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

NED JAMES, # K-91930,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 17-cv-623-NJR**
	)	
JOHN BALDWIN,	)	
KIM BUTLER,	)	
C/O GARNER,	)	
C/O BARKER,	)	
NANCY TOVAR,	)	
and MINH T. SCOTT,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

ROSENSTENGEL, District Judge:

Plaintiff, an inmate of the Illinois Department of Corrections ("IDOC") currently incarcerated at Pontiac Correctional Center ("Pontiac"), has brought this *pro se* civil rights action pursuant to 42 U.S.C. § 1983. His claims arose while he was confined at Menard Correctional Center ("Menard"). Plaintiff claims that he was sexually assaulted and denied due process in the proceedings over a disciplinary ticket. He also raises a state law tort claim based on the assault. The Complaint is now before the Court for a preliminary review 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 some of Plaintiff's claims survive threshold review under § 1915A.

The Complaint

On June 14, 2016, Plaintiff was ordered by unidentified Menard officers to terminate the telephone call he was on because he was going to segregation. (Doc. 1, p. 3). He was not given a reason for this move. When he was placed in punitive segregation on that day, Plaintiff went on crisis watch. He told the crisis watch officer to "put down his witness which was Plaintiff['s] call log to his pin number." *Id.*

Fifteen days later, on June 29, 2016, the Adjustment Committee held a hearing on Plaintiff's disciplinary ticket. Plaintiff objected because the hearing was not held within the 14-day time limit required by IDOC rules, and he asked for the ticket to be expunged. The Committee declined to expunge the ticket and found Plaintiff guilty of (107) sexual misconduct. (Doc. 1, p. 4). The hearing

report was falsified to state that the hearing was held on June 21, 2016. Plaintiff's telephone call log was never investigated, and his witness was not called. He blames Lieutenant Scott for these failures. (Doc. 1, p. 6).

Plaintiff filed a grievance over the disciplinary action. The Administrative Review Board agreed with Plaintiff's assertion that the hearing had actually been held on June 29 hearing date, but nonetheless denied his grievance. Plaintiff claims that these events violated his right to due process.

On July 8, 2016, C/O Garner and C/O Barker came to Plaintiff's cell, handcuffed him, and told him he was "moving behind the cell door on 6 Gallery." (Doc. 1, pp. 4-5). While Plaintiff's hands were cuffed, Garner pulled down Plaintiff's boxers and stuck his fingers in Plaintiff's anus several times. Plaintiff was yelling and screaming during this incident, but nobody came to his assistance. Plaintiff immediately requested medical attention, but he was not allowed to see a nurse until several days later. (Doc. 1, p. 5).

Based on the incident with Garner and Barker, Plaintiff asserts an Eighth Amendment claim for cruel and unusual punishment, as well as an Illinois state law claim for assault and battery. (Doc. 1, pp. 5-6).

Plaintiff states that he suffers from a serious mental illness (he does not elaborate further). He claims that due to this condition, he has suffered mental anguish and loss of sleep following the alleged assault and due process violation. (Doc. 1, pp. 4, 6).

Plaintiff seeks monetary damages and an order of protection from Menard staff. (Doc. 1, p. 9).

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 the following 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 as to their merit. Any other claim that is mentioned in the

Complaint but not addressed in this Order should be considered dismissed without prejudice.

Count 1: Fourteenth Amendment due process claim against Scott for failing to call Plaintiff's witness or investigate his call log in connection with Plaintiff's disciplinary hearing of June 29, 2016, and for failing to hold the hearing within 14 days;

Count 2: Eighth Amendment claims against Garner for sexually assaulting Plaintiff on July 8, 2016, against Barker for failing to intervene to stop the assault and against Garner and Barker for refusing Plaintiff's request for medical attention following the assault;

Count 3: Illinois state law claim for assault and battery against Garner and Barker based on the sexual assault incident of July 8, 2016.

As explained below, Count 1 shall be dismissed for failure to state a claim upon which relief may be granted. Counts 2 and 3 shall proceed in this action for further review.

Dismissal of Count 1 – Due Process

In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Supreme Court set out the minimal procedural protections that must be provided to a prisoner in disciplinary proceedings in which the prisoner loses good time, is confined to disciplinary segregation, or is otherwise subjected to some comparable deprivation of a constitutionally protected liberty interest. *Id.* at 556-572.

