IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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OLIVER A. PENTINMAKI, JR.,

Plaintiff,

v.

Warden DIEDRE MORGAN,
Security Director THELEN, Captain SPROELICH,
Captain BUETTNER, Lt. WINCHELL,
Lt. ALBERTS, Sgt. KELLY, Sgt. HAVENS,
DEBRA LANCE, Dr. JANET WALSH,

Defendants.

OPINION AND ORDER

10-cv-325-slc[1]

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This is the second of five lawsuits that plaintiff Oliver Pentinmaki has filed in this court within the last few months. I concluded that his complaint in the first case violated the Federal Rules of Civil Procedure because he failed to adequately describe his claims, in violation of Rule 8, and he seemed to be attempting to include unrelated claims against different defendants, in violation of Rule 20. Pentinmaki v. Alberts, No. 10-cv-194-slc, dkt. #10. His proposed amended complaint had the same problems. Id. at dkt. #16. Plaintiff

[1] I am assuming jurisdiction over this case for the purpose of this order.

responded by further limiting his claims in case no. 10-cv-194-slc and by filing four additional lawsuits. Ultimately, I allowed plaintiff to proceed in case no. 10-cv-194-slc on an excessive force claim against two defendants. Id. at dkt. #22.

Plaintiff has made an initial partial payment of the filing fee in this case as directed by the court under 28 U.S.C. § 1915(b)(1). Because plaintiff is a prisoner, I am required under the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A.

Plaintiff's complaint in this case is difficult to follow, but it is possible to understand the gist of most of his allegations. Plaintiff seems to have divided his complaint into five claims involving allegations of verbal harassment, a failure to protect him from abuse by another prisoner, a discriminatory conduct report, a grievance he was prevented from filing and a lack of meaningful review of the grievances he did file. I conclude that plaintiff has stated a claim upon which relief may be granted with respect to his claims that defendants Thelen, Sproelich, Buettner, Winchell, Kelly, Havens, Lance and Walsh failed to protect him from a substantial risk of serious harm and that defendant Kelly prevented him from filing a grievance. The other three claims must be dismissed for plaintiff's failure to state a claim upon which relief may be granted.

DISCUSSION

Because plaintiff's allegations are difficult to summarize, I will repeat them verbatim in the context of discussing each claim.

A. Verbal Harassment

> On May 18, 2009, Winchell informed the Plaintiff that the Plaintiff was classified as the lowest form of humanity while reinforcing this statement with hand gestures and continuing with the fact that he spoke on the Warden's behalf.
>
> Rather than refuting Winchell's discriminatory classification of the Plaintiff, the Warden made recriminations toward the Plaintiff and informed supervising staff directly with copies that could be shared with other Oakhill staff illustrating deliberate indifference and support of Winchell's discriminatory stance as the Institution's general position toward the Plaintiff.

Plaintiff seems to believe that defendant Winchell (presumably a correctional officer) violated his constitutional rights by referring to him as "the lowest form of humanity" and that "the Warden" (who plaintiff identifies as Diedre Morgan in his caption) refused to correct the problem. Although the language Winchell allegedly used is deplorable, verbal abuse in prison does not state a claim under the Constitution. "Standing alone, simple verbal harassment does not constitute cruel and unusual punishment, deprive a prisoner of a protected liberty interest or deny a prisoner equal protection of the laws." DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000). Because Winchell's alleged comment does not

provide the basis for a claim, Morgan's alleged approval of the comment cannot either.

B. Failure to Protect

> Between May 18, 2009 and August 31, 2009, Thelen, Sproelich, Buettner, Winchell, Alberts, Kelly, Havens, Lance, and Walsh denied equal protection displaying discrimination by refusing to apply the fullest capabilities of the Institution while showing deliberate indifference when the plaintiff was subjected to: harassment (example: "toilet paper on my bed smeared with feces"); threats (example: "beating the shit out of me"); intimidation (example: "while stealing you blind"); theft (example: "Mr. Lowry blamed Mr. Yops for stolen pens"); destruction of property (example: "cutting into personal towel"); and personal violence (example: "being attacked physically without provocation") among other various and numerous methods from reports of May 14 through August 31, 2009.

Reading these allegations in isolation, it is difficult to understand what plaintiff is trying to say. However, for reasons that are not clear, plaintiff includes additional allegations about this claim in the complaint that he filed in case no. 10-cv-337-slc. In that complaint, plaintiff alleges that many of the defendants named in this claim disregarded complaints that plaintiff made about a cell mate who harassed and assaulted him. In particular, plaintiff alleges that he made multiple verbal and oral complaints to defendants Thelen, Sproelich, Buettner, Winchell, Kelly, Havens, Lance, and Walsh about his cell mate who ultimately struck him in the head. For the sake of expediency, rather than ask plaintiff to file an amended complaint in this case, I will direct the clerk of court to docket in this case the complaint from case no. 10-cv-337-slc so that I may consider his allegations

regarding defendants' alleged failure to protect him. (Because the complaint in case no. 10-cv-337-slc includes a number of other claims as well, I decline to consolidate the two cases. Further, I will not consider any other claims from case no. 10-cv-337-slc in the context of this case.)

The Supreme Court recognized in Farmer v. Brennan, 511 U.S. 825 (1994), that "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." See also Borello v. Allison, 446 F.3d 742, 747 (7th Cir. 2006). Further, a prisoner need not wait until he is assaulted or worse before obtaining injunctive relief. Farmer. 511 U.S. at 845; Helling v. McKinney, 509 U.S. 25, 33-34 (1993). Under the test set forth in Farmer, the question is whether prison officials are "deliberately indifferent" to a "substantial risk of serious harm" to the prisoner's safety. In practical terms, a claim under Farmer has three elements:

- Was plaintiff seriously harmed?
- Were defendants aware of a substantial risk that plaintiff would be seriously harmed?
- If defendants knew of the risk, did they take reasonable measures to avert it?

Fisher v. Lovejoy, 414 F.3d 659, 662 (7th Cir. 2005); Lewis v. Richards, 107 F.3d 549, 553 (7th Cir. 1997); Langston v. Peters, 100 F.3d 1235, 1238 (7th Cir 1996).

Liberally construing plaintiff's complaint, I understand him to allege that he was

assaulted and otherwise abused by his cell mate after defendants Thelen, Sproelich, Buettner, Winchell, Kelly, Havens, Lance, and Walsh disregarded complaints plaintiff made about the cell mate. At this stage of the proceedings, it is reasonable to infer from plaintiff's allegations that defendants knew that plaintiff's cell mate posed a substantial risk of serious harm to plaintiff, but they failed to take reasonable measures to prevent the abuse. Accordingly, I will allow plaintiff to proceed on this claim against those defendants. However, because plaintiff does not allege that he complained to defendant Alberts about his cell mate, the claim will be dismissed as to Alberts.

At summary judgment or trial, plaintiff will have to come forward with specific evidence showing that he was seriously harmed by his cell mate and that each defendant knew of a substantial risk of harm *before* it occurred. If any of the defendants did not learn of the harm until after it was too late to stop it, they cannot be held liable under the Constitution.

C. Discriminatory Conduct Report

> The Plaintiff was prosecuted with discriminatory intent through Conduct Report 2000954 wrongfully issued by Kelly with authorization from Thelen, written by Winchell and heard by Alberts supposedly involving the Plaintiff and an inmate named Walker who was not issued a conduct report for the alleged violation through selective prosecution.

Plaintiff seems to be alleging that prison officials discriminated against him by giving

him a conduct report but not another prisoner who was involved in the same act. Unfortunately for plaintiff, however, not every instance of perceived unfairness can be remedied with a federal lawsuit. An allegation that another prisoner received better treatment is not enough to show an equal protection violation, particularly when plaintiff includes no allegations regarding the nature of his alleged conduct or the conduct of the other prisoner. I explained this to plaintiff in the order screening his complaint in case no. 10-cv-194-slc.

Even in criminal cases, where the stakes can be much higher, mere disparity in sentencing is not enough to show a violation of equal protection. See, e.g., Russell v. Collins, 998 F.3d 1287, 1294 (5th Cir. 1993) (rejecting claim that petitioner's right to equal protection was violated when he received death sentence and codefendant convicted of same crime received sentence of imprisonment); Powell v. Ducharme, 998 F.2d 710, 716 (9th Cir. 1993); cf. United States v. Moore, 543 F.3d 891, 898-901 (7th Cir. 2008)(in prosecution setting, differential treatment without rational basis does not necessarily violate equal protection). Particularly with respect to a discretionary decision like the one at issue here, plaintiff must at a minium allege facts suggesting that the difference in treatment does not have a rational explanation or that he was discriminated against for a reason that is subject to heightened scrutiny, such as race. St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 639 (7th Cir. 2007) (quoting Wroblewski v. City of Washburn, 965 F.2d

452, 460 (7th Cir. 1992) (in equal protection claim, plaintiff must "allege facts sufficient to overcome the presumption of rationality that applies to government classifications."). Because plaintiff has failed to allege any facts suggesting that his discipline violated his constitutional rights, I must dismiss the complaint as to this claim.

D. Prior Restraint

> The Plaintiff was denied equal protection of PLRA mandated remedies at Oakhill by Kelly as the result of an August 3, 2009 threat that the Plaintiff would receive a conduct report for disobeying an order if assistance was requested with the inclusion of asking to file an incident report to pursue a grievance.

I understand plaintiff to be alleging that defendant Kelly threatened to issue a conduct report against him if he filed a grievance or an incident report. It is well established that a prison official may not retaliate against a prisoner for exercising his constitutional right to file a grievance or otherwise complain about prison conditions. Powers v. Snyder, 484 F.3d 929, 932 (7th Cir. 2007); Pearson v. Welborn, 471 F.3d 732, 738 (7th Cir. 2006). In this case, plaintiff does not seem to be alleging that Kelly actually retaliated against him, but that he *threatened* to retaliate against him if he exercised his constitutional rights. That is sufficient to state a claim. "Threatening penalties for future speech goes by the name 'prior restraint,' and a prior restraint is the quintessential first-amendment violation." Fairley v. Andrews, 578 F.3d 518, 525 (7th Cir. 2009). Accordingly, I will allow plaintiff to proceed

on this claim against defendant Kelly. At summary judgment or trial, plaintiff will have to come forward with specific evidence showing that Kelly threatened to issue a conduct report against him for engaging in constitutionally protected speech.

E. Failure to Investigate Grievances

> [T]he Plaintiff proceeds with the inclusion of ICE Lance's displays of discrimination toward the Plaintiff with trepidation knowing that wrongful actions have been done tantamount to sending "each grievance to the shredder without reading it"—but perhaps legally acceptable methods. Lance had rubber-stamped grievances and maintained deniability with various deficiencies without so much as a proper investigation to the facility's fullest capabilities or even contacted the Plaintiff to insure that all relevant facts had been presented beyond simply stating a claim. The grievances include: the May 26, 2009 theft of coffee and popcorn; the July 6, 2009 theft of a thesaurus; June 14, 2009 theft of a library book' October 16, 2009 ICI acknowledgment of stolen envelopes; October 29, 2009 ICI acknowledgment of stolen typing and carbon paper; September 18, 2009, ICI acknowledgment of wrongfully confiscated drink mixes; September 24, 2009 ICI acknowledgment of a wrongfully confiscated light bulb; and the October 2, 2009 ICI acknowledgment of stolen deodorant.

I understand plaintiff to be alleging that defendant Lance should be held liable for failing to properly investigate his grievances. These allegations do not state a claim upon which relief may be granted.

To begin with, most of the grievances plaintiff is complaining about are related to alleged thefts by other prisoners. It is certainly unfortunate that so many of plaintiff's items seem to have disappeared but I am not aware of any constitutional provision that would

require prison officials to prevent thefts from occurring or provide compensation or replacement when something is stolen by another prisoner. The rest of the grievances are related to property confiscated by prison staff. To the extent plaintiff is alleging that staff deprived him of property in violation of the due process clause, that claim fails because no due process violation occurs for a deprivation of property in prison, so long as a meaningful remedy exists post-deprivation. Hudson v. Palmer, 468 U.S. 517 (1984). In Wisconsin, Wis. Stat. ch. 893 authorizes tort actions to recover damages for wrongfully taken or detained personal property and for the recovery of the property.

Even if prison staff could be held liable under § 1983 for failing to prevent a theft or confiscating a prisoner's property, this would not mean that grievance examiners could be held liable for failing to investigate a prisoner's grievances about these matters. Prison officials may not prevent a prisoner from filing grievances or retaliate against him for filing one, DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000), but they are under no constitutional obligation to provide an *effective* grievance system or, for that matter, any grievance system at all. Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993); see also Antonelli v. Sheahan, 81 F.3d 1422, 1431 (7th Cir. 1996). If a prison official fails to give individualized consideration to a grievance, this certainly runs counter to the problem-solving purpose of a grievance system, but it does not prevent or hinder a prisoner from filing a lawsuit, as is demonstrated by plaintiff's bringing of this case.

More generally, the Constitution does not require prison officials to take any particular action after a problem a occurs. Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002) ("[T]he defendants' uncooperative approach is not an independent constitutional tort; there is no duty to assist in an effort to obtain private redress.") A prison official "who rejects an administrative complaint about a completed act of misconduct does not violate the Constitution because "[r]uling against a prisoner on an administrative complaint does not cause or contribute to the violation." George v. Smith, 507 F.3d 605, 609-10 (7th Cir. 2007).

Plaintiff suggests that defendant Lance should be held liable because he believes her actions were "tantamount to sending each grievance to the shredder without reading it." Plaintiff seems to be quoting Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009), but he has taken the quotation of out context. The question in Burks was whether a grievance examiner could be held liable for failing to take reasonable measures to *prevent an assault* by another prisoner. The court stated that "[o]ne can imagine a complaint examiner doing her appointed tasks with deliberate indifference to the risks imposed on prisoners. If, for example, a complaint examiner routinely sent each grievance to the shredder without reading it, that might be a ground of liability." Id. Because plaintiff's claim is not that Lance failed to prevent a constitutional violation, but that she failed to take corrective action after his property was taken, he may not proceed on this claim.

ORDER

IT IS ORDERED that

1. The clerk of court is directed to docket the complaint from case no. 10-cv-337-slc as a supplement to the complaint in this case. Case no. 10-cv-337-slc shall remain open as separate case at this time.

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

(a) defendants Thelen, Sproelich, Buettner, Winchell, Kelly, Havens, Lance, and Walsh knew of a substantial risk that another prisoner was abusing plaintiff, but they failed to take reasonable measures to stop the abuse, in violation of the Eighth Amendment;

(b) defendant Kelly prevented plaintiff from filing a grievance, in violation of the First Amendment.

3. Plaintiff's complaint is DISMISSED as to all other claims. The complaint is DISMISSED as to defendant Alberts.

4. A strike will be recorded in accordance with 28 U.S.C. § 1915(g) and George v. Smith, 507 F.3d 605 (7th Cir. 2007).

5. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the

court's copy that he has sent a copy to defendants or to defendants' attorney.

6. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of documents.

7. Plaintiff is obligated to pay the unpaid balance of his filing fees in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fees have been paid in full.

8. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

9. When defendants file their answer, they should respond to each of the paragraphs of the complaint in case no. 10-cv-325-slc as well as paragraphs 3 and 7 of the complaint in

case no. 10-cv-337-slc.

Entered this 20th day of July, 2010.

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