

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

RANDY J. RICHBURG, #240 472,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: 2:19-CV-598-ECM-WC
	)	[WO]
STATE OF ALABAMA DPT. OF	)	
CORR., <i>et al.</i> ,	)	
	)	
Defendants.	)	

**RECOMMENDATION OF THE MAGISTRATE JUDGE**

Plaintiff, an inmate incarcerated at the Limestone Correctional Facility in Harvest, Alabama, brings this *pro se* 42 U.S.C. § 1983 action against the Alabama Department of Corrections, Commissioner Dunn, Captain Howard, and Captain McCee. Plaintiff alleges that while incarcerated at the Staton Correctional Facility Defendant Howard subjected him to unconstitutional conditions of confinement and excessive force. Plaintiff further alleges that Defendant McCee subjected him to verbal abuse during his incarceration the Elmore Correctional Facility. Upon review, the court concludes that dismissal of Plaintiff complaint against the Alabama Department of Corrections and Captain McCee prior to service of process is appropriate under 28 U.S.C. § 1915A(b)(1).

**I. STANDARD OF REVIEW**

The Prison Litigation Reform Act, as partially codified at 28 U.S.C. § 1915A, requires this court to screen complaints filed by prisoners against government officers or employees as early as possible in the litigation. The court must dismiss the complaint or

any portion thereof that it finds frivolous, malicious, seeks monetary damages from a defendant immune from monetary relief, or which states no claim upon which relief can be granted. 28 U.S.C. §1915A(b)(1) & (2). The court may *sua sponte* dismiss a prisoner's complaint prior to service. *See* 28 U.S.C. § 1915A(a).

Under § 1915A(b)(1) the court may dismiss a claim as “frivolous where it lacks an arguable basis in law or fact.” *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A claim is frivolous when it “has little or no chance of success,” that is, when it appears “from the face of the complaint that the factual allegations are clearly baseless or that the legal theories are indisputably meritless.” *Carroll v. Gross*, 984 F.2d 392, 393 (11th Cir. 1993). A claim is frivolous as a matter of law where the defendants are immune from suit, *id.* at 327, the claim seeks to enforce a right that clearly does not exist, *id.*, or there is an affirmative defense that would defeat the claim, such as the statute of limitations, *Clark v. Georgia Pardons & Paroles Board*, 915 F.2d 636, 640 n.2 (11th Cir. 1990). Courts are accorded “not only the authority to dismiss [as frivolous] a claim based on indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless.” *Neitzke*, 490 U.S. at 327.

The court may dismiss a complaint, or any portion thereof, under 28 U.S.C. § 1915A(b)(1) for failure to state a claim upon which relief may be granted. Dismissal under § 1915A(b)(1) may be granted “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (*citing Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)). A

review on this ground is governed by the same standards as dismissals for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See Jones v. Bock*, 549 U.S. 199, 215 (2007). To state a claim upon which relief may be granted, “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) (internal quotation marks omitted). To state a claim to relief that is plausible, the plaintiff must plead factual content that “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The allegations should present a “‘plain statement’ possess[ing] enough heft to ‘show that the pleader is entitled to relief.’” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678. When a successful affirmative defense, such as a statute of limitations, appears on the face of a complaint, dismissal for failure to state a claim is also warranted. *Jones*, 549 U.S. at 215.

*Pro se* pleadings “are held to a less stringent standard than pleadings drafted by attorneys” and are liberally construed. *Boxer X v. Harris*, 437 F.3d 1107, 1110 (11th Cir. 2006). However, they “must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555.

## **II. DISCUSSION**

### **A. The Alabama Department of Corrections**

Plaintiff names the Alabama Department of Corrections as a defendant. The Eleventh Amendment bars suit directly against a state or its agencies, regardless of relief sought. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Papasan v.*

*Allain*, 478 U.S. 265 (1986) (Unless the State of Alabama consents to suit or Congress rescinds its immunity, a plaintiff cannot proceed against the State or its agencies as the action is proscribed by the Eleventh Amendment and “[t]his bar exists whether the relief sought is legal or equitable.”).

“[T]he Eleventh Amendment prohibits federal courts from entertaining suits by private parties against States and their agencies [or employees].” *Alabama v. Pugh*, 438 U.S. 781, 781, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978). There are two exceptions to this prohibition: where the state has waived its immunity or where Congress has abrogated that immunity. *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 131 S.Ct. 1632, 1637–38, 179 L. Ed. 2d 675 (2011). “A State’s consent to suit must be ‘unequivocally expressed’ in the text of [a] relevant statute.” *Sossamon v. Texas*, 563 U.S. 277, 131 S. Ct. 1651, 1658, 179 L. Ed. 2d 700 (2011) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)). “Waiver may not be implied.” *Id.* Likewise, “Congress’ intent to abrogate the States’ immunity from suit must be obvious from ‘a clear legislative statement.’” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 786, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991)).

