IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EUGENE CHERRY,

ORDER

Petitioner,

03-C-129-C

v.

MATTHEW FRANK, GERALD BERGE,
PETER HUIBREGTSE, GARY BOUGTON,
BRAD HOMPE, JOAN GERL,
SGT. C. HANEY, TIM BELZ and
HENRY BRAY,

Respondents.

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This is a proposed civil action for declaratory, injunctive and monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner Eugene Cherry is presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. He alleges that (1) respondents Tim Belz and Henry Bray are retaliating against him for filing lawsuits and complaining about prison conditions by placing sewing needles and staples in his food; (2) respondents Matthew Frank, Gerald Berge, Peter Huibregtse, Brad Hompe and Gary Boughton knew about Belz's and Bray's actions against petitioner but did not intervene to help him; (3) that respondent Hompe issued conduct reports to petitioner, knowing that they were false and

in retaliation for petitioner's lawsuits and for his complaints about Belz's and Bray's misconduct; (4) respondent Sgt. C. Haney sexually assaulted him and respondent Joan Gerl refused to intervene to help him; and (5) respondent Gerl left him in the strip search cage for 3 ½ hours without clothes and refused to provide him with his medication, causing him "excruciating" pain. In addition, petitioner has filed a motion for a preliminary injunction and a motion for appointment of counsel.

Petitioner seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if, on three or more previous occasions, the prisoner has had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief. This court will not dismiss petitioner's case on its own for lack of administrative exhaustion, but

if respondents believe that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

I conclude that petitioner has stated a claim upon which relief may be granted on his claims that (1) respondents Belz and Bray retaliated against him by placing needles and staples in his food and respondents Frank, Berge, Huibregtse, Hompe and Boughton were aware of Belz's and Bray's misconduct and refused to intervene, in violation of petitioner's rights of free speech, access to courts and to be free from cruel and unusual punishment; (2) respondent Hompe retaliated against petitioner by issuing him false conduct reports because petitioner filed a lawsuit against Hompe's wife and complained about Bray's and Belz's misconduct, in violation of petitioner's right of free speech and access to courts; (3) respondent Haney performed a body cavity search on petitioner in a way that violated his rights to be free from excessive force and unreasonable searches and respondent Gerl refused to intervene; (4) respondent Gerl refused to provide him with medication in violation of his right to adequate medical care. I will grant petitioner leave to proceed on each of these claims. However, petitioner's claim that respondent Gerl violated his Eighth Amendment rights by keeping him in a cell without clothes for three hours fails to state a claim upon

which relief may be granted. Accordingly, petitioner's request for leave to proceed will be denied with respect to that claim.

A decision on petitioner's motion for a preliminary injunction will be stayed to give respondents an opportunity to respond. However, petitioner's motion for appointment of counsel will be denied.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Eugene Cherry is an inmate at the Wisconsin Secure Program Facility. Respondent Matthew Frank is Secretary of the Department of Corrections. Gerald Berge is the warden of the Secure Program Facility, Peter Huibregtse is the deputy warden, Gary Boughton is the security director and Brad Hompe is a unit manager. Respondents Joan Gerl, Sgt. C. Haney, Tim Belz and Henry Bray are correctional officers.

B. Sewing Needles and Staples

In January 2003 petitioner found sewing needles and staples in his food on numerous occasions. Because he was not always able to detect these objects before chewing his food, the needles and staples punctured his gums, causing pain and bleeding. On one occasion,

Respondents Belz and Bray, who had served petitioner his meal, asked him, "How was your meal?" when they came to retrieve his tray. On February 16 and 17, 2003, petitioner again found sewing needles in his food. Again, respondents Belz and Bray had delivered his meal.

On February 21, 2003, petitioner showed the sewing needles to respondent Huibregtse and told him that he found needles and staples in his food whenever respondents Belz and Bray delivered it. Respondent Huibregtse told petitioner that he would "take care of it" and he took the needles from petitioner. Respondents Belz and Bray continued to bring petitioner his food. They began harassing him, calling him "snitch" and "queer boy."

Petitioner believes that respondents Belz and Bray were putting sharp objects into his food in retaliation for two lawsuits that he filed against other prison officials and for complaining about the mistreatment he receives in prison. He still fears for his life. He complained about respondents Belz and Bray to respondents Frank, Berge, Huibregtse, Hompe and Boughton, but they refused to intervene. He also wrote letters to the Grant County Sheriff's Department, which did not investigate the incidents.

On March 4, 2003, respondents Belz and Bray came to petitioner's cell to deliver mail and legal supplies. They gave petitioner five legal envelopes, each embossed with a first-class adhesive stamp. Adhesive stamps are not permitted in the prison. Belz and Bray told him that he would receive more "if he learned to keep his trap shut." Petitioner believes that respondents Belz and Bray were bribing him to stop complaining. He wrote to respondent

Boughton about the bribe, but Boughton did nothing.

On March 12, 2003, petitioner discovered five more adhesive stamps in a stack of mail that respondent Bray had delivered to him. He told staff that he believed respondent Bray was trying to set him up. Respondent Hompe was notified of petitioner's accusations. Hompe issued several conduct reports to petitioner for lying about staff. Petitioner believes that respondent Hompe is attempting to cover up the misconduct of respondents Bray and Belz. Further, petitioner believes that Hompe is retaliating against him for suing Hompe's wife in case no. 02-C-394-C.

C. Strip and Body Cavity Search

On February 8, 2003, respondent Gerl ordered petitioner to come out of his cell. Gerl took petitioner to a cage, where he was strip searched. Once he was naked, petitioner was ordered to take his braids down. He refused. As a result, he was left in the "ice cold" cage without clothes for 3 ½ hours. At 7:00 p.m. petitioner was still in the cage. He asked for his prescribed medication for his back pain, stomach condition and sleeping disorder. Petitioner was ignored until 8:30 p.m., when respondent Gerl told him that he could not have his medication unless he took his braids out. As a result of not receiving his medication, petitioner experienced excruciating back and stomach pain. At 8:45 p.m. a cell extraction team was assembled. At this point, petitioner complied. He was handcuffed to

the door of the cage and forced to kneel down so that respondent Haney could search petitioner's braids.

When respondent Haney finished searching petitioner's braids, Haney grabbed petitioner's penis, tugged on it, pulled his foreskin back and then grabbed petitioner's testicles and lifted them up. Haney forced petitioner to bend over, after which Haney opened petitioner's buttocks for a visual inspection. Petitioner complained to respondent Gerl, but she said nothing.

DISCUSSION

A. Cruel and Unusual Punishment and Retaliation

I understand petitioner to contend that respondents Belz and Bray violated his Eighth Amendment right to be free from cruel and unusual punishment by placing sewing needles and staples in his food. In addition, I understand him to contend that they violated his right of access to courts and free speech because they were retaliating against him for filing two lawsuits and complaining about prison conditions.

The Eighth Amendment prohibits government officials from acting "maliciously and sadistically for the very purpose of causing harm," Hudson v. McMillan, 503 U.S. 1, 6 (1992), or "with the knowledge the harm will result." Farmer v. Brennan, 511 U.S. 825, 836 (1994); see also Outlaw v. Newkirk, 259 F.3d 833, 837 (7th Cir. 2001) (applying

standard from Hudson). Because malicious and sadistic acts always violate "contemporary standards of decency," an inmate may show an Eighth Amendment violation for such acts when he sustains more than a minimal injury. Hudson, 503 U.S. at 9-10. Both physical and psychological harm may form the basis for an Eighth Amendment violation, though, under 42 U.S.C. § 1997e(e), a plaintiff may not recover compensatory damages for psychological injuries unaccompanied by physical ones. Calhoun v. Detella, 319 F.3d 936 (7th Cir. 2003). Furthermore, even if no injury has yet occurred, an inmate may be entitled to relief under the Eighth Amendment if a prison official is subjecting him to a substantial risk of serious harm to his future health. Helling v. McKinney, 505 U.S. 25, 33 (1993).

If petitioner proves that respondents Bray and Belz knowingly put needles and staples into his food, there would be no question that they had acted maliciously and sadistically to cause harm and that they were subjecting petitioner to a substantial risk of serious harm. There could be no legitimate reason for placing sharp objects in an inmate's meal. Furthermore, if petitioner proves that Bray's and Belz's alleged misconduct was motivated by petitioner's lawsuits against other prison officials and his complaints about prison conditions, this retaliation would be a violation of his right of access to courts and free speech. See Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996) (prison official who takes action against a prisoner to retaliate against the prisoner for exercising a constitutional right may be liable to the prisoner for damages). Finally, if respondent Hompe issued a false

conduct report to petitioner for complaining about Bray's and Belz's misconduct, petitioner would have a claim for retaliation against respondent Hompe as well.

Of course, the operative word here is "if." Although petitioner has sent staples and needles to the court to support his allegations, it is difficult to believe that respondents would attempt to harm petitioner in this shocking and sadistic way, risking their jobs and possible criminal prosecution, even after he complained to various prison authorities (and apparently the sheriff's department) regarding respondents' alleged conduct. Generally, however, courts must accept as true all well-pleaded allegations in a complaint. Massey v. Helman, 259 F.3d 641, 645 (7th Cir. 2001). An exception to this rule applies when the allegations are so "nutty" and "delusional" that they are unbelievable as a matter of law. For example, in Gladney v. Pendleton Correctional Facility, 302 F.3d 773, 774 (7th Cir. 2002), the petitioner alleged that the respondents for three years had allowed other inmates to come into his cell while he was sleeping to drug and sexually assault him. He further alleged that he only became aware of the assaults when he noticed a needle mark under his lip. Although medical personnel at the prison claimed not to see the mark, according to the petitioner, they were lying to make him think he was delusional. The court of appeals held that the district court did not abuse its discretion in concluding that plaintiff's suit was factually frivolous.

Although petitioner's allegations are implausible, I cannot conclude that they are in

the same league as those in Gladney. See Bontkowski v. Smith, 305 F.3d 757 (7th Cir. 2002) (plaintiff alleged that his ex-wife and an FBI agent conspired to steal plaintiff's Salvador Dali prints and then have him prosecuted on baseless charges of telephone harassment; court of appeals concluded that these allegations were not factually frivolous). Given the high level of security at the Secure Program Facility, its stringent screening procedures for incoming mail and the lack of prisoner contact with members of the public or other inmates, there is a haunting question to be answered in this case about how petitioner obtained such dangerous contraband. Accordingly, I will grant petitioner leave to proceed on his claim that respondents Belz and Bray violated his rights under the First and Eighth Amendments by purposely putting needles and staples into his food. In addition, I will assume that respondents Frank, Berge, Huibregtse, Hompe and Boughton knew that respondents Belz and Bray were violating petitioner's constitutional rights but refused to intervene even though they could have taken corrective action. See Windle v. City of Marion, Indiana, 321 F.3d 658 (7th Cir. 2003) (quoting Yang v. Hardin, 37 F.3d 282, 285 (7th Cir. 1994)) (state actor may be liable for preventing another state actor from committing constitutional violation if he or she "'had a realistic opportunity to intervene to prevent the harm from occurring'"); see also Doyle v. Camelot Care Centers, 305 F.3d 603, 614-15 (7th Cir. 2002) (supervisory officials may be held liable under § 1983 only if they "had some personal involvement in the constitutional deprivation, essentially directing or

consenting the challenged conducted").

However, I remind petitioner of the gravity of his allegations. Although any allegation of wrongdoing may have adverse consequences for the alleged malfeasant, there are few charges more damaging than that of attempted murder. Fabricating such allegations in a lawsuit would be an egregious abuse of the judicial process. Under 28 U.S.C. § 1915(e)(2) and (g), I am required to dismiss this case and assess a strike if "at any time" I determine that the action is frivolous. I am also empowered to impose a fine on petitioner as a sanction under Fed. R. Civ. P. 11 if it is later revealed that he has filed this suit for an improper purpose. If this occurs, failure to pay the fines could lead to the loss of petitioner's ability to file additional suits. Newlin v. Helman, 123 F.3d 429, 437 (7th Cir. 1997). Thus, before petitioner chooses to maintain this suit, he should consider his reasons for filing the action and the evidence he has to support his allegations.

B. Strip and Body Cavity Search

Petitioner alleges that respondent Haney violated his Eighth Amendment rights by "sexually assault[ing]" him. What petitioner terms a sexual assault is more accurately described as a strip and body cavity search. Although such a search is "unpleasant, humiliating, and embarrassing, " Calhoun v. Detella, 319 F.3d 936, 939 (7th Cir. 2003), the Supreme Court has rejected constitutional challenges to visual body cavity searches of

prisoners when they are conducted for the purpose of finding contraband. Bell v. Wolfish, 441 U.S. 520, 559-69 (1974). Rather, in assessing whether a search of a prisoner's person violates the Eighth Amendment, the court of appeals has applied a standard similar to that of excessive force. In other words, petitioner must show that the search was "conducted in a harassing manner intended to humiliate and inflict psychological pain." Calhoun, 319 F.3d at 936. Unreasonable searches of a prisoner may also violate the Fourth Amendment, although the court of appeals has stated that "it is difficult to conjure up too many real life scenarios where prison strip searches of inmates could be said to be unreasonable under the Fourth Amendment." Peckham v. Wisconsin Dept. of Corrections, 141 F.3d 694, 697 (7th Cir. 1998). In assessing the reasonableness of any search, the court should balance "the scope of the particular intrusion, the manner in which it was conducted, the justification for initiating it, and the place in which it is conducted." Bell, 441 U.S. at 559.

Petitioner has alleged no facts from which I could reasonably infer that he was searched for the sole purpose of humiliating him or causing him pain. Rather, petitioner has alleged that he was searched shortly after he informed prison officials that he had obtained sewing needles and staples. Thus, there was a legitimate reason for investigating whether he was hiding additional needles on his person. However, in Bell, the Court stated that even when a search is justified it may not be conducted in an "abusive" fashion. Id. at 560. Similarly, in the context of excessive force, even when some force is appropriate the court

must still consider the relationship between the need for force and the amount of force actually used. Whitley v. Albers, 475 U.S. 312, 321 (1986).

In this case, petitioner alleges that respondent Haney forcibly subjected him to a body cavity search, pulling his penis and spreading apart his buttocks, without giving him a chance to comply with a *visual* body inspection without Haney touching him. If petitioner can prove this, he may be able to show that the search was unreasonable or excessive. See Bell, 441 U.S. at 558 n. 39 (emphasizing that strip searches being upheld were visual inspections that did not involve prison officials touching the inmates). In addition, I will assume that respondent Gerl could have stopped respondent Haney from performing the search, but chose not to intervene. Accordingly, I will grant petitioner leave to proceed on a claim that both Haney and Gerl violated his rights under the Fourth and Eighth Amendments. However, if the reason respondent Haney touched petitioner was that he refused to comply with a visual inspection, then the additional use of force would not be unconstitutional. See Soto v. Dickey, 744 F.2d 1260, 1267 (7th Cir. 1984) (physical force may be used in response to noncompliance with an order).

C. Denial of Medication and Temperature of Cell

I also understand petitioner to allege that respondents Gerl and Haney violated his Eighth Amendment rights by leaving him in an "ice cold" cage for 3 ½ hours without clothes

and denying his request for medication. Petitioner will be denied leave to proceed on his claim regarding the time he spent in the cell. Although the court of appeals has recognized that extended exposure to extreme cold may violate the Eighth Amendment in some circumstances, see Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997), I am not persuaded that being naked in a cell for several hours violates the Constitution, particularly when petitioner has not alleged that he suffered any adverse effects on his health.

However, "[d]eliberately [ignoring a] request for medical assistance has long been held to be a form of cruel and unusual punishmen . . . provided that the illness or injury for which assistance is sought is sufficiently serious or painful to make the refusal of assistance uncivilized." Cooper v. Casey, 97 F.3d 914,916-17 (7th Cir. 1996). Although the Constitution does not require prison staff to dispense medication for ailments such as the "sniffles or minor aches and pains," the deliberate refusal to treat pain that is sufficiently serious may violate the Eighth Amendment. Id. Petitioner alleges that he was in "excruciating" pain as a result of not receiving his prescribed medication. At this stage, this allegation is sufficient to show that petitioner's condition was sufficiently serious. Westlake v. Lucas, 537 F.2d 837 (6th Cir. 1976) (cited in Gutierrez v. Peters ,111 F.3d 1364, 1372 n.6 (7th Cir. 1997)) (holding that stomach pain and abdominal distress constituted a serious medical need). However, in addition to showing a serious medical need, petitioner must also show that respondent Gerl was "deliberately indifferent" to his health or safety. Estelle v.

Gamble, 429 U.S. 97, 106 (1976). In other words, petitioner must show that respondent Gerl refused to provide petitioner with his prescribed medication even though she knew of or recklessly disregarded the risk that failing to do so would cause him extreme pain. At this point, I will assume that respondent Gerl was aware of such a risk. Therefore, I will grant petitioner leave to proceed on a claim that respondent Gerl denied him medication in violation of the Eighth Amendment.

D. Motion for Preliminatry Injunction

Petitioner requests a preliminary injunction directing respondents to transfer him out of the Secure Program Facility "to a facility where his life will not be in imminent danger by retaliating WSPF officials." In order to obtain preliminary injunctive relief, petitioner must show that (1) he has no adequate remedy at law and will suffer irreparable harm if the relief is not granted; (2) the irreparable harm he would suffer outweighs the irreparable harm defendants would suffer from an injunction; (3) he has some likelihood of success on the merits; and (4) the injunction would not frustrate the public interest. Palmer v. City of Chicago, 755 F.2d 560, 576 (7th Cir. 1985).

Assuming petitioner's allegations are true, he easily satisfies the first two requirements. Money damages would not be sufficient to protect petitioner from further attempts to harm him by placing needles in his food. However, this would not necessarily

mean that the proper relief is transfer rather than a more narrowly tailored remedy. See 18 U.S.C. § 3626(a)(2) ("Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm.") In addition, I cannot determine petitioner's likelihood of success on the merits until I have heard respondents' side of the story. Accordingly, respondents Belz, Bray, Frank, Berge, Huibregtse, Hompe and Boughton may have until May 26, 2003, in which to file and serve a brief and a response to petitioner's proposed findings of fact in support of his preliminary injunction, which he included with his complaint. I will determine at that time whether an evidentiary hearing is necessary.

E. Motion to Appoint Counsel

In considering whether counsel should be appointed, I first must determine whether plaintiff made reasonable efforts to retain counsel and was unsuccessful or whether he was precluded effectively from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Plaintiff has provided the names and addresses of several lawyers that he has requested to represent him. Therefore, I conclude that plaintiff has satisfied the requirements of Jackson.

I must also determine whether plaintiff is competent to represent himself given the

complexity of the case, and if he is not, whether the presence of counsel would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). It is simply too early in the case these determinations. Thus far, petitioner has shown that he is capable of drafting a complaint and various motions and preparing proposed findings of fact, both in this case and in other cases that he has before this court. I am satisfied that petitioner is competent to represent himself for the time being.

ORDER

IT IS ORDERED that

1. Petitioner Eugene Cherry may proceed on his claim that (1) respondents Tim Belz and Henry Bray violated his right of access to courts and free speech when they retaliated against him for filing lawsuits against other prison officials and complaining about prison conditions; (2) respondents Belz, Bray, Matthew Frank, Gerald Berge, Peter Huibregtse, Brad Hompe and Gary Boughton violated his right to be free from cruel and unusual punishment when Belz and Bray placed needles and staples in his food and the other respondents were aware of their misconduct but refused to intervene; (3) respondent Hompe retaliated against petitioner by issuing him false conduct reports because petitioner filed a lawsuit against Hompe's wife and complained about Bray's and Belz's misconduct in

violation of petitioner's right of free speech and access to courts; (4) respondent Sgt. C. Haney performed a body cavity search on petitioner in a manner that violated his rights to be free from excessive force and unreasonable searches and respondent Joan Gerl refused to intervene; (5) respondent Gerl refused to provide him with medication in violation of his right to adequate medical care.

2. Petitioner's claim that respondent Gerl violated his Eighth Amendment rights by keeping him in the strip search cage without clothes for 3 ½ hours is DISMISSED pursuant to 28 U.S.C. § 1915A(b)(2) for plaintiffs' failure to state a claim upon which relief may be granted.

3. Petitioner's motion for a preliminary injunction is STAYED. Respondents Belz, Bray, Frank, Berge, Huibregtse, Hompe and Boughton may have until May 26, 2003, in which to file and serve a brief and a response to petitioner's proposed findings of fact in support of his preliminary injunction.

4. Petitioner's motion for appointment of counsel is DENIED without prejudice to his filing another motion at a later date.

5. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer that will be representing the defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the

court's copy that plaintiff has sent a copy to defendant or to defendant's attorney.

6. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

7. The unpaid balance of petitioner's filing fee is $ 149.50; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2) when the funds become available.

Entered this 25th day of April, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge