IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARTIN R. BUB,

Plaintiff,

v.

LT. SWIEKATOWSKI, JOHN DOE, CAROL ROWE, ELIZABETH MASON, CAPTAIN SCHULTZ, PETE ERICKSEN, MICHAEL BAENEN, MICHAEL MOHR, CHARLES FACKTOR, CATHY JESS, GARY HAMBLIN and ALERE LABS,

Defendants.

OPINION & ORDER

15-cv-195-jdp

Plaintiff Martin Bub is an inmate currently incarcerated at the Wisconsin Secure Program Facility. He brings claims against employees at the Green Bay Correctional Institution and Wisconsin Department of Corrections, as well as a private lab-testing company, for violating his constitutional rights in various ways. Plaintiff contends that prison staff harassed him in retaliation for defending himself against a conduct report, and for helping his girlfriend with a lawsuit against prison officials. Staff ultimately brought a false conduct report for drug use against him after they tampered with his urine sample.

Because plaintiff is a prisoner seeking relief from government employees, I must screen the 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. § 1915A. In screening any pro se litigant's complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972).

After considering plaintiff's allegations, I will grant him leave to proceed on retaliation, equal protection, Eighth Amendment, due process, and Fourth Amendment claims. Plaintiff has also filed a motion for the court's assistance in recruiting him counsel, which I will deny without prejudice.

ALLEGATIONS OF FACT

Plaintiff Martin R. Bub is a prisoner of the State of Wisconsin in the custody of the Wisconsin Department of Corrections (DOC). Plaintiff is currently incarcerated at the Wisconsin Secure Program Facility (WSPF) but was previously incarcerated at the Green Bay Correctional Institution (GBCI). Several of the defendants worked at GBCI: Lt. Swiekatowski was a security supervisor, Pete Ericksen was the security director, Captain Schultz was the segregation building captain, Michael Baenen was the warden, and Michael Mohr was a complaint examiner. Defendant John Doe also worked at GBCI. Another set of defendants are DOC officials: Gary Hamblin was the DOC secretary, Cathy Jess was the Department of Adult Institutions administrator, and Charles Facktor was a corrections complaint examiner. Defendants Elizabeth Mason and Carol Rowe worked at the DOC's Drug Abuse Correctional Center, located in Winnebago, Wisconsin. Defendant Alere Labs contracted with the DOC to perform urinalysis confirmation tests.

On June 15, 2010, while plaintiff was confined at GBCI, defendant Swiekatowski issued him a conduct report alleging that his girlfriend, Kathleen Sell, was smuggling drugs to him at the prison on visits. Plaintiff was later found not guilty of those charges. Sell filed a notice of claim with the attorney general stating that state officials defamed her in making those accusations.

From July 2010 to December 2011, defendants Swiekatowski, Ericksen, and Baenen took various actions to harass plaintiff: giving him strip searches when he went to and came back from meals, giving him bi-weekly cell searches, subjecting him to an inordinate number of urinalyses, opening his outgoing mail, monitoring his phone calls, and making his visits with Sell uncomfortable by seating them at a table close to the guard desk that several cameras could watch.

Plaintiff filed both a grievance about defendant Ericksen's harassment and later a transfer request to be moved away from the harassment. Defendants Mohr and Baenen were two of the reviewers denying his grievance. On the final step of the administrative review process, a designee of defendant Hamblin denied plaintiff's appeal. Plaintiff's transfer request was also denied.

In August 2011, Sell filed a tort lawsuit against defendants Swiekatowski and Ericksen in the Dane County Circuit Court. In early December 2011, an officer told plaintiff that legal materials concerning Sell's lawsuit were confiscated from another inmate, who was assisting plaintiff and Sell with the case. The officer said the materials were confiscated on the orders of Swiekatowski and Ericksen. The next day, Swiekatowski came to plaintiff's cell, asking plaintiff whether he had gotten his work back and telling him that he "had not forgotten about him and the promise he made to him." Plaintiff took this to mean that Swiekatowski meant to retaliate against him.

On the morning of December 16, 2011, plaintiff was awoken for a urine test. After plaintiff provided his urine sample, he signed his name on the tamper-proof seal and on the "chain of evidence" form. He watched Sergeant Process (who is not a defendant) sign his

name on the collector's line of the seal and then place the seal over the sample cup and place the cup in a plastic bag.