> *Wolff* required that inmates facing disciplinary charges for misconduct be accorded [1] 24 hours' advance written notice of the charges against them; [2] a right to call witnesses and present documentary evidence in defense, unless doing so would jeopardize institutional safety or correctional goals; [3] the aid of a staff member or inmate in presenting a defense, provided the inmate is illiterate or the issues complex; [4] an impartial tribunal; and [5] a written statement of reasons relied on by the tribunal. 418 U.S. at 563-572.

Hewitt v. Helms, 459 U.S. 460, 466 n.3 (1983). The Supreme Court has also held that due process requires that the findings of the disciplinary tribunal must be supported by some evidence in the record. *Superintendent v. Hill*, 472 U.S. 445, 455-56 (1985); *McPherson v. McBride*, 188 F.3d 784, 786 (7th Cir. 1999). However, even a meager amount of supporting evidence is sufficient to satisfy this inquiry. *Scruggs v. Jordan*, 485 F.3d 934, 941 (7th Cir. 2007).

Here, the Complaint indicates a possible violation of the due process standards set forth in

Wolff, where Plaintiff requested a witness who was not called during the hearing. Additionally, no investigation was made of Plaintiff's call log documentation. Plaintiff fails to explain, however, how the outcome of the disciplinary action might have been different if the witness and call log had been made available during his June 29 hearing. From Plaintiff's description, the only matter in dispute that could have been clarified by the call log and witness was the date on which Plaintiff received notice of the disciplinary action (June 14, 2016), which would have shown that the Adjustment Committee hearing held on June 29 fell outside the prescribed 14-day time limit. Plaintiff does not indicate that the call log or witness would have provided evidence that he was not guilty of the disciplinary charge itself.

The fact that Plaintiff's hearing was not held within the 14 days prescribed by state law and procedure does not amount to a constitutional violation of his due process rights, even if the delay violated the state rules. A federal court does not enforce state law or regulations. *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1065 (1989); *Pasiewicz v. Lake Cnty. Forest Preserve Dist.*, 270 F.3d 520, 526 (7th Cir. 2001). Therefore, the Complaint fails to state a constitutional claim upon which relief may be granted on the basis of the delayed hearing.

Even if the call log or witness would have provided some exculpatory evidence regarding the disciplinary charge against Plaintiff, this would not support a due process claim so long as the Committee had *some* evidence before it to support the finding of guilt. *See Scruggs v. Jordan*, 485 F.3d 934, 941 (7th Cir. 2007) ("once the meager threshold has been crossed our inquiry ends"). The Complaint does not disclose what evidence was relied upon to find Plaintiff guilty, nor does Plaintiff include a copy of the disciplinary ticket or the Adjustment Committee's report. Thus, the Complaint does not support a conclusion that Plaintiff's due process rights were violated by the absence of his call log or witness from the proceeding.

Finally, Plaintiff does not reveal the length of time he was confined in punitive segregation as

a result of the disciplinary action, or whether he received any other punishment. Nor does he mention the conditions of his confinement while he remained in punitive segregation.

Even if Plaintiff's hearing had violated the *Wolff* procedural standards, a prisoner cannot maintain a constitutional claim for deprivation of a liberty interest without due process unless certain narrow requirements are met. Overall, the conditions of the disciplinary segregation must have imposed an "atypical and significant hardship" on the inmate when compared to the conditions he would have faced in nondisciplinary segregation. *Sandin v. Conner*, 515 U.S. 472, 484 (1995); *see also Wagner v. Hanks*, 128 F.3d 1173, 1175 (7th Cir. 1997). In order to assess whether a plaintiff was subjected to atypical and significant hardships, courts consider both the duration of the punitive segregation term and the conditions of that confinement. *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 697-98 (7th Cir. 2009). For relatively short periods of disciplinary segregation, inquiry into specific conditions of confinement is unnecessary, and the claim would be subject to dismissal. *See Lekas v. Briley*, 405 F.3d 602, 612 (7th Cir. 2005) (56 days); *Thomas v. Ramos*, 130 F.3d 754, 761 (7th Cir. 1997) (70 days) ("a relatively short period when one considers his 12 year prison sentence"). In these cases, the short duration of the disciplinary segregation forecloses any due process liberty interest regardless of the conditions. *See Marion*, 559 F.3d at 698 ("we have affirmed dismissal without requiring a factual inquiry into the conditions of confinement"). Only if the disciplinary segregation period was sufficiently long *and* if the conditions of confinement were unusually harsh, may an inmate maintain a civil rights claim for deprivation of a liberty interest without due process.

