IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ANTHONY D. TURNER,

Petitioner, ORDER

v. 05-C-508-C

PETER HUIBREGTSE, in his individual and official capacities, DERRICK ESSER, in his individual and official capacities, and SGT. MICKELSON, in his individual and official capacities,

Respondents.

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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 Wisconsin Secure Program Facility in Boscobel, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915.

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); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioner contends that his rights under the Eighth Amendment were violated when: (1) respondent Mickelson sexually assaulted him on April 4, 2005, and later sexually harassed him; (2) respondent Esser failed to prevent respondent Mickelson from sexually assaulting and harassing him; and (3) respondent Huibregtse deliberately disregarded his offender complaint regarding sexual harassment and failed to prevent respondent Mickelson from sexually assaulting him. Petitioner will be granted leave to proceed on his claims against respondents Mickelson and Esser regarding the alleged sexual assault on April 4, 2005, but not regarding petitioner's claim of sexual harassment, because petitioner has alleged no facts describing the alleged "harassment." Also, he will be denied leave to proceed on his claim that respondent Huibregtse deliberately disregarded his offender complaint.

However, I will grant petitioner leave to proceed on his claim that respondent Huibregtse failed to protect him from respondent Mickelson's assault.

Petitioner has named all respondents in both their individual and official capacities. To the extent that petitioner is asserting damage claims against respondents in their official capacities, his lawsuit is an action against the state, and a state is not a "person" subject to a damages action under 42 U.S.C. § 1983. Lapides v. Bd. of Regents, 535 U.S. 613, 617 (2002). Therefore I will consider petitioner's claims against respondents in their individual capacities only, and petitioner will be denied leave to proceed in forma pauperis on his claims against respondents in their official capacities because such claims are not cognizable in an action under § 1983. Williams v. State of Wisconsin, 336 F.3d 576 (7th Cir. 2003).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Anthony D. Turner is a Wisconsin state inmate housed at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Respondent Peter Huibregtse is deputy warden at the Wisconsin Secure Program Facility; respondent Derrick Esser is a correctional officer at the Wisconsin Secure Program Facility; and respondent Sargent Mickelson is an officer at the Wisconsin Secure Program Facility.

At approximately 6:25 p.m. on April 4, 2005, petitioner was moved to a different cell

within the facility by respondents Mickelson and Esser and a third, unknown individual. There was no security reason for moving petitioner. Before taking him to a cell in the Foxtrot unit, respondent Esser shackled and held petitioner so that he could not move. Respondent Mickelson conducted a pat down starting from petitioner's shoulders. During the pat down respondent Mickelson grabbed petitioner's buttocks and penis and as he fondled petitioner's penis he asked, "What is this?" Respondent Esser laughed while respondent Mickelson assaulted petitioner.

After the sexual assault by respondent Mickelson, petitioner was moved to the new cell. As they placed petitioner in the new cell the officers sexually harassed him again.

On April 11, 2005, petitioner filed an offender complaint describing the April 4 incident as follows:

> On 4/4/05 around 6:25pm Sgt. Mickelson and C.O. Esser and another officer not sure of his name came to my cell and Sgt. Mickelson stated we are going to move you to Foxtrot unit. I came out my cell Sgt. Mickelson started patting me down roughly he started from my shoulders when his hands got down to my buttocks he grabbed my buttocks and penis with his hands and then rubbed both of his hands up and down my legs all of the officers that was present then started laughing then after that him and the other officers described above escorted me to Foxtrot unit and put me in a cell and left.

On April 12 the institution complaint examiner wrote that

> The issue raised in this complaint needs to be investigated pursuant to the provisions of Administrative Directive 11.6 - which deals with possible staff misconduct investigations. . . . Since that investigative process is regulated by state law and collective bargaining agreements (which protect the privacy and

> due process rights of staff) no further information can be given to [petitioner]. Based on that, no further action will be taken by this office.

The examiner recommended that petitioner's complaint be dismissed. On April 12, 2005, respondent Huibregtse, who was the complaint reviewer, dismissed petitioner's complaint.

On April 27, 2005, petitioner appealed respondent Huibregtse's decision to the corrections complaint examiner. In his appeal, petitioner wrote that he had been told the Grant County Sheriff's Department would be contacted regarding his complaint, but he never received a response from the sheriff's department.

After petitioner filed grievances against the officers regarding the sexual assault, he was constantly moved to new cells at any time of day or night.

Petitioner never caused or permitted sexual contact by respondent Mickelson.

Respondent Huibregtse knew about the pattern of sexual assaults on prisoners by prison staff. However, respondent Huibregtse ignored "long-standing well-documented sexual assaults by staff" that were known to prison officials and the Grant County Sheriff's Department.

DISCUSSION

A. Respondent Mickelson

I understand petitioner to allege that his rights under the Eighth Amendment were

violated when respondent Mickelson subjected him to a sexually abusive pat search on April 4, 2005. "In the context of bodily searches performed upon those incarcerated in our prison system, only those searches that are maliciously motivated, unrelated to institutional security, and hence totally without penological justification are considered unconstitutional." Whitman v. Nesic, 368 F.3d 931, 934 (7th Cir. 2004) (citations and quotations omitted). Petitioner has adduced sufficient facts to establish a claim that respondent Mickelson conducted an unconstitutional bodily search when he fondled petitioner's buttocks and penis. There is no security or penological justification for an officer to fondle an inmate's genitalia during a pat down search. I will grant petitioner leave to proceed in forma pauperis against respondent Mickelson on his claim that respondent Mickelson sexually assaulted him before moving him to his new cell.

Also, petitioner alleges that the officers sexually "harassed" him as they placed him in the new cell in the Foxtrot unit. Petitioner does not allege any facts about the harassment. It would be pure speculation to infer that the "harassment" mirrored the sexual assault that petitioner described as taking place on April 4, 2005, particularly in light of the fact that petitioner's inmate complaint alleged nothing about sexual harassment occurring after the alleged assault. In the absence of any allegations suggesting how he was sexually "harassed" when he arrived at his new cell, I will deny petitioner leave to proceed in forma pauperis on this claim.

B. Respondent Esser

I understand petitioner to allege that his rights under the Eighth Amendment were violated when respondent Esser failed to prevent respondent Mickelson from sexually assaulting him.

Petitioner alleges that respondent Esser held him and laughed while respondent Mickelson assaulted him. A state actor may be liable for failing to prevent another state actor from committing a constitutional violation if he or she "'had a realistic opportunity to intervene to prevent the harm from occurring.'" Windle v. City of Marion, Indiana, 321 F.3d 658, 663 (7th Cir. 2003) (quoting Yang v. Hardin, 37 F.3d 282, 285 (7th Cir. 1994)). I will allow petitioner to proceed on his claim against respondent Esser.

As explained above, I will deny petitioner leave to proceed on his claim that the officers sexually harassed him as they placed him in the new cell in the Foxtrot unit because he did not allege facts to support this claim.

C. Respondent Huibregtse

I understand petitioner to allege that respondent Huibregtse violated his rights under the Eighth Amendment in two ways: (1) by acting with deliberate indifference towards his inmate complaint concerning the April 4, 2005, sexual assault; and (2) by failing to prevent the sexual assault in the first place.

Petitioner does not allege that respondent Huibregtse was personally involved in the April 4 incident. However, from petitioner's allegation that respondent Huibregtse "disregarded [his] complaints of sexual assaults," I understand petitioner to be alleging that respondent Huibregtse condoned the assault or turned a blind eye to it. A prison official may be liable under § 1983 for a violation of a petitioner's constitutional rights even if the official

did not participate directly in the constitutional violation. Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985). An official may be held liable if he knew about the violation and facilitated it, approved it, condoned it or turned a blind eye for fear of what he might see. Morfin v. City of Chicago, 349 F.3d 989, 1001 (7th Cir. 2003).

Petitioner's allegations do not state a claim that respondent Huibregtse acted with deliberate indifference towards his inmate complaint. The exhibits attached to petitioner's complaint reveal that after petitioner filed an inmate complaint concerning the sexual assaults of April 4, 2005, an institutional complaint examiner recommended dismissal of the complaint, noting that the matter would be investigated but that petitioner would not be given any further information because the investigation was regulated by state law and collective bargaining agreements that protect staff privacy. On this basis, respondent Huibregtse accepted the examiner's recommendation and dismissed petitioner's complaint. In dismissing petitioner's complaint, respondent Huibregtse did not state that he did not

believe petitioner's allegations or that he would or could put a stop to an investigation. He affirmed the examiner's explanation of the procedure that had to be followed to investigate plaintiff's complaint. His failure to do anything more does not constitute deliberate indifference. Greeno v. Daley, 414 F.3d 645, 656 (7th Cir. 2005). The fact that petitioner had not received a response from the sheriff's department when he wrote his appeal on April 27, 2005, does not mean that respondent Huibregtse was deliberately indifferent to his complaint. Therefore, I will deny petitioner leave to proceed in forma pauperis on his claim that respondent Huibregtse acted with indifference towards his inmate complaint.

Petitioner appears also to be alleging that respondent Huibregtse knew about a pattern of sexual assaults on inmates by prison staff before April 4, 2005, so he had reason to know that respondent Mickelson might sexually assault him yet he failed to prevent the assault. In a case in which the petitioner alleges that a respondent failed to protect him from harm, "[t]he inmate must prove a sufficiently serious deprivation, that is, conditions which objectively 'pos[e] a substantial risk of serious harm.'" Pope v. Shafer, 86 F.3d 90, 92 (7th Cir. 1996). The inmate also must prove that the prison official acted with deliberate indifference to the inmate's safety, "effectively condon[ing] the attack by allowing it to happen." Langston v. Peters, 100 F.3d 1235, 1237 (7th Cir. 1996) (quoting Haley v. Gross, 86 F.3d 630, 640 (7th Cir. 1996)). A prison official may be liable for knowing that there was a substantial likelihood that the prisoner would be assaulted and failing to take

reasonable protective measures. Farmer v. Brennan, 511 U.S. 825, 847 (1994). The prison official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and the official must draw that inference. Pavlick v. Mifflin, 90 F.3d 205, 207-08 (7th Cir. 1996). The prisoner does not have to show that the prison official intended that the prisoner be harmed; it is enough that the official ignored a known risk to the prisoner's safety. Id. at 208. In cases alleging a failure to protect, "[a] prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety." McGill v. Duckworth, 944 F.3d 344, 349 (7th Cir. 1991). Here, petitioner is alleging that respondent Huibregtse ignored "long-standing well-documented sexual assaults by staff that was/has been expressly noted by prison officials and [the] Grant Co. Sheriff Department." From this, I understand him to allege that respondent Huibregtse knew Mickelson was involved in a series of sexual assaults and that there was a high risk that Mickelson would assault him, yet he consciously disregarded that risk.

Because petitioner is proceeding pro se, I must construe his complaint liberally. Although he will have an uphill battle in obtaining evidence to prove his claim against respondent Huibregtse, I cannot say at this early stage of the proceedings that he could not prove any set of facts entitling him to relief. Therefore, petitioner will be allowed to proceed in forma pauperis on this claim.

D. Motion for Preliminary Injunction

After he filed his complaint but before the complaint could be screened, petitioner wrote this court on August 21, 2005, asking for a preliminary injunction ordering the Wisconsin Secure Program Facility to investigate his allegation that corrections officer Kolker is poisoning his food. Petitioner contends that Kolker began poisoning his food to retaliate against him for having filed this lawsuit against other staff at the facility.

Petitioner's claim of retaliation is not properly raised on a motion for a preliminary injunction in this case. In situations in which a plaintiff alleges that the respondents or third-parties have retaliated against him for initiating a lawsuit, it is the policy of this court to require the claim to be presented in a lawsuit separate from the one which is alleged to have provoked the retaliation. This is to avoid the complication of issues which can result from an accumulation of claims in one action.

The court recognizes an exception to this policy only where it appears that the alleged retaliation would directly, physically impair the petitioner's ability to prosecute his lawsuit. Petitioner alleges that he feels ill every time after he eats a meal that was delivered to him by Officer Kolker. In plaintiff's view, this means that Kolker is attempting to poison him.

A district court is not bound to accept unquestioningly the truth of a pro se

petitioner's allegations. Denton v. Hernandez, 504 U.S. 25, 31-32 (1992). When motion contains factually baseless claims, such as those "describing fantastic or delusional scenarios," a district court can properly deny the motion. Neitzke, 490 U.S. 319, 327-28 (1989). "[A] finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible . . . ." Denton, 504 U.S. at 33. In this case I will not apply the exception because his petitioner's allegations that an officer is poisoning his food are of the delusional sort described by the Supreme Court in Neitzke and Denton. Accordingly, petitioner's motion for a preliminary injunction will be denied.

ORDER

IT IS ORDERED that

1. Petitioner Anthony D. Turner is GRANTED leave to proceed on his claims that respondents Mickelson and Esser, in their individual capacities, violated his Eighth Amendment rights by sexually assaulting him on April 4, 2005.

2. Petitioner is DENIED leave to proceed on his claims that respondents Mickelson and Esser, in their individual capacities, violated his Eighth Amendment rights by sexually harassing him following the assault.

3. Petitioner is DENIED leave to proceed on his claim that respondent Huibregtse

personally participated in the April 4 assault by dismissing petitioner's inmate complaint.

4. Petitioner is GRANTED leave to proceed on his claim that respondent Huibregtse failed to prevent the sexual assault by respondents Mickelson and Esser on April 4, 2005.

5. Petitioner's motion for preliminary injunction is DENIED.

6. 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 respondents or to respondents' attorney.

7. 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.

8. The unpaid balance of petitioner's filing fee is $245.67; petitioner is obligated to pay this amount when he has the means to do so, as described in 28 U.S.C. § 1915(b)(2).

9. Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's complaint and this order are being sent today to the Attorney General for service on the state respondents.

Entered this 24th day of October, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge