IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JANARI L. MCKINNIE,

OPINION AND ORDER

Petitioner,

09-cv-188-bbc

v.

MARK HEISZ; BRAD WOLFGRAM; ALAN MORRIS; JANEL NICKEL; ANTHONY ASHWORTH; LESLIE WINSLOW-STANLEY; GREG GRAMS; DAHLIA SULIENE: STEVE HELGERSEN; SANDRA SITZMAN; KENNETH EVANS; SAMUEL ESSEX; PETE ERICKSEN; and WILLIAM POLLARD,

Respondents.

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This is a proposed civil action for monetary and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Green Bay Correctional Institution, alleges that respondents Kenneth Evans and Samuel Essex, two fellow inmates, assaulted him and that the remaining respondents violated his constitutional rights in assorted ways related to the alleged assault. Petitioner has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 and has paid the initial partial filing fee.

Because petitioner is a prisoner, the 1996 Prison Litigation Reform Act requires the

court to screen petitioner's complaint and deny him leave to proceed if he has had three or more lawsuits or appeals dismissed for lack of legal merit, or if his complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a respondent who by law cannot be sued for money damages. 28 U.S.C. § 1915(e). At the same time, petitioner is a pro se litigant, which means his complaint will be construed liberally as it is reviewed for these potential defects. Haines v. Kerner, 404 U.S. 519, 521 (1972).

Petitioner asserts a whopping thirteen claims in this lawsuit. Normally, such lawsuits must be severed pursuant to Fed. R. Civ. P. 20. However, petitioner's claims all arise out of a single transaction or series of transactions related to an alleged assault he suffered at the hands of respondents Evans and Essex. Therefore, these claims may proceed together, as varied as they are. After assessing the merits of his claims, I conclude that petitioner may proceed in forma pauperis on six of his claims: (1) respondents Mark Heisz, Brad Wolfgram, Alan Morris, Janel Nickel and Greg Grams violated his Eighth Amendment rights by failing to protect him from a substantial risk of serious harm at the hands of other inmates; (2) respondents Dalia Suliene, Steve Helgersen and Sandra Sitzman violated his Eighth Amendment rights by failing to provide adequate medical care after petitioner was assaulted; (3) respondents Heisz and Wolfgram retaliated against him for reporting their misconduct to their superiors; (4) respondents Heisz and Wolfgram violated his free speech rights by

blocking his mail to respondents Nickel, Morris and Grams; (5) respondents Anthony Ashworth and Nickel violated his free speech rights by holding his incoming and outgoing mail; and (6) respondents Ashworth, Leslie Winslow-Winslow-Stanley and Nickel violated his free speech rights by retaining grievances and documents of petitioner's that had been confiscated during a search.

As for the remaining seven claims, petitioner will be denied leave to proceed on those claims. They are as follows: (1) respondents Heisz, Morris and Wolfgram violated his Eighth Amendment rights by failing to provide him adequate medical care after he was assaulted; (2) respondent Ashworth retaliated against him for his cooperation in the prosecution of the inmates who assaulted him and refusal to lie to the disciplinary committee; (3) respondents Heisz, Wolfgram, Ashworth, Morris, Nickel, Winslow-Stanley and Grams retaliated against him for his attempts to seek legal assistance against them or others; (4) respondents violated his free speech rights by reading his mail after it had been confiscated (5) respondents violated his right to access to the courts by interfering with his ability to file grievances and seek legal assistance; (6) respondents Kenneth Evans and Samuel Essex violated his constitutional rights by assaulting him; and (7) respondents Evans and Essex violated Wis. Stat. §§ 893.52 and 893.54 by assaulting him and damaging his property.

In his complaint, petitioner makes the following allegations of fact.

FACTS

A. Parties

Petitioner is a prisoner incarcerated at the Green Bay Correctional Institution. During 2006 and 2007, he was confined at the Columbia Correctional Institution. Respondents Kenneth Evans and Samuel Essex are prisoners who were incarcerated at the Columbia Correctional Institution when petitioner was there in 2006. Respondent Pete Ericksen is a Security Director and respondent William Pollard is the warden at the Green Bay Correctional Institution. The remaining respondents are prison officials at the Columbia Correctional Institution: Mark Heisz is a Corrections Officer II, Brad Wolfgram is a Corrections Unit Sergeant, Alan Morris is a Unit Manager, Janel Nickel is a Security Director, Anthony Ashworth is an Investigations Captain, Leslie Winslow-Stanley is a Corrections Captain, Greg Grams is the warden, Dahlia Suliene is a medical doctor, Steve Helgersen is a nurse and Sandra Sitzman is the former Health Services Unit Manager.

B. Events Leading up to the Physical Assault in Petitioner's Cell

Sometime before November 2006, petitioner and his former cellmate reported to respondents Heisz's and Wolfgram's superiors that these respondents were allowing "hooch" (an illegal intoxicant) to be made in the housing unit and were allowing inmates into unauthorized areas of the housing unit. After petitioner reported respondents Heisz and

Wolfgram, these respondents told other inmates that petitioner and his former cellmate were "snitching" and that they "deserved [to have] their asses beat[en]."

Respondents Evans and Essex, who were housed on petitioner's unit, started making physical threats to petitioner. In October 2006, respondent Morris was told five times that respondents Evans and Essex were threatening petitioner. Respondent Morris told petitioner that he had heard that "a hit had been put on [petitioner]."

Respondent Nickel was also told about respondents Evans's and Essex's threats to petitioner. On October 27 and 29, 2006, respondent Nickel received letters describing the threats and on October 28, 2006, respondent Nickel had two conversations with petitioner's former cellmate regarding the threats. Petitioner's cellmate sent letters regarding Evans's and Essex's planned assault on petitioner to respondent Grams, who responded that "it was being looked into." Nonetheless, respondents Nickel, Morris and Grams "did nothing" about the threats.

C. The Assault

On November 1, 2006, respondent Heisz allowed respondents Evans and Essex out of their cell between 12:25 and 12:30 p.m. for the stated reason of showering, although both were in temporary lockup and those inmates are allowed to shower only in the morning and only for ten minutes. At some point between 1:00 p.m. and 1:30 p.m., respondent

Wolfgram, who was in charge of petitioner's housing unit, authorized respondent Heisz to allow petitioner to enter his cell to use the toilet. They knew that respondents Evans and Essex were in temporary lockup and wanted to harm petitioner. At the time, respondent Heisz was stationed in the unit's control center, from which petitioner's cell is visible. While petitioner was on his break, respondents Essex and Evans entered his cell, physically assaulted him for several minutes and then exited his cell.

After the assault, petitioner was dizzy, bleeding, in severe pain and could not see out of his right eye. Both respondents Heisz and Wolfgram were placed on administrative leave on November 1, 2006, and returned on November 9, 2006.

D. Medical Care Following the Assault

After the assault, petitioner was taken to the Health Services Unit and then to a hospital in the community. The next day, petitioner returned to the Health Services Unit, this time speaking with respondent Suliene. She prescribed an extra pillow for his pain, Tylenol 3 and eye drops.

On November 7, 2006, petitioner's former cellmate helped petitioner prepare a health service request to the Health Services Unit, explaining that petitioner suffered from continuing pain, blood in his urine, inability to sleep and dizziness. Respondent Suliene's only response was that petitioner should drink more fluids to clear his urinary output.

After respondents Heisz and Wolfgram returned from administrative leave, both refused to give petitioner his prescribed pain medication on different occasions. It would be illegal for respondents Heisz and Wolfgram to dispense petitioner's medication; it was a schedule II drug (Tylenol 3 contains codeine) and they had not received proper authorization. Nonetheless, Heisz and Wolfgram had administered such drugs in the past, but refused to do so for petitioner. Petitioner told respondent Morris that respondents Heisz and Wolfgram were denying petitioner his pain medication; respondent Morris "did nothing."

On November 13, 2006, petitioner's cellmate helped petitioner prepare another health service request, describing petitioner's continued pain and complaining that petitioner's symptoms were not improving. In response, respondent Helgersen told petitioner that he was scheduled for a follow-up with a medical doctor. On November 17, 2006, petitioner saw respondent Suliene again. Respondent Suliene told petitioner that "there was not much that she could do about [his] pain." He complained that she had not done anything for him. In response, she stared at him and then said she would see him in a month.

Two days later, petitioner asked respondent Suliene to conduct more tests or x-rays on him, but she refused. Instead, respondent Suliene renewed petitioner's Tylenol 3 prescription, wrote an instruction for amitriptyline for petitioner's rib pain and ordered an

extra mattress for petitioner. Petitioner never received the amitriptyline or the extra mattress.

On November 20, 2006, petitioner sent another request to the Health Services Unit, complaining that he was still experiencing pain and that respondent Heisz was not providing petitioner his pain medication. Respondent Helgersen responded by saying, "You write every day with this information." On November 24, petitioner was still waiting for the medication ordered on November 19, 2006, so he sent another request to the Health Services Unit, asking about the medication. Health Services Unit staff responded that the medicine requested had been sent. Nothing had been sent. At some point, it was reported to respondent Suliene that respondents Wolfgram and Heisz had not been providing petitioner with his prescribed medication, but she did not follow up on this report.

Petitioner complained to respondent Suliene about his symptoms again on November 26, 2006, in particular that he continued to suffer from throbbing pain in his eye, blurriness, dizziness and pain in his back and side. Respondent Suliene simply told him that she would recheck his healing in a month and that he would be "better then."

On January 28, 2007, petitioner asked about his follow-up appointment and complained that the pain had returned within the last three days. Respondent Helgersen responded that he had a doctor's appointment scheduled for the following week. Petitioner did not have an opportunity to see a doctor, however. On February 17, 2007, he wrote to

ask about it. Respondent Helgersen responded that petitioner would see the doctor in six to eight weeks. Petitioner never received the promised follow-up appointment. Respondent Helgersen wanted petitioner to come in on "sick call" so he could collect $7.50 from petitioner "without addressing his medical concerns."

