

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

LIONEL R. BEARD,)	
#11819-040,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 16-cv-01209-JPG
)	
FEDERAL BUREAU OF PRISONS,)	
UNITED STATES OF AMERICA,)	
ASSISTANT MANAGER HUMPHRIES,)	
and FRED FALMIER,)	
)	
Defendants.)	

MEMORANDUM AND ORDER

GILBERT, District Judge:

This matter is now before the Court for consideration of the First Amended Complaint (Docs. 12, 12-1) filed by Plaintiff Lionel Beard, an inmate who is currently incarcerated at the Federal Correctional Institution in Greenville, Illinois (FCI-Greenville). Plaintiff claims that he was verbally and physically assaulted by a UNICOR factory supervisor (Fred Falmier) at the United States Penitentiary in Marion, Illinois (USP-Marion), on August 11, 2015. (Doc. 12-1). An assistant manager (Humphries) who was present during the incident did not intervene or otherwise attempt to stop the assault. (Doc. 12-1, pp. 3-4). When Plaintiff filed a formal complaint, he was transferred to USP-Marion’s Special Housing Unit (SHU), where he remained for at least five months while the matter was investigated. (Doc. 12-1, p. 4). Before he was ever interviewed, Plaintiff was transferred to FCI-Greenville. *Id.* He now seeks monetary relief for the negligence and/or deliberate indifference of these federal officials under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346, 2671-80. (Doc. 12-1, p. 7).

This case is now before the Court for preliminary review of the First Amended Complaint pursuant to 28 U.S.C. § 1915A, which provides:

(a) **Screening** – The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) **Grounds for Dismissal** – On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint–

(1) is frivolous, malicious, or fails to state a claim on which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

An action or claim is frivolous if “it lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Frivolousness is an objective standard that refers to a claim that any reasonable person would find meritless. *Lee v. Clinton*, 209 F.3d 1025, 1026-27 (7th Cir. 2000). An action fails to state a claim upon which relief can be granted if it does not plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The claim of entitlement to relief must cross “the line between possibility and plausibility.” *Id.* at 557. At this juncture, the factual allegations are to be liberally construed. *See Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 821 (7th Cir. 2009). The First Amended Complaint survives screening under this standard.

First Amended Complaint

During his incarceration at USP-Marion, Plaintiff claims that he was verbally and physically assaulted while working for UNICOR, a government corporation within the Federal Bureau of Prisons (“BOP”) that offers industrial work programs and training opportunities for federal prisoners. (Doc. 12-1). On August 11, 2015, the employee supervisor, Fred Falmier,

used racial slurs while “violently shoving” Plaintiff. (Doc. 12-1, p. 3). He suffered bruising as a result of the incident. (Doc. 12-1, pp. 3-4).

Assistant Manager Humphries “witnessed the exchange.” (Doc. 12-1, p. 4). However, Humphries did not intervene to stop the assault or assist Plaintiff in filing a complaint against Falmier. *Id.* Plaintiff asked Humphries to review video footage of the incident, but it is not clear whether Humphries did so. *Id.*

When Plaintiff filed a formal complaint on his own, he was transferred into USP-Marion’s SHU on August 13, 2015. (Doc. 12-1, p. 4). He remained there while the matter was under investigation. *Id.* On September 24, 2015, a Special Investigative Supervisor, named Lieutenant Malcolm,¹ informed Plaintiff that the institutional level investigation was complete, and the matter had been referred to the Office of Inspector General. *Id.* After five months, Lieutenant Malcolm informed Plaintiff that the case was referred back to the institutional level for review. *Id.* Plaintiff repeatedly asked when he would be interviewed, but he never was. *Id.* Eventually, Plaintiff was transferred to FCI-Greenville “for his own protection.” *Id.* He now claims that prison officials failed to protect him from a substantial risk of serious harm in violation of the Eighth Amendment and breached the duty of care they owed to him under Illinois negligence law. (Doc. 12-1, p. 5).

Discussion

¹ Malcolm is not named as a defendant in the First Amended Complaint, and no claims are asserted against this individual. When parties are not listed in the caption, this Court will not treat them as defendants, and any claims against them should be considered dismissed without prejudice. *See* FED. R. CIV. P. 10(a) (noting that the title of the complaint “must name all the parties”); *Myles v. United States*, 416 F.3d 551, 551-52 (7th Cir. 2005) (holding that to be properly considered a party, a defendant must be “specif[ied] in the caption”).

To facilitate the orderly management of future proceedings in this case, and in accordance with the objectives of Federal Rules of Civil Procedure 8(e) and 10(b), the Court has re-organized the claims in the *pro se* First Amended Complaint into the following counts:

- Count 1 -** Falmier exhibited deliberate indifference toward Plaintiff, in violation of the Eighth Amendment and under *Bivens*, when he/she verbally and physically assaulted Plaintiff on August 11, 2015.
- Count 2 -** Humphries exhibited deliberate indifference toward Plaintiff, in violation of the Eighth Amendment and under *Bivens*, when he/she failed to intervene and stop the assault or assist Plaintiff in filing a complaint on August 11, 2015.
- Count 3 -** The United States is liable under the FTCA for Falmier's assault of Plaintiff and Humphries' failure to intervene and stop the assault on August 11, 2015.

The parties and the Court will continue using these designations in all future pleadings and orders, unless otherwise directed by a judicial officer of this Court. Plaintiff has abandoned all other claims identified in this Court's original screening Order (Counts 3, 4, 5, and 6 in Document 7) by omitting them from the First Amended Complaint. (Doc. 7)

Discussion

A federal prisoner who seeks relief for the misconduct of federal agents may obtain monetary relief in federal court in three ways. He may bring a suit against the United States under the FTCA for conduct of federal agents that is considered tortious under state law. *Sisk v. United States*, 756 F.2d 497, 500 n. 4 (7th Cir. 1985) (citing 28 U.S.C. §§ 1346(6), 2680). He may sue individual agents for violating his constitutional rights under the theory set forth in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). *Id.* Alternatively, he may pursue both types of claims in the same suit. *See, e.g., Ting v. United States*, 927 F.2d 1504, 1513 n. 10 (9th Cir. 1991).

Plaintiff's chosen path is unclear. In his original Complaint, Plaintiff pursued monetary relief against individual federal agents and federal agencies under *Bivens*. (Doc. 1). In the First Amended Complaint, he pursues monetary relief against the United States, BOP, Falmier, and Humphries under the FTCA. (Docs. 12, 12-1). Construing this *pro se* prisoner's amended complaint liberally, the Court finds that it states viable claims under both. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

However, the *Bivens* claims in Counts 1 and 2 may only proceed against the individual federal agent(s) who allegedly caused or participated in each constitutional violation. *Kaba v. Stepp*, 458 F.3d 678, 687 (7th Cir. 2006) (holding that “[a] *Bivens* action may not be brought against the United States or a federal agency”). “[T]he point of *Bivens* [i]s to establish an action against the employee to avoid the sovereign immunity that would block an action against the United States.” *See Sterling v. United States*, 85 F.3d 1225, 1228-29 (7th Cir. 1996); *F.D.I.C. v. Meyer*, 510 U.S. 471, 484-86 (1994); *Okoro v. Callaghan*, 324 F.3d 488, 490 (7th Cir. 2003). This Court already discussed the legal framework that is applicable to both claims in the original screening Order. (Doc. 7, pp. 4-7). The First Amended Complaint articulates a viable Eighth Amendment claim under this framework against Defendant Falmier in Count 1 and against Defendant Humphries in Count 2. These claims shall be dismissed with prejudice against all other defendants.

In contrast, the FTCA claim in Count 3 may only proceed against the United States. *Jackson v. Kotter*, 541 F.3d 688, 693 (7th Cir. 2008) (“only proper defendant in an FTCA action is the United States”); *Hughes v. United States*, 701 F.2d 56, 58 (7th Cir. 1982). *See* 28 U.S.C. § 2679(b). The FTCA allows “civil actions on claims against the United States, for money damages . . . for . . . personal injury or death caused by the negligent or wrongful act or omission

of any employee of the Government while acting within the scope of his office or employment.” 28 U.S.C. § 1346(b)(1). FTCA claims are governed by the law of the state where the tort occurred, which in this case is Illinois. *Parrott v. United States*, 536 F.3d 629, 637 (7th Cir. 2008). *See also Palay v. United States*, 349 F.3d 418, 425 (7th Cir. 2003).

The allegations suggest that Falmier and/or Humphries were negligent under Illinois law. *Thompson v. Gordon*, 948 N.E.2d 39, 45 (Ill. 2011) (citing *Iseberg v. Gross*, 879 N.E.2d 278 (2007) (Illinois negligence claims). Accordingly, the FTCA claim in Count 3 shall proceed against the United States on this basis.

Whether allegations of an assault provide an independent basis for bringing the FTCA claim is a separate matter altogether. The FTCA provides a limited waiver of the United States’ sovereign immunity. *Millbrook v. United States*, 133 S. Ct. 1441 (2013). Exceptions to this waiver appear in 28 U.S.C. § 2680 and include “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.” 28 U.S.C. § 2680(h). Section 2680(h) has been referred to as the “intentional tort exception.” *Id.* at 1443. However, Congress carved out an “exception to § 2680(h)’s preservation of the United States’ sovereign immunity for intentional torts by adding a proviso covering claims that arise out of the wrongful conduct of law enforcement officers” (*i.e.*, referred to as the “law enforcement proviso”). *Id.* (citation omitted). The United States Supreme Court has held that the waiver effected by the law enforcement proviso “extends to acts or omissions of law enforcement officers that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest.” *Id.* at 1446. Whether the assault allegedly perpetrated by Falmier fits into the intentional tort

exception under § 2680, and thus precludes an FTCA claim based on the assault, or fits within the law enforcement proviso as interpreted in *Millbrook*, and thus allows a claim arising from the assault, remains to be seen. At this stage, the Court will allow the FTCA claim to proceed against the United States based on the alleged negligence and assault of Plaintiff by the UNICOR staff on August 11, 2015. Count 3 shall be dismissed with prejudice against all other defendants.

Pending Motion

Plaintiff's Motion for Status (Doc. 14) is **DENIED** as **MOOT**. This Order reflects the current status of this case.

Disposition

IT IS HEREBY ORDERED that **COUNT 1** shall receive further review against Defendant **FALMIER**; the claim is hereby **DISMISSED** with prejudice against Defendants **UNITED STATES OF AMERICA, FEDERAL BUREAU OF PRISONS,** and **HUMPHRIES** for failure to state a claim upon which relief may be granted.

IT IS ORDERED that **COUNT 2** shall receive further review against Defendant **HUMPHRIES**; the claim is hereby **DISMISSED** with prejudice against Defendants **UNITED STATES OF AMERICA, FEDERAL BUREAU OF PRISONS,** and **FALMIER** for failure to state a claim upon which relief may be granted.

IT IS ORDERED that **COUNT 3** shall receive further review against Defendant **UNITED STATES OF AMERICA**; the claim is hereby **DISMISSED** with prejudice against Defendants **FEDERAL BUREAU OF PRISONS, FALMIER,** and **HUMPHRIES** for failure to state a claim upon which relief may be granted.

IT IS ORDERED that Defendant **FEDERAL BUREAU OF PRISONS** is **DISMISSED** with prejudice because the First Amended Complaint fails to state a claim for relief against this defendant. The Clerk is directed to **TERMINATE** this party in CM/ECF.

IT IS ORDERED that with regard to **COUNT 3**, the Clerk of Court is **DIRECTED** to complete, on Plaintiff's behalf, a summons for service of process on Defendant **UNITED STATES OF AMERICA**; the Clerk shall issue the completed summons. Further, with regard to **COUNTS 1 and 2**, the Clerk of Court is **DIRECTED** to complete, on Plaintiff's behalf, a summons and form USM-285 for service of process on Defendant **FALMIER** (Count 1 only) and Defendant **HUMPHRIES** (Count 2 only); the Clerk shall issue the completed summons. The United States Marshal **SHALL** serve Defendants **FALMIER** and **HUMPHRIES** pursuant to Rule 4(e) of the Federal Rules of Civil Procedure.² All costs of service shall be advanced by the United States, and the Clerk shall provide all necessary materials and copies to the United States Marshals Service.

