

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DARREN MUELLER,

Plaintiff,

v.

STATE OF WISCONSIN
DEPARTMENT OF CORRECTIONS,
SERGEANT SCHNICK, MR. DAVIDSON,
MR. DUNHAM, MR. ROSENBURGER
and DAN BERTRAND,

Defendants.

OPINION AND ORDER

01-C-310-C

This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff, who is presently confined at the Jackson Correctional Institution in Black River Falls, Wisconsin, alleges that defendant Schnick violated the Eighth Amendment by failing to protect him from an assault, that defendants Schnick, Davidson, Dunham and Rosenburger violated the Eighth Amendment by failing to provide him with adequate medical treatment and that defendant Bertrand violated his right to due process under the Fourteenth Amendment.

Plaintiff has paid the full fee for filing his complaint. However, because he is a

prisoner and defendants are “governmental entit[ies] or officer[s] or employee[s] of a governmental entity,” this court is required to screen the complaint, identify the claims and dismiss any claim that is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. §§ 1915A(a), (b).

Plaintiff’s case will be dismissed because he brought the same Eighth Amendment claims in a previous suit against the same defendants and his Fourteenth Amendment claim fails to state a claim upon which relief may be granted. Plaintiff has moved for appointment of counsel. Because his case will be dismissed, his motion will be denied as moot.

In his complaint, plaintiff makes the following allegations of fact.

ALLEGATIONS OF FACT

Plaintiff Darren Mueller is an inmate at Jackson Correctional Institution. The following defendants are employees of the Jackson Correctional Institution: defendant Sergeant Schnick is a unit sergeant; defendant Davidson is a lieutenant; defendant Dunham is a nurse; defendant Rosenburger is a dentist; and defendant Dan Bertrand is the warden. Plaintiff also named the Wisconsin Department of Corrections as a defendant.

On October 3, 1995, plaintiff was showering when Nate Sellers began looking at him in an “undesirable manner.” In his haste to leave, plaintiff took Seller’s soap container by

mistake, at which point Sellers began to argue with plaintiff in front of defendant Schnick. Plaintiff returned to his cell and Sellers complained to defendant Schnick, who told him to go to plaintiff's cell. When Sellers went to plaintiff's cell, Sellers yelled at plaintiff; as plaintiff attempted to close his cell door, Sellers assaulted him and left him unconscious. Defendant Schnick went to plaintiff's cell and plaintiff told her that Sellers had assaulted him and that he needed medical attention. Defendant Schnick later returned with Sellers so that he could apologize to plaintiff for the assault.

Defendant Schnick called defendant Davidson and, upon his arrival, plaintiff asked Davidson for medical attention for his broken jaw. Defendant Davidson asked plaintiff to tell him about the assault when Sellers and other gang members were within 5 feet of them. Plaintiff refused to describe the attack so defendant Davidson refused plaintiff's request for medical attention.

On October 4, 1995, plaintiff saw defendant Dunham, who provided plaintiff with anti-inflammatory medication, taught him how to relocate his own broken jaw and told him that Dunham would schedule a dentist appointment for him. On October 8, 1995, the health services unit manager ordered the dental department to see plaintiff. Defendant Rosenburger ordered plaintiff's immediate transfer to an outside medical facility, where plaintiff had x-rays taken. On October 9, plaintiff had x-rays taken again; the x-rays showed that plaintiff had two broken areas in his lower jaw. Plaintiff had not been provided with

soft food and the pain medication was not working.

On November 10, plaintiff's jaw was broken again and wired shut. Plaintiff received soft food and adequate pain medication and was placed under observation in the medical ward. Defendant Rosenburger's staff said that Rosenburger had failed to leave a wire cutters in case plaintiff vomited. During the healing process, some of the wires broke and were not replaced, causing plaintiff multiple problems.

Defendant Bertrand gave plaintiff two conduct reports for alleged violations of §§ DOC 303.26 (soliciting staff) and 303.15(d) (sexual conduct) before the change in § DOC 303. Plaintiff never had a hearing or received written notice. Plaintiff did not violate § DOC 303.26 and the Department of Corrections did not prove a violation but defendant Bertrand found plaintiff guilty.

OPINION

I. SCREENING

A. Eighth Amendment Claims

I understand plaintiff to allege that defendant Schnick violated the Eighth Amendment by failing protect him from an assault and that defendants Schnick, Davidson, Rosenburger and Dunham violated the Eighth Amendment by failing to provide him with adequate medical treatment. Plaintiff's claims will be dismissed because he brought the same

claims against the same defendants in a previous case in the United States District Court for the Eastern District of Wisconsin. See Mueller v. Schnick, 98-C-203. In an order entered April 30, 1998, Judge Rudolph Randa dismissed plaintiff's claims, a decision that was upheld by the Court of Appeals for the Seventh Circuit, see Mueller v. Schnick, 98-2260, unpublished, 2000 WL 250122 (7th Cir. Feb. 24, 2000). The Supreme Court denied plaintiff's petition for writ of certiorari, see Mueller v. Schnick, 99-9466, 121 S. Ct. 89 (Oct. 2, 2000), and denied plaintiff's petition for rehearing, see Mueller v. Schnick, 99-9466, 121 S. Ct. 443 (Nov. 6, 2000). Plaintiff has had a full and fair hearing on these claims against defendants Schnick, Davidson, Dunham and Rosenburger.

B. Due Process

I understand plaintiff to be alleging that defendants Bertrand and Department of Corrections violated his rights under the Fourteenth Amendment by failing to provide him with a hearing or written notice after he was given two conduct reports. Plaintiff named the Wisconsin Department of Corrections as a defendant in this case. The Supreme Court has held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." Will v. Michigan Department of State Police, 491 U.S. 58, 71 (1989). Furthermore, "[i]t is well-settled that a claim against a state or local agency or its officials may not be premised upon a *respondeat superior* theory." Rascon v. Hardiman, 803 F.2d 269,

274 (7th Cir. 1986) (citing Monell v. Department of Social Services, 436 U.S. 658, 694 (1978)). “The agency must be culpable in its own right, for example by having a policy of violating such rights.” Bailey v. Faulkner, 765 F.2d 102, 104 (7th Cir. 1985). Plaintiff may not proceed against defendant Wisconsin Department of Corrections.

The Fourteenth Amendment prevents the state from depriving someone of life, liberty or property without due process of law, usually in the form of notice and some kind of hearing by an impartial decision maker. A procedural due process claim against government officials requires proof of inadequate procedures *and* interference with a liberty or property interest. See Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). In Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that liberty interests “will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” After Sandin, in the prison context, protectible liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. See Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, Sandin does not allow suit complaining about deprivation of liberty). Plaintiff has failed to allege that he received any punishment for being found guilty in two conduct reports. Even if plaintiff had alleged punishment such as administrative or program

segregation, he would still not be able to demonstrate that he suffered “atypical, significant deprivations.” Plaintiff’s due process claim will be dismissed.

II. MOTION FOR APPOINTMENT OF COUNSEL

Because plaintiff’s case will be dismissed, his motion for appointment of counsel will be denied as moot.

ORDER

IT IS ORDERED that

1. Plaintiff’s Eighth Amendment claims and Fourteenth Amendment claim are DISMISSED.

2. Plaintiff’s motion for appointment of counsel is DENIED as moot.

Entered this 2nd day of July, 2001.

BY THE COURT:

A black rectangular box containing a white handwritten signature that reads "Barbara B. Crabb".

BARBARA B. CRABB
District Judge