constitutional deprivation, another defendant is personally responsible, and thus liable under § 1983, only if he knows about the other person's act, has a realistic opportunity to prevent it, but deliberately or recklessly fails to do so. Lewis v. Downey, 581 F.3d 467, 472 (7th Cir. 2009). Defendants Waller and Greff were present and saw what was happening to the plaintiff and did not intervene to stop it.

The plaintiff makes no mention in the body of his complaint of defendants Edward F. Wall, Secretary of the Wisconsin Department of Corrections, or Tony Meli, the Security Director at Waupun. Government officials may not be held liable under § 1983 for unconstitutional conduct of their subordinates under theory of respondeat superior. Ashcroft v. Iqbal, 556 U.S.662, 676 (2009). Because vicarious liability is inapplicable, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." Id. The court will dismiss Wall and Meli as defendants to this action.

The plaintiff attempts to allege a claim against defendant William Pollard based on his actions. He states that Pollard had knowledge of these events or similar ones occurring within the prison. The plaintiff further asserts that Pollard had been told about a previous incident involving the plaintiff, and that the acts were ignored and not even investigated. Section 1983 makes public employees liable “for their own misdeeds but not for anyone else’s.” Burks v. Raemisch, 555 F.3d 592, 596 (7th Cir.2009); see George v. Smith, 507 F.3d 605, 609 (7th Cir.2007). It is unclear at this stage whether Pollard himself deprived the plaintiff of his constitutional rights, but the plaintiff has said enough to state an Eighth Amendment claim against Pollard.

Next, the court will consider the plaintiff’s claims against Lt. Schneider for deliberate indifference to the plaintiff’s serious medical needs and for deliberate indifference to plaintiff having adequate food, clothing, shelter.

The plaintiff’s requested medical treatment immediately after the incident described in his complaint. A nurse came and examined him. Plaintiff then asked for various medical supplies. Lt. Schneider denied the plaintiff’s requests because of his control status, and the plaintiff did not receive treatment again for almost four days. Though it is not clear whether the nurse who examined the plaintiff believed the plaintiff needed those supplies, the court will allow the plaintiff to proceed on an Eighth Amendment medical care claim against Lt. Schneider due to his denial of medical supplies and the four day delay before the plaintiff was treated again.

As to his conditions of confinement, the plaintiff submits that he was placed on control status with no clothes or bedding and forced to eat seg loaf instead of standard meal. However, the plaintiff was released from this status after only seven hours. The short amount of time that the plaintiff was without clothes and bedding, coupled with the fact that the plaintiff was fed during the seven hours,

is not the type of extreme deprivation that supports an Eighth Amendment conditions of confinement claim. See Delaney v. DeTella, 256 F.3d 679, 683 (7th Cir. 2001).

Finally, the plaintiff also asserts that the defendants are guilty of substantial battery, a Class I felony. Neither the plaintiff nor this court has the power to bring criminal charges against the defendants, especially not in this civil suit.

In conclusion, the plaintiff may proceed on the following claims: (1) Eighth Amendment excessive force claims against defendants Schneider, Burns, Kitzman, Gill, and Staniec; (2) Eighth Amendment claims against defendants Waller and Greff for failure to intervene; (3) an Eighth Amendment claim against Pollard for his actions in failing to prevent or remedy the plaintiff's suffering; and (4) and Eighth Amendment claim against Schneider for his deliberate indifference to the plaintiff's medical needs.

**NOW, THEREFORE, IT IS HEREBY ORDERED** that pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being electronically sent today to the Wisconsin Department of Justice for service on the following state defendants: William Pollard, Jesse Schneider, Brian Greff, Shane Waller, Matthew Burns, Jeff D. Gill, Jeremy Staniec, and Justen S. Kitzman.

**IT IS FURTHER ORDERED** that, pursuant to the informal service agreement between the Wisconsin Department of Justice and this court, the defendants shall file a responsive pleading to the complaint within sixty days of receiving electronic notice of this order.

**IT IS FURTHER ORDERED** that the following individuals be and hereby are **DISMISSED** as defendants to this action: Edward F. Wall, Tony Meli.

**IT IS FURTHER ORDERED** that, pursuant to the Prisoner E-Filing Program, the plaintiff shall submit all correspondence and case filings to institution staff, who will scan and e-mail documents to the Court. The Prisoner E-Filing Program is in effect at Green Bay Correctional Institution and Waupun Correctional Institution and, therefore, if the plaintiff is no longer incarcerated at either institution, he will be required to submit all correspondence and legal material to:

Honorable Aaron E. Goodstein  
% Office of the Clerk  
United States District Court  
Eastern District of Wisconsin  
362 United States Courthouse  
517 E. Wisconsin Avenue  
Milwaukee, Wisconsin 53202

The plaintiff is further advised that failure to make a timely submission may result in the dismissal of this action for failure to prosecute.

In addition, the parties must notify the Clerk of Court of any change of address. Failure to do so could result in orders or other information not being timely delivered, thus affecting the legal rights of the parties.

Dated at Milwaukee, Wisconsin this 15<sup>th</sup> day of January, 2014.

BY THE COURT:

s/ Aaron E. Goodstein  
AARON E. GOODSTEIN  
United States Magistrate Judge