IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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THOMAS W. ZACH,

Plaintiff,

v.

BRIAN BEAHM, BRIAN GREEN,
SANDY HEISER, ROBERT SCHENCK,
RANDY LEWIS, TROY HERMANS,
THOMPSON CORRECTION CENTER,
KAREN GOURLIE, TODD JOHNSON,
TOM GOZINSKE, WELCOME ROSE,
TIMOTHY LUNQUIST, ISMAEL OZANNE,
AMY SMITH, WISCONSIN DEPARTMENT
OF CORRECTIONS, JOHN DOE and JANE DOE,

Defendants.

ORDER

13-cv-849-bbc

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Plaintiff Thomas Zach, a former prisoner at the Thompson Correctional Center, filed a proposed complaint against various Wisconsin Department of Corrections employees. In a March 13, 2014 order, I dismissed plaintiff's complaint because it violated Federal Rule of Civil Procedure 20 by joining several claims that did not belong in the same lawsuit and because the allegations were too vague to give defendants a fair understanding of plaintiff's claims, thereby violating Federal Rule of Civil Procedure 8. I gave plaintiff a chance to respond to the order, telling him to identify which of the four separate lawsuits he wished to pursue under this case number and to say whether he wished to pursue any of the other

three lawsuits under separate case numbers. In addition, I directed him to provide an amended complaint for any case he wished to continue to pursue, providing allegations that properly put defendants on notice of the claims he wished to bring against them.

Plaintiff has indicated that he wishes to pursue the lawsuit I identified as Lawsuit #2 in the order (containing claims that defendants Troy Hermans and Randy Lewis placed him in temporary lockup). He has now submitted an amended complaint concerning those claims and clarifying others that he wishes to bring, dkt. #7. Therefore, I will screen plaintiff's amended complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. McGowan v. Hulick, 612 F.3d 636, 640 (7th Cir. 2010). After considering plaintiff's allegations regarding the variety of claims he is attempting to bring regarding his placement in temporary lockup, I will allow him to proceed on claims that defendants Hermans and Lewis violated his First and Eighth Amendment rights by placing him in a cell with substandard conditions in retaliation for filing a grievance; and that defendant John Doe prison officials violated his Eighth Amendment rights by ignoring his requests for medical treatment while he was in temporary lockup. I will deny plaintiff leave to proceed on the remainder of his claims and dismiss the other defendants named in the caption of his amended complaint.

I draw the following facts from plaintiff's amended complaint.

ALLEGATIONS OF FACT

Plaintiff Thomas Zach was incarcerated for a time at the Thompson Correctional Center. On April 3, 2009, he was summoned to one of the prison vehicles. Defendant Brian Beahm showed plaintiff that the seat belt was buckled in the empty driver's seat, which plaintiff does to remind other prisoners to use the seat belt. Beahm yelled at plaintiff and threatened him with a "warning." Plaintiff asked why what he did was wrong. Beahm became more confrontational and ultimately gave plaintiff a written warning.

Plaintiff drafted a grievance about this incident, citing Beahm's hostile attitude. On April 17, 2009, plaintiff handed the grievance to defendant Robert Schenck, who was sitting at the officers' table in the dining room.

Later that day, defendant Randy Lewis placed plaintiff in temporary lockup and gave him a "Notice of Offender Placed in Temporary Lockup" signed by defendants Troy Hermans and Lewis. (Plaintiff does not say where the lockup was; it appears that it was not at Thompson.) The written reason for the punishment was "Pending investigation for unauthorized forms of communication." Plaintiff "realiz[ed] immediately" that this was defendants Hermans and Schenck's way of retaliating against him for filing a grievance against Beahm. When plaintiff asked what was happening, Lewis responded, "You tell me, seems you pissed off someone." Plaintiff was never issued a conduct report for events related to the investigation.

Plaintiff remained in lockup (a form of segregation) for 12 days in a cell with a "severely worn out and tattered (1) inch in density, mold infested mattress." Plaintiff says that while he was in segregation, he "suffered the ill effects caused by painful constipation,

severe cramping and body aches, nightmares and painful dried out skin and bed sores that were scabbing up due to the flat, worn out mold infested and torn vinyl mattress and cold dry air in segregation" and that he suffered from "severe sleep deprivation . . . bed sores, low caloric intake, night terrors and the pain and suffering associated with being forced to sleep on" the thin, moldy mattress. Plaintiff filed several requests to change the mattress and several medical requests but he did not receive a new mattress or any medical attention.

During his time in segregation, plaintiff received a rejection of his grievance from defendant Schenck. The stated reason for the rejection was that plaintiff filed it more than 14 days after the incident, but this was incorrect; plaintiff gave Schenck the grievance on April 17, the fourteenth day.

On April 29, 2009, plaintiff was released from temporary lockup. Defendants Schenk and Hermans either allowed or authorized defendant Beahm to transport plaintiff back to the Thompson Correctional Center. Being in Beahm's presence following his "constant bullying and retaliation" caused plaintiff a headache, nausea and severe anxiety.

Plaintiff believes that all of the defendants are aware that he has been involved in litigating a state habeas corpus action and various inmate grievances. At one time or another, plaintiff has filed grievances against each of the named defendants.

OPINION

In parsing plaintiff's original complaint, I described the claims in individual "Lawsuit #2" as "claims that defendants Troy Hermans and Randy Lewis placed plaintiff in temporary

lockup, where he suffered substandard conditions of confinement." Dkt. #4. Now that plaintiff has filed an amended complaint clarifying his claims, I understand him to be asserting the following claims:

- defendant Beahm berated plaintiff and gave him a written warning;
- defendants Hermans and Lewis placed plaintiff in temporary lockup, where he suffered substandard conditions of confinement;
- unnamed defendants did not help plaintiff after he complained about the poor conditions and his medical problems caused by the conditions;
- defendant Schenck rejected plaintiff's grievance as untimely even though plaintiff handed it to him within the allowable time;
- defendants Schenk and Hermans either allowed or authorized defendant Beahm to transport plaintiff back to the prison, which caused plaintiff physical and emotional distress; and
- all of these actions were performed by defendants to retaliate against him for his previous lawsuits and grievances.

A. Retaliation

Plaintiff brings an overarching claim that all of defendants' actions were taken to retaliate against him for his previous lawsuits and grievances. To state a claim for retaliation under the First Amendment, a plaintiff must identify (1) the constitutionally protected activity in which he was engaged; (2) one or more retaliatory actions taken by the defendant that would deter a person of "ordinary firmness" from engaging in the protected activity; and (3) sufficient facts to make it plausible to infer that the plaintiff's protected activity was one of the reasons defendant took action against him. Bridges v. Gilbert, 557 F.3d 541, 556 (7th Cir. 2009). Plaintiff alleges facts sufficient to meet the first two elements: he has a

constitutional right under the First Amendment to file grievances and lawsuits without the threat of retaliation, Hoskins v. Lenear, 395 F.3d 372, 375 (7th Cir. 2005); Babcock v. White, 102 F.3d 267, 274–75 (7th Cir. 1996), and it seems likely that at least some of the alleged actions by defendants would serve to deter a person of "ordinary firmness" from filing future grievances or lawsuits. However, he largely fails in meeting the third element.

In the court's March 13, 2014 order, I addressed similar claims brought by plaintiff in his original complaint:

> At any rate, it is clear that plaintiff's claims cannot stand together at this point because his allegations of retaliation by Schenck (as well as the other defendants) are so vague that they fail to state a claim and thus cannot serve to connect his various underlying claims together under Rule 20. . . .
>
> Plaintiff's allegations supporting the third prong of this analysis [that plaintiff's protected activity was one of the reasons defendant took the action she did against him] are so thin that he does not state plausible claims for retaliation. Plaintiff suggests that all of the defendants are aware that he has litigated a state habeas proceeding and inmate grievances, but his allegations are too vague. . . . At this point, most of plaintiff's allegations of retaliation rely purely on plaintiff's speculation that defendants acted the way they did because of his habeas corpus action or inmate grievances. He suggests that defendants took the alleged retaliatory actions *after* he filed certain grievances, but he does not describe when he filed those grievances or who the subjects were.

Dkt. #4. Plaintiff's amended complaint does not cure this problem. He has not shown any real connection between his litigation and grievance history and the actions taken by defendants, with one exception. Plaintiff states that defendants Hermans and Lewis placed him in temporary lockup several hours after he handed the grievance to Schenck, which I conclude at this point is barely sufficient at this stage to show a retaliatory motive. Massey v. Johnson, 457 F.3d 711, 717 (7th Cir. 2006) ("Circumstantial proof, such as the timing

of events . . . may be sufficient to establish the defendant's retaliatory motive."). Accordingly, I will deny plaintiff leave to proceed on all of his retaliation claims with the exception of his claim that Hermans and Lewis placed plaintiff in temporary lockup in retaliation for filing a grievance against Beahm. I will move on to consider whether defendants' underlying actions violate the Constitution in their own right, apart from plaintiff's retaliation claims.

B. Verbal Harassment and Written Warning

I understand plaintiff to be raising claims against defendant Beahm for berating him and giving him a written warning, and against defendants Schenk and Hermans for having Beahm transport him back to the prison despite the anxiety plaintiff felt in Beahm's presence as a result of Beahm's verbal abuse. I conclude that none of these allegations support a claim upon which relief may be granted. By itself, verbal harassment is rarely sufficient to support a constitutional claim. Dewalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000) ("[S]imple 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."); Dobbey v. Illinois Department of Corrections, 574 F.3d 443, 446 (7th Cir. 2009) ("[H]arassment, while regrettable, is not what comes to mind when one thinks of 'cruel and unusual' punishment."). Therefore, I conclude that plaintiff has not stated a claim against Beahm for verbally harassing him or against Schenk and Hermans for placing plaintiff with Beahm.

In addition, to the extent that plaintiff seems to be saying that Beahm gave him a

baseless "written warning," that allegation does not support an actionable claim. Usually, as long as a prisoner's disciplinary hearing provided procedural due process, an allegation that a prison official offered false evidence or false reports in order to implicate the inmate in a disciplinary infraction does not state a claim for which relief can be granted. Hanrahan v. Lane, 747 F.2d 1137, 1141 (7th Cir. 1984). Here, the disciplinary process never even progressed to the hearing stage; it appears that plaintiff was investigated for an infraction, but did not end up receiving a conduct report. Beahm's written warning falls well short of any discipline supporting a claim. Clark v. Stevenson, 06-C-419-C, 2006 WL 2380658 (W.D. Wis. Aug. 15, 2006) ("Because petitioner was not deprived of any protected liberty interest, he had no right to any process before being given the warnings to which he objects.").

C. Conditions of Confinement

I understand plaintiff to be alleging that defendants Hermans and Lewis knowingly placed him in an segregation cell that was unhealthy and extremely uncomfortable because of a thin, moldy mattress and cold, dry air. The Eighth Amendment's prohibition against cruel and unusual punishment imposes a duty upon prison officials to provide prisoners "humane conditions of confinement." Farmer v. Brennan, 511 U.S. 825, 832 (1994). Although there is no definitive test to determine whether conditions of confinement are cruel and unusual under the Eighth Amendment, the following kinds of alleged conditions have been found to rise to the level of unsanitary conditions: sleeping on a moldy and wet

mattress for 59 days, Townsend v. Fuchs, 522 F.3d 765, 773-74 (7th Cir. 2008); a lack of sanitary conditions, including clean bedding, Gillis v. Litscher, 468 F.3d 488, 493-94 (7th Cir. 2006); having to live in a cell in which there was mold and fiberglass in the ventilation ducts, causing the plaintiff severe nosebleeds and respiratory problems, Board v. Farnham, 394 F. 3d 469, 486 (7th Cir. 2005); having to live for sixteen months in a cell infested with cockroaches that crawled over the prisoner's body, Antonelli v. Sheahan, 81 F.3d 1422, 1431 (7th Cir. 1996); having to live in "'filth, leaking and inadequate plumbing, roaches, rodents, the constant smell of human waste, poor lighting, inadequate heating, unfit water to drink, dirty and unclean bedding, without toilet paper, rusted out toilets, broken windows, [and] . . . drinking water contain[ing] small black worms which would eventually turn into small black flies,'" Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992); and confinement in isolation without adequate clothing or bedding, Maxwell v. Mason, 668 F.2d 361, 363 (8th Cir. 1981).

Although I am dubious about many of plaintiff's allegations regarding this claim, particularly that a thin mattress would cause symptoms like constipation or night terrors, plaintiff's allegations that the mattress was moldy and he developed bed sores is barely enough to state a conditions of confinement claim. At summary judgment or trial, plaintiff will have to come forward with specific facts showing that the mattress or other cell conditions caused him harm and that Hermans and Lewis knew about the risk and disregarded it.

D. Medical Care

I understand plaintiff to be bringing claims against unnamed "John Doe" prison officials for failing to arrange for medical treatment when plaintiff complained about the various maladies from which he suffered while he was in temporary lockup. Under the Eighth Amendment, prison officials have a duty to provide medical care to those being punished by incarceration. 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. Id. at 104.

A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). 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, Gutierrez v. Peters, 111 F.3d 1364, 1371-73 (7th Cir. 1997), "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), or otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825, 847 (1994). "Deliberate indifference" means that defendant was 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).

At this point in the proceedings, I conclude that it is possible that at least some of the symptoms plaintiff suffered in temporary lockup could be considered objectively serious

enough to pass muster under this standard, and the Doe defendants' failure to provide any medical assistance whatsoever is sufficient to show that they acted with deliberate indifference to his suffering. At the preliminary pretrial conference for this case, Magistrate Judge Stephen Crocker will explain the process plaintiff must use to identify the Doe defendants through the discovery process and amend his complaint to add those defendants' full names. For the sole purpose of allowing plaintiff to discover the identity of the Doe defendants, I will add Wayne Olson, superintendent of the Thompson Correctional Center, as a nominal defendant. Duncan v. Duckworth, 644 F.2d 653, 656 (7th Cir. 1981) (suggesting that naming a senior prison official is appropriate "to insure that those more directly involved will be identified").

E. Rejection of Grievance

Finally, plaintiff raises what I understand to be a due process claim that defendant Schenck rejected his grievance about Beahm's harassment as untimely even though plaintiff handed it to Schenck within the allowable time. This allegation does not state a constitutional claim. As stated above, although prison officials may not retaliate against a prisoner for filing a grievance, they are under no constitutional obligation to provide an effective grievance system or, for that matter, any grievance system at all. Owens v. Hinsley, 635 F.3d 950, 953 (7th Cir. 2011) ("Prison grievance procedures are not mandated by the First Amendment and do not by their very existence create interests protected by the Due Process Clause, and so the alleged mishandling of Owens's grievances . . . states no claim.").

ORDER

IT IS ORDERED that

1. Plaintiff Thomas Zach is GRANTED leave to proceed on the following claims:

a. Defendants Troy Hermans and Randy Lewis violated his First Amendment rights by placing him in temporary lockup in retaliation for filing a grievance.

b. Hermans and Lewis violated his Eighth Amendment rights by subjecting him to cruel and unusual conditions of confinement.

c. Defendant John Doe prison officials violated his Eighth Amendment rights by ignoring his requests for medical treatment while he was in temporary lockup.

2. Wayne Olson, superintendent of the Thompson Correctional Center, is added to the caption as a nominal defendant for the purpose of identifying the Doe defendants.

3. Plaintiff is DENIED leave to proceed on the remainder of his claims. All defendants named in the caption other than defendants Hermans, Lewis and "John and Jane Doe" are DISMISSED from the case. The caption will be amended accordingly.

4. Copies of plaintiff's amended complaint, this order and summonses will be forwarded to the United States Marshal for service on defendants.

5. For the time being, 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 his documents.

Entered this 14th day of May, 2014.

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