On December 22, 2011, defendant Swiekatowski put plaintiff in temporary lockup for testing positive for cocaine. Plaintiff never took cocaine. Swiekatowski told plaintiff something to the effect of, "I told you I would get you, you never should have made me look bad with all of your complaints and your girl suing me. Now I am gonna bury you." Dkt. 1, at 8.[1]

Plaintiff received a conduct report for use of intoxicants. He met with a staff advocate on January 4, 2012, who told him that the "due process hearing" was scheduled for 7 p.m. on January 9. Plaintiff's request for live witnesses was denied because the witnesses worked first shift and the hearing was scheduled for second shift. Plaintiff was denied viewing of the chain-of-custody form and tamper-proof seal prior to the hearing.

Plaintiff's advocate obtained an adjournment of the due process hearing. In the meantime, plaintiff sought the record of the report that would have had to have been generated for officials to conduct a "cause" urinalysis. Plaintiff also wrote to defendants Baenen and Jess about getting a DNA test of his urine sample, because he thought his sample had been tampered with.

On January 18, 2012, at about 9 a.m., plaintiff was awoken by a sergeant, who told plaintiff that his disciplinary hearing was to be held at that time. Plaintiff had no advance warning and was given a new advocate for the hearing. Plaintiff was not allowed live witnesses, even though the hearing was now during the first shift, when those witnesses might

[1] Plaintiff also discusses a March 2011 incident in which he was falsely found guilty of possessing marijuana, but he does not explain what any of the named defendants had to do with that incident.

have been available. Plaintiff objected to these problems, but defendant Schultz, the hearing examiner, denied them. Schultz was friends with Swiekatowski and Ericksen.

Plaintiff asked to see the incident report that would have allowed a "cause" urinalysis, but Schultz said that he did not have one. The urine cup was presented as evidence, and plaintiff could tell that the seal was not the same one he had signed; the handwriting was not his. Defendant Rowe's signature was on the seal instead, which could not have been correct, because Sergeant Process had collected his sample. Plaintiff believes that defendant Doe tampered with plaintiff's urine sample by putting cocaine in it and that Rowe fraudulently signed a new seal as the collector of plaintiff's sample after his sample was tampered with. He also believes that defendant Mason knew that Rowe could not have been the person who collected plaintiff's sample, yet she tested the sample anyway.

Schultz concluded that the signature could have been plaintiff's even though it did not match the signature from other documents. Schultz denied plaintiff's request to obtain a handwriting expert. Schultz found plaintiff guilty of the use of intoxicants charge and imposed a penalty of 360 days of disciplinary separation, which is far higher than other inmates received for a first-time positive urine test.

Plaintiff appealed the conviction to Baenen and also requested a DNA test and handwriting analysis. Defendant Baenen wrote to plaintiff, stating that that the "confirmation UA" (I take this to mean a second test of the same sample) was positive for cocaine, and that a DNA test could not be performed on the urine sample because it had been destroyed by the lab after the confirmation test. The destruction of his sample was contrary to policy. Baenen also told plaintiff that he denied plaintiff's request for handwriting analysis. Baenen later affirmed plaintiff's conviction, stating that there was "No Due Process

Error." Plaintiff wrote to Jess about the handwriting analysis but she had a designee write back, denying his request.

Plaintiff filed a grievance about procedural errors in the disciplinary proceedings. Defendant Mohr recommended dismissal of the grievance. The recommendation was upheld by the reviewing authority. Defendant corrections complaint examiner Facktor recommended dismissing plaintiff's appeal. A designee of defendant Hamblin affirmed the dismissal.

In January 2012, plaintiff filed a Psychological Service Request form about a neighboring inmate constantly making loud noises. Psychological Services Unit staff responded that plaintiff could be seen in one to two weeks.

On February 28, 2012, plaintiff filed a grievance about being subjected to "gas" (I take this to mean pepper spray) when the spray was used on other prisoners. Defendants Mohr, Baenen, and Facktor denied plaintiff's grievance.

Plaintiff was transferred to WSPF on March 1, 2012, to serve his segregation sentence. Conditions at WSPF are hasher than those at a maximum-security prison. Plaintiff was subjected to 24-hour bright lighting, no-contact visits and constant exposure to mentally ill inmates who were so disruptive that plaintiff could not sleep for days at a time.