Here, because the Complaint does not demonstrate a procedural flaw of constitutional dimension in the disciplinary hearing, and because Plaintiff has provided no information on the duration or conditions of his confinement in punitive segregation, Plaintiff has failed to state a claim upon which relief may be granted with respect to **Count 1.** This due process claim shall therefore be dismissed without prejudice.

Count 2 – Sexual Assault & Deliberate Indifference to Medical Needs

The intentional use of excessive force by prison guards against an inmate without penological justification constitutes cruel and unusual punishment in violation of the Eighth Amendment and is actionable under § 1983. *See Wilkins v. Gaddy*, 559 U.S. 34 (2010); *DeWalt v. Carter*, 224 F.3d 607, 619 (7th Cir. 2000). An inmate must show that an assault occurred and that "it was carried out 'maliciously and sadistically' rather than as part of 'a good-faith effort to maintain or restore discipline.'" *Wilkins*, 559 U.S. at 40 (citing *Hudson v. McMillian*, 503 U.S. 1, 6 (1992)). An inmate seeking damages for the use of excessive force need not establish serious bodily injury to make a claim, but not "every malevolent touch by a prison guard gives rise to a federal cause of action." *Wilkins*, 559 U.S. at 37-38 (the question is whether force was de minimis, not whether the injury suffered was de minimis); *see also Outlaw v. Newkirk*, 259 F.3d 833, 837-38 (7th Cir. 2001).

Plaintiff's allegation that Garner forcibly penetrated Plaintiff's anus with his finger states an Eighth Amendment claim that merits further review. Furthermore, even if Garner's action was meant to be a search for contraband, physical touching that goes beyond what is necessary to accomplish a search may violate the Constitution. "An unwanted touching of a person's private parts, intended to humiliate the victim or gratify the assailant's sexual desires, can violate a prisoner's constitutional rights whether or not the force exerted by the assailant is significant." *Washington v. Hively*, 695 F.3d 641, 643 (7th Cir. 2012) (citing *Mays v. Springborn*, 575 F.3d 643, 650 (7th Cir. 2009); *Calhoun v. DeTella*, 319 F.3d 936, 939-40 (7th Cir. 2003); *Farmer v. Perrill*, 288 F.3d 1254, 1260 (10th Cir. 2002); *Freitas v. Ault*, 109 F.3d 1335, 1338 (8th Cir. 1997); *Boddie v. Schneider*, 105 F.3d 857, 860-61 (2d Cir. 1997)). In fact, sexual offenses may involve no touching at all. *Washington*, 695 F.3d at 643. In this case, the Complaint suggests that whatever was Garner's intent, his actions may have crossed the line into sexual abuse. **Count 2** shall therefore proceed against Garner.

As to Barker, who was present during the incident but did nothing to deter Garner's actions or assist Plaintiff, an officer who witnesses an incident of excessive force or assault but fails to

intervene may be equally as liable as the perpetrator. *See Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972); *see also Lanigan v. Vill. of E. Hazel Crest*, 110 F.3d 467, 477 (7th Cir. 1997); *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir. 1994) (collected cases). The claim against Barker thus survives scrutiny under § 1915A as well.

Finally, the Seventh Circuit has held that a guard who uses excessive force on a prisoner has "a duty of prompt attention to any medical need to which the beating might give rise[.]" *Cooper v. Casey*, 97 F.3d 914, 917 (7th Cir. 1996). Thus both Garner, who perpetrated the alleged assault, and Barker, who failed to intervene to stop it, and then prevented Plaintiff from getting immediate medical attention, may be found liable for deliberate indifference to Plaintiff's need for medical care. At this stage, it cannot be determined whether the actions of Barker and Garner constituted deliberate indifference to a serious medical need of Plaintiff. Therefore, this portion of Plaintiff's claim against Garner and Barker shall also go forward under **Count 2**.

Count 3 – Assault & Battery State Tort Claim

Under Illinois state law, "[a] battery occurs when one 'intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual.'" *Smith v. City of Chicago*, 242 F.3d 737, 744 (7th Cir. 2001) (quoting 720 ILL. COMP. STAT. 5/12–3(a)). Based on the factual allegations in the Complaint, Garner's actions fall within the scope of a battery claim. Where a district court has original jurisdiction over a civil action such as a § 1983 claim, it also has supplemental jurisdiction over related state law claims pursuant to 28 U.S.C. § 1367(a), so long as the state claims "derive from a common nucleus of operative fact" with the original federal claims. *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 936 (7th Cir. 2008). "A loose factual connection is generally sufficient." *Houskins v. Sheahan*, 549 F.3d 480, 495 (7th Cir. 2008) (citing *Baer v. First Options of Chicago, Inc.*, 72 F.3d 1294, 1299 (7th Cir. 1995)).

Here, Plaintiff's potential state law claim in Count 3 is based on the identical set of facts that

support his civil rights claim in Count 2. Therefore, supplemental jurisdiction over Count 3 is appropriate at this time.

The state law tort claim against Garner in **Count 3** shall thus proceed for further consideration. As Barker appears to have had some level of participation in the incident, the claim against him also survives dismissal at this early stage, so **Count 3** shall proceed against Barker as well.

Dismissal of Additional Defendants

Plaintiff lists IDOC Director Baldwin, Warden Butler, and C/O Tovar among the Defendants, but he fails to mention any of these individuals in his statement of claim. 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).

Furthermore, Butler and Baldwin cannot be held liable for the alleged violations of Plaintiff's constitutional rights merely because they are, respectively, the chief administrator of the prison and the Director of IDOC. "The doctrine of *respondeat superior* does not apply to § 1983 actions; thus to be held individually liable, a defendant must be 'personally responsible for the deprivation of a constitutional right.'" *Sanville v. McCaughtry*, 266 F.3d 724, 740 (7th Cir. 2001) (quoting *Chavez v. Ill. State Police*, 251 F.3d 612, 651 (7th Cir. 2001)). *See also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); *Eades v. Thompson*, 823 F.2d 1055, 1063 (7th Cir. 1987).

Accordingly, Baldwin, Butler, and Tovar shall be dismissed from this action without prejudice.

Pending Motion

Plaintiff's motion for recruitment of counsel (Doc. 2) shall be referred to United States Magistrate Judge Wilkerson for further consideration.

Disposition

COUNT 1 is **DISMISSED** without prejudice for failure to state a claim upon which relief may be granted. **BALDWIN, BUTLER, TOVAR,** and **SCOTT** are **DISMISSED** from this action without prejudice.

The Clerk of Court shall prepare for **GARNER** and **BARKER**: (1) Form 5 (Notice of a Lawsuit and Request to Waive Service of a Summons), and (2) Form 6 (Waiver of Service of Summons). The Clerk is **DIRECTED** to mail these forms, a copy of the Complaint, and this Memorandum and Order to each Defendant's place of employment as identified by Plaintiff. If a Defendant fails to sign and return the Waiver of Service of Summons (Form 6) to the Clerk within 30 days from the date the forms were sent, the Clerk shall take appropriate steps to effect formal service on that Defendant, and the Court will require that Defendant to pay the full costs of formal service, to the extent authorized by the Federal Rules of Civil Procedure.

With respect to a Defendant who no longer can be found at the work 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 or disclosed by the Clerk.

Plaintiff shall serve upon Defendants (or upon defense counsel once an appearance is entered), a copy of every 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 the document was served on Defendants 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.

Defendants are **ORDERED** to timely file an appropriate responsive pleading to the Complaint and shall not waive filing a reply pursuant to 42 U.S.C. § 1997e(g).

Pursuant to Local Rule 72.1(a)(2), this action is **REFERRED** to United States Magistrate Judge **Donald G. Wilkerson** for further pre-trial proceedings, which shall include a determination on the pending motion for recruitment of counsel (Doc. 2).

Further, this entire matter shall be **REFERRED** to United States Magistrate Judge Wilkerson for disposition, pursuant to Local Rule 72.2(b)(2) and 28 U.S.C. § 636(c), *if all parties consent to such a referral.*

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, notwithstanding that his application to proceed *in forma pauperis* has been granted. *See* 28 U.S.C. § 1915(f)(2)(A).

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 19, 2017

NANCY J. ROSENSTENGEL
United States District Judge