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

RAY HARRIS, # M-21142,
Plaintiff,

v. **No. 3:17-cv-00642-DRH**

BETSY SPILLER,
MAJOR D. MALCOLM,
BART LIND,
JACQUELINE LASHBROOK,
and LT. FURLOW,
Defendants.

MEMORANDUM AND ORDER

HERNDON, District Judge:

Plaintiff, currently incarcerated at Pinckneyville Correctional Center ("Pinckneyville"), has brought this *pro se* civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff claims that he was intentionally placed in a cell with a known enemy who then attacked him, and that officers subjected him to excessive force.

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 Plaintiff's claims survive threshold review under § 1915A.

The Complaint

On August 30, 2016, Plaintiff and his cellmate (Jackson) got into an "extremely violent fight" in their cell, during which they punched, kicked, and bit each other. Plaintiff asserts that according to prison policy, he and the cellmate should have been immediately placed on the "KSF- keep separate from" list after such an incident, so that they would not be housed together again. (Doc. 1, p. 6).

On September 1, 2016, Plaintiff was called to the Internal Affairs Office, where Lind and Furlow "intimidated and threatened" him, saying that if Plaintiff did not admit that he and Jackson had a fight, Plaintiff would "get his ass kicked" and would get 6 months in segregation plus lose 6 months of good time. (Doc. 1, p. 7). An anonymous source had accused Plaintiff of fighting with Jackson. Plaintiff was then placed in segregation away from Jackson.

At some point, Plaintiff filed a grievance, and then learned that he was "in danger of retaliation" from the grievance. (Doc. 1, p. 7).

Furlow, Lind, Spiller, Love,[1] and Lashbrook ordered Plaintiff to be moved again, and he was placed into Cell 5-C-16 back with his "enemy" Jackson. *Id.* Plaintiff and Jackson "squared off" to continue their aggression. Plaintiff refused to enter the cell, telling the officers (an unnamed C/O and Lieutentant) that he was in segregation for fighting the same inmate they were forcing him to cell with. He showed these officers his disciplinary ticket for fighting with Jackson. Despite this information, the officers ordered Plaintiff to lock up, saying it was Furlow's and the Warden's call to place him there. Jackson refused to cuff up to be moved.

[1] Love is not included among the named Defendants.

Plaintiff told the officers that he was afraid he would be attacked, but they told him to "man the f**k up." *Id.*

Sometime later, Spiller and Malcolm came to the cell to speak with Plaintiff, after Plaintiff complained that Jackson had made multiple threats to kill him. (Doc. 1, p. 8). While Plaintiff stood at the cell door talking to Spiller and Malcolm, Jackson came up behind Plaintiff and began punching him. Malcolm unlocked the door, ordered them to stop fighting, and began spraying them with OC spray. Malcolm continued spraying Plaintiff even after he put his hands behind his back to be cuffed, and while Jackson was still beating him. Plaintiff was violently slammed to the floor, with an officer's knee pressed into his neck and lower back, when Spiller told Malcolm to "keep spraying." *Id.* Malcolm then sprayed Plaintiff directly into his nostril and ear canal. An officer violently pressed Plaintiff's face into the floor, after Malcolm and Spiller issued orders to "turn his f***ing head" and "make him feel it." *Id.*

Following that incident, Plaintiff suffers from severe headaches, injury to his jaw, neck and back pain, hearing loss, and a burning, running nose. (Doc. 1, p. 9).

Plaintiff seeks compensatory and punitive damages. (Doc. 1, p.10).

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 against Furlow, Lind, Spiller, and Lashbrook, for failure to protect Plaintiff from attack by Jackson, when they intentionally placed Plaintiff in a cell with Jackson following the August 30 fight;
>
> **Count 2:** First Amendment retaliation claim against Furlow, Lind, Spiller, and Lashbrook, for placing Plaintiff in a cell with Jackson after Plaintiff filed a grievance following the August 30 fight;
>
> **Count 3:** Eighth Amendment claim against Malcolm and Spiller for using excessive force against Plaintiff during Jackson's attack on him.

Each of these claims shall proceed for further review.

Count 1 - Failure to Protect

In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Supreme Court held that "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." *Id.* at 833 (internal citations omitted); *see also Pinkston v. Madry*, 440 F.3d 879, 889 (7th Cir. 2006). However, not every harm caused by another inmate translates into constitutional liability for the corrections officers responsible for the prisoner's safety. *Farmer*, 511 U.S. at 834. In order for a plaintiff to succeed on a claim for failure to protect, he must show that he is incarcerated under conditions posing a substantial risk of serious harm, and that the defendants acted with "deliberate indifference" to that danger. *Id.*; *Pinkston*, 440 F.3d at 889. A plaintiff also must prove that prison officials were aware of a

specific, impending, and substantial threat to his safety, often by showing that he complained to prison officials about a *specific* threat to his safety. *Pope v. Shafer*, 86 F.3d 90, 92 (7th Cir. 1996). In other words, Defendants had to know that there was a substantial risk that those who attacked Plaintiff would do so, yet failed to take any action. *See Sanville v. McCaughtry*, 266 F.3d 724, 733-34 (7th Cir. 2001). However, conduct that amounts to negligence or inadvertence is not enough to state a claim. *Pinkston*, 440 F.3d at 889 (discussing *Watts v. Laurent*, 774 F.2d 168, 172 (7th Cir. 1985)).

In Plaintiff's case, it appears that he initially denied fighting with Jackson on August 30, 2016. (Doc. 1, pp. 7, 15). However, he was placed in segregation, questioned by Internal Affairs officers Lind and Furlow, and was then issued a disciplinary ticket for that fight. It is not clear whether Plaintiff requested officers to keep him and Jackson separate from one another. However, the above sequence of events would seem to have been sufficient notice for Plaintiff and Jackson to be housed in different cells after they fought. Despite this situation, Furlow and Lind (who had questioned Plaintiff about the fight), together with Spiller and Lashbrook, allegedly ordered Plaintiff to be placed back in the same cell with Jackson just days after their fight. The unnamed C/O and Lieutenant carried out that order even though Plaintiff objected to the placement and told them about the fight and the disciplinary ticket. As Plaintiff feared, Jackson attacked him in the presence of Spiller and Malcolm.

Based on these facts, at this early stage of the case Plaintiff has stated an Eighth Amendment claim against Spiller, Lind, Lashbrook, and Furlow in **Count 1** that merits further review.

Count 2 – Retaliation

Plaintiff also asserts that the decision by Furlow, Lind, Spiller, and Lashbrook to place him back in a cell with Jackson was triggered by Plaintiff's filing of a grievance with reference to the August 30 fight with Jackson and the disciplinary action that followed. If that grievance was submitted before Plaintiff was placed again with Jackson, then Plaintiff may have a retaliation claim against the Defendants who were aware of his complaint. "A complaint states a claim for retaliation when it sets forth 'a chronology of events from which retaliation may plausibly be inferred.'" *Zimmerman v. Tribble*, 226 F.3d 568, 573 (7th Cir. 2000) (citation omitted). Prison officials may not retaliate against inmates for filing grievances or otherwise complaining about their conditions of confinement. *See, e.g.*, *Gomez v. Randle*, 680 F.3d 859, 866 (7th Cir. 2012); *Walker v. Thompson*, 288 F.3d 1005 (7th Cir. 2002).

The only grievance Plaintiff submitted along with the Complaint, however, was filed by him on September 3, 2016, which was after he was placed in the cell with Jackson, and after Jackson attacked him. (Doc. 1, pp. 15-16). That grievance could therefore not have been the one that prompted the retaliatory action of placing Plaintiff in the cell before Jackson's attack. However, based on Plaintiff's assertion that he filed an earlier grievance which caused Furlow, Lind,

Spiller, and Lashbrook to place him in danger by housing him with Jackson after their initial August 30 fight, **Count 2** shall also proceed for further review.

Count 3 – Excessive Force

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).

In Plaintiff's case, he claims that Malcolm and Spiller sprayed him with OC (pepper) spray while Jackson was punching him. They continued to spray Plaintiff even while he was not throwing any punches and was holding his hands behind his back to be cuffed. They (or some officer at their direction) slammed Plaintiff violently to the floor, and continued to direct the OC spray into Plaintiff's nose and ear canal while he was being held face-down on the floor. These facts

and Malcom's comments to "make him feel it" indicate that Malcom and Spiller applied force to Plaintiff beyond what was necessary to restore discipline, particularly considering that Plaintiff was the victim of attack by Jackson. (Doc. 1, p. 8).

Accordingly, **Count 3** for excessive force shall proceed against Malcolm and Spiller.

Pending Motions

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

The motion for service of process at government expense (Doc. 4) is **GRANTED.** Service shall be ordered below.

Disposition

The Clerk of Court shall prepare for Defendants **SPILLER, MALCOLM, LIND, LASHBROOK,** and **FURLOW**: (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.

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 a United States Magistrate Judge 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 the United States Magistrate Judge 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. *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.

Signed this 27th day of July, 2017.

Digitally signed by
Judge David R. Herndon
Date: 2017.07.27
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UNITED STATES DISTRICT JUDGE