From November 21, 2006 to February 19, 2007, respondent Sitzman received at least five letters from petitioner and his former cellmate describing petitioner's ongoing problems receiving adequate treatment from respondents Suliene and Helgersen. On January 4, 2007, respondent Sitzman responded to petitioner's concerns, concluding that her review of the records showed nothing inappropriate about the treatment that respondents Suliene and Helgersen provided him. Petitioner continues to suffer from pain in his back and rib cage, headaches, blurred vision and difficulty sleeping as a result of nightmares.

E. Treatment by Prison Officials after the Assault

Between November 9, 2006 to November 21, 2006, respondent Heisz slammed petitioner's cell door in the morning to wake him from his sleep at least ten times. In addition, respondent Heisz instructed kitchen workers to provide petitioner with less food than usual.

While investigating the assault on November 10, 2006, and later on November 17, 2006, respondent Ashworth accused petitioner of having a sexual relationship with his

former cellmate and of being in a gang. He told petitioner to lie to the disciplinary committee regarding the identity of his assailants and refuse to cooperate with law enforcement officials in the criminal prosecution of respondents Evans and Essex and told petitioner that he could "make things a lot easier" if he did things "his way." After petitioner refused to lie to the committee, petitioner placed him in temporary lockup twice, on January 5, 2007, and on February 16, 2007.

On November 22, 2006, petitioner filed a grievance complaining about the assault. From November 19, 2006 to February 15, 2007, each time petitioner would ask respondents Heisz and Wolfgram for inmate grievance forms, they told him that there were no forms so he would have to use blank paper. When petitioner filed a grievance using blank paper, it was rejected for not being on a standard form. Petitioner told respondents Morris and Ashworth that respondents Heisz and Wolfgram refused to provide him with forms. Respondent Morris said that Heisz and Wolfgram would provide the forms in the future, although that never happened.

In addition, any time petitioner would send mail addressed to respondents Nickel, Morris and Grams, including those grievances he managed to prepare on proper forms, respondents Heisz and Wolfgram would intercept the mail and, if the mail concerned either of them, they would not deliver the mail to its intended recipient.

On January 5, 2007, respondent Heisz lied to respondent Ashworth, telling him that

he had witnessed petitioner's actions during a confrontation between petitioner and another inmate that day. Respondent Ashworth told respondent Heisz to place petitioner in temporary lockup, allegedly for his involvement in the confrontation.

A few days before January 20, 2007, respondent Heisz conducted a search of petitioner's cell. Respondent Heisz removed petitioner's and his former cellmate's sheets, stomped on them and threw magazines and papers on the floor. During the search, respondent Heisz read personal legal mail of petitioner's, including legal letters to attorneys, grievances and other letters complaining of Heisz's and Wolfgram's misconduct.

Around January 20, 2007, respondent Ashworth, on respondent Nickel's authorization, ordered that all petitioner's incoming and outgoing mail be held for him. On January 20, 2007, respondent Wolfgram told respondent Winslow-Stanley that petitioner and his former cellmate had threatened another inmate and his family in a personal letter. Respondent Winslow-Stanley took two "legal envelopes" from petitioner's cell. These envelopes contained legal letters to attorneys, grievances petitioner was preparing for filing, letters of complaints regarding Heisz's and Wolfgram's misconduct and personal letters from petitioner's family. (It is unclear whether the "legal envelopes" also contained the allegedly threatening letter written by petitioner's former cellmate.) Initially, respondent Winslow-Stanley said that she was taking the materials because they were contraband, but she later admitted that the real reason for taking the envelopes was because respondent Heisz was

"concerned about" the materials Heisz had read earlier, particularly the letters to attorneys, grievances and other letters complaining about his and Wolfgram's alleged misconduct.

On January 31, 2007, the Program Review Committee informed petitioner that he would be transferred from the Columbia Correctional Institution to another institution because another inmate had asked to be separated from him.

Between February 1, 2007, and February 8, 2007, petitioner received four letters from law firms that had been opened outside his presence. The entire legal correspondence was missing from two of the four envelopes.

For three weeks, respondents Ashworth, Winslow-Stanley and Nickel retained the grievances and legal documents they had obtained during the January 20 search. During that time, "all" respondents read his grievances and letters. On February 13, 2007, respondent Winslow-Stanley returned to petitioner some of the documents in his "legal envelopes." Certain copies of his legal letters, grievances and letters from his family were not returned. On February 16, 2007, respondent Winslow-Stanley placed petitioner in temporary lockup, telling him that respondent Ashworth had ordered the lockup, but "she was going to do it herself after the things that she read in [petitioner's] legal envelopes." In addition, at some point, Winslow-Stanley called petitioner a "gay gang-banger" and said that being one would cause him to "get his ass beat every time."

Around February 21, 2007, petitioner was charged $1.03 for postage for two articles

of mail sent to his former cellmate. The mail was sent through free institution mail, not through the U.S. Postal System.

On February 16, 2007, respondent Winslow-Stanley placed petitioner in a different housing unit and then placed him in temporary lockup for alleged threats to prison staff made in a letter to petitioner's former cellmate. On February 23, 2007, petitioner was transferred to the Green Bay Correctional Institution. He was given different explanations for his transfer. The Program Review Committee told him he would be transferred because another prisoner had filed a separation request; respondent Winslow-Stanley told him that his transfer was in response to threats he had made to a staff member in a letter he sent to his former cellmate; and respondent Grams told petitioner he was being transferred because of safety concerns. However, the "real reason" was that petitioner was seeking legal assistance against respondents.

Since petitioner was transferred to the Green Bay Correctional Institution, he has been threatened several times by other inmates. Several of Evans's and Essex's friends are at the Green Bay Correctional Institution. More threatening inmates have been arriving from "everywhere, except Dodge Correctional Institution."

OPINION

A. Failure to Protect

The Eighth Amendment gives prisoners a right to remain safe from assaults by other inmates. Langston v. Peters, 100 F.3d 1235, 1237 (7th Cir. 1996). "[P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." Farmer v. Brennan, 511 U.S. 825 (1994). "Having incarcerated persons with demonstrated proclivities for antisocial criminal, and often violent, conduct, [and] having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." Farmer, 511 U.S. at 833.

To state an Eighth Amendment failure to protect claim, a prisoner must allege that (1) he faced a "substantial risk of serious harm" and (2) the prison officials identified acted with "deliberate indifference" to that risk. Id. at 834; Brown v. Budz, 398 F.3d 904, 909 (7th Cir. 2005). Petitioner alleges that Evans and Essex had threatened to assault him before he was assaulted, from which it is possible to infer that petitioner was at a "heightened risk" of assault from Evans and Essex. This is sufficient to satisfy the first prong of a failure to protect claim. Brown, 398 F.3d at 911 (citing Weiss v. Cooley, 230 F.3d 1032, 1033 (7th Cir. 2000)) ("heightened risk" of assault from particular inmate satisfies requirement that there be "substantial risk of serious harm").

The second prong is often harder to meet. Under the deliberate indifference standard,

a prison official may be held liable under the Eighth Amendment "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Farmer, 511 U.S. at 847. "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).

Petitioner alleges that respondent Heisz knew Evans and Essex wanted to harm him, allowed them out of temporary lockup around the same time he was allowed to return to his room and manned the control center from which petitioner's cell was visible during the assault. The allegations imply that respondent Heisz was aware of a specific threat and disregarded it. Respondent Wolfgram is a closer case. Although he allegedly knew that Evans and Essex wanted to harm petitioner and let petitioner return to his room, he also knew that Evans and Essex were in temporary lockup. Unlike respondent Heisz, respondent Wolfgram was not alleged to have released Evans and Essex from temporary lockup or have been in a position to watch petitioner's cell. However, it is plausible to infer that Wolfgram knew about or authorized the inmates' release from temporary lockup just as he authorized petitioner's entry into his cell, because he was in charge of the housing unit. Moreover, petitioner alleges motivation: he had reported Wolfgram's and Heisz's misconduct to their superiors before the incident and both had been telling inmates that petitioner was a

"snitch" who "deserved" to be beaten.

As for respondents Morris, Nickel and Grams, petitioner alleges that all received letters describing the threats Evans and Essex were making and about their access to the general housing unit. Petitioner does not allege exactly what their threats were or what each of these respondents knew about these threats, but petitioner's alleged repeated attempts to receive attention for the threats suggest that respondents Morris, Nickel and Grams knew of the serious risk petitioner allegedly faced. Indeed, Morris allegedly knew that a "hit" had been put out against petitioner.

The last question is what each of these respondents did with the information petitioner gave them. Prison officials need not do the impossible, only "take reasonable measures to abate" a known risk. Farmer, 511 U.S. at 847. Respondents Heisz's and Wolfgram's failure to "take reasonable measures" is apparent; according to petitioner, they essentially sent him into the lions' den. As for respondents Morris, Nickel and Grams, petitioner alleges that they "did nothing," although he also suggests that respondent Grams at least intended to "look into" the problem. At this early stage, it is plausible to infer that each of Morris, Nickel and Grams could have done something to stop the assault once they were informed of the threat, but failed to take any steps at all.

The allegations are sufficient to allow an inference to be drawn that respondents Heisz, Wolfgram, Morris, Nickel and Grams each knew that Evans and Essex created a

substantial risk of serious harm and failed to take reasonable measures to abate that risk. Therefore, I will grant petitioner leave to proceed on his failure to protect claim against these respondents. Petitioner should be aware that, come trial or motions for summary judgment, he will have to set forth evidence that each of these respondents was aware of the specific threat of assault he faced from Evans and Essex and failed to take reasonable steps to prevent the assault.

B. Inadequate Medical Care

Aside from prison officials' duty to protect prisoners from serious assaults, they have a duty under the Eighth Amendment "'to provide medical care for those whom it is punishing by incarceration.'" Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state an Eighth Amendment medical care claim, a prisoner must allege facts from which it can be inferred that he had a "serious medical need" and that prison officials were "deliberately indifferent" to this need. Estelle, 429 U.S. at 104; Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

A medical need may be serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering when treatment is withheld, Gutierrez, 111 F.3d at 1371-73 (7th Cir. 1997), "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), causes

pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or otherwise subjects the prisoner to a substantial risk of serious harm, Farmer, 511 U.S. 825. "Deliberate indifference" means that the officials were aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, petitioner's claim has three elements:

(1) Did petitioner need medical treatment?

(2) Did respondents know that petitioner needed treatment?

(3) Despite their awareness of the need, did respondents fail to take reasonable measures to provide the necessary treatment?

Petitioner alleges that respondent Suliene (1) was told that petitioner was suffering multiple symptoms such as pain, blood in his urine and inability to sleep, but addressed only the blood in his urine; (2) on numerous occasions, refused to provide pain medication or other treatment for petitioner's continuing pain; (3) promised to provide amitriptyline and an extra mattress for petitioner's rib pain but never executed the order; and (4) failed to follow up on reports that petitioner was not receiving his prescribed medication on his housing unit from Wolfgram and Heisz. In addition, petitioner alleges that he complained about his pain and symptoms to the Health Services Unit on several occasions and respondent Helgersen stated several times that a doctor's appointment had been scheduled

but petitioner never saw a doctor. Petitioner will be granted leave to proceed on these claims against respondents Suliene and Helgersen. The allegations allow an inference to be drawn that petitioner's medical condition was serious and respondents Suliene and Helgersen failed to take reasonable measures to provide proper treatment, Suliene by failing to provide adequate treatment or insure that petitioner was receiving the prescription she had written and Helgersen by failing to insure that petitioner was provided a doctor's appointment he needed.

In addition, petitioner will be granted leave to proceed on his claim that respondent Sitzman failed to intervene to insure petitioner was receiving proper medical care from the Health Services Unit after she received several letters describing the inadequate treatment. Although respondent Sitzman was not directly involved in petitioner's health care, she was the Health Services Unit manager. The complaint allows an inference to be drawn that respondent Sitzman knew of petitioner's need for treatment and could have intervened to insure that he received it, but failed to do so. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995) (prison official who "know[s] about the conduct and facilitate[s] it, approve[s] it, condone[s] it, or turn[s] a blind eye" to it may be held personally liable under § 1983); Burks v. Raemisch, 555 F.3d 592, 596 (7th Cir. 2009) (reversing dismissal of head of medical unit).

However, petitioner will not be granted leave to proceed against respondents Heisz,

Wolfgram and Morris because he has pleaded himself out of court on these claims. Petitioner alleges that respondents Heisz and Wolfgram did not provide him his pain medication and respondent Morris "did nothing" about it when he complained about it. Petitioner is not suggesting that Heisz, Wolfgram or Morris prevented him from seeking medical care from those who could provide it; indeed, his allegations suggest he was doing a fine job asking the Health Services Unit for treatment. Instead, he complains that, although Heisz and Wolfgram were not legally authorized to administer his prescribed medication, they *had* administered such medicine before, but refused to give him the same illegal treatment and Morris did "nothing" to make sure they afforded him that treatment. The Eighth Amendment does not require prison officials to provide medicine in violation with the law. Therefore, I will deny petitioner leave to proceed on his Eighth Amendment medical care claims against respondents Heisz, Wolfgram and Morris.

C. Retaliation

"An act 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). Petitioner must plead three elements in order to state a claim for retaliation: he must (1) identify a constitutionally protected activity in which he was engaged; (2) identify one or more retaliatory actions taken by each respondent that would deter a person of "ordinary

firmness" from engaging in the protected activity in the future; and (3) allege sufficient facts that would make it plausible to infer that petitioner's protected activity was one of the reasons respondents took the action they did against him. Bridges v. Gilbert, 557 F.3d 541, 555-56 (7th Cir. 2009); Hoskins v. Lenear, 395 F.3d 372, 375 (7th Cir. 2005).

Petitioner's claims for retaliation are as follows: respondents Heisz and Wolfgram retaliated against him because he reported their misconduct to their superiors; respondent Ashworth retaliated against him because he cooperated in a criminal prosecution of Evans and Essex; and respondents Heisz, Wolfgram, Ashworth, Morris, Nickel, Winslow-Stanley and Grams retaliated against him because he intended to seek legal assistance against them or others.

1. Retaliation for reporting misconduct

Petitioner alleges that, after he reported respondents Heisz and Wolfgram to their superiors, they told other prisoners that petitioner was a "snitch" who deserved to be physically harmed and they allowed Evans and Essex to physically harm petitioner. In addition, petitioner alleges that respondents Wolfgram and Heisz blocked his attempts to use the grievance procedure to complain about their misconduct and that respondent Heisz continued to "harass" him by slamming his cell door in the morning, lying to get petitioner in trouble, performing a disruptive search of petitioner's cell and getting another official to

confiscate petitioner's legal and personal documents.

As to these respondents, petitioner has identified a constitutionally protected activity, reporting prison officials' misconduct, Bridges, 557 F.3d at 552 (prisoner's participation in third party's lawsuit involving prison officials' misconduct was constitutionally protected activity), has identified actions taken by respondents that, as a whole, would undeniably "deter a person of ordinary firmness" from engaging in further retaliatory acts, id. (retaliatory acts may be considered as a whole), and has alleged sufficient facts to make it plausible to infer that petitioner's reporting their misconduct was at least one of the reasons that respondents took those actions against him. Therefore, petitioner will be granted leave to proceed on his claim that respondents Heisz and Wolfgram retaliated against him for reporting their misconduct to their superiors.

2. Retaliation for cooperating in criminal prosecution

As for respondent Ashworth, petitioner alleges that he told petitioner to lie to the disciplinary committee and refuse to cooperate with law enforcement officials in the criminal prosecution of Evans and Essex and added that petitioner could "make things a lot easier" on himself by doing as Ashworth told him. After petitioner refused, Ashworth placed him in temporary lockup twice. These allegations are not enough to allow petitioner to proceed on this claim.

Petitioner identifies protected activities, cooperating with law enforcement officials and defending himself before the disciplinary committee, Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002) (right to use available grievance procedures); Bridges, 557 F.3d at 552 (right to participate in lawsuit against officials). Moreover, the alleged retaliatory action by Ashworth, two temporary lockups, is sufficiently adverse to "deter a person of ordinary firmness," a relatively low standard. Bridges, 557 F.3d at 552, 554-55 (concluding that delays in incoming and outgoing mail, harassment by guard, unjustified disciplinary charges and and improper dismissal of grievances sufficient to deter a person of ordinary firmness).

Where petitioner's claim fails is in his allegations tying the two placements in lockup to the protected activity. It is not plausible to infer that petitioner's cooperation in the prosecution of Evans and Essex or refusal to lie to the disciplinary committee was one of the reasons that respondent Ashworth put petitioner in temporary lockup. Although respondent Ashworth had asked petitioner to lie and refuse to cooperate and had told petitioner that things would be "easier" for him if he did, petitioner does not relate those statements to Ashworth's decision to put petitioner in temporary lockup, which occurred months later, at different times, in the context of allegations that petitioner misbehaved (first by participating in a "confrontation," second by threatening staff). Notably, petitioner does not suggest that he was falsely accused of misbehaving or that respondent Ashworth knew the allegations

were false. (He states that respondent Heisz lied about *witnessing* the confrontation but does not deny his role in the confrontation). In this context, it would not be plausible to infer that respondent Ashworth put petitioner in temporary lockup for engaging in protected activity, which is what Rule 8 requires. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). Therefore, petitioner will be denied leave to proceed on his claim that respondent Ashworth retaliated against him for cooperating with the prosecution of Evans and Essex or refusing to lie to the disciplinary committee.

3. Retaliation for attempting to seek legal assistance

Finally, petitioner alleges that Heisz, Wolfgram, Ashworth, Morris, Nickel, Winslow-Stanley and Grams all retaliated against him for attempting to seek legal assistance by blocking and confiscating his legal and personal mail, placing him in temporary lockup and bringing about his transfer to the Green Bay Correctional Institution. These claims must fail because petitioner has failed to identify a constitutionally protected activity.

It is true that petitioner has a constitutional right to access to the courts and to legal assistance "necessary . . . for ensuring a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." Shaw v. Murphy, 532 U.S. 223, 231 n.3 (2001) (citing Lewis v. Casey, 518 U.S. 343, 350-51 (1996)). Likewise, petitioner has a constitutional right to petition the government for redress of grievances.

Walker, 288 F.3d at 1009. However, petitioner alleges that respondents retaliated against him *before* he could do any of those things, when they discovered that he intended to use the courts to obtain legal help. The retaliation petitioner identifies allegedly relates to his having prepared letters to lawyers, letters of complaint and other "legal documents" that he apparently hoped to use to litigate a case related to prison officials' misconduct. Hoping to engage in constitutionally protected activity is not itself constitutionally protected activity. At most, petitioner's actions could be construed as a "threat" to assert his rights but that is not enough. Bridges, 557 F.3d at 555 (noting that it "seems implausible that a *threat* to file a grievance would itself constitute a First Amendment protected grievance"). To the extent respondents injured petitioner's ability to gain access to the courts, that is a separate claim (which, as I explain below, has its own problems). I will deny petitioner leave to proceed on his claim that respondents Heisz, Wolfgram, Ashworth, Morris, Nickel, Winslow-Stanley and Grams retaliated against him for seeking legal assistance because the allegations do not allow an inference that he was engaged in a constitutionally protected activity.

D. Free Speech

The First Amendment's guarantee of freedom of speech provides protection from censorship of a prisoner's incoming and outgoing correspondence. Rowe v. Shake, 196 F.3d 778, 782 (7th Cir. 1999) (citing Thornburgh v. Abbott, 490 U.S. 401, 407-08 (1989);

Turner v. Safley, 482 U.S. 78, 89 (1987)). However, "the legitimate governmental interest in the order and security of penal institutions justifies the imposition of certain restraints on inmate correspondence." Procunier v. Martinez, 416 U.S. 396, 412-413 (1974).

Petitioner alleges that (1) respondents Heisz and Wolfgram blocked his mail to respondents Nickel, Morris and Grams; (2) respondents Ashworth and Nickel were involved in holding his incoming and outgoing mail; and (3) respondents Ashworth, Winslow-Stanley and Nickel retained written grievances and documents of petitioner's that had been confiscated during a search. Petitioner will be allowed to proceed on these claims. The allegations suggest that respondents may have had legitimate reasons for putting a block on petitioner's mail and interfering with at least some of his communications, but it is too early to determine whether respondents' reasons are adequate to justify their interference with the mail. Those questions will have to be addressed at a later stage, applying the standards set forth in Procunier v. Martinez, 416 U.S. 396 (1974) (outgoing mail) and Turner v. Safley, 482 U.S. 78 (1987) (incoming mail).

However, petitioner also alleges that "all respondents" read petitioner's mail when it was held by respondents Ashworth, Winslow-Stanley and Nickel. Petitioner may not proceed against respondents on such a barebones allegation. Aside from failing to provide plausible grounds for such a dubious claim, the mere reading of petitioner's already-confiscated mail does not rise to the level of a constitutional violation by itself. Therefore,

I will deny petitioner leave to proceed on his claim that respondents read his mail.

E. Denial of Access to the Courts

Although petitioner is less than direct about his claims, he suggests that he wishes to proceed on a claim that certain respondents violated his constitutional right to access to the courts by interfering with his attempts to seek legal assistance and file a grievance. To the extent petitioner wishes to proceed on such a claim, that request will be denied because he has not identified any injury that he has suffered from the alleged interference.

One of the elements for a claim for denial of access to the courts is an "actual injury" in the form of interference with an underlying claim. Lewis, 518 U.S. at 353. The only potential "underlying claims" in this case are those that petitioner is raising before this court, each of which is being addressed on the merits. To the extent petitioner was prevented from airing these issues as administrative grievances, that is unimportant; he is airing them now before this court. Because petitioner "is currently exercising his right to petition the government for redress of grievances, through this lawsuit, he has not been harmed" by the alleged interference with his ability to do so earlier. Bridges v. Gilbert, 557 F.3d 541, 555 (7th Cir. 2009).

At any rate, petitioner is likely to find that the most effective relief from respondents' alleged interference will be that provided in the "underlying" case itself. Christopher v.

Harbury, 536 U.S. 403, 415 (2002) (petitioners are usually better served attempting to raise access to courts concerns in the context of underlying case first). If respondents have interfered with petitioner's ability to pursue administrative remedies, that is an issue to raise in the context of a motion for summary judgment for failure to exhaust administrative remedies, where the question is whether petitioner exhausted all *available* remedies. 42 U.S.C. § 1997(e).

F. Claims against Evans and Essex

Petitioner mentions in passing that he seeks to assert a § 1983 claim against respondents Evans and Essex as well, but if he is "not allow[ed]," he would like to proceed against these respondents on two state law tort claims arising under Wis. Stat. §§ 893.52 and 893.54. Petitioner's request to proceed on a claim against respondents Evans and Essex under § 1983 must be denied. Section 1983 allows suit only against persons acting "under color of state law." There is no plausible basis on which to infer that respondents Evans and Essex were acting "under color of state law" when they assaulted petitioner. The "ultimate issue in determining whether a person is subject to suit under section 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?'" Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982). Although the allegations allow an inference to be drawn that

respondents Heisz and Wolfgram *let* respondents Evans and Essex assault him, there is nothing to suggest that these officials or any other respondents *directed* them to do so. Indeed, petitioner suggests that they had their own reasons for assaulting him.

As for petitioner's state law claims, they must be addressed elsewhere. 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 the two "form part of same case or controversy." Petitioner's allegations do not meet this standard. Although there is a close relationship between petitioner's claims against Evans and Essex and his claims against Heisz and Wolfgram, there is very little overlap in the facts relevant to each claim.

To prove a claim against Evans and Essex, petitioner will have to prove facts relating to Evans's, Essex's and his own actions and intentions. E.g., 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 the prison officials, which include whether those officials were aware of the risk that the alleged assault would occur and refused to take reasonable steps to prevent the assault. In other words, petitioner's claims against the prison officials are

distinct from his claims against respondents Evans and Essex. He can prove an assault and battery claim in state court against Evans and Essex without even mentioning the prison officials' actions or inactions. Allowing petitioner to litigate tort claims against Evans and Essex along with his constitutional claims against the prison officials would serve only to confuse matters. Therefore, I decline to exercise supplemental jurisdiction over petitioner's state law claims against respondents Evans and Essex. If petitioner wishes, he can pursue these claims in state court.

G. Respondents Ericksen and Pollard

Although petitioner names both Pete Ericksen and William Pollard in his complaint, he does not assert any claim against either of them, apparently naming them for the sole reason that he feels threatened at the Green Bay Correctional Institution and wants to be transferred to the Dodge Correctional Institution. However, petitioner does not allege any facts related to his attempts to address his safety concerns at his current institution or any constitutional failings on the part of officials at that institution. Thus, there is no basis for keeping respondents Ericksen or Pollard in this complaint. To the extent petitioner wishes to address safety concerns at his current institution, he will have to do so in a separate complaint, and with enough facts to put the respondents on notice of the nature of his claim.

H. Other Allegations not Related to Any Claims

Petitioner complains of other behavior by prison officials. He alleges that (1) both respondents Ashworth and Winslow-Stanley falsely accused him of being homosexual and in a gang; (2) he was charged for postage for mail that went through free mail; (3) and he had a few pieces of legal mail opened out of his presence. However, none of these allegations are related to any claims. As for respondents Ashworth's and Winslow-Stanley's offensive statements, neither occurred in the context of retaliation (Ashworth allegedly made the statements *before* he even asked petitioner to lie and refuse to cooperate and the allegations do not suggest that Winslow-Stanley made the statements for a retaliatory purpose). At most, these were mean-spirited statements, not actionable constitutional violations.

As for the allegations related to postage and legal mail, petitioner does not allege that any of the respondents were involved in those acts; therefore, he has no claim against respondents. At any rate, it is unlikely that the alleged false postage charges or failure to open legal mail in his presence on a handful of occasions would rise to the level of a constitutional claim.

On a final note, petitioner should be aware that he has a daunting task before him. He has petitioner raised thirteen claims. In most cases, such complaints must be severed into multiple lawsuits pursuant to Fed. R. Civ. P. 20 and George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007). In this case, however, petitioner's claims were all related to the same

"transaction or series of transactions": the assault he suffered at the hands of respondents Evans and Essex.

Now, however, what may have been the advantage of lumping his claims will quickly turn into a disadvantage: that of gathering evidence to support each and every one of those claims that have survived screening, to present either in response to a motion for summary judgment or at trial. Petitioner should be aware that he should not expect extra time or special treatment simply because his case is too big or complicated; he has made it that way. If he is serious about litigating this case, he should start preparing his materials as soon as possible and work diligently to meet the deadlines he will receive at an upcoming preliminary pretrial conference, to be scheduled after respondents are given an opportunity to answer the allegations set forth in his complaint.

ORDER

IT IS ORDERED that:

1. Petitioner Janari L. McKinnie's request for leave to proceed in forma pauperis is GRANTED on his claims that:

a. respondents Mark Heisz, Brad Wolfgram, Alan Morris, Janel Nickel and Greg Grams violated his Eighth Amendment rights by failing to protect him from a substantial risk of serious harm at the hands of other inmates;

b. respondents Dalia Suliene, Steve Helgersen and Sandra Sitzman violated his Eighth Amendment rights by failing to provide adequate medical care after petitioner was assaulted;

c. respondents Heisz and Wolfgram retaliated against him for reporting their misconduct to their superiors;

d. respondents Heisz and Wolfgram violated his free speech rights by blocking his mail to respondents Nickel, Morris and Grams;

e. respondents Anthony Ashworth and Nickel violated his free speech rights by holding his incoming and outgoing mail; and

f. respondents Ashworth, Leslie Winslow-Winslow-Stanley and Nickel violated his free speech rights by retaining grievances and documents of petitioner's that had been confiscated during a search.

2. Petitioner's request for leave to proceed in forma pauperis is DENIED on his claims that:

a. respondents Heisz, Morris and Wolfgram violated his Eighth Amendment rights by failing to provide him adequate medical care after he was assaulted; that claim is DISMISSED with prejudice for failure to state a claim upon which relief may be granted;

b. respondent Ashworth retaliated against him for his cooperation in the

prosecution of the inmates who assaulted him and refusal to lie to the disciplinary committee; that claim is DISMISSED with prejudice for failure to state a claim upon which relief may be granted;

c. respondents Heisz, Wolfgram, Ashworth, Morris, Nickel, Winslow-Stanley and Grams retaliated against him for his attempts to seek legal assistance against them or others; that claim is DISMISSED with prejudice for failure to state a claim upon which relief may be granted;

d. respondents violated his free speech rights by reading his mail after it had been confiscated; that claim is DISMISSED with prejudice for failure to state a claim upon which relief may be granted;

e. respondents violated his right to access to the courts by interfering with his ability to file grievances and seek legal assistance; that claim is DISMISSED as unripe;

f. respondents Kenneth Evans and Samuel Essex violated his constitutional rights by assaulting him; that claim is DISMISSED with prejudice for failure to state a claim upon which relief may be granted;

g. respondents Evans and Essex violated Wis. Stat. §§ 893.52 and 893.54 by assaulting him and damaging his property; those claims are DISMISSED without prejudice to petitioner's refiling the claims in state court;

3. Petitioner's complaint is DISMISSED as to respondents Evans, Essex, Pete

Ericksen and William Pollard.

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 respondents or to respondents' 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. Petitioner is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at the Green Bay Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

7. 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.

8. A strike will be recorded against petitioner pursuant to § 1915(g) because one or

more claims has been dismissed for failure to state a claim upon which relief may be granted.

Entered this 7th day of May, 2009.

BY THE COURT:

/s/

_____
BARBARA B. CRABB
District Judge