

United States Court of Appeals  
for the Fifth Circuit

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United States Court of Appeals  
Fifth Circuit

**FILED**

December 15, 2023

No. 23-20236  
Summary Calendar

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Lyle W. Cayce  
Clerk

ANDREW BURKE,

*Plaintiff—Appellant,*

*versus*

LIEUTENANT SCOTT SOLAND,

*Defendant—Appellee.*

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 4:23-CV-300

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Before HIGGINBOTHAM, STEWART, and SOUTHWICK, *Circuit  
Judges.*

PER CURIAM:\*

Andrew Burke, a pretrial detainee at the Fort Bend County Jail (Inmate # 00242515), filed a civil rights complaint against Lieutenant Scott Soland complaining of verbal threats and unwanted touching. The district court determined that the complaint failed to state a claim upon which relief

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\* This opinion is not designated for publication. *See 5TH CIR. R. 47.5.*

may be granted, and it dismissed the complaint with prejudice pursuant to 28 U.S.C. § 1915A(b)(1).

To avoid a dismissal for failure to state a claim upon which relief may be granted, a civil rights complaint must allege enough factual content to allow the court to draw a reasonable and non-speculative inference that the defendant is liable for the alleged misconduct. *See Carlucci v. Chapa*, 884 F.3d 534, 537-38 (5th Cir. 2018). The plaintiff's alleged facts will be accepted as true and viewed in the light most favorable to the plaintiff. *Id.* at 537.

Here, the district court concluded that Burke's allegations of verbal threats and unwanted touching, if true, did not amount to a constitutional violation. *See Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992); *Calhoun v. Hargrove*, 312 F.3d 730, 734 (5th Cir. 2002).

On appeal, Burke merely reiterates his factual allegations, and he complains without explanation that the district court "ignored very clear evidence." Burke's conclusional arguments do not show that the district court erred in determining that the complaint failed to state a claim upon which relief may be granted. *See* § 1915A(b)(1).

Accordingly, the judgment of the district court is AFFIRMED. Burke has moved for appointment of counsel and for a restraining order. The motions are DENIED.

A prisoner is precluded from bringing a civil action or an appeal of a judgment in a civil action in forma pauperis (IFP) if he has, on three or more occasions, while incarcerated or detained in a facility, brought an action or appeal that was dismissed as frivolous or malicious or for failure to state a claim. *See* 28 U.S.C. § 1915(g). The district court's dismissal of the complaint for failure to state a claim upon which relief may be granted counts as a strike under § 1915(g). *See id.*; *see also Coleman v. Tollefson*, 575 U.S. 532, 537 (2015). Court records show that Burke has no fewer than four other

strikes. *See, e.g., Burke v. Ft. Bend Cnty. Sheriff's Office*, No. 4:22-CV-2577 (S.D. Tex. Nov. 3, 2022); *Burke v. Diaz*, No. 4:23-CV-332 (S.D. Tex. Feb. 2, 2023); *Burke v. Chesser*, No. 4:23-CV-842 (S.D. Tex. Mar. 14, 2023); *Burke v. Webb*, No. 4:22-CV-4366 (S.D. Tex. Apr. 27, 2023).

Accordingly, IT IS ORDERED that Burke is BARRED from proceeding IFP in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. *See* § 1915(g).

# Exhibit A

STATE OF TEXAS  
COUNTY OF FORT BEND

LT. Scott Soland #: (281) 341-8515  
AFFIDAVIT

Know all men by these presents I, Andrew Burke P#00242515,  
Of the City of RICHMOND in FORT BEND County, Texas. Being of a  
sound mind and capable of making this affidavit of my own free will, do hereby state the following:

"On the day of January 2nd, 2023 I was  
sexually assaulted by LT. Scott Soland. He had Mo.  
escorted from medical that that day, by himself,  
back to my cell. In the hallway, between  
doors, he grabbed me in a sexually  
explicit area, below my waist. He threatened  
to injure me with his baton, so I could be  
a "zombie" which would make it easy for  
him to rape me in the future. Witnesses  
at Treatment Team that day, can corroborate  
start of him threatening to turn you  
into a "zombie" with his baton" and his overall  
demeanor.

Also he threatened if I "snitch" he would  
definitely kill me. I actually did report him  
and file a DERA investigation. He Sabotaged  
the investigation. His Administrative power and  
position enabled him to do so. He has  
subtracted justice for his own self interest.

Under the penalty of perjury, I testify  
against LT. Scott Soland, A.G.E. Sexual Assault."

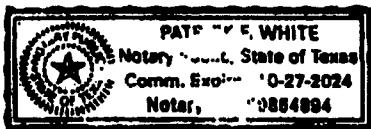
Executed this the 6th day of MARCH, 2023.

  
Signature of Affiant

P#00242515  
Fort Bend County Jail Identification Number

Subscribed and sworn to before me, the undersigned Notary, on this 7  
day of MARCH, 2023.

  
Patrick T. White  
Notary Public in and for Fort Bend County,  
State of Texas



# Exhibit B

STATE OF TEXAS:  
COUNTY OF FORT BEND:  
TO ANY PEACE OFFICER:

GRAND JURY SUBPOENA  
AGENCY CASE# CR2023-008

## GREETINGS:

YOU ARE HEREBY DIRECTED TO SERVE WITH SUBPOENA THE FOLLOWING PERSON: FORT BEND COUNTY SHERIFF'S OFFICE, CUSTODIAN OF RECORDS, 1840 RICHMOND PARKWAY, RICHMOND, TEXAS, 77469;

PURSUANT TO AN OFFICIAL INVESTIGATION BEING CONDUCTED BY THE FORT BEND COUNTY DISTRICT ATTORNEY'S OFFICE, YOU ARE HEREBY DIRECTED TO FURNISH CERTIFIED COPIES OF ANY AND ALL JAIL RECORDS AND INMATE LOGS PERTAINING TO THE DETENTION OF: ANDREW BURKE, (DOB: 10/21/86), ANY AND ALL RECORDS ON FILE TO INCLUDE, BUT NOT LIMITED TO: MOST RECENT BOOKING DATE, MEDICAL RECORDS/LOGS, DISCIPLINARY ISSUES, INVESTIGATIONS, COMPLAINTS, INMATE WORK STATUS/HISTORY AND EVIDENCE RELATED TO ANY PREVIOUS OR CURRENT INVESTIGATION CONDUCTED.

THESE RECORDS ARE BELIEVED TO BE MATERIAL EVIDENCE IN AN OPEN INVESTIGATION.

\*\*\*PLEASE PROVIDE AN "ORIGINAL", COMPLETED AND NOTARIZED BUSINESS RECORDS AFFIDAVIT PROVIDED WITH THIS GRAND JURY SUBPOENA AND MAIL WITH THE RECORDS/DISKS TO THE ADDRESS PROVIDED BELOW.

TO APPEAR AND TESTIFY, AND PRODUCE ANY INDICATED RECORDS AND/OR DOCUMENTS, AS A WITNESS BEFORE THE GRAND JURY OF THE 458TH DISTRICT COURT OF FORT BEND COUNTY, TEXAS ON THE 3RD FLOOR OF THE FORT BEND COUNTY JUSTICE CENTER, LOCATED AT 1422 EUGENE HEIMANN CIRCLE, RICHMOND, FORT BEND COUNTY, TEXAS, 77469, INSTANTER. THIS SUBPOENA IS ISSUED PURSUANT TO ARTICLE 20A.251, 20A.252, 24.02 AND/OR 24.28 OF THE TEXAS CODE OF CRIMINAL PROCEDURE, AS AMENDED. ADDITIONALLY, IT IS BELIEVED THAT THE WITNESS AND HIS/HER TESTIMONY IS BELIEVED TO BE MATERIAL IN THE ABOVE GRAND JURY INVESTIGATION.

\*\*\*A SUBPOENA RELATING TO A GRAND JURY PROCEEDING OR INVESTIGATION MUST BE KEPT SECRET TO THE EXTENT AND FOR AS LONG AS NECESSARY TO PREVENT THE UNAUTHORIZED DISCLOSURE OF A MATTER BEFORE A GRAND JURY. VIOLATION OF THE DUTY TO MAINTAIN SECRECY IS PUNISHABLE AS CONTEMPT OF COURT WITH A FINE NOT EXCEEDING \$500 AND/OR IMPRISONMENT NOT EXCEEDING 30 DAYS.\*\*\*

\*\*\*YOU MAY COMPLY WITH THIS SUBPOENA BY PROVIDING THE AFORESAID MENTIONED INFORMATION/RECORDS TO: FORT BEND COUNTY DA INVESTIGATOR RUSSELL TERRY, FORT BEND COUNTY DISTRICT ATTORNEY'S OFFICE, 301 JACKSON STREET, ROOM 101, RICHMOND, TEXAS, 77469; TELEPHONE NUMBER: 281-341-4437; FAX NUMBER: 832-471-1860; EMAIL: RUSSELL.TERRY@FORTBENDCOUNTYTX.GOV

WITNESS MY SIGNATURE THIS 16<sup>TH</sup> DAY OF MARCH A.D., 2023.

  
Lester Blizzard  
ASSISTANT DISTRICT ATTORNEY  
FORT BEND COUNTY, TEXAS

813

Note by Burke.  
Please contact DA as to  
verify this correlates with  
Defendant L T Scott Soland and  
Victim Andrew Burke, P#00242515.  
I have already made in person testimony  
with ADA MR Russel Terry.

# Exhibit C



## FORT BEND WOMEN'S CENTER

*Bringing healing & hope to survivors of domestic violence & sexual assault.*

06/06/2023

Mr. Burke,

After careful consideration of your case, and upon review with my supervisor, it has been determined that now is the appropriate time to terminate our therapeutic relationship.

It is not ethical to continue services that you are not benefitting from. It has become reasonably clear that continuing the short-term crisis intervention therapy would not benefit you as we have not been able to make clear progress specific to the event I was brought in to discuss with you. Furthermore, from your statements on multiple occasions, it has become clear that the services you are looking for are not within my scope of practice within this setting; i.e. a legal advocate, medical services advocate, and/or general facility advocate.

Within the facility you are currently detained it has been identified that there is access to mental health services should you decide that you need continued mental health care. I encourage you to reach out to appropriate staff around you to make a reasonable request for services if you choose to.

Respectfully,

Alyssa Rodriguez, LMSW

Fort Bend Women's Center

Note by Burke:

This serves as evidence I did receive counselling for incident w/  
LT. Soland. My PREA complaint was acknowledged and substantiated. Security terminated  
my sessions prematurely. Call # to verify.

PO Box 183 • Richmond, Texas 77406-0005 • 281-344-5750 • 281-232-5041 (fax)  
24-Hour Crisis Hotline 281-342-HELP • A United Way Agency

United States District Court  
Southern District of Texas

**ENTERED**

May 11, 2023

Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

ANDREW BURKE,  
Inmate #00242515,

§

§

§

Plaintiff,

§

§

v.

CIVIL ACTION NO. H-23-0300

LT. SCOTT SOLAND,

§

§

§

Defendant.

§

**FINAL JUDGMENT**

For the reasons set forth in the court's Memorandum Opinion  
and Order entered on this date, this action is **DISMISSED with  
prejudice.**

This is a **FINAL JUDGMENT.**

**SIGNED** at Houston, Texas, on this 11th day of May, 2023.



\_\_\_\_\_  
SIM LAKE  
SENIOR UNITED STATES DISTRICT JUDGE

**ENTERED**

May 11, 2023

Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

ANDREW BURKE, §  
Inmate #00242515, §  
§  
Plaintiff, §  
§  
v. § CIVIL ACTION NO. H-23-0300  
§  
LT. SCOTT SOLAND, §  
§  
Defendant. §

**MEMORANDUM OPINION AND ORDER**

The plaintiff, Andrew Burke (Inmate #00242515), has filed a Prisoner's Civil Rights Complaint under 42 U.S.C. § 1983 ("Complaint") (Docket Entry No. 1), concerning an incident that occurred during his confinement at the Fort Bend County Jail in Richmond, Texas. Because Burke is a prisoner who proceeds in forma pauperis, the court is required by the Prison Litigation Reform Act ("PLRA") to scrutinize the claims and dismiss the Complaint, in whole or in part, if it determines that the Complaint "is frivolous, malicious, or fails to state a claim upon which relief may be granted" or "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b); see also 28 U.S.C. § 1915(e)(2)(B). After considering all of the pleadings, the court concludes that this case must be dismissed for the reasons explained below.

**I. Background**

Burke is currently confined at the Fort Bend County Jail as a pretrial detainee.<sup>1</sup> Public records from the Fort Bend County District Clerk's Office confirm that he has been charged with indictments for several serious felonies, including: (1) aggravated assault with a deadly weapon in Case No. 21-DCR-097693; (2) assault on a public servant in Case No. 21-DCR-097923; and (3) solicitation of capital murder for remuneration in Case No. 22-DCR-099866.<sup>2</sup> He was also charged recently with misdemeanor assault causing bodily injury in Case No. 23-CCR-231922.<sup>3</sup>

Burke has filed this lawsuit against Lieutenant Scott Soland, who works at the Jail.<sup>4</sup> Burke alleges that Lieutenant Soland was escorting him to see a "treatment team" when Soland displayed a "C.I.A. badge as a form of intimidation."<sup>5</sup> Burke contends that Soland threatened to go to court for purposes of forcibly medicating Burke with anti-psychotic medication (Haldol).<sup>6</sup> Burke

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<sup>1</sup>Complaint, Docket Entry No. 1, p. 3. For purposes of identification, all page numbers refer to the pagination imprinted by the court's electronic filing system, CM/ECF.

<sup>2</sup>See Fort Bend County District Clerk's Office, available at: <https://www.tylerpaw.co.fort-bend.tx.us> (last visited May 9, 2023).

<sup>3</sup>See id.

<sup>4</sup>Complaint, Docket Entry No. 1, p. 3.

<sup>5</sup>Id. at 4.

<sup>6</sup>Id. The court takes judicial notice of "Mental Health Sick (continued...)"

claims that Soland then "grabbed [Burke's] behind" and threatened to rape him in the future.<sup>7</sup> Burke alleges that Soland also threatened to kill him if he did not cooperate.<sup>8</sup>

Exhibits attached to the Complaint show that Burke filed three grievances against Lieutenant Soland, accusing him of sexual abuse in connection with this incident, which reportedly occurred on January 2, 2023.<sup>9</sup> The grievances were assigned to a "PREA Investigator" (referring to the Prison Rape Elimination Act), who determined that Burke's allegation of sexual abuse was "**Unfounded**" after interviewing witnesses and viewing surveillance footage.<sup>10</sup>

Invoking 42 U.S.C. § 1983, Burke accuses Lieutenant Soland of "aggravated sexual assault" as well as making "death threats" against him.<sup>11</sup> Burke seeks immediate release from custody and

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<sup>6</sup>(...continued)

Calls" submitted in another lawsuit filed by Burke, which disclose that he has a mental health disorder and has repeatedly refused medication. See Exhibits in Burke v. Mundin, Civil No. H-22-4364 (S.D. Tex.) (Docket Entry No. 12, pp. 3, 5-6).

<sup>7</sup>Complaint, Docket Entry No. 1, p. 4.

<sup>8</sup>Id.

<sup>9</sup>Inmate Grievances attached to Complaint, Docket Entry No. 1, pp. 7-9.

<sup>10</sup>Fort Bend County Sheriff's Office, Detention Bureau Investigations Unit Memorandum dated January 9, 2023, attached to Complaint, Docket Entry No. 1, p. 6 (emphasis in original).

<sup>11</sup>Complaint, Docket Entry No. 1, p. 3.

\$50,000,000.00 in damages.<sup>12</sup> The court concludes, however, that the Complaint must be dismissed because Burke fails to articulate a claim upon which relief may be granted under 42 U.S.C. § 1983.

## II. Standard of Review

Federal district courts are required by the Prison Litigation Reform Act ("PLRA") to screen prisoner complaints to identify cognizable claims or dismiss the complaint if it is frivolous, malicious, or fails to state a claim upon which relief may be granted. See Crawford-El v. Britton, 118 S. Ct. 1584, 1596 (1998) (summarizing provisions found in the PLRA, including the requirement that district courts screen prisoners' complaints and summarily dismiss frivolous, malicious, or meritless actions); see also Coleman v. Tollefson, 135 S. Ct. 1759, 1761-62 (2015) (discussing the screening provision found in the federal in forma pauperis statute, 28 U.S.C. § 1915(e)(2), and reforms enacted by the PLRA that were "'designed to filter out the bad claims [filed by prisoners] and facilitate consideration of the good'") (quoting Jones v. Bock, 127 S. Ct. 910, 914 (2007)) (alteration in original).

A complaint is frivolous if it "'lacks an arguable basis either in law or in fact.'" Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke v. Williams, 109 S. Ct. 1827, 1831 (1989)). "A complaint lacks an arguable basis in law if it is

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<sup>12</sup>Id.

based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist." Harper v. Showers, 174 F.3d 716, 718 (5th Cir. 1999) (citations and internal quotation marks omitted). "A complaint lacks an arguable basis in fact if, after providing the plaintiff the opportunity to present additional facts when necessary, the facts alleged are clearly baseless." Talib v. Gilley, 138 F.3d 211, 213 (5th Cir. 1998) (citation omitted).

To avoid dismissal for failure to state a claim, the factual allegations in the complaint "must be enough to raise a right to relief above the speculative level[.]" Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007) (citation omitted). If the complaint has not set forth "enough facts to state a claim to relief that is plausible on its face," it must be dismissed. Id. at 1974. A reviewing court must "accept all well-pleaded facts as true and construe the complaint in the light most favorable to the plaintiff." Heinze v. Tesco Corp., 971 F.3d 475, 479 (5th Cir. 2020) (citation omitted). But it need not accept as true any "conclusory allegations, unwarranted factual inferences, or legal conclusions." Id. (internal quotation marks and citations omitted); see also White v. U.S. Corrections, LLC, 996 F.3d 302, 307 (5th Cir. 2021) (same). In other words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 129 S. Ct. 1937,

1949 (2009) (citing Twombly, 127 S. Ct. at 1965).

### **III. Discussion**

#### **A. Request for Release From Confinement**

Burke asks the court to grant him release on his own recognizance.<sup>13</sup> Alternatively, Burke appears to ask the court to issue a writ of habeas corpus to release him from the Fort Bend County Jail.<sup>14</sup> These claims are not actionable in a lawsuit under 42 U.S.C. § 1983. The writ of habeas corpus provides the remedy for prisoners who challenge the "fact or duration" of their confinement and seek "immediate release or a speedier release from that imprisonment." Preiser v. Rodriguez, 93 S. Ct. 1827, 1841 (1973). Therefore, his request for release from confinement will be dismissed for failure to state a claim upon which relief may be granted.<sup>15</sup>

#### **B. Verbal Threats**

"To state a claim under § 1983, a plaintiff must (1) allege a violation of rights secured by the Constitution or laws of the

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<sup>13</sup>Complaint, Docket Entry No. 1, p. 4.

<sup>14</sup>Id.

<sup>15</sup>The court notes that Burke has filed several habeas corpus petitions seeking his release on bond, which have been dismissed for failure to exhaust available state court remedies. See Burke v. Fagan, Civil No. H-22-4407 (S.D. Tex. Dec. 28, 2022) (Docket Entry No. 5); Burke v. Fagan, Civil No. H-23-104 (S.D. Tex. Feb. 8, 2023) (Docket Entry No. 3); Burke v. Fagan, Civil No. H-23-993 (S.D. Tex. April 17, 2023) (Docket Entry No. 8).

United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." Sanchez v. Oliver, 995 F.3d 461, 466 (5th Cir. 2021) (citation omitted). Burke alleges that Lieutenant Soland violated his rights by verbally threatening to harm him in the future.<sup>16</sup>

The Fifth Circuit has repeatedly held that verbal threats against an inmate by a detention officer or guard do not amount to a constitutional violation and are not actionable under 42 U.S.C. § 1983. See Calhoun v. Hargrove, 312 F.3d 730, 734 (5th Cir. 2002); see also Larson v. Westbrook, 799 F. App'x 263, 264 (5th Cir. 2020) (per curiam) (holding that "verbal threats and threatening gestures, standing alone, do not amount to a constitutional violation") (citations omitted). Accordingly, this allegation will be dismissed for failure to state a claim upon which relief may be granted.

#### **C. Unwanted Touching**

Burke also alleges that Lieutenant Soland sexually assaulted him by grabbing his "behind" while escorting him to receive treatment.<sup>17</sup> It is well established that not every unwanted malevolent touch by a prison guard gives rise to a federal cause of action. See Hudson v. McMillian, 112 S. Ct. 995, 1000 (1992)

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<sup>16</sup>Complaint, Docket Entry No. 1, p. 4.

<sup>17</sup>Id.

(citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973) ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights.")). The Constitution excludes from recognition de minimis uses of physical force, provided that the use of force is not of a sort "'repugnant to the conscience of mankind.'" Hudson, 112 S. Ct. at 1000 (citation and quotation omitted).

Courts have concluded that a prison official's sexual abuse of an inmate may reach constitutional dimensions and give rise to a claim under 42 U.S.C. § 1983 if the allegations are sufficiently serious. See, e.g., Boddie v. Schnieder, 105 F.3d 857, 860-61 (2d Cir. 1997) (affirming the dismissal of an inmate's allegations that he was "verbally harassed, touched, and pressed against without his consent" as not "objectively, sufficiently serious" to state a constitutional violation). Although Burke has characterized the incident involving Lieutenant Soland as a sexual assault, his allegations are more accurately characterized as a brief, isolated instance of unwanted touching that did not result in any physical injury.<sup>18</sup> Assuming that his allegations are true for purposes of

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<sup>18</sup>The PLRA precludes an action by a prisoner for compensatory damages "for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18)." 42 U.S.C. § 1997e(e). The plaintiff does not allege that he suffered a physical injury. Nor does he describe a sexual act as that term is defined in 18 U.S.C. § 2246(2). As a result, the PLRA precludes any claim for compensatory damages based on mental or emotional distress. See Alexander v. Tippah County, Miss., 351 F.3d 626, 631 (continued...)

reviewing the Complaint under the PLRA, 28 U.S.C. § 1915A(b), his allegations are insufficient to state a claim.

The Fifth Circuit has held in a series of unpublished opinions that “[w]hile violent sexual assaults involving more than de minimis force are actionable under the Eighth Amendment, . . . isolated, unwanted touchings by prison employees, though ‘despicable and, if true, they may potentially be the basis of state tort actions . . . they do not involve a harm of federal constitutional proportions as defined by the Supreme Court.’” Copeland v. Nunan, 250 F.3d 743, 2001 WL 274738, at \*3 (5th Cir. 2001) (per curiam) (quoting Boddie, 105 F.3d at 860-61); see also Allen v. Johnson, 66 F. App’x 525, 2003 WL 21017401, at \*1 (5th Cir. 2003) (per curiam) (affirming the district court’s dismissal of a case as frivolous where a prisoner alleged that the guard touched him in a sexual manner during routine pat-down searches); Pryer v. Walker, 385 F. App’x 417, 418, 2010 WL 2836160, at \*1 (5th Cir. 2010) (per curiam) (concluding that a prisoner’s claim of sexual abuse against a female prison guard, who rubbed his chest and made comments about his hair and chest during an electrocardiogram, were properly dismissed as frivolous).

Several district courts within the Fifth Circuit have also concluded that incidents involving a single, brief encounter that did not result in physical injury do not violate the Constitution.

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<sup>18</sup>(...continued)  
(5th Cir. 2003) (per curiam).

See Felan v. Fernandez, Civ. A. No. SA-17-CV-880-XR, 2019 WL 3781443, at \*4 (W.D. Tex. Aug. 12, 2019) (dismissing a prisoner's claim that an officer grabbed his buttocks as "isolated, unwanted touching" rather than "repugnant contact of a sexual nature that offends modern standards of decency"); Ben v. Brinks, No. EP-13-CV-00023-KC-ATB, 2014 WL 931796, at \*2 (W.D. Tex. Feb. 13, 2014) rec. adopted, 2014 WL 931432 (W.D. Tex. Mar. 10, 2014) (dismissing for failure to state a claim the plaintiff's allegation that he was awakened one night by a guard rubbing and touching his inner thighs and buttocks); Brown v. Sloan, No. 1:09-CV-01066, 2010 WL 476720, at \*2 (W.D. La. Feb. 10, 2010) (holding that a single incident of physical touching or fondling during a shakedown was not "the kind of 'severe and repetitive' abuse or wanton and sadistic infliction of pain that rises to the level of an Eighth Amendment violation"); Wright v. Thompson, No. 3:09-CV-1544, 2010 WL 3282955, at \*4-5 (W.D. La. June 30, 2010), rec. adopted, 2010 WL 3282957 (W.D. La. Aug. 17, 2010) (dismissing claims of sexual abuse by an officer who allegedly touched the plaintiff's penis on one occasion as a "single, brief physical contact" which, even when coupled with verbal harassment, was "not sufficiently serious and pervasive to permit redress under the Eighth Amendment").

Because Burke's allegations are insufficient to establish a constitutional violation or an actionable claim under 42 U.S.C. § 1983, his Complaint will be dismissed for failure to state a claim

upon which relief may be granted.

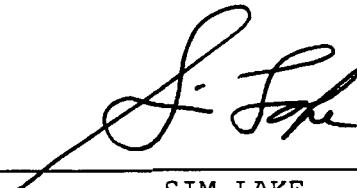
**IV. Conclusion and Order**

Based on the foregoing, the court **ORDERS** as follows:

1. The Prisoner Civil Rights Complaint under 42 U.S.C. § 1983 filed by Andrew Burke (Docket Entry No. 1) is **DISMISSED WITH PREJUDICE**.
2. The dismissal will count as a strike for purposes of 28 U.S.C. § 1915(g).

**The Clerk is directed to provide a copy of this Memorandum Opinion and Order to the plaintiff. The Clerk will also send a copy of this Order to the Manager of Three Strikes List at [Three\\_Strikes@txs.uscourts.gov](mailto:Three_Strikes@txs.uscourts.gov).**

**SIGNED** at Houston, Texas, on this 11th day of May, 2023.



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**SIM LAKE**  
SENIOR UNITED STATES DISTRICT JUDGE