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

ANTHONY WIMBERLY, # N-61282,

Plaintiff,

v. **Case No. 17-cv-472-DRH**

WARDEN JEFFREY DENNISON,

Defendant.

MEMORANDUM AND ORDER

HERNDON, District Judge:

Plaintiff, currently incarcerated at Illinois River Correctional Center, filed this this *pro se* civil rights action pursuant to 42 U.S.C. § 1983 for constitutional violations that allegedly occurred while he was incarcerated at Shawnee Correctional Center ("Shawnee"). Plaintiff claims that he was subjected to unsanitary cell conditions for 20 days when he was placed in disciplinary segregation in January 2017. This case is now before the Court for a preliminary review of the Complaint pursuant to 28 U.S.C. § 1915A.

Under § 1915A, the Court is required to screen prisoner complaints to filter out non-meritorious claims. *See* 28 U.S.C. § 1915A(a). The Court must dismiss any portion of the Complaint that is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or asks for money damages from a defendant who by law is immune from such relief. 28 U.S.C. § 1915A(b).

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 "no reasonable person could suppose to have any merit." *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. Conversely, a complaint is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although the Court is obligated to accept factual allegations as true, *see Smith v. Peters*, 631 F.3d 418, 419 (7th Cir. 2011), some factual allegations may be so sketchy or implausible that they fail to provide sufficient notice of a plaintiff's claim. *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009). Additionally, Courts "should not accept as adequate abstract recitations of the elements of a cause of action or conclusory legal statements." *Id.* At the same time, however, the factual allegations of a pro se complaint are to be liberally construed. *See Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011); *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 821 (7th Cir. 2009).

Applying these standards, the Court finds that the Complaint does not survive threshold review under § 1915A.

The Complaint

On January 11, 2017, Plaintiff was placed in segregation for 30 days because of an altercation (a 301 fight). (Doc. 1, p. 5). Plaintiff was confined in a segregation cell which, he claims, was uninhabitable and should have been "condemned" due to poor conditions. *Id.* The sink and toilet were full of mold and mildew. *Id.* The sink was non-functional because a "seg pen" was stuck in the faucet and no water would come out. *Id.* Plaintiff did not have cleaning supplies to clean the segregation cell. *Id.* Additionally, the mattress in the cell had urine stains on it and "reeked" of urine. *Id.* Plaintiff remained in the unsanitary segregation cell for 20 days. *Id.* Plaintiff was moved to a new segregation cell after "constantly complaining" and filing grievance. *Id.*

In connection with these claims, Plaintiff sues Jeffrey Dennison, the warden, because the staff worked "under" Warden Dennison. (Doc. 1, p. 5). Plaintiff seeks monetary damages. (Doc. 1, p. 6).

Earlier Filed Civil Rights Action

This is not Plaintiff's first action involving conditions of confinement while housed at Shawnee. On December 6, 2016, Plaintiff filed a similar *pro se* civil rights action in the Southern District of Illinois. *See Wimberly v. C/O Sams et al.,* No. 3:16-cv-1309-MJR-SCW. This action (hereinafter, "Pending Shawnee Action") is presently proceeding before Chief Judge Michael J. Reagan.

In the Pending Shawnee Action, Plaintiff's Complaint brought claims pertaining to unsanitary cell conditions, loss of property, and failure to respond to

grievances. (Pending Shawnee Action, Docs. 1, 14). Plaintiff's claims arose in connection with his 30-day stint in disciplinary segregation (from March 21, 2016 through April 21, 2016). In connection with these claims, Plaintiff sued two correctional officers and Jeffrey Dennison. In conducting a preliminary review of Plaintiff's Complaint, Judge Reagan summarized the allegations pertaining to unsanitary cell conditions (Count 2 in the Pending Shawnee Action) as follows:

> Plaintiff was confined for 30 days (until April 21, 2016) in the segregation cell which, he claims, should have been "condemned" due to the poor conditions. (Doc. 1, p. 4). The cell had "no proper running water" because a seg pen was stuck in the faucet spout. Not only did the pen obstruct the flow of water, it exposed Plaintiff to germs in his drinking water from that foreign object. (Doc. 1, pp. 4-5). The window was "drilled shut" so that the air did not circulate properly. The window screen was torn, allowing insects and ants to invade the cell. They crawled on Plaintiff, got into his bed, and bit him day and night. (Doc. 1, pp. 5, 13). The sink and toilet were contaminated with fungus and mildew, and Plaintiff was not given cleaning supplies. He had to drink from and wash up in the filthy sink for the entire 30 days, placing his health at risk. (Doc. 1, p. 6).
>
> Plaintiff asked Sams to move him to a better cell, but Sams ignored the request. Warden Dennison was the supervisor of Sams and was responsible for the conditions throughout the facility.

(Pending Shawnee Action, Doc. 14, p. 3). Plaintiff's Complaint was divided into three counts. (Pending Shawnee Action, Doc. 14, p. 4). Counts 1 and 3 did not survive preliminary review. Count 2 proceeded against one of the correctional officer defendants. (Pending Shawnee Action, doc. 14, p. 7). However, Warden Dennison was dismissed from Count 2 and from the Complaint for lack of personal involvement. *Id.* In dismissing Warden Dennison, the Judge Reagan explained that supervisory liability is not applicable to § 1983 actions.

Merits Review Pursuant to 28 U.S.C. § 1915A

Based on the allegations of 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 as to merit. Any other claim that is mentioned in the Complaint but not addressed in this Order should be considered dismissed without prejudice.

> **Count 1:** Eighth Amendment claim for being confined under unsanitary conditions in the segregation cell for 20 days beginning on January 11, 2017.

The Eighth Amendment prohibition on cruel and unusual punishment forbids unnecessary and wanton infliction of pain, and punishment grossly disproportionate to the severity of the crime. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). Prison conditions that deprive inmates of basic human needs – food, medical care, sanitation, or physical safety – may violate the Eighth Amendment. *Rhodes*, 452 U.S. at 346; s*ee also James v. Milwaukee Cnty.*, 956 F.2d 696, 699 (7th Cir. 1992). In the instant case, Count 1 must be dismissed because it states no claim as to the only named defendant – Warden Dennison.

Section 1983 creates a cause of action based on personal liability and predicated upon fault; thus, "to be liable under § 1983, the individual defendant must have caused or participated in a constitutional deprivation." Pepper v. Village of Oak Park, 430 F.3d 805, 810 (7th Cir. 2005) (internal quotations and

citations omitted). In order to state a claim against a defendant, a plaintiff must describe what each named defendant did (or failed to do), that violated the plaintiff's constitutional rights.

Here, Plaintiff does not allege that Warden Dennison was directly involved in the alleged constitutional deprivations. Rather, he alleges that Warden Dennison is liable because he supervised "staff" at Shawnee. The doctrine of *respondeat superior* (supervisory liability) is not applicable to § 1983 actions. *Sanville v. McCaughtry*, 266 F.3d 724, 740 (7th Cir. 2001) (citations omitted). Thus, Warden Dennison is not subject to liability merely because of his role as a supervisor at Shawnee.

Under certain circumstances, a prison official's knowledge of an ongoing violation can trigger a duty investigate and, if necessary, exercise his or her authority to intervene on a prisoner's behalf. *See Perez v. Fenoglio,* 792 F.3d 768, 781-82 (7th Cir. 2015).[1] In the instant case, the Complaint does not suggest that such circumstances exist. Plaintiff merely alleges that he complained to "staff" and filed a grievance. Apparently, in response to his complaints, Plaintiff was moved to another segregation cell. This does not suggest that Warden Dennison "turned a blind eye" to a constitutional violation as described in *Perez* and related authority.

[1] But, the denial of a grievance – standing alone – generally states no constitutional claim. *United States Constitution*. *See George v. Abdullah*, 507 F.3d 605, 609 (7th Cir. 2007); *Owens v. Hinsley*, 635 F.3d 950, 953 (7th Cir. 2011); *Estate of Miller by Chassie v. Marberry*, 847 F.3d 425, 428-29 (7th Cir. 2017).

Pending Motions

Plaintiff has filed a Motion for Recruitment of 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*.

With respect to the first inquiry, Plaintiff states that he has contacted several lawyers with no response. The minimal information provided does not allow the Court to determine if Plaintiff has made *reasonable* attempts to obtain counsel on his own. With respect to the second inquiry, there is no indication that the recruitment of counsel is not warranted at this stage of the litigation. Plaintiff has some high school education and, to date, has submitted coherent pleadings. 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 provide an amended complaint that includes sufficient factual content regarding the alleged constitutional violations and the individuals associated with the alleged violations. Plaintiff alone has knowledge of these facts, and no legal training or special knowledge is required to set them down on paper. Therefore, the Motion for Recruitment of Counsel (Doc. 3) is **DENIED** without prejudice. The Court will remain open to appointing counsel as the case progresses.

Disposition

IT IS HEREBY ORDERED that the Complaint is **DISMISSED without prejudice.**

Plaintiff is **GRANTED** leave to file a "First Amended Complaint" on or before August, 30th, 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. Kamminga*, 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-472-DRH).

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.
Signed this 31st day of July, 2017.

Digitally signed by
Judge David R. Herndon
Date: 2017.07.31
13:19:34 -05'00'

UNITED STATES DISTRICT JUDGE