

**UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF ILLINOIS**

|                                     |   |                             |
|-------------------------------------|---|-----------------------------|
| <b>JAMES FONTANO,</b>               | ) |                             |
|                                     | ) |                             |
| <b>Plaintiff,</b>                   | ) |                             |
|                                     | ) |                             |
| <b>v.</b>                           | ) | <b>No.: 12-3042-SEM-TSH</b> |
|                                     | ) |                             |
| <b>S.A. GODINEZ, <i>et al.</i>,</b> | ) |                             |
|                                     | ) |                             |
| <b>Defendants.</b>                  | ) |                             |

**ORDER****SUE E. MYERSCOUGH, U.S. District Judge:**

This cause is before the Court on Defendants' motion for summary judgment. Defendants' motion is denied because genuine issues of material fact exist that preclude summary judgment in Defendants Alex Dawson's and Kevin Standley's favor.

The basic facts of this case are as follows. Plaintiff James Fontano began serving a term of imprisonment with the Illinois Department of Corrections ("IDOC") in February 2011. Fontano has since been released from IDOC's custody. Fontano was first assigned to the Jacksonville Correctional Center ("Jacksonville") but was transferred to the Logan Correctional Center ("Logan") after spending only two weeks at Jacksonville.

Logan was a medium security prison in 2011 which is one step above a minimum security prison. Fontano was assigned to B wing, cell 54 in the X house at Logan.

After about a month at Logan, Fontano's cellmate began making physical contact with him in the form of slapping his buttocks and attempting to massage his shoulders. Fontano informed his cellmate that he was not interested in receiving such physical contact from him. Fontano reported to Officer Riggins that his cellmate had been touching his buttocks, and Officer Riggins referred Fontano to Internal Affairs.

Defendant Lt. Kevin Standley was in charge of Internal Affairs at Logan during the relevant time. After Fontano reported the incident with his cellmate to Lt. Standley, Lt. Standley told Fontano that he could walk himself to segregation to get out of his cell and away from his cellmate. Fontano did not want to go voluntarily to segregation for the fear that he would have an additional fifteen (15) days added to his sentence.

Thereafter, Fontano's cellmate continued to try to rub Fontano's shoulders or would attempt to make some sort of physical contact with him on a periodic basis. Fontano spoke with

Lt. Standley for a second time, but no action was taken by Lt. Standley. Fontano did not present himself to segregation after reporting, for a second time, the physical contact from his cellmate.

On August 5, 2011, Fontano reported to Officer McKinney that he had been sexually assaulted by his cellmate. Officer McKinney took Fontano to the Health Care Unit to be examined and to receive medical attention as needed. While at the Health Care Unit, Fontano reported to Lt. Standley that his cellmate had sexually assaulted him.

On August 6, 2011, Dr. Ashley determined that Fontano should be placed on crises watch. Logan does not have a protective custody unit, and so, inmates who require segregation and who are in distress are generally housed in the Health Care Unit. Fontano remained in the Health Care Unit for an extended period of time.

On August 18, Fontano received a disciplinary ticket for providing false information regarding his alleged sexual assault. The adjustment committee recommended a finding of guilty on this disciplinary ticket because Fontano admitted to recanting his rape allegations, because Fontano's cellmate passed a lie detector test, and because Fontano's physical examination was inconsistent with

Fontano's rape allegations. Fontano claims that he was threatened and coerced into recanting his story and that the investigation was flawed and conducted in a biased, retaliatory manner. Ultimately, Fontano was found guilty on the disciplinary ticket and was given segregation time.

## **II. LEGAL STANDARDS GOVERNING SUMMARY JUDGMENT**

Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *see Ruiz-Rivera v. Moyer*, 70 F.3d 498, 500-01 (7<sup>th</sup> Cir. 1995). The moving party has the burden of providing proper documentary evidence to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a

genuine issue for trial. *Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291, 294 (7<sup>th</sup> Cir. 1997). “[A] party moving for summary judgment can prevail just by showing that the other party has no evidence on an issue on which that party has the burden of proof.” *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1183 (7<sup>th</sup> Cir. 1993).

Accordingly, the non-movant cannot rest on the pleadings alone, but must designate specific facts in affidavits, depositions, answers to interrogatories or admissions that establish that there is a genuine triable issue. The “‘must do more than simply show that there is some metaphysical doubt as to the material fact.’” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986)(quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)); *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 818 (7<sup>th</sup> Cir. 1999).

Finally, a scintilla of evidence in support of the non-movant’s position is not sufficient to oppose successfully a summary judgment motion; “there must be evidence on which the jury could reasonably find for the [non-movant].” *Anderson*, 477 U.S. at 250. “This standard applies when cross motions for summary judgment

are filed” as they are here. *Franklin v. City of Evanston*, 384 F.3d 838, 843 (7<sup>th</sup> Cir. 2004).

### III. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT

In conjunction with filing his response to Defendants’ motion for summary judgment, Fontano filed a stipulation to dismiss. In this stipulation, Fontano agreed, pursuant to Federal Rule of Civil Procedure 41, to dismiss Defendants Simmons, Bender, Jennings, Call, and Fishel with prejudice. Fontano also agreed to dismiss his failure to protect claim (Count I) against Defendant Alex Dawson who was the Warden at Logan. Accordingly, the Clerk of the Court is directed to terminate Defendants Simmons, Bender, Jennings, Call, and Fishel from this case.

In addition, the “John Doe Defendants” are terminated from this case. Fontano has not moved to substitute the true identity of the John Doe Defendants, and the time to do so has expired. Therefore, they are dismissed as parties to this case.

#### **A. Questions of fact exist on Fontano’s retaliation claim.**

That leaves Warden Dawson and Lt. Standley against whom Fontano has asserted five claims. Defendants argue that they are

entitled to summary judgment because the undisputed evidence shows that Fontano was not placed in segregation because he made a report of a sexual assault. On the contrary, Defendants claim that Fontano was placed into segregation because he made a false statement and provided false information during the investigation of his sexual assault claims.

“An act taken in retaliation for the exercise of a constitutionally protected right violates the Constitution.” *DeWalt v. Carter*, 224 F.3d 607, 618 (7<sup>th</sup> Cir. 2000). “Otherwise permissible actions by prison officials can become impermissible if done for retaliatory reasons.” *Zimmerman v. Tribble*, 226 F.3d 568, 573 (7<sup>th</sup> Cir 2000). In order to state a claim for retaliation for exercising one’s First Amendment right, a plaintiff must demonstrate that: “(1) his speech was constitutionally protected; (2) he has suffered a deprivation likely to deter free speech; and (3) his speech was at least a motivating factor” behind the retaliatory actions. *Massey v. Johnson*, 457 F.3d 711, 716 (7<sup>th</sup> Cir. 2006).

“A ‘motivating factor’ in this context ‘is a factor that weighs in [on] the defendant’s decision to take the action complained of-in other words, it is a consideration present to his mind that favors,

that pushes him toward action.” *Dace v. Smith-Vasquez*, 658 F. Supp. 2d 865, 881 (S.D. Ill. 2009)(quoting *Hasan v. United States Dept. of Labor*, 400 F.3d 1001, 1006 (7<sup>th</sup> Cir. 2005)). A plaintiff may demonstrate that his speech was a motivating factor behind the defendant’s retaliatory actions by presenting direct or circumstantial evidence. *Kidwell v. Eisenhower*, 679 F.3d 957, 965 (7<sup>th</sup> Cir. 2012). “Direct evidence is evidence which, if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption.” *Rudin v. Lincoln Land Cmty. College*, 420 F.3d 712, 720 (7<sup>th</sup> Cir. 2005)(internal quotation omitted). Direct evidence is rare and is something along the lines of a direct admission. *Naficy v. Illinois Dept. of Human Servs.*, 697 F.3d 504, 512 (7<sup>th</sup> Cir. 2012); *Benders v. Bellows & Bellows*, 515 F.3d 757, 764 (7<sup>th</sup> Cir. 2008).

On the other hand, “[c]ircumstantial evidence . . . is evidence from which a trier of fact may infer that retaliation occurred.” *Kidwell*, 679 F.3d at 966. “Circumstantial evidence may include suspicious timing, ambiguous oral or written statements, or behavior towards or comments directed at other[s] . . . .” *Long v. Teachers’ Retirement Sys. of Illinois*, 585 F.3d 344, 350 (7<sup>th</sup> Cir.



