NOT RECOMMENDED FOR PUBLICATION

No. 22-1309

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RUFUS LAMAR SAVIN SPEARMAN, Plaintiff-Appellant, v. CHAD H. WILLIAMS, Assistant Resident Unit Supervisor, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

O R D E R

Before: NORRIS, McKEAGUE, and MATHIS, Circuit Judges.

Rufus Lamar Savin Spearman, a pro se Michigan prisoner, appeals the district court's judgment disposing of his civil-rights lawsuit. Spearman moves for the appointment of counsel on appeal. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the reasons set forth below, we deny the motion for the appointment of counsel, affirm in part and vacate in part the district court's judgment, and remand for further proceedings.

I. Facts & Procedural History

At the time giving rise to his allegations, Spearman was confined at the Carson City Correctional Facility ("DRF"). According to Spearman, on April 21, 2014, Correctional Officer Kent Ley informed him that he was being moved to a different housing unit within DRF. Spearman told Ley, Assistant Resident Unit Supervisor Jennifer Gehoski, Lieutenant (Unknown) Shinaberg, and Deputy Warden Laura Krick that it was not safe for him to move to another unit because other prisoners were threatening to harm him. Despite these warnings, the transfer continued. Spearman

alleged that the transfer was in retaliation for his having filed grievances against DRF's chaplain and unspecified prison officials a few weeks earlier.

On April 24, 2014, Spearman's new roommate violently attacked him. Spearman alleged that he subsequently informed certain officials, including Correctional Officer David Osbourne and Assistant Resident Unit Supervisor Chad Williams, about the attack and asked them for a different housing assignment, but they were indifferent to his plight and refused to change his housing situation.

Later that day, Spearman explained his safety concerns to Krick, Osbourne, and Williams, who all instructed Spearman to write a statement requesting protective custody. After Spearman did so, he was moved to a different room on a different wing in the same housing unit. Osbourne and another correctional officer packed Spearman's belongings for the move, but Spearman alleged that when he received his property later that day, he was missing his television, gym shoes, and religious scrolls. The next morning, Spearman spotted his former roommate wearing his gym shoes. Spearman confronted his former roommate, who told Spearman that Osbourne had left the shoes behind when he packed up Spearman's property. When Spearman confronted Osbourne about leaving his property behind, Osbourne allegedly accused Spearman of being a "snitch" in the presence of other prisoners. Minutes later, Correctional Officer Peter Youngert returned Spearman's television to him, but Spearman alleged that he never received his religious scrolls, which prevented him from practicing his religion.

On April 27, 2014, Spearman's newly assigned roommate allegedly threatened to assault him and said to him, "[Y]ou got nothing coming . . . [corrections officers] say you bold." Spearman explained that corrupt officials regularly use the word "bold" to mean that a certain prisoner is disfavored, and its use usually results in that prisoner getting attacked, having his mail withheld or discarded, and having his food contaminated.

Spearman seemed to go on without issues until May 14, 2014, when he asked Williams to process a disbursement so that he could mail some grievance appeals to another prison. Williams purportedly refused to do so and said, "Will someone taze this motherfucker and get him out of

here!" When Spearman turned to leave Williams's office, he allegedly saw Osbourne pointing his taser at him.

On May 16, 2014, Spearman filed a grievance against Gehoski, Williams, Shinaberg, Ley, Krick, Deputy Warden David Fenby, and any other person involved in the decision to move him to the new housing unit on April 21, 2014. He also filed a grievance on June 2, 2014, against health services, alleging that he had continuously been denied medical treatment for an unspecified need. And on July 6, 2014, he filed another grievance against Osbourne for unspecified "retaliatory harassment."

On July 22, 2014, while Spearman was leaning over a table, Youngert allegedly walked up and put his crotch near Spearman's face. Spearman objected to having his "personal space" violated, and Youngert allegedly responded, "[I]'ll violate whatever I want to violate, you just have to deal with it!" After Spearman backed off, Youngert began to walk toward him, and Spearman retreated to his room. Spearman filed a grievance against Youngert three days later, on July 25, 2014.

On August 7, 2014, Spearman filed another grievance, alleging that Youngert and Williams had conspired to increase his security classification because he filed the grievance against Youngert on July 25, 2014. Spearman also alleged in that grievance that Fenby had threatened to effectuate Youngert's and Williams's retaliation by making the following statement: "[T]his don't sound right [the recommendation by defendant Williams], but you can believe [I]'m gonna' lay you down."

