IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TITUS HENDERSON,

ORDER

Petitioner,

03-C-729-C

v.

DAVID BELFUEL, in his individual and official capacity, JEFFREY ENDICOTT, in his individual and official capacity, SUZANNE DEHAAN, in her individual and official capacity, SCOTT ECKSTEIN, in his individual capacity, JANELLE PASKE, in her individual capacity, DAVID TARR, in his individual capacity, SANDRA HAUTUMAKI, in her individual capacity, CINDY O'DONNELL, in her official capacity and JOHN DOES,

Respondents.

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This is a proposed civil action for monetary, declaratory and injunctive relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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 the prisoner has had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion 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). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioner will be granted leave to proceed on his claims that respondents Belfuel, Endicott, Dehaan, Eckstein, Tarr and three unnamed officers subjected him to cruel and unusual punishment by inserting a needle into his arm when they had no reason to do so. However, petitioner will be denied leave to proceed on his claim that respondents Tarr and two unnamed officers violated the Eighth Amendment by holding down his arms during a blood test because this use of force was *de minimus*. Petitioner will be denied leave to proceed

on his related state law battery claim. Petitioner will be allowed to proceed on his claim that respondent Belfuel violated the Fourth Amendment prohibition on unreasonable searches and seizures by taking a sample of petitioner's blood. Finally, petitioner will be granted leave to proceed on his claim that respondent Tarr retaliated against plaintiff for exercising his First Amendment right to file an inmate complaint by prolonging petitioner's stay in segregation.

In his complaint, petitioner alleges the following facts.

## ALLEGATIONS OF FACT

At the time giving rise to this complaint, petitioner Titus Henderson was an inmate at the Redgranite Correctional Institution in Redgranite, Wisisconsin. Respondent Jeffrey Endicott is the warden of the Redgranite facility and respondent Suzanne Dehaan is an associate warden. Also at the Redgranite facility, respondent Scott Eckstein is the security director, respondent Janelle Paske is an inmate complaint examiner, respondent David Tarr is the captain of administrative segregation and the three Doe respondents are correctional officers. Respondent David Belfuel is a detective with the Redgranite police department. Respondent Sandra Hautumaki is a corrections complaint examiner and respondent Cindy O'Donnell is a deputy secretary for the Wisconsin Department of Corrections.

On October 1, 2002, respondents Belfuel, Endicott, Dehaan, Eckstein, Tarr and three

unnamed officers took a blood sample from petitioner to obtain his DNA. Respondent Belfuel ordered that the sample be taken. Respondent Tarr instructed two of the unnamed officers to hold petitioner's arms down on the examiner's table while the sample was taken, even though petitioner was handcuffed and cooperating. The third unnamed officer used a needle to extract the sample from petitioner's arm, leaving a puncture wound that caused soreness in his arm for two days.

While the sample was being taken, petitioner asked respondents Belfuel and Tarr whether they needed a warrant to take a sample of bodily fluid. Petitioner also told them that he had submitted to a DNA test in November or December of 2001 and questioned them about whether this second test was necessary. Respondent Tarr told petitioner to shut up and that he was taking the sample simply because he wanted to give respondent Belfuel a new one. In addition, respondent Tarr told petitioner that a warrant was not necessary to take his blood because he was incarcerated.

On October 4, 2002, petitioner filed an inmate complaint about the incident. Respondent Janelle Paske told respondent Tarr that petitioner had filed a complaint about the DNA extraction incident. Respondent Tarr retaliated against petitioner for filing this grievance by prolonging petitioner's stay in segregation and engaging in other retaliatory acts.

Respondents Paske and Dhaan dismissed the complaint on October 8, 2002, even

though respondent Paske had told petitioner that she knew about the incident. Petitioner appealed the dismissal to respondant Endicott on October 9, 2002. In the appeal, petitioner complained of both the DNA extraction and respondent Tarr's retaliatory tactics. Respondent Endicott stated that petitioner should "start talking to as to affirm" respondent Endicott's retaliatory conduct. On October 11, 2002, respondent Endicott dismissed petitioner's appeal without an investigation and upon the recommendation of respondents Dehaan and Paske.

On October 14, 2002, petitioner filed a second complaint with respondent Hautumaki about the DNA extraction and the retaliatory conduct of respondent Tarr. On October 21, 2002, respondent Sandra Hautumaki dismissed petitioner's grievance. Respondent Hautumaki did not conduct an independent investigation but instead based her decision on the report of respondent Paske. Respondent Cindy O'Donnell dismissed petitioner's grievance on the basis of respondent Hautumaki's recommendation that petitioner's complaint involved harmless error. Petitioner attempted to appeal respondent O'Donnell's dismissal but Deb March, an executive staff assistant rejected the appeal on November 6, 2002.

