IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

DAVID LEE GREEN,

Petitioner,

v.

WARDEN, MCC CHICAGO;
ASST. WARDEN HENRY;
CASE MANAGER MS. CHRISTMAS;
CAPTAIN SAVAGE;
COUNSELOR P. OWENS;
SUPERVISOR MR. HARRIS; and
INMATE TUCKER,

Respondents.

OPINION AND ORDER

07-C-37-C

- -

This is a proposed civil action for money damages, brought pursuant to 28 U.S.C. § 1331 and Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). Petitioner, who is presently confined at the Federal Correctional Institution in Oxford, 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 fee for filing 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

On November 7, 2005, petitioner was confined at the Metropolitan Correctional Center in Chicago, Illinois. On that day at 5:00 a.m. in the center's kitchen, respondent Tucker, another inmate, hit petitioner in the head when petitioner refused to turn on an

oven. Petitioner immediately went to the front of the kitchen and told respondent Harris, the Food Service Supervisor, that he had just been assaulted. When Harris asked petitioner whether he feared for his safety and whether he was hurt, petitioner answered "yes" to both questions. By this time, Tucker had joined petitioner at the supervisor's desk. Without a word, Harris stood up from his desk and walked over to a freezer and unlocked it. Meanwhile, Tucker said to petitioner, "You're telling on me!," and hit petitioner again with such force that it knocked petitioner unconscious. Petitioner fell to the floor, breaking his glasses and part of one tooth and knocking out another tooth altogether. Later, respondent Harris told petitioner that he had not taken petitioner seriously when petitioner told him he had just been assaulted. Petitioner responded that Harris had not followed Bureau of Prisons policy and had acted negligently in allowing him to be assaulted a second time.

"MCC Staff" covered up the incident by losing petitioner's inmate grievances filed on forms BP-8 and BP-9. In addition, respondent Savage told petitioner he had no right to have photographs taken of his injuries. Finally, respondents Christmas and Owens "threatened" petitioner by telling him that respondent Assistant Warden Henry had told them that petitioner had no right "to ask that charges be pressed" against respondent Harris. On December 6 or 7, 2005, Christmas called petitioner on the unit phone and told petitioner that she wanted to hear from his own mouth that he was refusing to drop his charges against Harris. Petitioner told her he would not drop the charges. Two days later,

petitioner was transferred to the Kankakee County jail, where there was no law library or law books available to petitioner. Petitioner believes his transfer was arranged by the warden of the Metropolitan Correctional Center and respondent Christmas to prevent petitioner from prosecuting a federal lawsuit against Harris. Petitioner was held at the jail for nine months, during which time he had only two visits from his lawyer, who refused to file any motions against the Center on petitioner's behalf.

Since his assault, petitioner has developed TMJ (Temporomandibular Joint Syndrome), which causes him pain, stiffness and soreness in his jaw and ear. Petitioner believes he will be on pain medication for the remainder of his life.

OPINION

A. Protection from Assault

I understand petitioner to be alleging that respondent Harris violated his Eighth Amendment rights when he deliberately failed to protect petitioner from Tucker's second assault.

The failure of a prison official to protect an inmate from an assault by another inmate may violate the Eighth Amendment if the official acted with deliberate indifference to the prisoner's safety. Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985); Matzker v. Herr, 748 F.2d 1142, 1149 (7th Cir. 1984). Deliberate indifference is evidenced by a prison official's

actual intent or reckless disregard for a prisoner's health or safety, and must amount to highly unreasonable conduct or a gross departure from ordinary care in a situation in which a high degree of danger is readily apparent. Id. In other words, to succeed on his claim ultimately, petitioner will have to prove that respondent Harris was both aware of facts from which the inference could be drawn that petitioner faced a substantial risk of serious harm and that he drew the inference. Greeno v. Daley, 414 F.3d 645, 653 (7th Cir. 2005) (citing Farmer v. Brennan, 511 U.S. 825, 837 (1994)).

Petitioner's allegations that respondent Harris walked away from him and inmate Tucker to unlock a freezer door after just having heard from petitioner that petitioner had been assaulted and feared further harm from Tucker is sufficient at the pleading stage to make out an Eighth Amendment claim against Harris.

