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

BILLY D. PALMER, #B74805,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 17−cv–0585−MJR**
	)	
JOHN BALDWIN, and	)	
MATTHEW SWALLS,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

REAGAN, Chief District Judge:

Plaintiff Billy Palmer, an inmate in Vienna Correctional Center ("Vienna"), brings this action for deprivations of his constitutional rights that allegedly occurred during his confinement at Vienna. Plaintiff indicated on the cover page of his Complaint that it is brought pursuant to the Federal Tort Claims Act,[1] 28 U.S.C. §§ 1346, 2671–2680 (Doc. 1, p. 1). However, because Plaintiff is a state prisoner, he clearly claims that his constitutional rights were infringed, and he names no federal entities in connection with his claims, the Court construes this case as a civil rights action brought pursuant to 42 U.S.C. § 1983.

In his Complaint, Plaintiff claims he has been subjected to unconstitutional conditions of confinement and unreliable phone services in violation of the Eighth and First Amendments. (Doc. 1). Plaintiff seeks permanent injunctive relief from the defendants. (Doc. 1, p. 6). This case is now before the Court for a preliminary review of the Complaint pursuant to 28 U.S.C. § 1915A, which provides:

[1] The FTCA provides jurisdiction for suits against the United States regarding torts committed by federal officials, not state officials. Therefore, Plaintiff's claims do not fall within the jurisdiction of the FTCA.

> (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).

After fully considering the allegations in Plaintiff's Complaint, the Court concludes that this action is subject to summary dismissal.

The Complaint

In his Complaint (Doc. 1), Plaintiff makes the following allegations: the Vienna "facility has failed to abide by Food Service safety guidelines by: a) Workers and staff not wearing beard nets while serving b) Staff serving without hair or beard net[s] . . . c) Roaches and mice being able to run around food service area while serving d) Fans blowing debris into food on food service line e) open building allowing birds inside dining area and flying over while trying to

eat." (Doc. 1, p. 5). Further, the facility has "fail[ed] to maintain phone service" by randomly disconnecting phones, ending inmate calls despite a full charge being assessed, and "failing / refusing to correct the disconnection issue, even after staff confirms the problem." *Id.*

Plaintiff seeks an order requiring the Illinois Department of Corrections ("IDOC") and Vienna "to immediately begin complying with Food, Health, and Safety Guidelines" and "to correct phone access issues and refund lost charges." (Doc. 1, p. 6).

Discussion

Based on the allegations of the Complaint, the Court finds it convenient to divide the *pro se* action into 2 counts. The parties and the Court will use these designations in all future pleadings and orders, unless otherwise directed by a judicial officer of this Court. The designation of these counts does not constitute an opinion regarding their merit.

Count 1 – Defendants subjected Plaintiff to unconstitutional conditions of confinement in violation of the Eighth Amendment by failing to abide by certain food service safety guidelines.

Count 2 – Defendants failed to maintain consistent phone services at Vienna in violation of the First Amendment.

As discussed in more detail below, Counts 1 and 2 will be dismissed for failure to state a claim upon which relief may be granted. Any other intended claim that has not been recognized by the Court is considered dismissed without prejudice as inadequately pleaded under the *Twombly* pleading standard.

Count 1

To prevail on an Eighth Amendment claim based on inadequate prison conditions, the prisoner must show that (1) the conditions in the prison were objectively "sufficiently serious so that a prison official's act or omission results in the denial of the minimal civilized measure of life's necessities," and (2) prison officials acted with deliberate indifference to those conditions.

Townsend v. Fuchs, 522 F.3d 765, 773 (7th Cir. 2008) (internal citations and quotation marks omitted). Prisons are required to "provid[e] nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who consume it." *French v. Owens*, 777 F.2d 1250, 1255 (7th Cir.1985), *cert. denied*, 479 U.S. 817, 107 S.Ct. 77, 93 L.Ed.2d 32 (1986).

While it is a close call whether the conditions of the food service at Vienna "present an immediate danger to [Plaintiff's] health and well being" as described, particularly because Plaintiff did not allege that he considers himself to be in any danger, Plaintiff failed to allege that either of the defendants acted with deliberate indifference to these conditions, or were even aware of them. Plaintiff has therefore not satisfied the second element of his deliberate indifference claim, and Count 1 will be dismissed without prejudice as against both defendants.

Count 2

The Supreme Court has recognized that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," *Turner v. Safley*, 482 U.S. 78, 84, 107 S.Ct. 2254, 2259, 96 L.Ed.2d 64 (1987), "nor do they bar free citizens from exercising their own constitutional rights by reaching out to those on the 'inside.'" *Thornburgh v. Abbott*, 490 U.S. 401, 407, 109 S.Ct. 1874, 1878, 104 L.Ed.2d 459 (1989). The federal courts have accordingly held that prison inmates retain their First Amendment rights to communicate with family and friends, including reasonable access to the telephone. Unreasonable restrictions on prisoners' telephone access may violate the First and Fourteenth Amendment. *Tucker v. Randall*, 948 F.2d 388, 391 (7th Cir. 1991). Denial of attorney telephone calls, furthermore, would also run afoul of the Sixth and First Amendments. *Id.*

However, the First Amendment's protection of communication is not without restriction,

due to the security problems inherent in correctional facilities. *Martin v. Tyson*, 845 F.2d 1451, 1457 (7th Cir. 1988), *cert. denied*, 488 U.S. 863, 109 S.Ct. 162, 102 L.Ed.2d 133 (1988) (citing *Martin v. Brewer*, 830 F.2d 76, 78 (7th Cir. 1987)). An inmate "has no right to unlimited telephone use." *Benzel v. Grammer*, 869 F.2d 1105, 1108 (8th Cir. 1989), *cert. denied*, 493 U.S. 895, 110 S.Ct. 244, 107 L.Ed.2d 194 (1989). Instead, the exact nature of telephone service to be provided to inmates is generally to be determined by prison administrators, "subject to court scrutiny for unreasonable restrictions." *Washington v. Reno*, 35 F.3d 1093, 1100 (6th Cir. 1994); *see also Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986).

Plaintiff has failed to allege sufficient facts to state a First Amendment claim based upon the random disconnection of an unspecified number of phone calls to unspecified individuals. He has not claimed his access to legal counsel, or the courts, has been impeded. He has also not alleged that he has been unreasonably prevented from communicating with family and friends over the phone, only that such communication has, on occasion, been interrupted.

To the extent Plaintiff's primary concern is with the full charge being imposed on calls that were otherwise cut short, the Court finds that the fees and costs associated with making calls from Vienna do not state a cause of action as described. *Arsberry v. Illinois,* 244 F.3d 558, 564 (7th Cir. 2001) (excessive telephone charge did not implicate prisoner's First Amendment rights). Moreover, the Court notes that if Plaintiff's Complaint concerns collect calls, these fees and costs are likely not even imposed upon (or, presumably) paid by Plaintiff. *See id.*

For the foregoing reasons, Count 2 of the Complaint shall be dismissed. Out of an abundance of caution, this dismissal shall be without prejudice.

Defendants

Notably, Plaintiff lists John Baldwin (the Director of IDOC) and Matthew Swalls (the

Warden of Vienna) as the defendants, but makes no allegations against either of them in the body of the Complaint. Plaintiffs are required to associate specific defendants with specific claims, so that defendants are put on notice of the claims brought against them and so they can properly answer the complaint. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); FED. R. CIV. P. 8(a)(2). Where a plaintiff has not included a defendant in his statement of the claim, the defendant cannot be said to be adequately put on notice of which claims in the complaint, if any, are directed against him. Furthermore, merely invoking the name of a potential defendant is not sufficient to state a claim against that individual. *See Collins v. Kibort*, 143 F.3d 331, 334 (7th Cir. 1998). And in the case of those defendants in supervisory positions, the doctrine of *respondeat superior* is not applicable to § 1983 actions. *Sanville v. McCaughtry*, 266 F.3d 724, 740 (7th Cir. 2001) (citations omitted). Plaintiff has not alleged that either defendant is "personally responsible for the deprivation of a constitutional right," *id.*, and a defendant cannot be liable merely because he supervised a person who caused a constitutional violation. Accordingly, Baldwin and Swalls will be dismissed from this action without prejudice.

Pending Motions

Plaintiff has filed a Motion for Recruitment of Counsel (Doc. 3) which is hereby **DENIED** without prejudice. There is no constitutional or statutory right to appointment of counsel in federal civil cases. *Romanelli v. Suliene*, 615 F.3d 847, 851 (7th Cir. 2010). Federal District Courts have discretion under 28 U.S.C. § 1915(e)(1) to request counsel to assist *pro se* litigants. *Id.* When presented with a request to appoint counsel, the Court must consider: "(1) has the indigent plaintiff made a reasonable attempt to obtain counsel or been effectively precluded from doing so; and if so, (2) given the difficulty of the case, does the plaintiff appear competent to litigate it himself [.]" *Pruitt v. Mote*, 503 F.3d 647, 654 (7th Cir. 2007).

With regard to the first step of the inquiry, there is no indication whether Plaintiff has attempted to obtain counsel on his own, or has been effectively precluded from doing so. Because Plaintiff has not made this showing, the Court finds that Plaintiff has not made a reasonable attempt to find counsel. Therefore, Plaintiff's motion for the appointment of counsel merits denial.

Plaintiff's Motion for Service of Process at Government Expense (Doc. 4) is **DENIED** as moot. Plaintiff is advised that it is not necessary for a litigant proceeding *in forma pauperis* to file a motion requesting service of process by the United States Marshal Service or other process server. The Clerk will issue summons and the Court will direct service for any complaint that passes preliminary review.

Disposition

IT IS HEREBY ORDERED that Plaintiff's Complaint (Doc. 1) is **DISMISSED** without prejudice for failure to state a claim upon which relief may be granted.

IT IS FURTHER ORDERED that **BALDWIN** and **SWALLS** are **DISMISSED** without prejudice because the Complaint fails to state a claim for relief against them.

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. Kamminga*, 34 F.3d 466 (7th Cir. 1994); 28 U.S.C. § 1915(e)(2). Such dismissal shall count as one of Plaintiff's three allotted "strikes" within the meaning of 28 U.S.C. § 1915(g).

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-585-MJR). The pleading shall present each claim in a separate count, and each count shall specify, *by name*, each defendant alleged to be liable under the count, as well as the actions alleged to have been taken by that defendant. Plaintiff should attempt to include the facts of his case in chronological order, inserting each defendant's name where necessary to identify the actors. Plaintiff should refrain from filing unnecessary exhibits. Plaintiff should *include only related claims* in his new complaint. Claims found to be unrelated to Plaintiff's Eighth Amendment deliberate indifference and First Amendment phone access claims will be severed into new cases, new case numbers will be assigned, and additional filing fees will be assessed. 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___
U.S. Chief District Judge