2009). Regardless of whether the plaintiff offers direct or circumstantial evidence, “[t]o demonstrate the requisite causal connection in a retaliation claim, [a] plaintiff[] must show that the protected activity and the adverse action are not wholly unrelated.” *Sauzek v. Exxon Coal USA, Inc.*, 202 F.3d 913, 918 (7<sup>th</sup> Cir. 2000). “If he can show that retaliatory animus was a factor, then the burden shifts to the defendants to prove that the same actions would have occurred in the absence of the protected conduct.” *Soto v. Bertrand*, 2009 WL 1220753, \* 1 (7<sup>th</sup> Cir. 2009).

Fontano has presented sufficient evidence with which to create a question of fact regarding Defendants’ motive for placing him into segregation. Fontano has offered evidence that Lt. Standley threatened him and demanded that Fontano drop or recant his allegations that he had been raped. When Fontano would not do so, Lt. Standley conducted a flawed investigation of the rape allegation and approved Fontano’s placement into segregation. Lt. Standley claims that placement in Logan’s segregation that was at the prison’s Health Care Unit was not punitive in nature. However, that question is best left for the jury to decide in this case.

Finally, Fontano has offered evidence that at least raises a question of fact regarding the thoroughness of Lt. Standley's investigation into his rape allegations. This evidence when paired with the timing of Fontano's placement into segregation precludes summary judgment in Lt. Standley's favor on Fontano's retaliation claim against him.

Similarly, issues of fact preclude summary judgment in Warden Dawson's favor. According to Fontano, Warden Dawson approved Lt. Standley's flawed investigation of his rape allegations, ignored evidence that Fontano had been threatened into recanting his allegations of rape, and approved Fontano's placement into segregation even though Warden Dawson knew that the discipline was unwarranted. Fontano claims that Warden Dawson took these actions in order to conceal Lt. Standley's and his own misdeeds with regard to Fontano's rape allegations and their unresponsiveness to his claims.

In short, Fontano's evidence raises a question of fact regarding Lt. Standley's and Warden Dawson's motives regarding Fontano's rape allegations and Fontano's placement into segregation. Motive is generally a question that must be decided by the jury. *Davison v.*

*International Bhd. of Teamsters, Local Union No. 627*, 2015 WL 753545, \* 6 (C.D. Ill. Feb. 20, 2015)(“summary judgment is typically inappropriate for resolving questions of a party’s motive or intent; this is also question of fact for the jury.”); *Ashman v. Barrows*, 438 F.3d 781, 784 (7<sup>th</sup> Cir. 2006); *Santiago v. Lane*, 894 F.2d 218, 224 (7<sup>th</sup> Cir. 1990).

Accordingly, Defendants’ motion for summary judgment is denied as to Fontano’s claim that Defendants retaliated against him in violation of his First Amendment rights.

**B. Questions of fact exist on Fontano’s failure to intervene claim.**

Questions of fact also exist on Fontano’s claim that Lt. Standley and Warden Dawson violated his Eighth Amendment rights by failing to intervene on his behalf to protect him from his cellmate. “In failure to protect cases, a prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety.” *Pope v. Shafer*, 86 F.3d 90, 92 (7<sup>th</sup> Cir. 1996).

Specifically, the Seventh Circuit has held:

Under the Eighth Amendment, prison officials have a duty to protect prisoners from violence at the hands of

other prisoners. An inmate can prevail on a claim that a prison official failed to protect him if the official showed deliberate indifference; that is, that the defendant was subjectively aware of and disregarded a substantial risk of serious harm to the inmate. To make a guard subjectively aware of a serious risk of attack, the inmate must communicate a specific and credible danger. But even when he is aware of a substantial risk of serious harm to an inmate, a prison guard is not liable if he responds reasonably to the risk, whether or not his response ultimately prevents the harm.

*Gidarisingh v. Pollard*, 2014 WL 3511697, \* 3 (7<sup>th</sup> Cir. July 17, 2014)(internal quotations and citations omitted). “Once prison officials know about a serious risk of harm, they have an obligation to take reasonable measures to abate it.” *Dale v. Poston*, 548 F.3d 563, 569 (7<sup>th</sup> Cir. 2008)(internal quotation omitted). “If prison officials are aware of a serious threat and do nothing, that is deliberate indifference.” *Gidarisingh*, 2014 WL 3511697 at \* 4.

However, “a general risk of violence in a maximum security unit does not by itself establish knowledge of a substantial risk of harm.” *Shields*, 664 F.3d at 181. A state actor who fails to intervene to prevent other state actors from infringing upon the constitutional rights of citizens may be held liable under § 1983 if the state actor: (1) had reason to know that a constitutional violation had been committed and (2) had a realistic opportunity to

intervene to prevent the harm from occurring. *Chavez v. Illinois State Police*, 37 F.3d 282, 285 (7<sup>th</sup> Cir. 2001).

Here, Fontano has offered sufficient evidence to preclude summary judgment on his claim that Lt. Standley and Warden Dawson failed to intervene on his behalf in violation of his Eighth Amendment rights. Taking the evidence in a light most favorable to Fontano reveals that both Lt. Standley and Warden Dawson were participants in investigating Fontano's rape allegations and in disciplining him for providing false statements. Neither took any action(s) to prevent the other from violating Fontano's Constitutional rights by stopping the other from retaliating against Fontano and unjustly disciplining him. Accordingly, Defendants' motion for summary judgment is denied on Fontano's failure to intervene claim.

**C. Questions of fact exist on Fontano's conspiracy claims.**

Summary judgment is also denied on Fontano's conspiracy claims under both federal and Illinois laws. As for his federal conspiracy claim, Fontano "must present facts showing that these defendants had an agreement to deprive him of his constitutional rights and further prove an actual deprivation of rights arising from

overt acts in furtherance of the agreement.” *Jones v. St. Clair Cty.*, 2016 WL 759556, \* 1 (S.D. Ill. Feb. 26, 2016)(citing *Scherer v. Balkema*, 840 F.2d 437, 442 (7th Cir. 1988)). An agreement may be inferred from circumstantial evidence as long as the evidence is sufficient to permit a reasonable jury to conclude that a meeting of the minds had occurred and the parties had an understanding to achieve the conspiracy’s objectives.” *Green v. Benden*, 281 F.3d 661, 665-66 (7<sup>th</sup> Cir. 2002).

As for his conspiracy claim under Illinois law, Fontano must demonstrate: “(1) an agreement between two or more persons for the purpose of accomplishing either an unlawful purpose or a lawful purpose by unlawful means; and (2) at least one tortious act by one of the co-conspirators in furtherance of the agreement that caused an injury to the plaintiff. *Borsellino v. Goldman Sachs Group, Inc.*, 477 F.3d 502, 509 (7<sup>th</sup> Cir. 2007)(citing *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill.2d 102, 720 N.E.2d 242, 258 241 Ill. Dec. 787 (Ill. 1999). “The agreement is a necessary and important element of this cause of action.” *Id.* (internal quotations omitted). “A defendant who innocently performs an act which happens to fortuitously further the tortious purpose of another is not liable

under the theory of civil conspiracy.” *Adcock v. Brakegate*, 164 Ill.2d 54, 645 N.E.2d 888, 894, 206 Ill. Dec. 636, (Ill. 1994).

Sufficient evidence exists from which a reasonable jury could conclude that Warden Dawson and Lt. Standley agreed with one another to deprive Fontano of his constitutional rights and to inflict injury upon him. For example, Warden Dawson acknowledged during his deposition that he assigned Lt. Standley to perform the investigation of Fontano’s rape allegations, and Warden Dawson also participated in the early stages of the investigation. Warden Dawson also approved Lt. Standley’s investigation.

As the head of Internal Affairs, Lt. Standley had an obligation to conduct a thorough and fair investigation and to report his findings to Warden Dawson. Fontano claims that Lt. Standley did not conduct a fair and unbiased investigation but conducted one that sought to conceal his and Warden Dawson’s violation of his rights. Specifically, Warden Dawson and Lt. Standley agreed to conceal the shoddy investigation by punishing and disciplining Fontano for alleging that he had been raped.

Based upon this evidence, a reasonable jury could find that Defendants conspired against Fontano in violation of both his

federal rights and rights under Illinois law. Accordingly, Defendants' motion for summary judgment on Fontano's conspiracy claims is denied.

**D. Questions of fact preclude summary judgment on Fontano's emotional distress claim.**

Defendants' motion for summary judgment on Fontano's claim under Illinois law of the intentional infliction of emotional distress is also denied. As the United States Court of Appeals for the Seventh Circuit has recently explained:

To survive summary judgment on an IIED claim under Illinois law, a plaintiff must show that: (1) the defendant's conduct was extreme and outrageous; (2) the defendant intended that his conduct would cause severe emotional distress, or knew that there was at least a high probability that the conduct would inflict severe emotional distress; and (3) the conduct did in fact cause severe emotional distress. *Honaker v. Smith*, 256 F.3d 477, 490 (7<sup>th</sup> Cir. 2001)(citing *McGrath v. Fahey*, 126 Ill.2d 78, 127 Ill. Dec. 724, 533 N.E.2d 806, 809 (Ill. 1988)). IIED requires more than "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *McGrath*, 127 Ill. Dec. 724, 533 N.E.2d at 809 (citation and internal quotation marks omitted). Under Illinois law, one factor that influences the extreme and outrageous nature of the conduct is the degree of power or authority that the actor has over the plaintiff. *Id.* at 809–10.

*Boston v. U.S. Steel Corp.*, \_\_\_ F.3d \_\_\_, 2016 WL 851552, \* 9 (7<sup>th</sup> Cir. Mar. 4, 2016).



Retaliating against an individual for reporting a sexual assault satisfies the standard of extreme and outrageous conduct necessary to support a claim of intentional infliction of emotional distress under Illinois law. *E.g., Thomas v. Habitat Co.*, 213 F. Supp. 2d 887, 899 (N.D. Ill. 2002)(holding that the “entire course” of retaliatory conduct taken against plaintiff for reporting sexual harassment was sufficient to defeat the defendant’s motion for summary judgment on plaintiff’s intentional infliction of emotional distress claim). A reasonable jury could conclude based upon Fontano’s testimony and his expert’s testimony that Fontano suffered severe emotional distress. A reasonable jury could also conclude that Fontano suffered this severe emotional distress as a result of Defendants’ retaliation and attempts to conceal their misdeeds after Fontano reported his allegations of rape. Accordingly, Defendants’ motion for summary judgment on this claim is denied.

**E. Defendants are not immune from suit.**

Finally, Defendants are not entitled to summary judgment based upon the doctrine of sovereign immunity or the doctrine of qualified immunity. As for Defendants’ arguments based upon sovereign, those arguments are directed towards Fontano’s failure

to protect claim. Fontano has dismissed his failure to protect claim. Therefore, the doctrine of sovereign immunity is inapposite.

As for Defendants' arguments based upon the doctrine of qualified immunity, the law was established long before the incident in this case that a state official may not retaliate against an inmate for exercising his Constitutional rights. *Babcock v. White*, 102 F.3d 267, 276 (7<sup>th</sup> Cir. 1996). As explained *supra*, questions of fact preclude summary judgment on Fontano's claims, and questions of fact also preclude summary judgment on whether Defendants' actions would entitle them to qualified immunity.

**IT IS, THEREFORE, ORDERED:**

**1. The Clerk of the Court is directed to terminate Defendants Simmons, Bender, Jennings, Call, and Fishel from this case.**

**2. The Clerk of the Court is also directed to terminate the "John Doe Defendants" from this case.**

**3. Defendants' motion for summary judgment [98] is DENIED.**

**4. This case will proceed to trial against Defendants Alex Dawson and Kevin Stanley on the following claims asserted by Plaintiff:**

**a. Defendants retaliated against him in violation of his First Amendment rights;**

**b. Defendants failed to intervene on his behalf in violation of his Eighth Amendment rights;**

**c. Defendants conspired against him in violation of his federal constitutional rights;**

**d. Defendants conspired against him in violation of his rights under Illinois law; and**

**e. Defendants inflicted emotional distress upon him in violation of rights under Illinois law.**

**5. A final pretrial conference is set for May 9, 2016, at 9:30 a.m.**

**6. Trial is set for June 14, 2016, at 9:00 a.m.**

**7. The Parties are reminded of their obligation to file a proposed Final Pretrial Order that complies with the Local Rules.**

ENTERED this 28 day of March, 2016

/s Sue E. Myerscough  
SUE E. MYERSCOUGH  
UNITED STATES DISTRICT JUDGE