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

PATRICK MEYERR,
M47701

Plaintiff,

Case No. 17-cv-259-MJR

vs.

IDOC,
ROBINSON CORRECTIONAL CENTER, and
SHANE PICA,

Defendants.

MEMORANDUM AND ORDER

REAGAN, Chief Judge:

Plaintiff Patrick Meyer, currently incarcerated in Robinson Correctional Center, brings this *pro se* action for deprivations of his constitutional rights pursuant to 42 U.S.C. § 1983. According to the Complaint, a correctional officer has been verbally harassing and making fun of Plaintiff. Plaintiff contends the officer's conduct is causing mental anguish and seeks monetary relief. In connection with these claims, Plaintiff sues the Illinois Department of Corrections ("IDOC"), Robinson Correctional Center, and Shane Pica, a correctional officer.

This case is now before the Court for a preliminary review of the 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 of the *pro se* complaint are to be liberally construed. *See Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 821 (7th Cir. 2009).

The Complaint

On October 18, 2016, Plaintiff was moved to 2B Wing. (Doc. 1, p. 5). After being moved to this wing, Plaintiff alleges Pica, a correctional officer, began verbally harassing and "making fun" of him. *Id.* Specifically, Plaintiff contends Pica made comments such as: "Oh my feet hurt soo soo much, I can barely walk, oh my ears I can barely hear." *Id.* Pica also made harassing comments regarding Plaintiff's depression. *Id.* Plaintiff feels intimidated by the comments. *Id.* As a result, he often remains in his cell and has requested psychological treatment. In connection with these claims, Plaintiff seeks monetary damages.

Discussion

Dismissal of IDOC and Robinson Correctional Center

As a preliminary matter, the Court notes that, in addition to Officer Pica, Plaintiff has named as defendants Robinson Correctional Center and IDOC. Neither Defendant, however, is a proper defendant with respect to Plaintiff's claim for damages. IDOC is a state agency. "State agencies are not 'persons' for purposes of the Civil Rights Act." *Toledo, Peoria & Wester R. Co. v. State of Ill. Dept. of Transp.*, 744 F.2d 1296, 1298 (7th Cir. 1984). Similarly, Robinson Correctional Center is a division of a state agency (the Department of Corrections) and is not a "person" within meaning of § 1983. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66–67, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Williams v. Wisconsin*, 336 F.3d 576, 580 (7th Cir. 2003); *Smith v. Gomez*, 550 F.3d 613, 618 (7th Cir. 2008).

Accordingly, IDOC and Robinson Correctional Center shall be dismissed from this action with prejudice.

Merits Review

Based on the allegations in the Complaint, the Court finds it convenient to divide the *pro se* action into a single count. The parties and the Court will use this designation in all future pleadings and orders, unless otherwise directed by a judicial officer of this Court. The designation of this count does not constitute an opinion regarding its merit. Any other claim that is mentioned in the Complaint but not addressed in this Order should be considered dismissed without prejudice as inadequately pled under the *Twombly* pleading standard.

Count 1- Constitutional claim against Pica for verbally harassing Plaintiff.

The allegations in the Complaint do not state a claim against Pica for taunting Plaintiff. "[H]arassment, while regrettable, is not what comes to mind when one thinks of 'cruel and

unusual' punishment" under the Eighth Amendment. *Dobbey v. Ill. Dep't of Corrections*, 574 F.3d 443, 446 (7th Cir. 2009). The "Constitution does not compel guards to address prisoners in a civil tone using polite language." *Antoine v. Uchtman*, 275 F.App'x. 539, 541 (7th Cir. 2008). The Seventh Circuit has held that "[s]tanding alone, simple verbal harassment does not constitute cruel and unusual punishment [under the Eighth Amendment], deprive a prisoner of a protected liberty interest [under the Fourteenth Amendment] or deny a prisoner equal protection of the laws [under the Fourteenth Amendment]." *DeWalt v. Carter* 224 F.3d 607, 612 (7th Cir. 2000) (collecting cases). *But see Beal v. Foster*, 803 F.3d 356, 357-58 (7th Cir. 2015) (dismissal of Eighth Amendment claim based on harassment was premature, where plaintiff alleged psychological trauma to the extent of seeking mental health care; harassment was sexual in nature and included physical conduct beyond the verbal harassment; and harassment arguably placed plaintiff at greater danger of assault by other prisoners). The Complaint fails to state a claim against Pica for harassing and taunting Plaintiff.

Count 1 shall therefore be dismissed for failure to state a claim upon which relief may be granted. The dismissal, however, shall be without prejudice and with leave to amend.

Pending Motions

Plaintiff's Motion for Leave to Proceed *in Forma Pauperis* has been granted. (Doc. 8). Accordingly, Plaintiff's Motion for Service of Process at Government Expense (Doc. 4) shall be **DENIED** as Moot.

Plaintiff has also filed a Motion to Appoint Counsel. (Doc. 3). The dismissal of the Complaint without prejudice raises the question of whether Plaintiff is capable of drafting a viable amended complaint without the assistance of counsel.

There is no constitutional or statutory right to counsel in federal civil cases. *Romanelli v. Suliene*, 615 F.3d 847, 851 (7th Cir. 2010); *see also Johnson v. Doughty*, 433 F.3d 1001, 1006 (7th Cir. 2006). Nevertheless, the district court has discretion under 28 U.S.C. § 1915(e)(1) to recruit counsel for an indigent litigant. *Ray v. Wexford Health Sources, Inc.*, 706 F.3d 864, 866–67 (7th Cir. 2013).

When a *pro se* litigant submits a request for assistance of counsel, the Court must first consider whether the indigent plaintiff has made reasonable attempts to secure counsel on his own. *Navejar v. Iyiola*, 718 F.3d 692, 696 (7th Cir. 2013) (citing *Pruitt v. Mote*, 503 F.3d 647, 654 (7th Cir. 2007)). If so, the Court must examine "whether the difficulty of the case—factually and legally—exceeds the particular plaintiff's capacity as a layperson to coherently present it." *Navejar*, 718 F.3d at 696 (quoting *Pruitt*, 503 F.3d at 655). "The question ... is whether the plaintiff appears competent to litigate his own claims, given their degree of difficulty, and this includes the tasks that normally attend litigation: evidence gathering, preparing and responding to motions and other court filings, and trial." *Pruitt*, 503 F.3d at 655. The Court also considers such factors as the plaintiff's "literacy, communication skills, education level, and litigation experience." *Id*.

As to the first inquiry, Plaintiff states that he has been unable to find an attorney because "nobody will take pro bono cases." (Doc. 3, p. 1). Based on this limited information the Court cannot determine if Plaintiff has made a *reasonable* attempt to obtain counsel.

As to the second inquiry, Plaintiff states that he has some high school education. (Doc. 3, p. 2). This does not suggest that Plaintiff is unable to file an amended complaint without the assistance of an attorney. Moreover, Plaintiff's Complaint suggests that he is capable of coherently stating the relevant facts. At this juncture, the Court is merely concerned with

whether this action can get out of the gate, so to speak. All that is required is for Plaintiff to include more factual content (to the extent that there are additional facts that might state a viable claim) regarding the alleged constitutional violation. No legal training or knowledge is required to do this. Therefore, the recruitment of counsel is not warranted at this time and the motion is dismissed without prejudice.

Disposition

IT IS HEREBY ORDERED that Defendants **IDOC** and **ROBINSON CORRECTIONAL CENTER** are **DISMISSED** with prejudice. The Clerk of the Court is **DIRECTED** to terminate these Defendants as parties in CM/ECF.

IT IS FURTHER ORDERED that Plaintiff's Motion for Service of Process at Government Expense (Doc. 4) is **DENIED** as moot and Plaintiff's Motion to Appoint Counsel is **DENIED** without prejudice.

IT IS FURTHER ORDERED that the Complaint is **DISMISSED without prejudice** for failure to state a claim upon which relief can be granted**.**

Plaintiff is **GRANTED** leave to file a "First Amended Complaint" on or before August 14, 2017. Should Plaintiff fail to file his First Amended Complaint within the allotted time or consistent with the instructions set forth in this Order, the entire case shall be dismissed with prejudice for failure to comply with a court order and/or for failure to prosecute his claims. FED. R. APP. P. 41(b). *See generally Ladien v. Astrachan*, 128 F.3d 1051 (7th Cir. 1997); *Johnson v. Kamming*a, 34 F.3d 466 (7th Cir. 1994); 28 U.S.C. § 1915(e)(2).

Should Plaintiff decide to file a First Amended Complaint, it is strongly recommended that he use the forms designed for use in this District for such actions. He should label the form, "First Amended Complaint," and he should use the case number for this action (*i.e*. 17-cv-259-

MJR).

To enable Plaintiff to comply with this Order, the **CLERK** is **DIRECTED** to mail Plaintiff a blank civil rights complaint form.

An amended complaint supersedes and replaces the original complaint, rendering the original complaint void. *See Flannery v. Recording Indus. Ass'n of Am.*, 354 F.3d 632, 638 n. 1 (7th Cir. 2004). The Court will not accept piecemeal amendments to the original Complaint. Thus, the First Amended Complaint must stand on its own, without reference to any previous pleading, and Plaintiff must re-file any exhibits he wishes the Court to consider along with the First Amended Complaint. The First Amended Complaint is subject to review pursuant to 28 U.S.C. § 1915(e)(2).

Plaintiff is further **ADVISED** that his obligation to pay the filing fee for this action was incurred at the time the action was filed, thus the filing fee of $350.00 remains due and payable, regardless of whether Plaintiff elects to file a First Amended Complaint. *See* 28 U.S.C. § 1915(b)(1); *Lucien v. Jockisch*, 133 F.3d 464, 467 (7th Cir. 1998).

Finally, 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 17, 2017

s/MICHAEL J. REAGAN
Chief Judge
United States District Court