## DISCUSSION

A. Eighth Amendment

I understand petitioner to allege that respondents Tarr and two unnamed respondents violated his Eighth Amendment rights by holding down his arms while a blood sample was being taken. Further, I understand petitioner to allege that respondents Belfuel, Endicott, Dehaan, Eckstein, Tarr and three unnamed respondents subjected him to cruel and unusual punishment by inserting a needle into his arm when they had no reason to do so. "'[T]he unnecessary and wanton infliction of pain,'" including unnecessary use of force, constitutes cruel and unusual punishment forbidden by the Eight Amendment. Whitley v. Albers, 475 U.S. 312, 319, 320-21 (1986) (quoting Ingraham v. Wright, 430 U.S. 651, 670 (1977)).

Not every injury or deprivation suffered by a prisoner translates into constitutional liability for prison officials responsible for the prisoner's health and well-being. See Farmer v. Brennan, 511 U.S. 825, 834 (1994); Estelle v. Gamble, 429 U.S. 97, 105 (1976); Oliver v. Deen, 77 F.3d 156, 159 (7th Cir. 1996). The injury suffered must have been objectively sufficiently serious. Rhodes v. Chapman, 452 U.S. 337, 347-49 (1981). "[A] prisoner would not have a claim of cruel and unusual punishment if a prison official literally slapped him on the wrist for no good reason." Leslie v. Doyle, 125 F.3d 1132, 1135 (7th Cir. 1997). See also Hudson v. McMillian, 503 U.S. 1, 9-10 (1992) ("The Eighth Amendment's prohibition of 'cruel and unusual' punishments necessarily excludes from constitutional recognition *de minimus* uses of physical force . . . ."). Petitioner's allegation that respondents

Tarr and two unnamed officers held down his arms unnecessarily while a blood test was administered is at most, a figurative slap on the wrist and does not give rise to a cognizable claim of constitutional proportions. There is no suggestion that petitioner was harmed or injured in any way by this conduct. Accordingly, petitioner will be denied leave to proceed on his claim that respondents Tarr and the unnamed officers violated his rights under the Eighth Amendment by holding down his arms.

In contrast, petitioner has alleged that he suffered a small puncture wound and two days of soreness as a result of the incision of a needle in his arm. Although this injury is slight, an insignificant injury can violate the Eighth Amendment's prohibition against cruel and unusual punishment if it is "'so totally without penological justification that it results in the gratuitous infliction of suffering.'" Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003) (quoting Gregg v. Georgia, 428 U.S. 153, 173, 183 (1976)). "[G]ratuitous infliction of pain always violates contemporary standards of decency and need not produce serious injury in order to violate the Eighth Amendment." Id. (citing Hudson, 503 U.S. at 9). Although respondents may have had any number of legitimate reasons for taking the blood sample, none is suggested in petitioner's complaint. Accordingly, petitioner will be granted leave to proceed on his claim that respondents Tarr, Belfuel, Endicott, Dehaan, Echkstein and three unnamed offiers violated his rights under the Eighth Amendment.

B. Fourth Amendment

Petitioner contends that respondent Belfuel subjected him to an unreasonable search and seizure by obtaining a blood sample without a warrant. The Fourth Amendment protects inmates against unreasonable searches and seizures by prison officials. Taking a blood sample is a search for Fourth Amendment purposes. E.g., Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1988); Schmerber v. California, 384 U.S. 757, 767-68 (1966); Herzog v. Village of Winnetka, Ill., 309 F.3d 1041,1044 (7th Cir. 2002).

Whether a search is "reasonable" is determined by balancing its intrusiveness to the individual against the government's legitimate interest in it. Delaware v. Prouse, 440 U.S. 648, 654 (1979). The general rule is that, to be reasonable, a search must be authorized by a valid warrant. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987). However, there is no "*per se* Fourth Amendment requirement of probable cause, or even a lesser degree of individualized suspicion, when government officials conduct a limited search for the purpose of ascertaining and recording the identity of a person who is lawfully confined to prison." Jones v. Murray, 962 F.2d 302, 306 (4th Cir. 1992).

The United States Supreme Court has stated repeatedly that the privacy interest infringed by a blood test is minimal because the intrusion caused by the taking of a blood sample is "not significant." E.g., Skinner, 489 U.S. at 625; Winston v. Lee, 470 U.S. 753, 761 (1985); Schmerber, 384 U.S. at 771. Moreover, the reasonableness of petitioner's

privacy expectations is diminished substantially because he was incarcerated that the time the sample was taken. See, e.g., Hudson v. Palmer, 468 U.S. 517 (1984) (inmates have no reasonable expectation of privacy in their prison cells). "[P]rivacy is the thing most surely extinguished by a judgment committing someone to prison." Peckham v. Wisconsin Dept. of Corrections, 141 F.3d 694, 697 (7th Cir. 1998) (quoting Johnson v. Phelan, 69 F.3d 144, 146-47 (7th Cir. 1995)). Although the Court of Appeals for the Seventh Circuit has noted that it is difficult to imagine an unreasonable search in the prison context, the court was unwilling to say that inmates have no protection under the Fourth Amendment during their incarceration. Id. (noting that "the Eighth Amendment that is more properly posed to protect inmates from unconstitutional strip searches, notably when their aim is punishment, not legitimate institutional concerns.") Petitioner alleges that the stated purpose of the sample was to collect DNA, but that he had provided a DNA sample in November or December of 2001. Because petitioner's allegations do not indicate that there was any legitimate governmental interest for the blood test, he will be allowed to proceed on his unreasonable search and seizure claim against respondent Belfuel.

C. Retaliation

Petitioner alleges that respondent Tarr retaliated against him for filing a complaint about the forced blood extraction by prolonging petitioner's temporary lock-up in

segregation. A prison official who takes action in retaliation for a prisoner's exercise of a constitutional right may be liable to the prisoner for damages. See Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). The official's action need not independently violate the Constitution. See id. Otherwise lawful action "taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000). See also Zimmerman v. Tribble, 226 F.3d 568, 573 (7th Cir. 2000) ("[O]therwise permissible conduct can become impermissible when done for retaliatory reasons.") Petitioner has a constitutional right to file nonfrivolous lawsuits and to complain about prison conditions. To state a claim for retaliation, a petitioner need not allege a chronology of events from which retaliation could be plausibly inferred. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). However, he must allege sufficient facts to put the defendants on notice of the claim so that they can file an answer. Id. A petitioner satisfies this minimal requirement when he specifies the suit or complaint he filed and the act of retaliation. Id. Because petitioner has specified both in his complaint, he will be allowed to proceed on his First Amendment retaliation claim.

D. Wis. Stat. § 940.19(2)

Petitioner alleges that three unnamed respondents violated Wis. Stat. § 940.19(2) by holding down his arms while a blood sample was taken when it was unnecessary to do so.

Wis. Stat. § 940.19(2) is a criminal statute. As such, it does not create a right for individual recovery in a civil suit. Moreover, I am denying petitioner leave to proceed on his Eighth Amendment claim regarding his arms being held down. Accordingly, I will decline to exercise supplemental jurisdiction over his related state law claims. 28 U.S.C. § 1367(a) (federal courts have supplemental jurisdiction when state law claim is "so related to claims in the action within such original jurisdiction that they forma part of the same case or controversy".) See Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (district court has discretion to retain or to refuse jurisdiction over state law claims). Petitioner will be denied leave to proceed on his claim under Wis. Stat. § 940.19(2).

ORDER

IT IS ORDERED that

1. Petitioner is GRANTED leave to proceed on his claims that

(a) respondents Belfuel, Endicott, Dehaan, Eckstein, Tarr and three unnamed officers violated petitioner's Eighth Amendment rights by inserting a needle into his arm for the sole purpose of causing him pain;

(b) respondent Belfuel subjected petitioner to an unreasonable search and seizure in violation of his rights under the Fourth Amendment; and

(c) respondents Tarr, Endicott, Dehaan, Paske, Hautumaki and O'Donnell retaliated

against petitioner for filing an inmate complaint about the blood test by prolonging his stay in segregation.

2. Petitioner is DENIED leave to proceed on his claims that

(a) respondent Tarr and two unnamed officers violated his Eighth Amendment rights by holding his arms down; and

(b) three unnamed officers committed a battery by holding down petitioner's arms.

- Early on in this lawsuit, Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference. At the time of the conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed respondents and will set a deadline within which petitioner is to amend his complaint to include the unnamed respondents.
- For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.
- Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or

typed copies of his documents.

- The unpaid balance of petitioner's filing fee is $149.00; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

Entered this 16th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge