IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TAYR KILAAB AL GHASHIYAH (KHAN),
f/n/a JOHN CASTEEL,

Plaintiff,

ORDER

v.

07-C-308-C

MATTHEW FRANK, RICHARD SCHNEITER,
CHRISTINE BEERKIRCHER, JAILOR A. JONES,
GERALD KONDOZ, JAILOR SHARPE,
JAILOR HANFIELD, JAILOR PRIMMER,
JAILOR MICKELSON, JAILOR ESSER,
JAILOR SCULLION, JAILOR BEARCE,
JOHN McDONALD, JOHN POLINSKE,
PETER ROLE and JANE DOE,

Defendants.

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In an order dated July 12, 2007, I screened plaintiff's complaint, as I am required to do under 28 U.S.C. §§ 1915 and 1915A. In doing so, I concluded that plaintiff could proceed with his claim that Gerald Kondoz, Matthew Frank, Richard Schneiter and Christine Beerkircher violated his free exercise rights by prohibiting him from using his religious name but that he had failed to state a claim upon which relief could be granted with respect his claims regarding outgoing mail, food deprivation and the constitutionality of Wis. Admin. Code § DOC 306.17(2)(c)2 and strip searches that are "unnecessary."

I could not determine whether plaintiff could proceed with many of his claims

because he had failed to provide enough facts to give fair notice to defendants of the basis of his claims against them. In particular, plaintiff had failed to explain how each defendant was personally involved in the alleged violations. In addition, with respect to his due process claims, plaintiff failed to describe the process he was given, making it impossible to determine whether he was given all the process he was due. Accordingly, I asked plaintiff to file an addendum to his complaint addressing these issues.

Plaintiff has responded to the July 12 order with three different documents. First, instead of filing an addendum, he has filed an amended complaint in which he has deleted the claims I dismissed in the July 12 order and added some allegations about the personal involvement of defendants and the process he received. In the amended complaint, he names six new defendants (who, presumably, were John and Jane Doe defendants in his original complaint; I have added the names of those defendants to the caption of this order). Second, plaintiff filed a motion for reconsideration, in which he says that the court overlooked claims for denial of his right to equal protection and his right of access to the courts. Third, he moves for appointment of counsel.

A. Amended Complaint

Although plaintiff filed an amended complaint instead of an addendum as I instructed, I see no reason to reject his submission. He has not sought to add any new claims; the only new allegations he adds are those I requested in the July 12 order. Although he has added new defendants, they are named in the context of the same claims as his

original complaint. In a sense, plaintiff has simplified the matter by eliminating from his amended complaint claims that I have already dismissed and by filing an amended complaint that may replace the original one without cross referencing the two. Thus, the only question is whether plaintiff has provided the information necessary to determine whether he states a claim upon which relief may be granted with respect to his claims regarding the strip search, his cell conditions and the process he received before being transferred to the Wisconsin Secure Program Facility and before he was punished after a disciplinary proceeding.

1. Strip search and assault

In the July 12 order, I concluded that plaintiff had three potential claims arising from a strip search that occurred on May 1, 2007: that officers conducted a manual inspection of his anus and genitals without giving him a chance to comply with a visual inspection, that officers performed the strip search in front of other prisoners and that officers beat plaintiff in the context of the search. I asked plaintiff to identify the nature of each defendant's involvement in this conduct.

In his amended complaint, plaintiff alleges the following. Defendant Taylor performed the manual inspection on the orders of defendants Sharpe and Primmer. Defendants Jones, Bearce, Esser and Scullion were present, but failed to intervene. Defendants Esser and Scullion beat plaintiff. Defendants Sharpe, Primmer, Taylor, Bearce and Jones were present during the beating but failed to intervene. Defendants Taylor, Jones,

Bearce, Esser, Scullion, Sharpe and Primmer were all present when plaintiff was strip searched in front of other prisoners.

Under § 1983, prison officials may be liable for unconstitutional conduct if they participate in the conduct, order the conduct or are aware of the conduct and fail to stop it despite an ability to do so. Harper v. Albert, 400 F.3d 1052, 1064 (7th Cir. 2005); Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). Because plaintiff's allegations regarding each of these defendants fall into one of these categories, I conclude that plaintiff has sufficiently alleged their personal involvement to proceed on each these claims.

Also, plaintiff says that defendants Frank (the department secretary) and Schneiter (the warden) "knew of their agents and/or employees disregard for incarcerated persons, including plaintiff, or they should have known of the proper exercise of their duties per state laws to train, supervise and enforce their employees compliance with the law." Although it is not clear exactly what plaintiff means by this allegation, it appears that plaintiff believes that Frank and Schneiter are responsible because they failed to appropriately train the other defendants.

Supervisors may be liable under § 1983 for a failure to train, but the circumstances are extremely limited. Negligence, or a "should have known" standard, is not enough. Rather, the plaintiff must show that the defendant knew that his failure to train was likely to lead to constitutional violations. Mombourquette ex rel. Mombourquette v. Amundson, 469 F. Supp. 2d 624, 651 (W.D. Wis. 2007) (citing Kitzman-Kelley v. Warner, 203 F.3d 454, 459 (7th Cir. 2000), and Butera v. Cottey, 285 F.3d 601, 605 (7th Cir. 2002)).

In this case, the only likely way plaintiff could meet this standard is if defendants Frank and Schneiter affirmatively told the other defendants in training or in a policy that the alleged manner in which defendants conducted the search was appropriate (for example, if policy instructed officers to strip search prisoners in front of other prisoners) or if defendants Frank and Schneiter failed to provide *any* training on these issues. Although these possibilities appear unlikely, that is not a basis for rejecting this claim. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965-66 (2007) ("a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely"). Accordingly, I will allow plaintiff to proceed against defendants Frank and Schneiter on this claim.

I come to a different conclusion with respect to one other defendant that plaintiff mentions in the context of the strip search. Plaintiff says without further explanation that defendant Mickelson was one of the defendants who "conducted" the strip search, but he omits any reference to Mickelson in his allegations regarding the manual inspection, the beating and plaintiff's exposure to other prisoners. These were the only three aspects of the search that I have concluded may have been unconstitutional, meaning that plaintiff may not proceed against Mickelson on any claim related to the strip search.

To the extent defendant Mickelson was involved in the initial decision to conduct the strip search, that is not a basis for liability. Plaintiff conceded in his original complaint that the search was conducted because he was being transferred to another unit, in accordance with department policy. Although plaintiff listed a number of reasons why he believed the

policy was unnecessary, I concluded that it was not unconstitutional because it was consistent with other types of strip searches that had been upheld by the court of appeals. Peckham v. Wisconsin Dept. of Corrections, 141 F.3d 694, 695 (7th Cir. 1998) (upholding various routine strip searches of prisoner, including those that occur "whenever a prisoner moves into segregation" and "whenever prison officials undertake a general search of a cell block").

The determinative question in this circuit is whether the search was conducted solely to harass and humiliate the prisoner. Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003). A policy that permits or requires strip searches when a prisoner transfers units is justified by legitimate security concerns, even if those concerns do not seem applicable with respect to a particular search. Thus, I cannot conclude that the decision to conduct the strip search was unconstitutional; plaintiff is limited to challenging the manner in which it was conducted.

2. Cell conditions

Plaintiff alleges in his original and amended complaint that he was placed in a cold cell, naked and without access to a bathroom or toilet for several hours. In the July 12 order, I concluded that these allegations stated a claim under the Eighth Amendment, but that plaintiff had failed to identify the defendants responsible.

In his amended complaint, plaintiff alleges that defendants Sharpe, Hanfield, Primmer and Mickelson placed him in the cell and held him there. In addition, he alleges

that defendant Schneiter was responsible for the policy authorizing the conditions. Accordingly, I will allow plaintiff to proceed against these defendants.

3. Due process

In the July 12 order, I concluded that plaintiff had two potential due process claims: (1) the failure to provide him with adequate process when he was transferred to the Wisconsin Secure Program Facility; and (2) the failure to provide adequate process for a disciplinary proceeding that resulted in the loss of good time credits. I stayed a decision on these claims because plaintiff had failed to describe the process he was given and identify the defendants responsible for failing to provide him with process.

In his amended complaint, plaintiff explains that he did not lose good time credits after the disciplinary hearing. Rather, he was placed in "disciplinary separation, which does not length[en] the sentenc[e] or confinement, but has a significant impact on prison records and parole reviews." Dkt. #4, at ¶59. Disciplinary separation is a type of segregated confinement during which the prisoner continues to earn good time credits. Wis. Admin. Code § DOC 303.70.

Unfortunately for plaintiff, his concession that he did not lose good time credits requires dismissal of this claim. The *potential* to affect the duration of confinement is not enough to trigger due process protections, as the Supreme Court held in Sandin v. Conner, 515 U.S. 472, 487 (1995). Rather, process is required if the discipline he receives "will inevitably affect the duration of his sentence." Id.

In Sandin, the Court concluded that a prisoner was not entitled to process before being placed in disciplinary segregation as a result of misconduct. Although the Court acknowledged that the disciplinary decision could affect the prisoner's parole, it concluded that "[t]he chance that a finding of misconduct will alter the balance is simply too attenuated to invoke the procedural guarantees of the Due Process Clause." Id. Thus, I must reject plaintiff's argument that he was entitled to process because the disciplinary findings could adversely affect his chances for parole.

Due process is required in another instance as well: when the discipline imposed constitutes an "atypical and significant" hardship. Although plaintiff appears to believe that segregation time meets this standard, the Court of Appeals for the Seventh Circuit has held consistently that it does not. Lekas v. Briley, 405 F.3d 602, 612 (7th Cir. 2005); Hoskins v. Lenear, 395 F.3d 372, 374- 75 (7th Cir. 2005); Thomas v. Ramos, 130 F.3d 754 (7th Cir. 1997); Crowder v. True, 74 F.3d 812, 815 (7th Cir. 1996); Williams v. Ramos, 71 F.3d 1246 (7th Cir. 1995). Accordingly, I will not allow plaintiff to proceed on a claim that he was denied due process before being placed in disciplinary separation.

As I noted in the July 12 order, the Supreme Court has held that prisoners may be entitled to due process in conjunction with placement in a supermaximum facility such as the Wisconsin Secure Program Facility. Wilkinson v. Austin, 545 U.S. 209, 223 (2005). Unfortunately, plaintiff still has not described the process he was given before he was transferred to that facility. He says only that he received a hearing before the program review committee and that the hearing was a "sham."

I will give plaintiff one more chance to provide sufficient information on this claim. Accordingly, plaintiff may have until August 14, 2007, in which to submit to the court a description of the process he received at the hearing. In particular, plaintiff should address the following questions:

• did plaintiff receive the reasons for his transfer at the hearing or at another time before the transfer occurred?

• did plaintiff have an opportunity to rebut the reasons provided or to give his side of the story?

To the extent plaintiff believes the hearing or the appeal process was a "sham," he should explain *why* he believes this. If plaintiff fails to provide this information by August 14, 2007, I will dismiss this claim for failure to prosecute.

4. Defendants Peter Role and "Jane Doe"

The complaint will be dismissed as to both of these defendants. Plaintiff mentions defendant Role only once in the body of complaint, when he alleges that Role (and numerous other defendants) "subjected the plaintiff to degrading torture treatment to harass and humiliate him." Dkt. #4, at ¶54. This allegation does not identify the conduct of defendant Role that constitutes "torture treatment" and therefore it fails to provide the notice required by Fed. R. Civ. P. 8.

Similarly, plaintiff continues to name "Jane Does" in many of his claims, but he fails to explain their involvement in the constitutional violations or provide any identifying

information about them. Accordingly, I will dismiss the complaint as to Peter Role and the Jane Does. If plaintiff discovers at a later date the identities of other defendants personally involved in the claims on which I am allowing him to proceed, he may seek leave to amend his complaint at that time.

B. Motion for Reconsideration

In the screening order, I allowed plaintiff to proceed on a claim that defendants Kondoz, Frank, Schneiter and Beerkircher rejected grievances plaintiff filed using his religious name, in violation of his right to practice his religion under the free exercise clause and the Religious Land Use and Institutionalized Persons Act. Now plaintiff says that in addition to free exercise claims, he intended to raise claims under his right of access to the courts, his right to petition the government and his right to equal protection of the laws.

With respect to plaintiff's equal protection claim, he says only that he received a memorandum from the prison registrar stating that the "Department has subsequently allowed other inmates to use their new legal names without referring to their former names." Construing plaintiff's complaint liberally, I understand him to be alleging that defendants Kondoz, Frank, Schneiter and Beerkircher are allowing other similarly situated prisoners to use their religious names on their grievances.

I conclude that plaintiff has alleged the bare minimum of necessary facts to state an equal protection claim. However, plaintiff should be aware that it will be significantly more difficult to prove his claim. First, plaintiff will have to show that other prisoners are in fact

receiving more favorable treatment and that *defendants* are providing that treatment. The memorandum from the registrar will not be sufficient to show this because it does not indicate whether other prisoners have been allowed to use their religious names on grievances and, also important, whether it is defendants who have been allowing those other prisoners to use their religious names.

Second, plaintiff will have to show why defendants are treating him differently. Plaintiff is wrong if he believes that prison officials are required to treat all prisoners the same under all circumstances. Generally, so long as there is a rational basis for prison officials' actions, there is no equal protection violation. May v. Sheahan, 226 F.3d 876, 882 (7th Cir. 2000). Heightened scrutiny is appropriate in limited circumstances, such as when a prison official discriminates on the basis of race. Johnson v. California, 543 U.S. 499 (2003) (applying strict scrutiny to racial discrimination in prison context). Because plaintiff does not identify the reason for the alleged discrimination, it is impossible to determine at this stage what level of scrutiny will apply.

With respect to plaintiff's claim for denial of his right of access to the courts and his right to petition the government for redress of grievances, it appears that plaintiff's theory is that these rights were denied because defendants rejected his grievances. Although the filing of a grievance is sometimes a prerequisite for a lawsuit, DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000), the right of access to the courts is not implicated until the prisoner is prevented from filing or maintaining an actual lawsuit. Lewis v. Casey, 518 U.S. 343, (1996). Because plaintiff has not identified a lawsuit he was unable to file or maintain as

a result of a rejection of a grievance, he has not stated a claim upon which relief may be granted.

Finally, with respect to plaintiff's right to petition the government, it is true that courts have held that the right extends to grievances to prison authorities. Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir. 1995). This means that prisoners must be allowed to *file* a grievance without consequence, but I am not aware of any authority holding that the right extends to a requirement on the government to take action on the grievance. If the rule were otherwise, it would mean that the right to petition the government would be violated every time a prisoner's grievance was rejected for any number of reasons, including failing to comply with a filing deadline. Accordingly, I conclude that plaintiff has failed to state a claim upon which relief may be granted on this claim.

C. Motion for Appointment of Counsel

Plaintiff's motion for appointment of counsel will be denied. In deciding whether to appoint counsel, I must first find that plaintiff has made reasonable efforts to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Plaintiff does not say that he has been prevented from trying to find a lawyer on his own. To prove that he has made reasonable efforts to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers that he asked to represent him in this case and who turned him down.

Plaintiff should be aware that even if he is unsuccessful in finding a lawyer on his own, that does not mean that one will be appointed for him. At that point, the court must consider whether plaintiff is able to represent himself given the legal difficulty of the case, and if he is not, whether having a lawyer 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)). This case is simply too new to allow the court to evaluate plaintiff's abilities or the likely outcome of the lawsuit. Therefore, the motion will be denied without prejudice to plaintiff's renewing his request at a later time.

ORDER

IT IS ORDERED that

1. Plaintiff Tayr Kilaab al Ghashiyah's motion for reconsideration is GRANTED IN PART.

2. Plaintiff is GRANTED leave to proceed on the following claims:

a. Defendants Gerald Kondoz, Matthew Frank, Richard Schneiter and Christine Beerkircher prohibited plaintiff from using his religious name on his grievances, in violation of his right to free exercise of religion under the First Amendment and the Religious Land Use and Institutionalized Persons Act, his right of access to the courts, his right to petition the government for redress of grievances and his right to equal protection of the law.

b. Defendant Taylor conducted a manual inspection of plaintiff's anus and genitals without giving him a chance to comply with a visual inspection; defendants Sharpe and

Primmer ordered this inspection; defendants Jones, Bearce, Esser and Scullion were present but failed to intervene; and defendants Frank and Schneiter caused the other defendants' conduct by failing to train them, in violation of the Fourth and Eighth Amendments;

c. Defendants Esser and Scullion beat plaintiff during with strip search; defendants Sharpe, Primmer, Taylor, Bearce and Jones were present but failed to intervene; defendants Frank and Schneiter caused the other defendants' conduct by failing to train them, in violation of the Eighth Amendment;

d. Defendants Taylor, Jones, Bearce, Esser, Scullion, Sharpe and Primmer subjected plaintiff to a strip search in front of other prisoners; defendants Frank and Schneiter caused the other defendants' conduct by failing to train them, in violation of the Fourth and Eighth Amendments;

e. Defendants Sharpe, Hanfield, Primmer and Mickelson placed plaintiff in a cold cell, naked and without access to a bathroom or toilet for several hours, in violation of the Eighth Amendment.

3. A decision whether to allow plaintiff to proceed will be STAYED with respect to his claim that defendants Frank, McDonald and Polinske denied him due process in the context of his transfer to the Wisconsin Secure Program Facility. Plaintiff may have until August 14, 2007, in which to submit to the court a description of the process he received at the program review committee hearing. In particular, plaintiff should address the following questions:

• did he receive the reasons for his transfer at the hearing or at another time before

the transfer occurred?

• did he have an opportunity to rebut the reasons provided or to give his side of the story?

To the extent plaintiff believes the hearing or the appeal process was a "sham," he should explain *why* he believes this. If plaintiff fails to provide this information by August 14, 2007, I will dismiss this claim for failure to prosecute.

4. Plaintiff is DENIED leave to proceed on all other claims.

5. Plaintiff's amended complaint is DISMISSED as to defendants Peter Role and Jane Doe.

6. Plaintiff's motion for appointment of counsel is DENIED without prejudice to plaintiff's filing it at a later date.

Entered this 1st day of August, 2007.

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