On August 18, 2014, Youngert allegedly attempted to provoke Spearman into committing an act of aggression by berating him, spitting in his face twice, and saying, "[W]hat you gone do bitch, [I]'ll fuck you up." Spearman filed a grievance against Youngert the next day. That grievance was assigned to Resident Unit Manager J. Dunigan (not a defendant) on August 26, 2014. Spearman acknowledged that he does not know to whom Dunigan spoke about that grievance, but he alleged that Williams and Fenby increased his security classification and transferred him to a Level-V prison the very next day. The change to Spearman's security

classification and prison assignment resulted in the confiscation of most of his personal property, his having fewer privileges, and greater restrictions being placed on his movements.

In October 2017, Spearman filed a 42 U.S.C. § 1983 complaint, which he later amended, claiming that Williams, Gehoski, Osbourne, Ley, Youngert, Fenby, Krick, and Shinaberg violated his constitutional rights by retaliating (and conspiring to retaliate) against him, inflicting cruel and unusual punishment, being deliberately indifferent to his health and safety, and subjecting him to a campaign of harassment. He also claimed that Osbourne violated his rights under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, et seq., by confiscating his religious literature. Spearman sought damages and injunctive relief.

On initial screening under the Prisoner Litigation and Reform Act ("PLRA"), the district court dismissed all of Spearman's claims that accrued before July 24, 2014, after concluding that the applicable statute of limitations barred those claims. *See* 28 U.S.C. §§ 1915(e)(2), 1915A; 42 U.S.C. § 1997e(c). The district court therefore dismissed Gehoski, Shinaberg, Kirk, Osbourne, and Ley from the lawsuit because all of Spearman's claims against those defendants accrued before July 24, 2014. The court permitted the following claims to proceed: (1) on August 7, 2014, Fenby conspired with Youngert and Williams to increase Spearman's security classification; (2) on August 18, 2014, Youngert verbally abused Spearman, spat in his face, and threatened to hurt him if he responded to the provocation; and (3) on August 26, 2014, Williams and Fenby increased Spearman's security classification and transferred him to a Level-V prison in retaliation for his grievances. The district court later dismissed the August 18 claim for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and granted summary judgment in the defendants' favor on the August 7 and August 26 claims.

On appeal, Spearman challenges the district court's dismissal of his claims under the PLRA and Rule 12(b)(6), as well as the district court's adverse summary judgment ruling.

II. Law & Analysis

a. PLRA & Rule 12(b)(6) Dismissals

We review de novo a district court's dismissal of a complaint for failure to state a claim under the PLRA and Rule 12(b)(6). *Hill v. Lappin*, 630 F.3d 468, 470 (6th Cir. 2010). To avoid dismissal, "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 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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*. To prevail on his § 1983 claims, Spearman needed to "prove that some conduct by a person acting under color of state law deprived [him] . . . of a right secured by the Constitution or other federal laws." *Foy v. City of Berea*, 58 F.3d 227, 229 (6th Cir. 1995). "[P]ro se complaints are liberally construed and are held to less stringent standards than the formal pleadings prepared by attorneys." *Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 358 (6th Cir. 2012).

As a preliminary matter, the district court properly determined that most of Spearman's claims are time-barred. Because § 1983 does not contain a statute of limitations, federal courts borrow the forum state's statute of limitations for personal-injury actions related to a violation of civil rights. *Carroll v. Wilkerson*, 782 F.2d 44, 44 (6th Cir. 1986) (per curiam). In Michigan, that statute of limitations is three years. *See* Mich. Comp. Laws § 600.5805(1). Though state law governs the length of the statute of limitations, federal law governs the accrual date. *See Wallace v. Kato*, 549 U.S. 384, 387-88 (2007). "[U]nder § 1983, the statute of limitations begins to run when the plaintiff knows or has reason to know of the injury that is the basis of the action. 'A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence.'" *Scott v. Ambani*, 577 F.3d 642, 646 (6th Cir. 2009) (quoting *Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984)).

Spearman's complaint references events that occurred between April and August 2014. Because Spearman had reason to know of his claimed injuries when they allegedly occurred, his

respective claims accrued on whichever date he asserted that they transpired. Giving Spearman the benefit of the prison mailbox rule, *see Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008), he filed his initial complaint on October 22, 2017, beyond Michigan's three-year limitations period. But the statute of limitations for § 1983 claims governed by the PLRA is "tolled while the [prisoner] exhausts his required administrative remedies." *Surles v. Andison*, 678 F.3d 452, 458 (6th Cir. 2012). Despite filing grievances concerning each of the federal claims in his amended complaint, Spearman did not indicate when prison officials completed Step III of the grievance process for those claims. Seeking to give Spearman the maximum amount of benefit, the district court therefore tolled the statute of limitations of each claim for 90 days. The district court believed, pursuant to MDOC Policy Directive 03.02.130, that 90 days was the maximum amount of time the grievance process would have taken. Applying the 90 days of tolling to each claim, the district court concluded that, to be timely filed, Spearman's claims must have occurred on or after July 24, 2014.

The district court, however, relied on an outdated version of the MDOC Policy Directive. The Policy Directive in effect at the time of the alleged misconduct in this case stated that "[t]he total grievance process . . . shall generally be completed within *120* calendar days." MDOC PD 03.02.130(S) (eff. July 9, 2007, superseded on Mar. 18, 2019) (emphasis added). Accordingly, if the district court wanted to give Spearman the benefit of tolling for the maximum amount of time that the total grievance process would have taken at the time of the alleged misconduct, it should have given him an additional 30 days of tolling time and considered any claim that accrued on or after *June* 24, 2014, as timely.

Applying this accrual date, the district court mistakenly dismissed one claim as untimely—specifically, Spearman's claim that Youngert encroached upon his personal space and threatened to "violate" him on July 22, 2014. But remand is not warranted on this claim because this allegation, even if true, is legally insufficient to state a claim under § 1983. *See Thomas v. City of Columbus*, 854 F.3d 361, 364 (6th Cir. 2017) ("[W]e may affirm a decision of the district court for any reason supported by the record, including on grounds different from those on which the district

court relied." (cleaned up)). We have long held that verbal abuse, idle threats, and nonphysical harassment of prisoners, standing alone, "do not constitute the type of infliction of pain that the Eighth Amendment prohibits." *Johnson v. Dellatifa*, 357 F.3d 539, 546 (6th Cir. 2004) (citing *Ivey v. Wilson*, 832 F.2d 950, 954-55 (6th Cir. 1987)). Nor do they constitute an adverse action of constitutional significance within the meaning of a First Amendment retaliation claim. *See Smith v. Craven*, 61 F. App'x 159, 162 (6th Cir. 2003) (citing *Ivey*, 832 F.2d at 954-55, and *Thaddeus-X v. Blatter*, 175 F.3d 378, 398 (6th Cir. 1999) (en banc) (per curiam)).

The district court also dismissed the August 18 claim for failure to state a claim. Spearman's complaint alleged that on August 18, 2014, shortly after he had filed two grievances against Youngert, Youngert attempted to provoke him into committing an act of aggression by berating him, spitting in his face twice, and threatening to hurt him if he responded to the provocation. The district court properly concluded that this allegation failed to state a claim. As just discussed, this type of conduct, though unprofessional and insensitive, does not amount to a constitutional violation. *See Johnson*, 357 F.3d at 546; *see also Smith*, 61 F. App'x at 162; *Williams v. Gobles*, No. 99-1701, 2000 WL 571936, at *1 (6th Cir. May 1, 2000) (holding that allegations that a prison guard verbally harassed, threatened, and spat on a prisoner failed to state a § 1983 claim).

Finally, the district court seems to have erroneously lumped Spearman's RLUIPA claim with his § 1983 claims for timeliness purposes. Although RLUIPA does not contain its own statute of limitations, all "civil action[s] arising under an Act of Congress enacted after [December 1, 1990]," such as RLUIPA claims, have a four-year limitations period. 28 U.S.C. § 1658(a); *see Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004); *Al-Amin v. Shear*, 325 F. App'x 190, 193 (4th Cir. 2009). Thus, the district court improperly dismissed Spearman's RLUIPA claim that Osbourne confiscated his religious literature in April 2014, and we vacate and remand as to that claim.