In addition, pursuant to Federal Rule of Civil Procedure 4(i), the Clerk shall:

- (1) personally deliver to or send by registered or certified mail addressed to the civil-process clerk at the office of the United States Attorney for the Southern District of Illinois a copy of the summons, the First Amended Complaint (Docs. 12, 12-1), and this Memorandum and Order; and
- (2) send by registered or certified mail to the Attorney General of the United States at

² Rule 4(e) provides, "an individual – other than a minor, an incompetent person, or a person whose waiver has been filed – may be served in a judicial district of the United States by: (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or (2) doing any of the following: (A) delivering a copy of the summons and of the complaint to the individual personally; (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or (C) delivering a copy of each to an agent authorized by appointment or law to receive service of process."

Washington, D.C., a copy of the summons, the First Amended Complaint (Docs. 12, 12-1), and this Memorandum and Order.

It is **FURTHER ORDERED** that Plaintiff shall serve upon the United States Attorney for the Southern District of Illinois a copy of every pleading or other document submitted for consideration by this Court. Plaintiff shall include with the original paper to be filed a certificate stating the date that a true and correct copy of the document was mailed to the United States Attorney. Any paper received by a district judge or a magistrate judge which has not been filed with the Clerk or which fails to include a certificate of service will be disregarded by the Court.

IT IS ORDERED that, if the Defendant cannot be found at the address provided by Plaintiff, the employer shall furnish the Clerk with the Defendant's current work address, or, if not known, the Defendant's last-known address. This information shall be used only for sending the forms as directed above or for formally effecting service. Any documentation of the address shall be retained only by the Clerk. Address information shall not be maintained in the court file, nor disclosed by the Clerk.

IT IS ORDERED that Plaintiff shall serve upon Defendant (or upon defense counsel once an appearance is entered), a copy of every further pleading or other document submitted for consideration by the Court. Plaintiff shall include with the original paper to be filed a certificate stating the date on which a true and correct copy of any document was served on Defendant or counsel. Any paper received by a district judge or magistrate judge that has not been filed with the Clerk or that fails to include a certificate of service will be disregarded by the Court.

IT IS ORDERED that pursuant to Local Rule 72.1(a)(2), this action is **REFERRED** to a **United States Magistrate Judge** for further pre-trial proceedings.

IT IS FURTHER ORDERED that this entire matter is **REFERRED** to a United States Magistrate Judge for disposition, as contemplated by Local Rule 72.2(b)(2) and 28 U.S.C. § 636(c), *should all the parties consent to such a referral.*

IT IS ORDERED that if judgment is rendered against Plaintiff, and the judgment includes the payment of costs under § 1915, Plaintiff will be required to pay the full amount of the costs, even though his application to proceed *in forma pauperis* was granted. *See* 28 U.S.C. § 1915(f)(2)(A).

Plaintiff is **ADVISED** that at the time application was made under 28 U.S.C. § 1915 for leave to commence this civil action without being required to prepay fees and costs or give security for the same, the applicant and his or her attorney were deemed to have entered into a stipulation that the recovery, if any, secured in the action shall be paid to the Clerk of the Court, who shall pay therefrom all unpaid costs taxed against Plaintiff and remit the balance to Plaintiff. Local Rule 3.1(c)(1)

Plaintiff is **ADVISED** that he is under a continuing obligation to keep the Clerk of Court and each opposing party informed of any change in his address; the Court will not independently investigate his whereabouts. This shall be done in writing and not later than **7 days** after a transfer or other change in address occurs. Failure to comply with this order will cause a delay in the transmission of court documents and may result in dismissal of this action for want of prosecution. *See* FED. R. CIV. P. 41(b).

IT IS SO ORDERED.

DATED: July 25, 2017

s/J. Phil Gilbert
District Judge
United States District Court