In addition, it is possible that petitioner is contending in the alternative that respondent Harris was *negligent* in failing to protect him. However, negligence does not form the basis for an Eighth Amendment claim. If petitioner wants to recover money damages from the Bureau of Prisons for the negligent act of one of its officers, he must file a lawsuit against the United States under the Federal Tort Claims Act. 28 U.S.C. § 2671-2680. Petitioner should be aware that a condition precedent to bringing a suit under the Federal Tort Claims Act is exhaustion of administrative remedies. 28 U.S.C. § 2675(a). Exhaustion under this statute requires that the petitioner file an administrative claim with "the

appropriate federal agency" within two years of the act giving rise to the claim, 28 U.S.C. § 2401(b), and the claim is denied or six months have elapsed without action by the agency. 28 U.S.C. § 2675. The exhaustion procedure for claims under the act are different from the procedure under which petitioner attempted to administratively grieve his Eighth Amendment claim using the BP forms. Compare 28 C.F.R. § 542.10 (setting out procedure for inmate grievances relating to any aspect of his confinement) with 28 C.F.R. § 543.31 (setting out administrative procedure for raising tort claim). Therefore, respondents' alleged loss of petitioner's BP-9 and BP-10 forms would not have prevented petitioner from pursuing the prerequisite administrative remedies for filing an action under the Federal Tort Claims Act. In any event, because petitioner did not name the United States as a respondent in this case, I will deny him leave to proceed in forma pauperis on a claim that respondent Harris was negligent in failing to protect him from inmate Tucker's assault.

B. Conspiracy

Petitioner appears to be alleging that prison officials engaged in a conspiracy to violate his constitutional right of access to the courts when "MCC staff" lost his complaints on forms BP-8 and BP-9, respondent Savage told petitioner he had no right to have photographs taken of his injuries, respondents Christmas, Owens and Henry told petitioner that he had no right to press charges against respondent Harris, and respondent warden and

Christmas arranged petitioner's transfer to a jail that had no law library or access to law books. Claims of conspiracies to effect deprivations of civil or constitutional rights may be brought against federal officials under Bivens or 42 U.S.C. §1985(3). Walrath v. United States, 35 F.3d 277 (7th Cir. 1994)(conspiracy claim under Bivens); Benson v. United States, 969 F. Supp. 1129, 1135 (N.D. Ill. 1997) (§ 1985 does not have a state action requirement comparable to that found in § 1983 and thus, federal officials may be sued under it) (citing Kaufmann v. United States, 840 F. Supp. 641, 648 (E.D. Wis. 1993)); see also Davis v. United States Dept. of Justice, 204 F.3d 723, 726 (7th Cir. 2000) (federal officials may not be sued in their official capacity under § 1985).

In pleading a conspiracy, it is sufficient for a petitioner to indicate "the parties, general purpose and approximate date so that the defendant has notice of what he is charged with." Walker v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002) (prisoner need not allege overt act to state conspiracy claim). In this case, petitioner has provided the names of the parties (respondents warden of MCC, Assistant Warden Henry, and respondents Savage, Owens and Christmas) as well as the alleged purpose of the conspiracy (to inhibit petitioner's ability to file a legal action against respondent Harris). In addition, his allegations allow an inference to be drawn that the alleged conspiracy formed between the time petitioner was assaulted and the date he was transferred out of the Metropolitan Correctional Center.

Nevertheless, I must deny petitioner leave to proceed on this claim because he has failed to satisfy the requirement set forth in Lewis v. Casey, 518 U.S. 343 (1996). In that case, the Supreme Court held that a prisoner cannot maintain a claim for a violation of the right to have access to the courts unless he demonstrates an "actual injury." Id. at 348. Denial of an adequate law library is not enough by itself; petitioner must allege facts from which an inference may be drawn that the failure to provide him with legal resources hindered him from bringing or pursuing a lawsuit. Id. at 351. Petitioner cannot make such a showing in this case. He alleges that respondents deprived him of legal materials in order to prevent him from filing a lawsuit against respondent Harris. But respondents' efforts were obviously unsuccessful because petitioner *has* filed a lawsuit against respondent Harris: this one. Because petitioner's own allegations reveal that he was not denied access to the courts, his claim that prison officials engaged in a conspiracy to deprive him of access to the courts must be dismissed.

C. Retaliation

A prison official who takes action in retaliation for an inmate's exercise of a constitutional right may be liable to the inmate for damages. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). Petitioner alleges that after he told respondent Christmas that he would not drop his legal action against respondent Harris, respondents MCC warden and

Carpenter arranged petitioner's transfer out of the center to a jail. It is possible to construe these allegations as stating a claim that respondents warden and Carpenter retaliated against petitioner for exercising his constitutionally protected right to file a complaint against Harris.

Under the circumstances alleged here, petitioner's transfer from one institution to another does not by itself offend the constitution. However, 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) ("otherwise permissible conduct can become impermissible when done for retaliatory reasons"). To state a claim for retaliation, an inmate 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 minimal facts sufficient to give defendants notice of the basis for the claim so that they can file an answer. Id. In the context of a retaliation claim, he must identify the allegedly retaliatory act as well as the constitutionally protected right he exercised. Id. Petitioner has done that. He alleges that he filed a complaint or intended to file a complaint against respondent Harris and that, in response, respondents warden and Christmas transferred him. This claim may be vulnerable to a motion to dismiss for petitioner's failure to exhaust his administrative remedies. At this stage, however, petitioner may proceed on the claim.

D. Inmate Tucker

Although I am allowing petitioner leave to proceed in forma pauperis on all of his claims except a possible claim under the Federal Tort Claims Act, I cannot allow him to proceed against respondent inmate Tucker.

In Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), the Supreme Court addressed at length the policy considerations for allowing a damage remedy for constitutional torts where Congress had not explicitly authorized it. The Court considered the magnitude of the differences in constitutional injuries inflicted by federal officials "acting under color of law" as opposed to injuries inflicted by private individuals, and concluded that it was in keeping with those considerations to allow a suit for damages against federal officials under §1331. Cases decided since Bivens implicitly require that the actions be brought against a federal official. E.g., Butz v. Economou, 438 U.S. 478, 504 (1978) (Bivens established that a citizen may "invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official.") In light of these holdings, inmate Tucker cannot be sued under Bivens.

Petitioner may have a legal claim against Tucker under state law for assault and battery. However, a federal court's authority to hear state law causes of action is limited. Under 28 U.S.C. § 1367(a), a federal district court may hear a state law claim when it is "so

related" to a federal claim in the same action "that they form part of same case or controversy." Petitioner's allegations do not meet this standard. Although there is a closeness in time between the events surrounding petitioner's claims against Tucker and Harris, there is very little overlap in the facts relevant to each claim.

To prove a claim against Tucker, plaintiff will have to prove facts relating to *Tucker*'s and petitioner's actions and intentions. WIS JI - Civil 2004 (assault requires intent to cause physical harm or intent to make plaintiff fear harm is imminent); WIS JI - Civil 2005 (battery requires intent to cause harm to which plaintiff did not consent). See also WIS JI - Civil 2006 (no battery occurs if injury was inflicted in self defense). These facts are largely irrelevant to the facts petitioner will have to prove to succeed on his claim against Harris, which are whether *Harris* 1) believed petitioner when petitioner told him that Tucker had hit him in the head; 2) drew an inference that petitioner would be attacked a second time; and 3) deliberately turned his back on the situation. In other words, petitioner's claim against Harris is distinct from his claim against inmate Tucker. He can prove an assault and battery claim in state court against Tucker without even mentioning Harris or Harris's actions or inactions. Allowing petitioner to litigate an assault and battery claim against Tucker along with his claim of constitutional wrongdoing against Harris would serve only to confuse matters. Therefore, I decline to exercise supplemental jurisdiction over petitioner's state law claim against respondent Tucker. If petitioner wishes, he can pursue

his claim against Tucker in state court.

ORDER

IT IS ORDERED that petitioner David Lee Green's request for leave to proceed in forma pauperis is

1. GRANTED with respect to his claims that

a) Respondent Harris deprived him of his Eighth Amendment rights by being deliberately indifferent to his safety; and

b) Respondents Warden of MCC Chicago and Ms. Christmas retaliated against petitioner for exercising his right to access the courts.

2. DENIED with respect to his claims

a) under the Federal Tort Claims Act that respondent Harris was negligent in failing to protect him from inmate Tucker's second assault, without prejudice to his filing a lawsuit against the United States after he has exhausted his administrative remedies;

b) under the Sixth Amendment that respondents Warden of MCC Chicago, Assistant Warden Henry, Ms. Christmas, Captain Savage, and P. Owens conspired to violate petitioner's constitutional right of access to the courts; and

c) under state law that respondent inmate Tucker assaulted him, without prejudice to petitioner's filing this claim in state court.

3. Respondents inmate Tucker, Assistant Warden Henry, Captain Savage and P. Owens are DISMISSED from this lawsuit.

4. 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.

5. 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.

6. The unpaid balance of petitioner's filing fee is $347.46; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

7. A copy of petitioner's complaint and a copy of this order are being forwarded to the United States Marshal for service on the respondents.

Entered this 21st day of February, 2007.

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