b. Summary Judgment

The district court disposed of Spearman's remaining claims on summary judgment. We review a district court's grant of summary judgment de novo, viewing the facts in the light most favorable to the non-moving party. *Flagg v. City of Detroit*, 715 F.3d 165, 178 (6th Cir. 2013). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Estate of Smithers ex rel. Norris v. City of Flint*, 602 F.3d 758, 761 (6th Cir. 2010). If the moving party satisfies this burden, the burden then shifts to the non-moving party to set forth "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (emphasis omitted) (quoting Fed. R. Civ. P. 56(e)). A party opposing a motion for summary judgment may not rest upon his pleadings but must set forth specific facts demonstrating that there are genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Spearman claimed that, on August 26, 2014, Williams and Fenby increased his security classification and transferred him to a Level-V prison in retaliation for his filing a grievance against Youngert on July 25, 2014. To state a First Amendment retaliation claim, a plaintiff must show that (1) he engaged in protected conduct, (2) the defendants took an adverse action against him that would deter a person of ordinary firmness from engaging in the protected conduct, and (3) the defendants were motivated, at least in part, to take the adverse action because of the plaintiff's protected conduct. *Thaddeus-X*, 175 F.3d at 394. The district court relied on the third element in granting summary judgment to Williams and Fenby, and that element is the only one the parties dispute on appeal. To establish the causal connection required by the third element, the defendants' retaliatory motive "must be a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (quoting *Hartman v. Moore*, 547 U.S. 250, 260 (2006)).

In moving for summary judgment, the defendants noted that Spearman admitted during his video deposition that Fenby made the "lay you down" comment—allegedly a veiled threat to

effectuate Youngert and Williams's retaliatory plot to increase his security classification—on July 15, 2014, nearly two weeks *before* Spearman filed his grievance against Youngert on July 25, 2014. The defendants argued that this timeline of events conclusively shows that the plan to transfer Spearman to a Level-V prison had been broached well before Spearman filed his grievance against Youngert. Thus, the defendants argued that Spearman could not establish a causal connection between his protected conduct (the July 25, 2014, grievance) and the adverse action taken against him (his transfer to a Level-V prison one month later).

Spearman responded to the defendants' summary judgment motion by arguing that the date on which Fenby made his "lay you down" remark is a factual question that precludes summary judgment. But Spearman cannot create a genuine issue of fact simply by pointing to discrepancies between his complaint (which alleged that Fenby's threat post-dated the July 25, 2014, grievance) and his subsequent deposition testimony that Fenby's threat pre-dated the July 25, 2014, grievance. *See Leary v. Livingston County*, 528 F.3d 438, 444 (6th Cir. 2008). "When a claimant's testimony contradicts the allegations in his complaint, we will credit his later testimony." *Id*. Accordingly, the district court properly credited Spearman's testimony that Fenby made the "lay you down" comment to him on July 15, 2014.

Because the record reflects that Williams and Fenby's plan to transfer Spearman to a Level-V prison was already in motion when Spearman filed the July 25, 2014, grievance, Spearman cannot show that his transfer was in any way motivated by his filing of that grievance. *See, e.g.*, *Feliz v. Taylor*, 49 F. App'x 3, 6 (6th Cir. 2002) ("It is apparent that there was no causal connection between Feliz's first grievance and the initial unfavorable evaluation because the evaluation preceded the grievance by one week."). Although Spearman alternatively asserted below that his July 6, 2014, grievance against Osbourne was the motivating force behind his prison transfer, he presented no evidence that either Williams or Fenby was aware of that earlier grievance when they decided to transfer him to the Level-V prison. *See Thaddeus-X*, 175 F.3d at 387 n.3 ("[T]he defendant must have known about the protected activity in order for it to have motivated the

adverse action."). Accordingly, the district court properly granted summary judgment in favor of Williams and Fenby on Spearman's First Amendment retaliation claim.

Relatedly, Spearman claimed that Fenby conspired with Youngert and Williams to increase his security classification in retaliation for his grievances. In the absence of a viable underlying First Amendment retaliation claim, Spearman's associated retaliation-conspiracy claim necessarily fails. *See Stricker v. Township of Cambridge*, 710 F.3d 350, 365 (6th Cir. 2013) (citing *Wiley v. Oberlin Police Dep't*, 330 F. App'x 524, 530 (6th Cir. 2009) (holding that a plaintiff cannot succeed on a conspiracy claim where "there was no underlying constitutional violation that injured her")). The district court properly granted summary judgment in favor of the defendants on Spearman's conspiracy claim.

c. Motion for Appointment of Counsel

Lastly, Spearman moves for the appointment of counsel on appeal. Appointment of counsel in a civil case is justified only in "exceptional circumstances," as determined by the "complexity of the factual and legal issues." *Lavado v. Keohane*, 992 F.2d 601, 605-06 (6th Cir. 1993). Because Spearman has ably represented himself thus far and the issues presented in this case are not especially complex, appointment of counsel is not warranted in this appeal.

III. Conclusion

For these reasons, we **VACATE** the district court's dismissal of Spearman's RLUIPA claim, **AFFIRM** the district court's judgment in all other respects, and **REMAND** for further proceedings. We **DENY** Spearman's motion for the appointment of counsel.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk