IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIE SIMPSON,

OPINION and ORDER

Plaintiff,

11-cv-851-bbc

v.

WSPF Warden TIMOTHY HAINES, THOMAS BELZ,
KEITH WEIGAL, TIMOTHY JONES, CO JONES,
MICHAEL COCKCROFT, TODD BRUDOS,
DAN ESSER, SUSAN GALLINGER,
CO SCULLION, CO BROWN, SGT. BRINKMAN,
SGT. WALLACE and JOLENDA WATERMAN,

Defendants.

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In the April 2, 2012 screening order in this case, I allowed plaintiff Willie Simpson, a prisoner at the Wisconsin Secure Program Facility, to proceed on the following claims:

> (1) Defendants Thomas Belz, Keith Weigal, Timothy Jones, C.O. Jones, Michael Cockcroft, C.O. Scullion, C.O. Brown, Todd Brudos, Dan Esser, Susan Gallinger, Sgt. Brinkman and Sgt. Wallace violated plaintiff's Eighth Amendment right to humane conditions of confinement by introducing toxic chemicals into his cell and banging on his cell walls; and defendant Warden Timothy Haines violated the Eighth Amendment by failing to take action after plaintiff complained about the conditions;
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> (2) Defendants Belz, Weigal, Timothy Jones, C.O. Jones, Cockcroft, Scullion, Brown, Brudos, Esser, Gallinger, Brinkman and Wallace violated plaintiff's Eighth Amendment right against excessive use of force by introducing toxic chemicals into his cell; and defendant Haines failed to protect plaintiff from harm after plaintiff complained.
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> (3) Defendant Jolenda Waterman violated plaintiff's Eighth Amendment right to adequate medical care by withholding treatment for plaintiff's HIV.

Dkt. #9. In the April 2 order, I dismissed various other claims brought by plaintiff either because he failed to raise allegations sufficient to state a claim upon which relief could be granted or because the allegations failed to show that plaintiff was in imminent danger of serious physical harm, as is required for him to proceed on a claim without prepaying the entire filing fee for this action. 28 U.S.C. § 1915(g). Now plaintiff has filed a motion for leave to amend his complaint along with a proposed amended complaint. Dkt. #13. Because plaintiff filed his proposed amended complaint before defendants filed their answer, plaintiff has a right to amend his complaint once without leave of court. Fed. R. Civ. P. 15(a)(1). Accordingly, I will treat plaintiff's proposed amended complaint as the operative complaint in this case. Massey v. Helman, 196 F.3d 727, 735 (7th Cir. 1999) ("[W]hen a plaintiff files an amended complaint, the new complaint supersedes all previous complaints and controls the case from that point forward.") I will discuss each of the claims in plaintiff's amended complaint in turn.

DISCUSSION

A. Conditions of Confinement and Excessive Force

The heart of plaintiff's complaint continues to be his allegations that prison officials introduced toxic chemicals into his cell and banged on the walls of his cell, preventing him from being able to sleep. I already have concluded that plaintiff's allegations about the chemicals sustain both a conditions of confinement claim and an excessive force claim and that the allegations of sleep deprivation support his conditions of confinement claim. Plaintiff has amended his complaint to add the names of more prison officials who used chemicals against

him and banged on his cell walls: C.O. Oswald, C.O. Parr, C.O. Sutters, C.O. Genrich, C.O. Pelky, C.O. Moris, Sgt. Leffler, Sgt. Hill, Sgt. Sherman, Sgt. Richter and Sgt. Roberts. Moreover, he has added additional detail to his conditions of confinement claim by stating that both the original and new defendants injured him by blocking the air vents in his cell when they applied the chemicals. Accordingly, I will allow him to proceed on his conditions of confinement and excessive force claims against the original and new defendants.

B. Failure to Protect

Plaintiff continues to allege that he complained to defendant Warden Haines about prison personnel's repeated use of chemicals but that Haines failed to protect him from further harm. I will allow plaintiff to proceed on this claim.

C. Conspiracy to Harm Plaintiff

Plaintiff has named Wisconsin Governor Scott Walker, Wisconsin Attorney General J.B. Van Hollen and Assistant Attorney General Abigal Potts as defendants and attempts to bring an Eighth Amendment claim against them, stating that they are conspiring with the various prison officials named in the complaint in an effort to kill plaintiff. He believes that defendants concocted this plan to silence plaintiff before he is successful in conducting other litigation that he believes will invalidate the state's truth-in-sentencing laws, leading to the grant of new trials for thousands of prisoners.

Particularly because of the fantastical nature of his allegations, plaintiff must include

enough specific facts to raise his claim above the level of speculation. Cooney v. Rossiter, 583 F.3d 967, 971 (7th Cir. 2009) ("[T]he plaintiff must meet a high standard of plausibility" when alleging "a vast, encompassing conspiracy"); Riley v. Vilsack, 665 F. Supp. 2d 994, 1003 (W.D. Wis. 2009) (heightened pleading requirement appropriate "when the theory of the plaintiff seems particularly unlikely"). Plaintiff fails to allege such facts, instead relying on a letter from defendant Potts as the foundation for his claim.

This letter, attached to the amended complaint, is the state's response to a letter plaintiff sent Van Hollen stating that prison officials were trying to kill him. In the response, Potts stated that the attorney general's office could not provide plaintiff with assistance in the matter and encouraged him to utilize the prison's inmate complaint system or contact a private attorney or local law enforcement. Plaintiff states that this letter "indicates a connection" between Walker, Van Hollen, Potts and the prison officials trying to harm plaintiff, or at least shows that they condone the violence threatened toward plaintiff, but this is an unreasonable reading of the letter. Rather than assisting or condoning defendant prison personnel in harming plaintiff, Potts explained why her office could not assist plaintiff and outlined options to guide him in finding help.

In any case, defendants Walker, Van Hollen and Potts did not have the duty of resolving what amounts to an inmate grievance or criminal matter, Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009)(prison official cannot be held liable for failing to take action outside his job duties), and plaintiff does not provide any allegations making it remotely plausible that these defendants acted in any way to assist others in harming plaintiff. Accordingly, I conclude

that plaintiff has failed to state an Eighth Amendment claim against those defendants.

D. Retaliation

In the April 2, 2012 screening order, I denied plaintiff leave to proceed on his First Amendment retaliation claim against various prison officials for pumping toxic chemicals into his cell after those officials had sworn revenge against plaintiff because he had defended himself in physical altercations with prison staff. As I told plaintiff in the screening order, to state a claim for retaliation he must plead three elements: (1) the constitutionally protected activity in which he was engaged; (2) one or more retaliatory actions taken by each defendant that would deter a person of "ordinary firmness" from engaging in the protected activity; and (3) sufficient facts that would make it plausible to infer that plaintiff's protected activity was one of the reasons defendants took the action they did against him. Bridges v. Gilbert, 557 F.3d 541, 556 (7th Cir. 2009). I concluded that his retaliation claim failed because he failed to identify a constitutionally protected activity in which he was engaged; instead, he alleged only that defendants retaliated against him for fighting prison staff, which is not a protected activity.

Plaintiff's amended complaint contains more detailed allegations that raise several possible retaliation claims. Plaintiff again alleges that several prison staff members (defendants Belz, Sgt. Broadbent, Brudos, Waterman and other unnamed officers) swore revenge against him in connection with a physical altercation. As with plaintiff's original allegations, these allegations fail to state a retaliation claim because plaintiff fails to identify a constitutionally protected activity in which he was engaged.

Plaintiff alleges also that defendants Walker, Van Hollen, Potts and various prison staff entered into a conspiracy to harm him after plaintiff argued to Wisconsin courts that the state's truth in sentencing laws were invalid. Unlike the previous claim, plaintiff successfully identifies a protected activity—litigating the validity of Wisconsin sentencing laws. However, as discussed above, plaintiff's conspiracy theory is inherently implausible, and any connection this alleged conspiracy has to his recent treatment at the hands of prison staff is based on pure speculation.

Finally, plaintiff alleges that defendant Brudos and six unnamed correctional officers came to his cell on March 28, 2012, and that Brudos threatened to "attack [him] and shoot [him] with a tazer gun if [he] did not stop asserting [his] rights to appear in court." These concrete allegations are sufficient to sustain a retaliation claim against Brudos and the six unnamed correctional officers. Pieczynski v. Duffy, 875 F.2d 1331, 1333 (7th Cir. 1989) (threats and harassment can be actionable in a First Amendment retaliation case). It is unclear whether the unnamed correctional officers will end up being already-named defendants, but if they are not, plaintiff will be given an opportunity to conduct discovery in order to ascertain the names of these defendants.

E. Grant County

In his amended complaint, plaintiff again attempts to bring a claim against defendants Grant County, Grant County District Attorney's Office, Grant County Sheriff's Department, and Grant County Courthouse, stating that the county failed to protect him from defendant

prison personnel. Plaintiff alleges that after he got into a physical altercation with prison staff, the sheriff's department investigated the incident, but District Attorney Lisa Riniker filed battery charges against plaintiff rather than against prison staff. Also, plaintiff alleges that he filed a John Doe criminal complaint in the Circuit Court for Grant County, but the case was dismissed and the judge failed to issue an injunction keeping plaintiff safe.

In the April 2 screening order, I stated that plaintiff could not bring a claim against Grant County judges for failing to protect him because they have judicial immunity. Plaintiff has now stated that he does not seek any claims against individuals. Rather, he styles his claim as one against the county for maintaining a policy or custom of "deny[ing] prisoners' requests for safety from WSPF officials." He states that the county acts this way at least in part because prison officials at the Wisconsin Secure Program Facility are related to the sheriff and D.A. Riniker.

In order to sustain a claim for municipal liability against Grant County, plaintiff must allege that there is (1) an explicit policy that results in constitutional deprivations when enforced; (2) a widespread practice so prevalent as to constitute a custom or usage with the force of law even if it is not an express policy; or (3) that his injury was caused by a person with final policymaking authority. McTigue v. City of Chicago, 60 F.3d 381, 382 (7th Cir. 1995); see also Monell v. New York City Department of Social Services, 436 U.S. 658 (1978).

Plaintiff fails to state a claim with regard to either (1) the failure to charge prison staff with battery or (2) the judge's dismissal of plaintiff's John Doe proceeding. First, circuit court judges are not agents of the county; they are "the local presence of the state." Iowa County v.

Iowa County Courthouse, 166 Wis. 2d 614, 619, 480 N.W.2d 499, 501 (1999). Accordingly, the decision to dismiss plaintiff's John Doe criminal case cannot be imputed to the county. Woods v. City of Michigan City, 940 F.2d 275, 279 (7th Cir. 1991).

As for the claim regarding the failure to charge prison staff with battery, plaintiff has not alleged a specific pattern or series of incidents supporting a general allegation of a custom or policy. Rather, he states that one incident occurred and then alleges in conclusory fashion that the county has a policy of choosing to ignore risks to prisoners. This is not sufficient to sustain a Monell claim for municipal liability. Blanton v. City of Indianapolis, 830 F.Supp. 1198, 1202 (S.D. Ind. 1993) ("[T]he complaint must set out some fact or facts to suggest that the claimed policy or custom actually exists, and that the alleged deprivation resulted from enforcement or pursuit of that policy—i.e. that the deprivation was not an 'isolated' incident.").

Moreover, Monell liability cannot be imposed where there is no underlying constitutional violation, Tesch v. County of Green Lake, 157 F.3d 465, 477 (7th Cir. 1998). Plaintiff fails to state a claim under Monell because he fails to show that the district attorney violated any right of plaintiff by failing to charge prison officials. The Constitution "does not require the states to prosecute persons accused of wrongdoing." Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002), see also Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) ("A private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.")

F. Waupun Correctional Institution

Plaintiff brings Eighth Amendment claims against several defendants at the Waupun

Correctional Institution for harm he suffered there. Plaintiff alleges that he was transferred to the Waupun prison in August 2011 and transferred back to the Wisconsin Secure Program Facility in November 2011. While he was at the Waupun prison, plaintiff was violently assaulted twice, once by defendant C.O. Beahem and a second time by defendants Beahem and C.O. Staniec. Plaintiff raised concerns about his physical safety with defendants Warden William Pollard and Lt. Braemer but they did not protect plaintiff from the second attack.

Plaintiff cannot bring these claims for two reasons. First, under Fed. R. Civ. P. 20, plaintiff may not join unrelated claims against different defendants in the same lawsuit, see also George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007), and plaintiff's claims against the Waupun defendants do not seem to be related to other claims.

Second, even if the claims were related, plaintiff would not be able to proceed with them because he is prohibited from proceeding in forma pauperis on claims of past harm. As I explained in the April 2, 2012 screening order, because plaintiff has struck out under 28 U.S.C. § 1915(g), he may proceed in forma pauperis only on claims that he is in imminent danger of serious physical injury. Claims of past harm from a different prison do not suffice to meet this standard. If plaintiff wishes to bring these claims in a separate lawsuit, he will have to prepay the entire $350 filing fee.

G. Medical Care

In his proposed amended complaint, plaintiff alleges that defendants Jolenda Waterman, Burton Cox and Mary Miller violated plaintiff's Eighth Amendment right to adequate medical

care by withholding treatment for plaintiff's HIV. However, following submission of his proposed amended complaint, plaintiff filed a motion to voluntarily dismiss his medical care claims. Defendants have stipulated to the dismissal of these claims without prejudice. Accordingly, these claims are dismissed without a court order pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii).

ORDER

IT IS ORDERED that

1. Plaintiff Willie Simpson's motion for leave to amend his complaint is DENIED as unnecessary; under Fed. R. Civ. P. 15(a)(1), plaintiff may amend his complaint as a matter of course.

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

a. Defendants Scott Walker, J.B. Van Hollen and Abigal Potts violated plaintiff's Eighth Amendment rights by conspiring to harm him.

b. Defendants Belz, Sgt. Broadbent, Brudos, Waterman and other unnamed officers violated plaintiff's First Amendment rights by retaliating against plaintiff for getting into altercations with prison staff.

c. Defendants Walker, Van Hollen, Potts and various prison staff violated plaintiff's First Amendment rights by retaliating against him after he argued to Wisconsin courts that the state's truth in sentencing laws were invalid.

d. Defendants Grant County, Grant County District Attorney's Office, Grant

County Sheriff's Department, and Grant County Courthouse failed to protect plaintiff from defendant prison personnel.

e. Defendants C.O. Beahem and C.O. Staniec violated plaintiff's Eighth Amendment by using excessive force against plaintiff while he was incarcerated at the Waupun Correctional Institution, and defendants Warden William Pollard and Lt. Braemer failed to protect him from that harm.

3. Defendants Broadbent, Walker, Van Hollen, Potts, Grant County, Grant County District Attorney's Office, Grant County Sheriff's Department, Grant County Courthouse, Beahem, Staniec, Pollard, Braemer, Jolenda Waterman, Burton Cox and Mary Miller are DISMISSED from this case.

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

a. Defendants Thomas Belz, Keith Weigal, Timothy Jones, C.O. Jones, Michael Cockcroft, C.O. Scullion, C.O. Brown, Todd Brudos, Dan Esser, Susan Gallinger, Sgt. Brinkman, Sgt. Wallace, C.O. Oswald, C.O. Parr, C.O. Sutters, C.O. Genrich, C.O. Pelky, C.O. Moris, Sgt. Leffler, Sgt. Hill, Sgt. Sherman, Sgt. Richter and Sgt. Roberts violated plaintiff's Eighth Amendment right to humane conditions of confinement by introducing toxic chemicals into his cell and banging on his cell walls; and defendant Warden Timothy Haines violated the Eighth Amendment by failing to take action after plaintiff complained about the conditions.

b. Defendants Belz, Weigal, Timothy Jones, C.O. Jones, Cockcroft, Scullion, Brown, Brudos, Esser, Gallinger, Brinkman, Wallace, C.O. Oswald, C.O. Parr, C.O. Sutters, C.O. Genrich, C.O. Pelky, C.O. Moris, Sgt. Leffler, Sgt. Hill, Sgt. Sherman, Sgt. Richter and

Sgt. Roberts violated plaintiff's Eighth Amendment right against excessive use of force by introducing toxic chemicals into his cell; and defendant Haines failed to protect plaintiff from harm after plaintiff complained.

c. Defendant Brudos and six unnamed correctional officers violated plaintiff's rights under the First Amendment by threatening harm to him in retaliation for his involvement in litigation.

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

Entered this 2d day of August, 2012.

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