*Selensky v. Alabama*, 619 F. App’x 846, 848–49 (11th Cir. 2015). Thus, neither the State of Alabama or its agencies may be sued unless the State has waived its Eleventh Amendment immunity, *see Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984), or Congress has abrogated the State’s immunity, *see Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996).

Neither waiver nor abrogation applies here. The Alabama Constitution states that “the State of Alabama shall never be made a defendant in any court of law or equity.” Ala. Const. art. I, § 14. The Supreme Court has recognized that this prohibits Alabama from waiving its immunity from suit. *Pugh*, 438 U.S. at 782, 98 S.Ct. 3057 (citing Ala. Const. art. I, § 14.)

*Selensky*, 619 Fed. App’x at 849. “Alabama has not waived its Eleventh Amendment immunity in § 1983 cases, nor has Congress abated it.” *Holmes v. Hale*, 701 F. App’x 751,

753 (11th Cir. 2017) (citing *Carr v. City of Florence*, Ala., 916 F.2d 1521, 1525 (11th Cir. 1990)). Consequently, any claims lodged against the State of Alabama or its agencies are frivolous as these claims are “based on an indisputably meritless legal theory.” *Neitzke*, 490 U.S. at 327.

## **B. Captain McCee**

Plaintiff alleges that Defendant McCee subjected him to abusive language. Defendant McCee, Plaintiff claims, cussed at him and called him names like cracker, white boy, and trash. Doc. 1-1 at 7.

To state a viable claim for relief in a 42 U.S.C. § 1983 action, the conduct complained of must have deprived Plaintiff of rights, privileges or immunities secured by the Constitution. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977, 985 (1999); *Parratt v. Taylor*, 451 U.S. 527 (1981); *Willis v. Univ. Health Servs., Inc.*, 993 F.2d 837, 840 (11th Cir. 1993). Derogatory, demeaning, profane, threatening or abusive comments made by an officer to an inmate, no matter how repugnant or unprofessional, do not rise to the level of a constitutional violation. *See Hernandez v. Fla. Dep’t of Corr.*, 281 Fed. App’x 862, 866 (11th Cir. 2008) (holding that inmate’s claim of “verbal abuse alone is insufficient to state a constitutional claim”); *Edwards v. Gilbert*, 867 F.2d 1271, 1274 n.1 (11th Cir. 1989) (holding that mere verbal taunts, despite their distressing nature, directed at inmate by jailers do not violate inmate’s constitutional rights); *Ayala v. Terhune*, 195 F. App’x. 87, 92 (3d Cir. 2006) (holding that “allegations of verbal abuse, no matter how deplorable, do not present actionable claims under § 1983.”); *McBride v. Deer*, 240 F.3d 1287, 1291 n.3 (10th Cir. 2001) (holding that “acts . . . resulting in an inmate being

subjected to nothing more than threats and verbal taunts do not violate the Eighth Amendment.”); *Northington v. Jackson*, 973 F.2d 1518, 1524 (10th Cir. 1992) (holding that mere threats, even to inmate’s life, made by guard do not satisfy the objective component of the Eighth Amendment as verbal threats and harassment are “necessarily excluded from the cruel and unusual punishment inquiry....”); *Gaul v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987) (holding that Eighth Amendment trivialized by assertion that mere threat constitutes a constitutional wrong); *Purcell v. Coughlin*, 790 F.2d 263, 265 (2d Cir. 1986) (holding that mere name-calling did not violate inmate’s constitutional rights). Because Plaintiff fails to state a cognizable claim regarding Defendant McCee’s use of derogatory language, the complaint against this defendant is due to be dismissed. 28 U.S.C. § 1915A(b)(1).

### III. CONCLUSION

Accordingly, it is the RECOMMENDATION of the Magistrate Judge that:

1. Plaintiff’s § 1983 claims against the Alabama Department of Corrections and Captain McCee be DISMISSED under 28 U.S.C. § 1915A(b)(1) for failing to state a claim upon which relief may be granted;

2. Defendants Alabama Department of Corrections and Captain McCee be terminated as parties prior to service of process;

3. This case be REFERRED to the undersigned for further proceedings.

It is further

ORDERED that **on or before November 22, 2019**, Plaintiff may file an objection to the Recommendation. Any objection filed must specifically identify the findings in the

Magistrate Judge's Recommendation to which Plaintiff objects. Frivolous, conclusive or general objections will not be considered by the District Court. Plaintiff is advised this Recommendation is not a final order and, therefore, it is not appealable.

Failure to file a written objection to the proposed findings and recommendations in the Magistrate Judge's report shall bar a party from a *de novo* determination by the District Court of issues covered in the report and shall bar a party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982). *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*), adopting as binding precedent the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

DONE this 8th day of November, 2019.

/s/ Wallace Capel, Jr.  
WALLACE CAPEL, JR.  
CHIEF UNITED STATES MAGISTRATE JUDGE