No. 14-1169

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Donald A. Smith Plaintiff-Appellant, v. Sheriff Dart, *et al.*, Defendant-Appellee.	)) Appeal from the United States) District Court for the Northern District) of Illinois, Eastern Division) Honorable Robert Amy J. St. Eve,) Judge Presiding))) No. 13 cv 5034)

BRIEF OF DEFENDANT-APPELLEE SHERIFF THOMAS J. DART

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JURISDICTIONAL STATEMENT

In accordance with Seventh Circuit Rule 28(b), Defendant accepts Plaintiff's jurisdictional statement as complete and correct.

ISSUES PRESENTED FOR REVIEW

I. Whether the district court properly granted Defendant's Motion to Dismiss pursuant to Fed. R. Civ. P 12(b)(6), without prejudice, for failure to sufficiently plead a "conditions of confinement" cause of action under 42 U.S.C. § 1983.

II. Whether the district court abused its discretion by dismissing the Plaintiff's lawsuit with prejudice, pursuant to Fed. R. Civ. P 41(b), after he failed to file an amended complaint.

III. Whether the district court properly dismissed Plaintiff's claim that he was entitled to earn minimum federal wages for his work at the Cook County Jail, while an incarcerated pretrial detainee, during its 28 U.S.C § 1915A review.

STATEMENT OF THE CASE

A. Plaintiff's Statement of the Case.

The statement of the case offered by Appellant-Plaintiff (Plaintiff) does not conform the requirements of Fed. R. App. P. 28(a)(6). Plaintiff's Statement of the Case is not a concise statement of the nature of the case and the course of the proceedings below but rather contains more spin and argument. In fact, Plaintiff uses secondary materials, outside of the record and not contained in his appendix, in support of his alleged "facts". Per the Rules, however, no fact should be stated in the Statement of the Case unless it is supported by reference to the document contained in the electronic record or the appendix where the fact appears. Fed. R. App. P. 28(e). Moreover, the Statement of the Case must be a fair summary and not contain argument or comment. 7th Cir. R. 28(c)(emphasis added); *See also Wiesmueller v. Kosobucki*, 547 F.3d 740, 741 (7th Cir. 2008)(Posner, J., in chambers). For the reasons stated above, Plaintiff's Statement of the Case and improper facts used to support his legal arguments throughout his brief should be stricken or disregarded.

B. Nature of the Case.

This is a prisoner's right lawsuit filed under 42 U.S.C. § 1983. Plaintiff alleges unconstitutional conditions of confinement at the Cook County Jail pursuant to 42 U.S.C. § 1983 as well as unfair wages under the Fair Labor Standards Act, 29 U.S.C.S. §§201-209.

C. Plaintiff's Complaint.

On July 15, 2013, Plaintiff Donald Smith (Plaintiff), while a pretrial detainee at the Cook County Jail (CCJ), filed a *pro se* complaint in the United States District Court, Northern District of Illinois, Eastern Division (district court). R. 1, p. 4. In Plaintiff's complaint, he states that as a veteran, he was provided an opportunity to participate in a veterans' program which provided benefits such as a job within the institution's laundry room. *Id.* His first allegation is that he was only paid $3.00 per day for his work and not the required federal minimum wage. *Id.* Additionally, he set forth a myriad of conditions allegedly present at CCJ asserting that they were unconstitutional pursuant to 42 U.S.C. § 1983 ; *i.e.,* inadequate food portions, the presence of insects and rodents, lack of outdoor recreation and "filthy" water. a. *Id.* Plaintiff named Sheriff Thomas Dart, the Director of Cook County Jail and the Superintendent of Division 5 as defendants in the caption of his complaint. R. 1. Sheriff Thomas Dart (Defendant) is the only individual who has been served and filed an appearance in this case. R. 7-9.

A review of Plaintiff's complaint was conducted pursuant to 28 U.S.C. § 1915A. R. 4. The district court determined that Plaintiff stated a colorable claim relating to his living conditions at CCJ and that "potential 'systemic' constitutional violations could infer personal involvement from senior officials." R. 4, p. 2. Plaintiff's claims regarding unfair wages, however, did not survive the district court's review, finding that Plaintiff had no constitutional right "to be paid for his jail job assignment at

all, let alone in accordance with minimum wage laws." *Id. citing Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992).

D. Procedural History

On September 12, 2013, Defendant filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). R. 12. Defendant argued that Plaintiff had not met the proper pleading requirements under Fed. R. Civ. P. 8(a)(2). *Id.* For example, with respect to the living conditions claim that survived the district court's review, Plaintiff only alleged a laundry list of complaints pertaining to his incarceration at CCJ. *Id.*, p. 3. The Plaintiff stated, in two sentences:

> …daily given breakfast of 1 egg – 1 2% milk half cup cereal small pak of Kool-Aid then lunch peanut butter sandwich and cookies with 1 pak of Kool-Aid. Pre-trial detainees are in program and conditions are foul roaches mice, cockroaches in food no mirrors even to see self shave can't go outside recreation filthy water etc.

R. 1. Sheriff Dart, the only defendant served in this case, was not put on proper notice of the claims against him under Rule 8(a). In the alternative, Defendant Dart requested a more definitive statement under Fed. R. Civ. P. 12(e). R. 12.

The district court held a hearing on Defendant's motion on October 1, 2013. R. 15. At that time, Plaintiff participated *via* telephone conference. *Id.* It was ordered that Plaintiff file a written response to Defendant's motion. *Id.* A week later, the district court received a letter from Plaintiff "in support of original complaint …. unconstitutional conditions of confinement. " R. 17. Plaintiff's letter included "physical evidence", *i.e.* an envelope of dead inspects and spiders. R. 16, 17. The

letter spelled out additional twenty (20) additional allegations, some relating to his conditions of confinement allegations, while others asserted new causes of action under 42 U.S.C. § 1983. R. 17. For example, Plaintiff alleged invasion of privacy regarding monitoring phone calls, lack of nutritious food, insect infestation, overcrowding, high priced commissary, polluted water, epidemics such as bird flu and scabies. Id. He also made allegations of lack of access to the law library, retaliation and claims of understaffing at Cermak. *Id.* Again, Plaintiff failed to allege any relevant time period or assert any claims of how Defendant Dart was legally responsible for his alleged deprivations.

Plaintiff submitted another request (motion) to the court "to introduce evidence." R. 18. The motion described yet more allegations of unconstitutional conditions of confinement. *Id.* For the first time, Plaintiff alleges a date he suffered an injury, a rash, in his allegations that he was exposed to an "infestation." *Id.* The letter, however, does not specify what "infestation" he was exposed to. *Id.* Plaintiff further requested the Court to send someone to take pictures of the living conditions at the jail. *Id.*

In response to the Plaintiff's filings, on October 16, 2013, the district court entered an order denying Plaintiff's motion to introduce evidence, without prejudice, as unnecessary. R. 19. A month and a half later, on December 3, 2013, the district court granted Defendant's motion to dismiss as uncontested, without prejudice, allowing Plaintiff to amend his pleading. R. 21. The court determined that Plaintiff's complaint failed to put the Defendant on sufficient notice of his claims.

Id. In significant detail, the district court advised Plaintiff of each deficiency in his original pleading as well as the necessary pleading requirements to be alleged in his amended complaint. *Id.* In its four page written opinion, the district court explained that the Plaintiff must "elaborate on his claims; the facts alleged are inadequate to satisfy even basic pleading requirements." R. 21, p. 2. The district court stated, in pertinent part: "The complaint on filed does not suggest that meals served at the jail are nutritionally inadequate or present a danger of harm." *Id.* at p. 3. "Plaintiff must likewise provide further details concerning his claim that the water is 'filthy'…. Plaintiff provides no facts from which one could infer that the jail's water is unsafe to drink." *Id.* Also, "… the complaint states that there are mice and cockroaches, but offers no basis for concluding the degree of infestation is such to create a constitutional claim. (citations omitted)". *Id.* The district court specifically instructed Plaintiff that "… the amended complaint must include dates. In order to satisfy the notice pleading requirements of Fed. R. Civ. P 8(a)(2), a plaintiff must [plead] 'some indication … of time and place.' (citations omitted)". *Id.* at p. 4. The Court ruled, "[i]n the absence of any such allegations, the complaint fails to state a cognizable claim. Plaintiff has failed to state facts indicating that his living conditions, either alone or in their totality, rise to the level of constitutional concern." *Id.*

Significantly, the district court advised Plaintiff that "an amended complaint supersedes the original complaint and must stand complete on its own. Therefore, all of the allegations against all Defendants must be set forth in the amended

complaint, without reference to the original complaint." *Id.* at p. 4. An amended civil rights complaint form was mailed to Plaintiff by the Clerk of the Court along with a copy of the district court's order. *Id.*

Subsequent to the dismissal order, Plaintiff filed a "Motion Clarifying Previously Cited Complaint About Conditions At Cook County Jail; Pluss (sic) Reconsideration of Portion of Same Dismissed Under The Eighth Amendment." R. 23. Plaintiff's motion addressed the dismissal of his wage claim during the § 1915A review and alleged new causes of action regarding false incarceration, denial of access to the law library and retaliation. *Id.* Plaintiff did not address his unconstitutional conditions of confinement at all. *Id.*

On December 16, 2013, the district court issued an order granting clarification of its previous orders but denying the relief requested by Plaintiff. R. 24. The district court advised Plaintiff that he was "granted … the opportunity to submit an amended complaint containing dates and rectifying other pleading deficiencies." *Id.*, p. 1. The Court's order stated that "Defendant's motion to dismiss [was granted] because the original complaint failed to state sufficient facts to state a plausible cause of action under the Fourteenth Amendment." *Id.* The district court specifically directed Plaintiff, for the second time, to file an amended pleading:

> If Plaintiff wishes to pursue his claims, he must state facts indicating that the food served at the jail is nutritionally inadequate or presents a substantial danger of harm, that the jail's water is unsafe to drink, that pest infestation is so profound as to rise to the level of a constitutional violation, and that the denial of exercise is extreme and prolonged. Plaintiff' must also provide relevant dates. The Court [dismissed] the complaint without prejudice, meaning that Plaintiff has a second change to state facts to support a 1983 claim.

Id. at p. 2. On its own motion, the district court granted Plaintiff additional time in which to file his amended pleading. *Id.*

Instead of filing an amended pleading per the district court's directive, on January 2, 2014, Plaintiff filed yet another motion entitled "Amended Motion in Support of Original Complaint." R. 25. In this document, Plaintiff set forth case law and referenced newspaper articles to support the allegations he pled in the original complaint. *Id.* At the end of the motion, Plaintiff cited to a "92 page study that can be accessed online which was done by the Department of Justice on Chicago's Cook County Jails (sic) short comings which still exist." *Id.* at p. 5. On January 7, 2014, the district court entered an order denying Plaintiff's motion. R. 26.

Plaintiff never pursued filing an amended pleading. Therefore, finally, on January 27, 2014, the district court dismissed his lawsuit with prejudice pursuant to Fed. R. Civ. P 41(b). R. 27.

SUMMARY OF ARGUMENT

Each of the district court's rulings at issue in this appeal should be affirmed. As an initial matter, Plaintiff's Statement of the Case does not comply with the rules of appellate procedure in that it adds argumentative "facts", obtained from secondary sources, which are not part of the record. Pl. Brief, pp. 3-9. As such, Plaintiff's Statement of the Case should not be considered by this Court.

Notwithstanding the procedural errors contained in Plaintiff's brief, the district court's order of December 3, 2013 dismissing Plaintiff's complaint *without prejudice* should be affirmed. The Plaintiff did not plead sufficient facts to state a "conditions of confinement" case under 42 U.S.C. § 1983. And, due to Plaintiff's conduct subsequent to the district court's dismissal order in not attempting to amend his pleading, even after being afforded numerous opportunities in which to do so, the district court properly dismissed the case with prejudice pursuant to Fed. R. Civ. P. 41(b). Finally, Plaintiff's claim that he is entitled to federal minimum wages for his work in the CCJ laundry room, which was offered to him as part of a program for veterans, was properly dismissed during the district court's initial 28 U.S.C. § 1915A review.

ARGUMENT

I. The district court's grant of dismissal, without prejudice, was appropriate pursuant to Fed. R. Civ. P. 12(b)(6).

A. Standard of Review

This Court reviews *de novo* the district court's grant of dismissal pursuant to Rule 12(b)(6), examining only the pleadings, taking all the facts pled as true, and construing all inferences in favor of the Plaintiff. *Thompson v. Ill. Dep't. of Prof'l Regulation*, 300 F.3d 750, 753 (7th Cir. 2002). Although a court must accept as true all well-plead allegations and draw all reasonable inferences in the plaintiff's favor, *Bielanski v. County of Kane*, 550 F.3d 632, 633 (7th Cir. 2008), it "need not accept as true legal conclusions, or threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009). Instead, a complaint "must contain 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 (2008)(*citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 463 (7th Cir. 2010)(citation omitted). This rule has particular force when considering the allegations of a pro se complaint, which are held "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Accordingly, "*pro se* complaints are to be liberally construed." *Wilson v. Civil Town of Clayton, Ind.*, 839 F.2d 375, 378 (7th Cir. 1988).

However, while it is often said that a claim may be dismissed only if, as a matter of law, "it is clear that no relief could be granted under any set of facts that could be

proved consistent with the allegations," *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (*quoting Hishon v. King & Spalding*, 467 U.S. 69, 73, (1984)), the Seventh Circuit has observed that this maxim "has never been taken literally." *Kyle v. Morton High School*, 144 F.3d 448, 455 (7th Cir. 1998) (*quoting Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984)). All plaintiffs -- whether *pro se* or represented -- must include in the complaint allegations concerning all material elements necessary for recovery under the relevant legal theory. *Chawla v. Klapper*, 743 F. Supp. 1284, 1285 (N.D. Ill. 1990).

In order for a claim to be plausible, a plaintiff must plead sufficient factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged; it requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 556 (emphasis added). Moreover, a court does not need to accept assertions which are supported only by conclusory allegations or merely sets forth "naked assertion[s] devoid of any 'factual enhancement.'" *Id.*, at 557. A complaint cannot escape dismissal merely by pleading facts that are "consistent with a defendant's liability." *Id.*

Plaintiff argues that the district court erred in granting Defendant's motion to dismiss because it did not consider Plaintiff's letters which arguably were "directly responsive" to Defendant's motion. Pl. Brief, pp. 14-17. However, even if the court did consider the two letters submitted by Plaintiff as a response to the motion, the allegations were still insufficient to place Defendant Dart on notice of Plaintiff's

actual claims. And the dismissal was without prejudice, with the district court providing Plaintiff with instruction on how to amend his claims. R. 21. Notwithstanding the lack of prejudice to Plaintiff, the two letters he sent to the district court, similar to his original complaint, only listed general conditions at the jail without stating how his constitutional rights were affected. R. 1, 17, 18. Assertions about general jail conditions not specific to an inmate's own constitutional deprivations, however, do not state a claim upon which the Court can grant relief. A § 1983 claim must establish not only the deprivation of a constitutional right by a state actor, "but also that the violation caused the plaintiff injury or damages." *Roe v. Elyea,* 631 F.3d 843, 864 (7th Cir. 2011). The only injury Plaintiff alleged, in his second letter to the district court, was a body rash that lasted approximately one week. R. 18. It is not clear from his letter what even caused the rash. *Id.* And, there are no allegations to support liability against Defendant Dart. None of Plaintiff's assertions, whether originally pled or in the subsequent letters to the district court, describe a violation of his federal constitutional right. Therefore, dismissal without prejudice allowing Plaintiff to amend his complaint was appropriate in this case.

B. Plaintiff's complaint failed to adequately allege sufficient facts to state a claim under 42 U.S.C. § 1983.

Plaintiff itemized the reasons that the conditions of confinement at CCJ were unconstitutional in two sentences; more specifically, the laundry room was "hot [and] smelly," the food portions were insufficient, the presence of rodents and insects, no mirrors, no outdoor recreation and that the water was "filthy". R. 1. He

argues on appeal that his conditions of confinement rose to the level of cruel and usual punishment. Pl. Brief, pp. 28-29. However, "at some point the factual content in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8." *Brooks*, 578 F.3d at 581 (*quoting Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 499 F.3d 663, 667 (7th Cir 2007)).

Plaintiff cites generally to the Department of Justice Report (Report), issued in 2008 to the Cook County Board President and Cook County Sheriff, in support of his claims of unconstitutional conditions of confinement. R. 17, 25. In his Statement of the Case, Plaintiff improperly asserts that the findings contained in the Report are 'facts' regarding the living conditions at CCJ. Pl. Brief, pp. 4-5. Notably, Plaintiff does not rely either the 'facts' he asserts or the Report when arguing that his Complaint was improperly dismissed court. This Court, however, should not consider any reference to the Report nor its findings. First, the DOJ Report was issued in 2008 - almost seven years ago and four years prior to Plaintiff's incarceration . Second, the Report is not part of the record before this Court nor was it attached in the Plaintiff's appendix. Third, the facts and findings contained in the letter are not appropriate for judicial notice because they are subject to reasonable dispute. *See Mitchell v. Dart*, 10 C 4873, Dkt. no. 41, September 14, 2011 Memo. op. and order (district court refused to take judicial notice of the DOJ Letter because there is a "reasonable dispute [ ] as to the truth and accuracy of those findings [in the DOJ Letter], which have been denied by Cook

County"); *Martinez v. Cook County*, 2012 U.S. Dist. LEXIS 175793, *15 (N.D. Ill Dec. 12, 2012); *See, e.g., Talley v. Dart*, 2012 U.S. Dist. LEXIS 68089, 2012 WL 1899393, at *5 (N.D. Ill. May 24, 2012)(July 2008 DOJ Letter on summary judgment not considered for the truth of the matters asserted).[1]

Plaintiff, as a pretrial detainee at CCJ, is protected by the Fourteenth Amendment's Due Process Clause, rather than the Eighth Amendment's prohibition against cruel and unusual punishment. Section 1983 claims brought under the Fourteenth Amendment are analyzed under the Eighth Amendment test. *See Higgins v. Correctional Med. Servs. of Illinois, Inc.*, 178 F.3d 508, 511 (7th Cir.1999). Eighth Amendment conditions of confinement claims have objective and subjective components. *McNeil v. Lane*, 16 F.3d 123, 124 (7th Cir. 1994). The objective prong requires the Court to determine whether the conditions were sufficiently serious such that the acts or omissions of the jail officials deprived the plaintiff of basic human needs. *See Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *see also Gillis v. Litscher*, 468 F.3d 488, 493 (7th Cir. 2006) (prison has duty to provide, *inter alia*, adequate sanitation and hygienic materials). If the conditions are sufficiently serious, then the Court considers whether jail officials were

[1] The Report suffers from motivational problems because it was prepared in anticipation of litigation against Cook County pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 (CRIPA). The Department of Justice (DOJ) is required to provide public officials with 49 days of a violation before it brings an action. *Id.* The Letter states that it was submitted to fulfill "the statutory requirements of CRIPA." DOJ Letter, p. 2. The inflammatory language used, as well as the self-serving nature of the report, indicates the DOJ was only motivated to do one thing: bring a lawsuit against the Sheriff and Cook County about the conditions at Cook County Jail. *See Bailey v. City of Chicago*, 2012 U.S. Dist. LEXIS 33120, at **15- 16 (N.D. Ill. March 9, 2012)(the DOJ Letter was "prepared in anticipation of a lawsuit that, in the DOJ letter, the DOJ threatened to file").

deliberately indifferent to the adverse conditions. That is, whether Defendant and Dart was "subjectively aware of the condition of danger complained of, but consciously disregard[ed] it." *Rice v. Correctional Medical Services*, 675 F.3d 650, 665 (7th Cir. 2012).

1. Objective Test.

None of the conditions as described by the Plaintiff are *de facto* unconstitutional or sufficient to put Defendant on notice of any actual claim. For example, with respect to Plaintiff's allegations, there are no glaringly obvious objectively serious constitutional violations. *See, e.g. Harris v. Flemming*, 839 F.2d 1232, 1236 (7th Cir. 1988) (lack of exercise that yields only inconvenience and discomfort does not present a constitutional violation.). Additionally, "a prisoner who gets three square meals a day has no constitutional recourse just because the food is poorly-prepared." *Lunsford v. Bennett*, 17 F.3d 1574, 1580 (7th Cir. 1994). Moreover, valid claims of an unconstitutional conditions based upon the presence of rodents in food involve far more severe situations. *See, e.g., Moore v. Monahan*, No. 06 C 6088, 2009 U.S. Dist. LEXIS 9266, (N.D. Ill. Feb. 9, 2009) (St. Eve, J.) (five and one-half months of exposure to insects, during which inmate was never bitten, did not amount to a constitutional violation). Similarly, while Plaintiff is dissatisfied with the portions of food, along with the conditions of his workplace, they have not resulted in any physical harm. In fact, the cumulative effect of all Plaintiff's allegations do not add up to the deprivation of a single human need.

2. Subjective Test.

Even assuming *arguendo* that Plaintiff sufficiently pled that the conditions at CCJ were objectively serious he failed to allege that Defendant Dart was deliberately indifferent to these conditions. *Farmer v. Brennan*, 511 U.S. 825, 842 (1994); *see also, Conwell v. Cook County*, 2014 U.S. Dist. LEXIS 147457, (N.D. Ill. Oct. 14, 2014). Plaintiff has never alleged that Dart participated in, was personally involved with, nor even had knowledge of his assertions that the conditions of confinement at CCJ were unconstitutional. R. 1, 17, 18. In fact, throughout each of his submissions to the district court, he does not allege one fact against Defendant Dart. *Id.* This Court has held "[w]here a complaint alleges no specific act or conduct on the part of the defendant and the complaint is silent as to the defendant except for his name appearing in the caption, the complaint is properly dismissed, even under the liberal construction to be given *pro s*e complaints. *Potter v. Clark*, 497 F.2d 1206, 1207 (7th Cir. 1974) *citing Brzozowski v. Randall*, 281 F. Supp. 306, 312 (E.D. Pa. 1968). In *Black v. Lane*, 22 F.3d 1395, 1401 (7th Cir. 1994) the magistrate judge's ruling which dismissed a named defendant was upheld when "there [were] no factual allegations involving him other than that he was charged with the administration of Menard and [was] responsible for all persons at Menard." There was insufficient personal involvement for the imposition of liability. *Id.*

Moreover, it was not until the second letter was submitted that Plaintiff alleged any injury or harm as a result of the conditions at CCJ. R. 18. Under the

Prison Litigation Reform Act (PLRA),"[n]o Federal Civil Action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). *See Cassidy v. Indiana Dep't of Corrections*, 199 F.3d 374, 375 (7th Cir. 2000) (Section 1997e(e) barred blind inmate's claims for damages for mental and emotional injuries under the Americans with Disabilities and Rehabilitation Act); *Zehner v.* Trigg, 133 F.3d 459, 461 (7th Cir. 1997) (no recovery of damages under section 1997e(e) where plaintiffs exposed to asbestos did not claim physical injury).

Therefore, Plaintiff's complaint, regardless of the subsequent submissions from Plaintiff, does not state a proper claim against Defendant Dart regarding his "conditions of confinement" and this Court should affirm the district court's ruling dismissing the case under Fed. R. Civ. P. 12(b)(6).

II. The Court did not abuse its discretion in dismissing Plaintiff's lawsuit with prejudice pursuant to Fed. R. Civ. P 41(b).

A. Standard of Review.

District courts have inherent authority to dismiss a case *sua sponte* for a plaintiff's failure to prosecute. *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962). A dismissal for lack of prosecution is appropriate when there is "a clear record of delay or contumacious behavior." *3 Penny Theater Corp. v. Plitt Theatres, Inc.*, 812 F.2d 337, 339(7th Cir. 1987) (*quoting Zaddack v. A.B. Dick Co.*, 773 F.2d 147, 150 (7th Cir. 1985) and *Webber v. Eye Corp.*, 721 F.2d 1067, 1069 (7th Cir. 1983)). The standard of review for a dismissal for want of prosecution is abuse of discretion.

Link, 370 U.S. at 633; *Pyramid Energy, Ltd. v. Heyl & Patterson*, 869 F.2d 1058, 1061 (7th Cir. 1989). In reviewing dismissals for want of prosecution, the Court has stated that it will not set aside a trial court's discretionary order unless it is clear that no reasonable person could concur with the trial court's assessment. *3 Penny Theater*, 812 F.2d at 339 (citations omitted).

In order to determine whether the trial court abused its discretion, the reviewing court must examine the procedural history of the case and the situation at the time of the dismissal. *Pyramid Energy*, 869 F.2d at 1061. The power of federal judges to dismiss for want of prosecution is based in part on the necessity to prevent "undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts." *Link*, 370 U.S. at 629, 82 S. Ct. at 1388. But the Court must provide, especially to pro se plaintiffs, "due warning" that dismissal for lack of prosecution is a possible consequence of continuing to neglect court-orders or failing to reasonably advance the case. *See Ball v. City of Chicago*, 2 F.3d 752, 755 (7th Cir. 1993); *Kruger v. Apfel*, 214 F.3d 784, 787 (7th Cir. 2000).

"The choice of an appropriate . . . sanction is primarily the responsibility of the district court. . . ." *Patterson v. Coca-Cola Bottling Co.*, 852 F.2d 280, 283 (7th Cir. 1988). Likewise, in *Pyramid Energy*, the Court found that the "trial court is entitled to say, under proper circumstances, that enough is enough, (citation omitted), and less severe sanctions than dismissal need not be imposed where the record of dilatory conduct is clear." 869 F.2d at 1062.

A trial court's authority to dismiss a case is not dependent on a showing of prejudice by the defendant, *Zaddack*, 773 F.2d at 150 (citations omitted), nor the age of the case. This Court stated in *3 Penny Theater Cor*p., "there have been many cases where we have held that dismissal was not an abuse of discretion, notwithstanding the fact that the actions were relatively young." 812 F.2d at 340 (*quoting Schilling v. Walworth County Park & Planning Comm'n*, 805 F.2d 272, 277 (7th Cir. 1986)).

B. The district court did not abuse its discretion terminating the case based on Plaintiff's conduct in not filing an amended complaint.

An abuse of discretion has occurred only when "the district court's decision . . . strikes [the Court] as fundamentally wrong." *Anderson v. United Parcel Service*, 915 F.2d 313, 315 (7th Cir. 1990). Plaintiff argues that the trial court should have accepted the documents he submitted to the court after the dismissal as an amended complaint. Pl. Brief, p. 17. In support thereof, he cites to *Donald v. Cook County Sheriff's Dept.*, 95 F.3d 548, 555 (7th Cir. 1996). However, that case is not analogous to the one at bar. In this case, Plaintiff was afforded two opportunities to file an amended complaint, (R. 21, 24) wherein *Donald*, the district court failed to provide the *pro se* Plaintiff the same deference. *Id.* at 555.

The district court properly terminated Plaintiff's lawsuit after he failed to abide with the multiple directives to file an amended pleading. R. 21, 24. The district court granted Defendant's motion to dismiss on December 3, 2013. R. 21. In a clear directive, as set forth above, the order set forth the deficiencies of Plaintiff's original pleading and granted him a month in which to file an amended complaint. *Id.* The

court was clear that Plaintiff had to file an amended complaint and could not reference the original complaint. R. 21, p. 4. The court then issued a second order, in response to Plaintiff's motion for clarification, once again detailing the requirements for pleading constitutional violations and granting him additional time in which to file the amendment. R. 24. The district court specified that "if Plaintiff wishes to pursue his claims" he had to file an amended pleading. R. 24, p. 2. The court specifically addressed what needed to be alleged to state a proper § 1983 claim. Despite the clear language of both orders, including the language that failure to comply with the court's order would result in dismissal (R. 21), Plaintiff chose not to amend his pleading but rather file motions to reconsider. R. 23, 25. *See e.g., Downs v. Westphal*, 78 F.3d 1252, 1257 (7th Cir. 1996) (noting that "being a *pro se* litigant does not give a party unbridled license to disregard clearly communicated court orders" or "to a general dispensation from the rules of procedure or court-imposed deadlines.")

Plaintiff was not precluded from amending his pleading. The district court was not required to give Plaintiff unlimited attempts to get it right. *Cf. Stanard v. Nygren*, 658 F.3d 792, 801 (7th Cir. 2011)(*citing Foman v. Davis*, 371 U.S. 178,182 (1962)(leave to replead need not be allowed when there is a repeated failure to cure prior defects). More importantly, and as this Court has advised, plaintiff was warned that that his failure to comply with the court's orders could result in the

dismissal of his case. Further, this is not Plaintiff's only lawsuit in the Northern district court, he is a seasoned litigant.[2]

Therefore, there was no abuse of discretion by the district court based on Plaintiff's conduct and this Court should affirm the district court's dismissal.

III. The district court properly dismissed Plaintiff's wage claims during its § 1915A review.

A. Standard of Review.

The standard of review for § 1915A dismissal is the same as the Federal Rule of Civil Procedure 12(b)(6) standard. *Santiago v. Walls*, 599 F.3d 749, 755-56 (7th Cir. 2010). Dismissal orders are reviewed de novo, "taking all well-pleaded allegations of the complaint as true and viewing them in the light most favorable to the plaintiff." *Id.* at 756 (*quoting Zimmerman v. Tribble*, 226 F.3d 568, 571 (7th Cir. 2000) (internal quotation marks omitted)); *Turley v. Rednour*, 729 F.3d 645, 649 (7th Cir. 2013). A determination of employment status under the Fair Labor Standards Act, 29 U.S.C.S. §§201-209 is a question of law subject to *de novo* review. *Villarreal v. Woodman*, 113 F.3d 202, 204 (11th Cir. 1997).

Plaintiff alleged in his complaint that his wages of $3.00 per day for his work in the laundry room at CCJ were unconstitutional and that he was entitled to federal minimum wages. R. 1. This claim was dismissed during the district court's § 1915A review. R. 4. The district court correctly dismissed this claim as there is no constitutional right to compensation as a pretrial detainee.

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2 *See Smith v. Vahey*, et al. 13 cv 4872, *Smith v. People of Illinois*, 14 cv 8293, *Smith v. Madigan*, 14 cv 8294

B. Plaintiff is not entitled to minimum wage payment under the Fair Labor Standards Act.

Plaintiff argues on appeal that he should be afforded the protections of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 206(a). Pl. Brief, p. 19. The FLSA applies to all employers in the free market, public and private. *Garcia v. San Antonio Metro*. Transit Auth., 469 U.S. 528, 555-56 (1985)(emphasis added). However, "[t]he FLSA is intended for the protection of the American worker's standard of living, not for those whose custody is controlled by the state." *Hendrickson v. Nelson*, 05 cv 1305, 2006 U.S. Dist. LEXIS 55963, *4 (E.D. Wis. Aug. 10, 2006) *citing Harker v. State Use Indust*, 990 F.2d 131, 133 (4th Cir. 1993). This Circuit has determined that incarcerated individuals are not covered by the FLSA. *See Sanders v. Hayden*, 544 F.3d 812, 814 (7th Cir. 2008)(civilly committed persons not covered by FLSA); *Bennett v. Frank*, 395 F.3d 409 (7th Cir. 2005)(FLSA is intended for the protection of employees, and prisoners are not employees of their prison); *Vanskike*, 974 F.2d at 810-12 (7th Cir. 1992)(applying the purposes behind the "economic reality" test used for FLSA does not call for application of the minimum wage provision to prisoner work) .

As stated in Bennett:

> People are not imprisoned for the purpose of enabling them to earn a living. The prison pays for their keep. If it puts them to work, it is to offset some of the cost of keeping them, or to keep them out of mischief, or to ease their transition to the world outside, or to equip them with skills and habits that will make them less likely to return to crime outside. None of these goals is compatible with federal regulation of their wages and hours. The reason the FLSA contains no express exception for prisoners is probably that the idea was too outlandish to

> occur to anyone when the legislation was under consideration by Congress.

395 F.3d at 410.

While there is no instruction from Congress or the United States Supreme Court as to whether prisoner workers are covered by FLSA, most federal circuit courts deciding similar cases have held it does not apply to prisoner laborers. *See Franks v. Oklahoma State Indus.*, 7 F.3d 971, 973 (10th Cir. 1993)(inmates working in prison not FLSA employees); *Miller v. Dukakis*, 961 F.2d 7, 8 (1st Cir.1992), cert. denied, 506 U.S. 1024 (1992)(denying FLSA and state minimum wage law coverage to convicts who work for the prisons in which they are inmates); *Danneskjold v. Hausrath*, 82 F.3d 37, 39 (2nd Cir. 1996)(FLSA does not apply to prison inmates whose labor provides services to the prison, whether the work is voluntary or not, and whether it is performed inside or outside the prison); *Tourscher v. McCullough*, 184 F.3d 236, 243 (3rd Cir. 1999)(FLSA does not apply to prisoners who perform intra prison work); *Harker v. State Use In*dus., 990 F.2d 131 (4th Cir.), cert. denied, 510 U.S. 886 (1993)(FLSA does not apply to prison inmates performing work at prison); *Reimonenq v. Foti*, 72 F.3d 472, 475 (5th Cir. 1996)(inmate who participates in work-release program has no claim against government under FLSA); *Sims v. Parke Davis & Co.*, 453 F.2d 1259 (6th Cir. 1971), cert. denied, 405 U.S. 978 (1971)(inmates working at private drug clinic inside prison not covered by FLSA); *McMaster v. Minn.*, 30 F.3d 976, 980 (8th Cir. 1994); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320 (9th Cir. 1991)(inmates not entitled to minimum wage for labor performed in State DOC); *Villarreal*, 113 F.3d at 207 (pretrial

detainee performing labor for benefit of the correctional facility and inmates not entitled to minimum wage protection of FLSA).

Plaintiff asks this Court to determine whether an employment relationship exists between Plaintiff and Defendant. Pl. Brief, p. 20. He argues that even though Plaintiff is incarcerated, the Court should look at the totality of the circumstances in determining whether or not he is an "employee" governed by the requirements of the FLSA. *Id.*, p. 21. The Plaintiff points out that this Court has not examined this issue to date and that because Plaintiff alleged that his basic needs were not being met at CCJ, this Court should determine that the protections of the FLSA apply. *Id.* But, in cases where courts found actually determined that FLSA applied inmate labor, it involved prisoners working outside the prison directly for private employers. *See Watson v. Graves*, 909 F.2d 1549, 1553-54 (5th Cir. 1990)(prisoners required to work for private construction company outside the prison to provide jailer's relative with commercial advantage were "employees" of company governed by FLSA); *Carter v. Dutchess Cmty. College*, 735 F.2d 8, 13-14 (2nd Cir. 1984) (prisoner working as a teaching assistant at community college which paid him wages directly could be FLSA "employee").

