IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DATHAN BEAN,

ORDER

Petitioner,

04-C-447-C

v.

SANDRA HAUTAMAKI, JEFFREY P. ENDICOTT and KELLY MUESKI,

Respondents.

- -

This is a proposed civil action for declaratory, injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Redgranite Correctional Institution in Redgranite, 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. 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 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). 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).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Dathan Bean is confined at the Redgranite Correctional Institution. Respondent Sandra Hautamaki is a corrections complaint examiner with the Wisconsin Department of Corrections. Respondent Jeffrey P. Endicott is the warden at the Redgranite Correctional Institution. Respondent Kelly Mueski is H-Housing Unit Manager and Institution Inmate Movement Coordinator at the Redgranite Correctional Institution and reports directly to respondent Endicott. Respondent Mueski is responsible for the day-to-

day operation of the H-North Secure Wing Housing Unit at the prison and for double-celling assignments for the inmates living in that wing.

Inmates that refuse educational assignments are forced to be housed in the H-North Secure Wing Housing Unit and must be locked down in their cells until 4:00 each day, except Saturdays, Sundays and holidays.

On April 21, 2004, petitioner was living in cell #250, a general population cell assignment, in the H-North Secure Housing Unit Wing of the prison. Around 7:30 a.m. that day, prison staff ordered petitioner to pack up his personal and institutional property items and move into cell #071-Upper, which was a double-celling assignment with inmate Oskar B. McMillian. Petitioner was expecting to move from his general population cell to a double cell with inmate Fuller, an inmate with whom he was familiar and compatible.

After learning that he would not be housed with inmate Fuller but rather inmate McMillian, petitioner went immediately to the first shift floor officer, C.O. II Roder. Petitioner asked Roder why he was being forced to move in with McMillian who was twice his age and who had a known history of being incompatible with younger African American or White inmates. Petitioner reminded Roder that McMillian was currently struggling with prison administration staff about his history of single-celling needs. Roder replied that respondent Mueski had cancelled the initial approved cell assignment of petitioner and inmate Fuller and instead ordered petitioner to be double-celled with inmate McMillian.

According to Roder, respondent Mueski was not going to allow McMillian to have a single cell at Redgranite Correctional Institution.

Petitioner requested to speak with the unit sergeant. Petitioner believed it was unfair for respondent Mueski to put him at substantial risk of violence from McMillian just so that she could carry out her personal agenda toward inmate McMillian. The sergeant gave petitioner two choices 1) petitioner could either double up with McMillian and deal with the possibility of violence as best he could; or 2) petitioner could go to segregation for refusing to double-cell. Petitioner discussed his choices with McMillian and chose to double-cell with him. Nevertheless, petitioner filed a formal grievance about the cell assignment. Petitioner noted that in 1983 McMillian had been diagnosed with chronic anxiety disorder, black rage syndrome, a possible stress disorder and most recently with having a form of imminent violence syndrome that required him to be medicated to keep from acting on his impulses. Petitioner stated that McMillian heard the voice of "Shaka Zulu" who told him to kill his cell-mates.

In addition, petitioner learned that the prison had placed McMillian under special clinical monitoring, that he was not allowed to be alone with any one staff member, that prison staff required him to always be under visual observation by a security staff member and that prison staff are to house McMillian close to the officer desk. However, cell #071, where McMillian is housed, is the last cell on the wing and furthest from the wing officer and

sergeant stations of the H-North secure wing. Furthermore, while McMillian was an out-of-state prisoner from May 2000 until December 17, 2003, McMillian physically assaulted inmates with whom he was double-celled over six times and his double-celling was a reason why McMillian was moved back to a Wisconsin prison; no out-of-state facility wanted the problem McMillian presented.

Sally J. Wess, an inmate complaint examiner, dismissed petitioner's grievance on May 3, 2004 stating:

> ICE reviewed Mr. Bean's complaint that he have Mr. McMillian removed as his roommate. The procedure for obtaining a different roommate is to discuss the situation with unit staff. They will make the determination on whether or not to recommend a change. If their decision is to not recommend a change, that is the way it will be because they are present to do the necessary observation and investigation. Given this, unit staff, rather than the ICE, are in the best position to make these determinations. Considering the above, it is recommended this complaint be dismissed.

On May 5, 2004, respondent Endicott accepted Wess's recommendation. Petitioner appealed Endicott's dismissal of his grievance. While waiting for a response to his appeal, petitioner continued to seek a "cell non-compatibility roommate transfer" because of continuous problems he was experiencing with McMillian. Because McMillian was not taking his medication that stemmed urges toward violence, McMillian was hearing the voice of Shaka Zulu, who was telling him to kill his roommate.

On May 12, 2004, respondent Endicott wrote petitioner, stating:

> This is to inform you that Redgranite Correctional Institution (RGCI) is not mandated by any federal law to execute "compatibility determinations" prior to double-celling . . . You request that Kelly Mueski execute a serious and meaningful inmate compatibility determination as an informal resolution to your concern. This request will not be granted. We do not have, nor do we intend to create a "Compatibility Determination" process.

On May 13, 2004, respondent Hautamaki dismissed petitioner's appeal, stating that she agreed with the institution complaint examiner's decision.

C.O. II Roder and H-North first shift sergeant Muller agreed that McMillian should not be double-celled because of his history of problems with all of his cell mates. However, there was nothing that Roder and Muller could do because respondent Mueski had personally ordered petitioner to be double-celled with McMillian and she was not going to let McMillian "pull the shit here at Redgranite that he was getting away with all these years."

Respondents Hautamaki, Endicott and Mueski are well aware of McMillian's clinical need of single-celling to prevent him from attempting to kill his roommates. Each respondent has been exposed to McMillian's clinical and general medical records repeatedly. These records note McMillian's need of constant psychiatric treatment, which Redgranite fails to provide. Respondents are aware that McMillian has filed a "Notice of an Affirmative Defense" with the Waushara County District Attorney on January 27, 2004, in which McMillian has informed the district attorney of his problems with hearing voices telling him to kill his roommates and that he suffers from various types of acknowledged psychological

problems that result in explosions of rage and violence against whomever he is double-celling with at the time. In particular, respondent Endicott is aware of McMillian's historical need to be single-celled. It was not until after February 11, 1999, when respondent Endicott was responsible for supervising McMillian, that McMillian was first forced to be double-celled after 16 years of being clinically determined unfit for double-celling situations. Respondent Endicott was able to achieve a double-celling arrangement for McMillian by intentionally destroying all of McMillian's clinical records prior to 1988. These records contained the majority of the attempts by McMillian to physically harm and seriously injure roommates. After respondent Endicott manufactured the approval for McMillian to be double-celled, a private clinical psychologist determined that McMillian represented a substantial risk of harm to his roommate. The report reads:

> This is an angry and potentially violent man with a fifty-year sentence. Risk of harm to others cannot be ruled out, and I think this is a man who is capable of pushing that envelope. On the other hand, there is an issue of personal responsibility here. Whether his anger, demand, and threat, however veiled, are enough to prompt you to acquiesce is something you will have to decide. From a strictly psychological perspective, I would see no reason why his mental health would be contingent upon having a single cell.

McMillian often wakes petitioner during the night by acting out psychological problems from which he suffers. McMillian tells petitioner that he needs to stay awake because Shaka is ordering him to kill petitioner and McMillian is not sure that he can resist the King Shaka's command. Sometimes petitioner awakens to find McMillian looking

strange and asking him whether he is still alive. McMillian states that he was dreaming that he had killed petitioner and that it was only petitioner's dead body lying under the covers in the upper bunk.

Petitioner has made many attempts to inform respondents of the non-compatibility between him and McMillian. He has told respondents of the psychological terror from which he suffers, including the nightly events in which McMillian wakes petitioner with his dreams of killing him and the voices McMillian hears regarding killing the unholy. Petitioner has informed respondents that he has awakened to find McMillian sitting on the cell desk holding various ink pens to see which one has the sharpest writing point. Respondents have responded to petitioner's concerns by stating that they do not care about what the federal law says and by telling McMillian that he will be held accountable for his assaults upon others.

Because respondents have not addressed petitioner's concerns, he is forced to fight off needed sleep each night so that he can watch McMillian and make sure that McMillian does not kill him. Petitioner has discovered that McMillian likes to attack his roommates at night. McMillian's psychological history requires reasonable accommodation under the Americans with Disabilities Act. Respondents could reasonably accommodate McMillian by putting him in a single cell.

DISCUSSION

I. SCREENING UNDER § 1915

I understand petitioner to contend that respondents violated their duty to protect him from serious harm when they ignored his pleas to be housed with a more compatible roommate who would not threaten his life. Farmer v. Brennan, 511 U.S. 825 (1994) (prison officials may be liable for failing to stop inmate assault if they were deliberately indifferent to prisoner's safety); see also Washington v. LaPorte County Sheriff's Department, 306 F.3d 515 (7th Cir. 2002) ("prison officials have a duty to protect inmates from violence at the hands of other inmates"). (I note also that petitioner attempts to argue that respondents are violating the Americans with Disabilities Act by failing to accommodate McMillian's mental health needs by housing him in a single cell. Petitioner has no standing to bring such a claim. Petitioner cannot sue someone for another person's injury; such action violates the basic concept of constitutional standing to bring a claim. A party must have sustained some sort of injury as a result of the alleged wrongdoing to have standing to bring a claim. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).)

Petitioner concedes in his complaint that the unit sergeant gave him the choice of either doubling up with McMillian and dealing with the possibility of violence as best he could or going to segregation for refusing to double-cell. After discussing his choices with McMillian, petitioner chose to double-cell with him. The Court of Appeals for the Seventh

Circuit has recognized that placing at-risk inmates in segregation is a common and acceptable way of averting an attack. Case v. Ahitow, 301 F.3d 605 (7th Cir. 2002) (citing Babcock v. White, 102 F.3d 267, 269 (7th Cir. 1996); Curley v. Perry, 246 F.3d 1278, 1282 (10th Cir. 2001); Hamilton v. Leavy, 117 F.3d 742, 747-48; Hosna v. Groose, 80 F.3d 298, 301 (8th Cir. 1996)). However, according to petitioner's allegations, respondents did not offer segregation as a form of protection but rather offered it as a form of punishment for refusing to double-cell with McMillian. Petitioner has alleged enough facts to state a claim of deliberate indifference under the Eighth Amendment.

To prevail on a deliberate indifference claim under the Eighth Amendment, a plaintiff must produce evidence that satisfies two elements. First, the danger to the inmate must be objectively serious. Farmer v. Brennan, 511 U.S. 825, 834 (1994); Sherrod v. Lingle, 223 F.3d 605, 610 (7th Cir. 2000). For the subjective prong, the defendants must have acted with deliberate indifference. Farmer, 511 U.S. at 838. The Supreme Court has held that the subjective component of deliberate indifference requires that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 837. It is not enough that he "should have known" of the risk. Rather, the official must know there is a risk and consciously disregard it. Higgins v. Correctional Medical Services of Illinois, 178 F.3d 508, 511 (7th Cir. 1999).

Petitioner alleges that each night McMillian wakes him with his dreams of killing him and the voices McMillian hears regarding killing the unholy and that petitioner is being terrorized by these episodes. He alleges also that at least one clinical psychologist has determined that McMillian is capable of harming his cell mate to "push the envelope" and that respondents are aware of McMillian's history of violence against his roommates. These facts, if true, are sufficient to meet the objective prong of the deliberate indifference test. Furthermore, petitioner alleges that he has told respondents of the psychological terror from which he suffers and respondents are well aware of McMillian's clinical need of single-celling to prevent him from attempting to kill his roommates, yet their only response to the risk is an offer of punitive, rather than administrative segregation.

Respondents' offer of punitive segregation suggests deliberate indifference to petitioner's fear of McMillian. Although the Court of Appeals for the Seventh Circuit has noted that placing an inmate in segregation is an appropriate way to protect an inmate from harm, Case v. Ahitow, 301 F.3d 605, 607 (7th Cir. 2002), respondents did not offer segregation as a form of protection. Had respondents offered administrative segregation to petitioner as a form of protection, petitioner would have been able to decide when he should be removed from segregation. However, respondents offered petitioner segregation as a means of punishment for refusing to double-cell, putting his removal from segregation in the hands of respondents. This suggests that respondents consciously disregarded the risk that

McMillian posed to petitioner.

At a later stage in this proceeding, respondents may be able to show that they did not believe McMillian to present a danger to petitioner. If they show this successfully, petitioner's Eighth Amendment claim will fail. Riccardo v. Rausch, 375 F.3d 521, 528 (7th Cir. 2004) (constitutional question is not what inmate said but what prison guard actually believed). However, at this early stage of the proceedings, petitioner's request for leave to proceed on his Eighth Amendment claim will be granted.

II. PRELIMINARY INJUNCTION

As part of his request for relief, petitioner moves the court for "preliminary injunction relief . . . from the double celling practice of [respondents regarding the forced double celling of inmate Oskar B. McMillian." I construe this as a motion for preliminary injunction for the removal of petitioner from his double-cell assignment with McMillian.

A preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant carries the burden of persuasion by a clear showing. Boucher v. School Board of Greenfield, 134 F.3d 821 (7th Cir. 1998). In order to succeed on a motion for a preliminary injunction, the moving party must show that "it has more than a negligible chance of success on the merits, and no adequate legal remedy. Once this is established, the district court must then consider the balance of hardships between the plaintiffs and the

defendants, adjusting the hardships for the probability of success on the merits." Planned Parenthood of Wisconsin v. Doyle, 162 F.3d 463, 473 (7th Cir. 1998). In addition, the Prison Litigation Reform Act limits the scope of preliminary injunctive relief available in challenges to prison conditions and treatment. The act provides that:

> 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. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief.

18 U.S.C. § 3626(a)(2).

At this point, petitioner has not put in any evidence to prove his claim. Therefore, I cannot tell whether he has more than a negligible chance for success on the merits. Nor can I make any of the other findings necessary for a decision on the motion for a preliminary injunction without further information from the parties.

As a result, I will set petitioner's motion for expedited briefing. Petitioner must support his allegations by evidence, such as affidavits or documents certified to be true and correct copies of whatever they purport to be. In completing the briefing of his motion for a preliminary injunction, petitioner should pay strict attention to that requirement and all of the requirements set out in the enclosed Procedures to be Followed on Motions for Injunctive Relief, including the requirement of establishing a factual basis for a grant of relief set out in II.A.

ORDER

IT IS ORDERED that:

1. Petitioner Dathan Bean's request for leave to proceed in forma pauperis on his claim that respondents violated the Constitution when they failed to protect his safety is GRANTED.

2. The parties are to observe the following schedule for briefing petitioner's motion for a preliminary injunction:

a. Petitioner may have until September 1, 2004, in which to serve and file supplemental materials, such as a brief, affidavits and other evidentiary materials, in support of his motion for a preliminary injunction.

b. Respondents Hautamaki, Endicott and Mueski may have until September 8, 2004, in which to serve and file a brief and evidence in opposition to the motion.

c. Petitioner may have until September 15, 2004, in which to serve and file a reply.

d. All submissions are to be in compliance with this court's Procedure to be Followed on Motions for Injunctive Relief, a copy of which is enclosed with this order.

- 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 $136.62; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).
- Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants.
- Petitioner submitted documentation of exhaustion of administrative remedies with his complaint. Those papers are not considered to be a part of petitioner's complaint. However, they are being held in the file of this case in the event respondents wish to examine them.

Entered this 26th day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge