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

MICHAEL P. CRENSHAW, # R-06537,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 17-cv-637-NJR**
	)	
JOHN R. BALDWIN,	)	
JACQUELINE A. LASHBROOK,	)	
and ILLINOIS DEPARTMENT	)	
of CORRECTIONS,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

ROSENSTENGEL, District Judge:

Plaintiff, an Illinois Department of Corrections ("IDOC") inmate currently incarcerated at Menard Correctional Center ("Menard"), has brought this *pro se* civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff is serving a 50-year sentence for murder. The Complaint includes claims that Defendants housed Plaintiff in an unconstitutionally small cell, deprived him of adequate exercise and state pay due to lockdowns, and were deliberately indifferent to his medical needs. 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 one of Plaintiff's claims survives threshold review under § 1915A. The rest will be dismissed.

The Complaint

Plaintiff states that from March 2003 until April 2017, he was housed in the North One cell house at Menard. (Doc. 1, p. 13). The cells in North One are less than 40 square feet in size, and Plaintiff had to share the cell with another inmate. (Doc. 1, p. 6). According to Plaintiff, these cells "have been deemed unconstitutional" because each inmate should have at least 50

square feet of living space.[1] *Id.* When some of the floor space is taken up by the bunks, sink, toilet, shelves, and property or legal boxes, the remaining living area is allegedly reduced to about 10 square feet. This space is inadequate for Plaintiff to exercise inside the cell, and Plaintiff is ordinarily confined there up to 20-22 hours per day.

Plaintiff alleges that Menard had many extended lockdown periods from 2008 through 2017, including 65 days in 2016, 158 days in 2015, 223 days in 2014, and 35 days so far in 2017, during which he was deprived of out-of-cell exercise. During lockdowns, he was confined in his cell for 24 hours per day, and could not exercise in the small space which was shared with his cellmate. (Doc. 1, p. 9).

Plaintiff was "forced" to take the bottom bunk in his cell, which has only about 28-30 inches of head space above the bed. (Doc. 1, p. 7). Due to Plaintiff's height of 6 feet, 1 inch, he needs about 36.5 or 38.5 inches of space in order to sit upright while on his bed. Because the bed lacks this space, Plaintiff is forced to sit in a hunched-over or side-leaning position, which causes chronic pain in his neck, upper back, and shoulders. He has no other place in the cell to sit, because inmates are prohibited from sitting on their legal boxes or property boxes to avoid damage to them. *Id.*

Plaintiff sought medical attention for his neck/shoulder/back pain between March 2015 and August 2016. (Doc. 1, pp. 10-11). He was not seen by any medical staff until June 17, 2016. (Doc. 1, p. 11). He saw the prison doctor on August 25, 2016. (Doc. 1, p. 10). The doctor issued Plaintiff an upper bunk permit, but otherwise "ignored" his complaints and gave him no other treatment. *Id.* Plaintiff seeks to hold Warden Lashbrook liable for the failure to treat his ailments because she allegedly knew about his problem through Plaintiff's grievances.

[1] Plaintiff cites to "3 National Institute of Justice, American Prisons and Jail 85 n.6 (1980)," and "A Handbook on Jail Architecture 63 1975" in reference to this claim. (Doc. 1, p. 6).

During lockdowns, Defendants allegedly violated Plaintiff's due process rights by confiscating his state pay, when he was not the cause of the lockdowns and did not owe money. (Doc. 1, p. 8).

Plaintiff raises another financial issue where "Jane or John Doe" confiscated money from him after he received an out-of-date money order from outside the prison which was credited to his account. Not realizing the money order had expired, Plaintiff spent three-fourths of the funds at the commissary before his account was apparently debited for the improperly-credited money order deposit. (Doc. 1, p. 8).

At some point, Plaintiff voluntarily signed himself in to protective custody ("PC"), where he remained for "over 24 days." (Doc. 1, p. 9). During his time in PC Intake, he had no access to the yard or recreation. He claims that even inmates who are in disciplinary segregation are entitled to yard/recreation time.

Based on these facts, Plaintiff seeks monetary damages and injunctive relief, including orders requiring Defendants to cease taking inmates' state pay during lockdowns, to allow inmates at least one hour per day of out-of-cell yard/recreation, and to discontinue housing prisoners two-to-a-cell in the North One and North Two cell houses. (Doc. 1, p. 12-13).

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: Eighth Amendment claim for housing Plaintiff and a cellmate in a small (less than 40 square feet) cell, which does not allow enough space to meet constitutional standards;

Count 2: Eighth Amendment claim for depriving Plaintiff of sufficient out-of-cell exercise to maintain his health during extended lockdowns, when exercising in the small cell was not possible;

Count 3: Eighth Amendment claim for requiring Plaintiff to be housed on the lower bunk in his small cell, which did not allow him sufficient space to sit upright, causing him to suffer from chronic pain in his neck, upper back, and shoulders;

Count 4: Eighth Amendment claim for deliberate indifference to Plaintiff's need for medical treatment for his painful neck, back, and shoulder condition;

Count 5: Fourteenth and Fifth Amendment claims for deprivation of state pay without due process, for "confiscating" Plaintiff's pay during lockdowns;

Count 6: Fourteenth Amendment claim for deprivation of property without due process, for allowing him to spend funds credited to his inmate trust account from an expired money order, then debiting his account for the improperly credited funds;

Count 7: Eighth Amendment claim for depriving Plaintiff of out-of-cell exercise/recreation time during the approximately 24 days that Plaintiff was housed in protective custody intake.

As explained below, Count 2 shall proceed for further review in this action against one Defendant. Count 1 and Counts 3-7 shall be dismissed, however, for failure to state a claim upon which relief may be granted.

Dismissal of Count 1 – Undersized Cell

In a case involving conditions of confinement in a prison, two elements are required to establish violations of the Eighth Amendment's cruel and unusual punishments clause. First, an objective element requires a showing that the conditions deny the inmate "the minimal civilized measure of life's necessities," creating an excessive risk to the inmate's health or safety. *Farmer*

v. Brennan, 511 U.S. 825, 834 (1994). The second requirement is a subjective element–establishing a defendant's culpable state of mind. *Id.*

Despite Plaintiff's assertion that the approximately 40-square-foot cells at Menard "have been deemed unconstitutional," this Court is unaware of any authority supporting this proposition. To the contrary, the Supreme Court held in its defining case addressing prison overcrowding issues that housing two inmates in a cell designed for one was not *per se* unconstitutional. *Rhodes v. Chapman*, 452 U.S. 337 (1981). The Supreme Court concluded that "[a]t most . . . double celling inflicts pain," *id.* at 348-349, but not the "unnecessary and wanton infliction of pain" that violates the Eighth Amendment. *Id.* at 346. The Court found that the Constitution "does not mandate comfortable prisons," *id.* at 349, and only those deprivations denying "the minimal civilized measure of life's necessities," *id.* at 347, are sufficiently grave to form the basis of an Eighth Amendment violation. In reaching this conclusion, the Court stated,

> Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment . . . . But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.

Rhodes, 452 U.S. at 347.[2] *See also Wilson v. Seiter*, 501 U.S. 294 (1991).

As an objective factor in a conditions-of-confinement claim, double-celling alone does not violate the Constitution. The amount of space per inmate has some relevance when evaluating whether the totality of the conditions of confinement may amount to a serious deprivation of basic human needs. *See Madyun v. Thompson*, 657 F.2d 868, 874 (7th Cir. 1981). A constitutional claim may arise if overcrowding causes other significant deprivations, such as

[2] Plaintiff's citations to the "National Institute of Justice, American Prisons and Jails," and "A Handbook on Jail Architecture" were apparently taken from a footnote to Justice Marshall's dissenting opinion in *Rhodes*, 452 U.S. at 371 n.4. (*See* Doc. 1, p. 6).

inadequate medical or mental health care. *See Brown v. Plata*, 563 U.S. 493, 510-11 (2011) (California prison system was required to reduce inmate population as part of remedial plan to correct constitutional deficiencies in medical and mental health care). *See also French v. Owens*, 777 F.2d 1250, 1252-53 (7th Cir. 1985) (comparing cases, and affirming in part injunction against double-celling in Pendleton, Indiana, prison, where combination of problems including overcrowded conditions (cell space less than 24 square feet per inmate, with inadequate ventilation and sanitation), unsanitary kitchen conditions, inadequate medical care, and overuse of mechanical restraints violated the Eighth Amendment). The Supreme Court found no constitutional violation for double-celling in *Rhodes*, where 63-square-foot cells were shared by two inmates, in a facility that provided adequate furnishings and hot water. *Rhodes*, 452 U.S. at 341. Similarly, the Seventh Circuit found no violation for double-celling inmates in Pontiac Correctional Center, where the cells ranged in size from 55 to 65 square feet and the facility was otherwise adequate. *Smith v. Fairman*, 690 F.2d 122, 124, 126 (1982), *cert. denied*, 461 U.S. 946 (1983).

At least two Courts of Appeal have concluded that even triple-celling is not *per se* unconstitutional. *See, e.g. Hubbard v. Taylor*, 538 F.3d 229 (3d Cir. 2008) (triple-celling of pretrial detainees in single-man cells was rationally related to managing overcrowded prison, and requiring detainees to sleep on mattresses on the floor was not a constitutional violation); *Strickler v. Waters*, 989 F.2d 1375, 1382 (4th Cir. 1993) (double or triple celling is not *per se* unconstitutional) (quoting *Williams v. Griffin*, 952 F.2d 820, 824-25 (4th Cir. 1991)). Likewise, the Seventh Circuit in an unpublished opinion found that a complaint over triple-celling in FCI-Greenville failed to state a constitutional claim, where the plaintiff did not connect any deprivation of "basic human needs" or "the minimal civilized measure of life's necessities" to

the crowded conditions. *McCree v. Sherrod*, 408 F. App'x 990, 992 (7th Cir. 2011) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). The appellate court reiterated that a floor space limitation of approximately 35 square feet per inmate does not by itself amount to cruel and unusual punishment. *McCree*, 408 F. App'x at 992-93 (citing *Rhodes*, 452 U.S. at 348-49; *Duran v. Elrod*, 760 F.2d 756, 759 (7th Cir. 1985); *Smith v. Fairman*, 690 F.2d 122, 124, 126 (7th Cir. 1982)).

In this case, Count 1 is grounded in Plaintiff's claim that the size of his cell alone violates constitutional standards. Because that is not the law, **Count 1** shall be dismissed.

Count 2 – Deprivation of Ability to Exercise

The Seventh Circuit has noted that a "[l]ack of exercise could rise to a constitutional violation where movement is denied and muscles are allowed to atrophy, and the health of the individual is threatened." *Harris v. Fleming*, 839 F.2d 1232, 1236 (7th Cir. 1988); *French v. Owens*, 777 F.2d 1250, 1255 (7th Cir. 1985), *cert. denied*, 479 U.S. 817 (1986). Some years later, the appellate court stated:

> In recent years we have not only acknowledged that a lack of exercise can rise to a constitutional violation, *French v. Owens*, 777 F.2d 1250, 1255 (7th Cir. 1986), but have concluded that "exercise is now regarded in many quarters as an indispensable component of preventive medicine." *Anderson v. Romero*, 72 F.3d 518, 528 (7th Cir. 1995). Given current norms, exercise is no longer considered an optional form of recreation, but is instead a necessary requirement for physical and mental well-being.

Delaney v. DeTella, 256 F.3d 679, 683-84 (7th Cir. 2001). *See also Turley v. Rednour*, 729 F.3d 645, 652-53 (7th Cir. 2013) (plaintiff stated Eighth Amendment claim where cumulative effect of repeated lockdowns deprived him of yard privileges, and cell was too small for physical activity).

Here, Plaintiff claims that the small size of his shared cell and the close proximity of the

cellmates to one another in that space make it impossible for him to engage in meaningful exercise inside the cell. Further, because of the frequent and prolonged lockdown periods at Menard over the past several years, he has been deprived of the opportunity to use the yard or any other out-of-cell area for recreation for significant periods of time. These conditions suggest that Plaintiff has been (and may continue to be) subjected to an objectively serious risk to his health.