In the case at bar, Plaintiff specifically pled that his job at CCJ is doing laundry for the inmate population. R. 1. He does allege that the food portions were inadequate, however, he stated that he received three meals per day. *Id.* While the conditions of the laundry room were "hot" and "smelly," prisoners are not entitled to "the equivalent of hotel accommodations." *U.S. v. Weatherington*, 507 F.3d 1068,

1073 (7th Cir. 2007)(*quoting Lunsford*, 17 F.3d at 1579 (7th Cir. 1994)). Further, the fact that Plaintiff was part of a veterans' program that offered "benefits" such as a job – that implies that Plaintiff voluntarily worked and it was not a requirement. R. 1. Therefore, the allegations as set forth in Plaintiff's complaint do indicate that his basic needs are not being met –which undermines his argument of the applicability of the FLSA. "A judicial admission trumps evidence. This is the basis of the principle that a plaintiff can plead himself out of court." *Whitlock v. Brown*, 596 F.3d 406, 412 (7th Cir. 2010). As a result, the requirements of the FLSA should not apply to Plaintiff and the district court correctly dismissed his wage claim during the § 1915A review.

C. Denial of federal minimum wage for a pretrial detainee does not implicate a Thirteenth Amendment violation.

Plaintiff further asserts a his work related claims are recognizable under the Thirteenth Amendment and Fourteenth Amendment and that under the constitution he cannot be subjected to involuntary servitude as a pretrial detainee. As stated above, Plaintiff on his own volition chose to be part of the CCJ's veteran program which provided him with privileges such as having his criminal case heard in veterans' court as well as a job to earn wages within the facility. R. 1. Logically, the Thirteenth's Amendment's prohibition against involuntary servitude cannot apply to the facts of this case.

Conversely, Plaintiff's argument fails as pretrial detainees may be required to perform "general housekeeping responsibilities" consistent with the Due Process Clause. *Tourscher* , 184 F.3d at 242 (3rd Cir. 1999). In *Bijeol v. Nelson*, 579 F.2d

423, 425 (7th Cir. 1978) (per curiam), this Court held that pretrial detainees were required to participate in "general housekeeping duties," including cleaning assignments of common areas, and there was no constitutional violation despite the fact that the detainees were segregated if they did not participate. In that case, the pretrial detainees did not receive any compensation. *Id.* In fact, the court stated that even more arduous tasks would not affect its decision. *See Id.* at 424, n.1.

Similarly, in *Hause v. Vaught*, 993 F.2d 1079 (4th Cir. 1993), the Fourth Circuit ruled that requiring pretrial detainees to help clean their "module" or be subjected to 48-hours "lock-down" was not inherently punitive and thus did not violate the Thirteenth Amendment. In *Buthy v. Comm'r of the Office of Mental Health of New York* State, 818 F.2d 1046 (2nd Cir. 1987), the Second Circuit stated, in dicta, that "restrictions relating to meals, exercise, and other aspects of institutional life . . . are mere 'incidental elements in the organized caretaking of the general company of inmates.'" *Buthy*, 818 F.2d at 1050-51 (*quoting Bijeol*, 579 F.2d at 424)(emphasis added). The court additionally noted that "[a] patient committed to the forensic unit, like a pretrial detainee, 'has no constitutional right to order from a menu or have maid service.'" 818 F.2d at 1051 (*quoting Bijeol*, 579 F.2d at 424).

While these cases are instructive, they are not directly on point. In *Hause*, *Bijeol* and *Buthy*, the respective institutions required the pretrial detainee to work or faced segregation. In this case, Plaintiff's participation in the veterans' program was voluntary and afforded him "benefits" and "resources" while in CCJ custody. R. 1. Plaintiff did not face segregation if he chose not to work, he faced being placed

into general population and losing his special benefits. R.17. Having his housing changed to general population and losing the benefits associated with the veterans' program is hardly punishment. As such, Plaintiff cannot make a constitutional claim under the Thirteenth and Fourteenth Amendments and his wage claim was properly dismissed by the district court.

CONCLUSION

For these reasons, this Court should find that Plaintiff failed to state a plausible claim against Tom Dart and that dismissal without prejudice pursuant to Fed. R. Civ. P. 12(b)(6) was appropriate, that the district court did not abuse its discretion in dismissing the case pursuant to Fed. R. Civ. P. 41(b) and that Plaintiff does not have a valid wage loss claim to withstand the Court's scrutiny under §1915A.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 31(e)

The undersigned hereby certifies that I have uploaded electronically, pursuant to Circuit Rule 31(e), a version of the brief, in PDF format, to the Court's web site *via* the internet.

/S/ Andrea L. Huff
Andrea L. Huff

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)because this brief contains 7098 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In making this certification, I relied upon the word count of the Microsoft Office Word 2007 word processing system used to prepare this brief.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 12 point Century.

/S/ Andrea L. Huff
Andrea L. Huff

CERTIFICATE OF SERVICE

I hereby certify that I have caused an original and fourteen copies the BRIEF OF THE DEFENDANT-APPELLEE to be filed with the United States Court of Appeals for the Seventh Circuit. I further certify that two copies of the foregoing brief were served to the person named below at the address shown, on this day, January 30, 2015, by depositing the same in the U.S. mail depository located at 500 Richard J. Daley Center, Chicago, Illinois, 60602, prepaid postage on or before the hour of 5:00 p.m.

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