As to the subjective component of a claim for unconstitutional conditions, it is unclear whether Warden Lashbrook was made aware of Plaintiff's complaints over his inability to engage in meaningful physical activity. Absent such knowledge, Plaintiff may not be able to show that she was deliberately indifferent to a risk of serious harm to his health from these conditions, so as to hold her personally liable if an Eighth Amendment violation is found. 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). As the current Warden of Menard, however, Lashbrook is the proper Defendant from whom to seek injunctive relief relative to the conditions described in Count 2. At this time, **Count 2** may proceed against Lashbrook, in both her individual and official capacity.

Count 2 shall be dismissed as to Defendants Baldwin and the Illinois Department of Corrections, however. The Complaint contains no factual allegations to show that Baldwin was personally aware or involved in creating or maintaining the conditions which placed Plaintiff's health at risk. Nor does it appear necessary to include Baldwin as a party in order to carry out any injunctive relief which may be ordered, while the Menard warden remains in the action. *See*

Gonzalez v. Feinerman, 663 F.3d 311, 315 (7th Cir. 2011) (proper defendant in a claim for injunctive relief is the government official responsible for ensuring any injunctive relief is carried out). Baldwin shall therefore be dismissed without prejudice from Count 2.

Finally, Plaintiff cannot maintain a suit for money damages against the Illinois Department of Corrections, because it is a state government agency. The Supreme Court has held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). *See also Wynn v. Southward*, 251 F.3d 588, 592 (7th Cir. 2001) (Eleventh Amendment bars suits against states in federal court for money damages); *Billman v. Ind. Dep't of Corr.*, 56 F.3d 785, 788 (7th Cir. 1995) (state Department of Corrections is immune from suit by virtue of Eleventh Amendment). Injunctive relief may be ordered against the IDOC without running afoul of the Eleventh Amendment, however, the Menard Warden may be ordered to implement any such relief if Plaintiff eventually prevails. The Illinois Department of Corrections shall also be dismissed from Count 2 without prejudice.

To summarize, **Count 2** shall proceed for further consideration, but against Lashbrook only.

Dismissal of Count 3 – Placement on Lower Bunk

Plaintiff contends that he was "forced" to be housed on the bottom bunk, which caused him ongoing pain and physical problems because he could not sit up straight on his bunk and had no other place in the cell where he could sit upright. Plaintiff does not identify any individual among the Defendants, however, who was responsible for "forcing" him into this placement, nor does he supply any factual narrative regarding how the cell and bunk assignment was made.

If Plaintiff brought this problem and the resulting health conditions to the attention of a

Menard official, who then failed to remedy the problem, Plaintiff may have a viable deliberate indifference claim based on his lower-bunk placement. But the current Complaint does not contain sufficient allegations to support a claim for liability against any individual Defendant. For this reason, **Count 3** fails to state a claim upon which relief may be granted, and it shall be dismissed at this time without prejudice.

Dismissal of Count 4 – Deliberate Indifference to Medical Needs

In order to state a claim for deliberate indifference to a serious medical need, an inmate must show that he (1) suffered from an objectively serious medical condition; and (2) that the defendant was deliberately indifferent to a risk of serious harm from that condition. An objectively serious condition includes an ailment that significantly affects an individual's daily activities or which involves chronic and substantial pain. *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997). "Deliberate indifference is proven by demonstrating that a prison official knows of a substantial risk of harm to an inmate and either acts or fails to act in disregard of that risk. Delaying treatment may constitute deliberate indifference if such delay exacerbated the injury or unnecessarily prolonged an inmate's pain." *Gomez v. Randle*, 680 F.3d 859, 865 (7th Cir. 2012) (internal citations and quotations omitted). *See also Farmer v. Brennan*, 511 U.S. 825, 842 (1994); *Perez v. Fenoglio*, 792 F.3d 768, 777-78 (7th Cir. 2015). However, the Eighth Amendment does not give prisoners entitlement to "demand specific care" or "the best care possible," but only requires "reasonable measures to meet a substantial risk of serious harm." *Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997). Further, a defendant's inadvertent error, negligence or even ordinary malpractice is insufficient to rise to the level of an Eighth Amendment constitutional violation. *See Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008).

In this case, Plaintiff's chronic back, neck, and shoulder pain could satisfy the objective element of an Eighth Amendment claim. The Complaint does not show, however, that any Defendant was deliberately indifferent to Plaintiff's need for treatment for this condition. There does appear to have been some delay between Plaintiff's initial requests for medical attention, and the time when he was seen by a nurse and then the doctor. But there is no information to suggest that any named Defendant was responsible for that delay.

Plaintiff states that in August 2016, the prison doctor issued him an upper bunk permit. It would seem that this permit would alleviate the physical problems Plaintiff had experienced from the bottom bunk placement. Nonetheless, Plaintiff complains that the doctor "ignored his complaint" of pain. Plaintiff's medical records also reflect that he was given pain medication (although he complained it did not help). (Doc. 1-1, pp. 12-14). These facts do not support a deliberate indifference claim against the doctor, if Plaintiff had attempted to assert such a claim.

Likewise, the allegations fail to state a deliberate indifference claim against Lashbrook, who would ordinarily be entitled to rely on the judgment of the prison medical staff as to what treatment was warranted for a prisoner's condition. *See Arnett v. Webster*, 658 F.3d 742, 755 (7th Cir. 2011) (If a prisoner is under the care of prison medical professionals, a non-medical prison official "will generally be justified in believing that the prisoner is in capable hands") (quoting *Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004)). Plaintiff does not discuss the content or frequency of any grievances that might have brought his complaints to the attention of Lashbrook, thus there is nothing to support the proposition that she was aware of the doctor's alleged non-treatment yet took no action. *See Perez v. Fenoglio*, 792 F.3d 768, 782 (7th Cir. 2015) (prisoner stated deliberate indifference claim against non-medical prison officials who failed to intervene despite their knowledge of his serious medical condition and inadequate

medical care, as explained in his "coherent and highly detailed grievances and other correspondences"). Finally, Plaintiff cannot rely on the doctrine of *respondeat superior* (supervisory liability) to maintain a claim against Lashbrook, because this principle is not applicable to § 1983 actions. *Sanville v. McCaughtry*, 266 F.3d 724, 740 (7th Cir. 2001) (citations omitted).

Similarly, the Complaint sets forth no facts to indicate that Baldwin was involved at all in Plaintiff's medical care (or lack thereof), or had any knowledge of Plaintiff's medical issues. And as discussed above under Count 2, Plaintiff cannot maintain a suit for damages against the Illinois Department of Corrections.

For these reasons, Plaintiff fails to state a deliberate indifference claim upon which relief may be granted against any of the Defendants. **Count 4** shall therefore be dismissed without prejudice.

Dismissal of Count 5 – Deprivation of State Pay

For this claim, Plaintiff faults "John or Jane Doe" (he does not include these parties as Defendants) for "confiscating" his "un-assigned state pay" during institutional lockdowns. (Doc. 1, p. 8). He states that he "was not on any work assignment" at the time. *Id.*

An inmate does not have a constitutionally protected property or liberty interest in a prison job, *see DeWalt v. Carter*, 224 F.3d 607, 613 (7th Cir. 2000), nor does a prisoner have a constitutional right to compensation for working. *See Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992) *cert. denied*, 507 U.S. 928 (1993) (prisoners may be required to work in prison, and the Constitution is not violated by low pay, no pay, or disparities in the hours or rates of pay). Further, prisoners do not have a constitutional right to participate in employment or rehabilitative programs in prison. *Garza v. Miller*, 688 F.2d 480, 485-86 (7th Cir. 1982), *cert. denied* 459 U.S.

1150 (1983).

Under the above authorities, Plaintiff has no constitutional claim to receive the "un-assigned state pay" even if he was working at a prison job. Based on Plaintiff's statement that he was not on a work assignment, and the fact that the prison was on lockdown when his state pay was "confiscated," it also appears that he did not perform any work at the time in question. Accordingly, **Count 5** fails to state a claim upon which relief may be granted, and it shall be dismissed with prejudice.

Dismissal of Count 6 – Recoupment of Mistakenly Credited Funds

For this claim, Plaintiff complains that "Jane or John Doe" deposited funds to Plaintiff's inmate trust account after a person outside the prison sent a money order to Plaintiff, without checking first to see that the money order was out of date (more than 6 months old). (Doc. 1, p. 8). Plaintiff himself never saw the money order before this transaction was made and had no way to know about the problem. Plaintiff spent most of the funds at the commissary. Some time later, the funds were apparently "confiscated" by debiting Plaintiff's account after the expiration date on the money order was discovered.

As a Fourteenth or Fifth Amendment claim for the deprivation of property without due process, this claim fails. Plaintiff has a right to be free from deprivations of his property by state actors without due process of law. To state a claim under the due process clause, however, Plaintiff must establish a deprivation of liberty or property *without due process of law*; if the state provides an adequate remedy, Plaintiff has no civil rights claim. *Hudson v. Palmer*, 468 U.S. 517, 530-36 (1984) (availability of damages remedy in state claims court is an adequate, post-deprivation remedy). The Seventh Circuit has found that Illinois provides an adequate post-deprivation remedy, in an action for damages in the Illinois Court of Claims. *Murdock v.*

Washington, 193 F.3d 510, 513 (7th Cir. 1999); *Stewart v. McGinnis*, 5 F.3d 1031, 1036 (7th Cir. 1993); 705 ILL. COMP. STAT. 505/8 (1995). The opportunity to pursue such a claim in state court means that a prisoner cannot maintain a federal constitutional claim, whether or not the prisoner is successful in a Court of Claims action.

Plaintiff's allegations also suggest that the officials who deposited the funds to his prisoner account may have been negligent in their handling of the matter. Negligence, however, does not violate the Constitution. Thus, a defendant in a § 1983 action can never be held liable for negligence. *Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Zarnes v. Rhodes*, 64 F.3d 285, 290 (7th Cir. 1995).

For these reasons, **Count 6** fails to state a constitutional claim upon which relief may be granted. The civil rights claims in Count 6 shall be dismissed with prejudice, however, that dismissal shall not preclude Plaintiff from bringing his property or negligence claims in state court.

Dismissal of Count 7 – Restriction on Exercise/Recreation in Protective Custody Intake

As noted under the discussion of Count 2, a deprivation of the opportunity to engage in physical activity for a prolonged period of time may violate the Eighth Amendment. In contrast, however, courts have held that short periods of exercise denial do not violate the Constitution. *See Harris v. Fleming*, 839 F.2d 1232, 1236 (7th Cir. 1988) (28-day denial not unconstitutional); *Phillips v. Norris*, 320 F.3d 844 (8th Cir. 2003) (37 days in segregation without exercise "is perhaps pushing the outer limits of acceptable restrictions" but does not create atypical and substantial hardship); *Vinson v. Texas Bd. of Corr.*, 901 F.2d 474, 475 (5th Cir. 1990) (occasional denial of recreation claims were frivolous).

In this case, Plaintiff complains that he spent approximately 24 days in "Protective

Custody Intake," and he was not allowed to have any out-of-cell exercise or recreation time during that period. His chief objection to this restriction is that inmates who are in disciplinary segregation are entitled to yard/recreation time, and there did not appear to be any reason why this privilege was not available for inmates in protective custody. That is not the standard, however, for evaluating a claim for deprivation of the ability to exercise.

Under the precedent of *Harris v. Fleming*, Plaintiff's temporary inability to access the yard or engage in out-of-cell exercise for approximately 24 days did not violate his constitutional rights. **Count 7**, as pled in the Complaint, fails to state a claim upon which relief may be granted, and shall be dismissed without prejudice.

Pending Motion

Plaintiff's motion for recruitment of counsel (Doc. 3) shall be referred to United States Magistrate Judge Wilkerson for further consideration.

Disposition

COUNTS 1, 3, 4, and 7 are **DISMISSED** without prejudice for failure to state a claim upon which relief may be granted. **COUNTS 5 and 6** are **DISMISSED** with prejudice for failure to state a claim upon which relief may be granted. The dismissal with prejudice of the civil rights claim in **COUNT 6** shall not preclude Plaintiff from bringing his property or negligence claims in that count in state court.

BALDWIN and the **ILLINOIS DEPARTMENT of CORRECTIONS** are **DISMISSED** from this action without prejudice.

In order for **COUNT 2** to proceed, the Clerk of Court shall prepare for **LASHBROOK**: (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 Defendant's place of employment as identified by Plaintiff. If 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 Defendant, and the Court will require Defendant to pay the full costs of formal service, to the extent authorized by the Federal Rules of Civil Procedure.

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.

Defendant is **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. 3).

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 27, 2017

NANCY J. ROSENSTENGEL
United States District Judge