In May 2012, plaintiff finally received a copy of the incident report providing cause to give him a urinalysis. Plaintiff received this report only after asking the DOC for all incident reports concerning him. Plaintiff believes that the DOC's previous inability to provide him with the incident report shows that the report was fabricated.

Plaintiff filed a petition for writ of certiorari in the Dane County Circuit Court, seeking review of the disciplinary proceedings. As part of the evidence produced for that litigation, plaintiff received a copy of the "chain of evidence" form for his urine sample. This

was the first time plaintiff saw the form after the date of the test. Sergeant Process's signature was missing from the form.

In May 2012, Judge Juan Colas issued a ruling reversing the disciplinary conviction for use of cocaine. Judge Colas concluded that there was sufficient evidence for the hearing officer to conclude that the sample was not tampered with, but concluded that plaintiff's due process rights were violated when the hearing time was changed and the advocate was switched at the last minute. Judge Colas also concluded that the justification for preventing the witnesses to testify in person was eliminated by moving the hearing to a time where first-shift staff was present, and so those witnesses should have testified in person.

Plaintiff filed another grievance, this one focusing on the newly discovered chain-of-evidence form. The grievance was rejected by defendant Mohr and the rejection was affirmed by the reviewing authority. Plaintiff wrote to Jess about the new evidence and the rejection of his grievance. Jess responded, stating that the proper procedures were followed in the collection of plaintiff's sample.

In March 2013, plaintiff was denied reclassification to a less secure prison. In March 2014, plaintiff was transferred to a medium security prison.

ANALYSIS

The core of plaintiff's case is that several prison staff members retaliated against him for being found not guilty of smuggling drugs into the prison. The harassment culminated in a false conduct report for use of cocaine that plaintiff believed was supported by the tampering of his urine sample. His allegations raise several types of claims.

A. Retaliation

Plaintiff alleges that defendants Swiekatowski, Ericksen, and Baenen undertook a campaign of harassment against him from July 2010 to December 2011 because he was found not guilty of smuggling drugs on a previous conduct report issued by Swiekatowski, and because he helped Sell with her lawsuit against Swiekatowski. Retaliatory actions included repeated unnecessary strip searches, cell searches, and urinalyses, excessive monitoring of his visits with Sell, the opening of his mail, monitoring of his phone calls, and the confiscation of legal materials for the lawsuit with which plaintiff was assisting Sell.

This retaliation culminated with a false conduct report orchestrated by Swiekatowski and approved by Ericksen. Defendant Doe tampered with plaintiff's urine sample by putting cocaine in it, and defendants Rowe and Mason covered up the tampering during their testing of the sample. Plaintiff also alleges that defendant Schultz gave him an excessively long sentence in part to further the retaliation from his friends Swiekatowski and Ericksen.[2]

These allegations raise a retaliation claim under the First Amendment. To succeed on a retaliation claim, plaintiff must establish that: (1) he engaged in activity protected by the First Amendment; (2) defendants took actions that would deter a person of "ordinary firmness" from engaging in the protected activity; and (3) the First Amendment activity was

[2] Plaintiff also suggests that defendants "conspired" to violate his rights with regard to the retaliation claims and several other of his claims. But when a plaintiff alleges a conspiracy, he must explain why he believes the conspiracy existed; "mere suspicion that persons adverse to the plaintiff had joined a conspiracy against him or her [i]s not enough." *Cooney v. Rossiter*, 583 F.3d 967, 970-71 (7th Cir. 2009). Plaintiff does not explain how he knows that the various defendants are joined in a conspiracy to harm him, so his allegations of conspiracy add nothing to his claims. Instead, I will consider his allegations that certain defendants were directly personally involved in violating his rights.

at least a "motivating factor" in defendants' decisions to take those actions. *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009).

Plaintiff has a First Amendment right to defend himself in disciplinary proceedings and assist his girlfriend in her litigation. I can reasonably infer from plaintiff's allegations that defendants harassed plaintiff because of his efforts in the disciplinary proceedings and that the harassment could dissuade a prisoner from taking these actions in the future. Accordingly, I will allow plaintiff to proceed on retaliation claims against defendants Swiekatowski, Ericksen, Baenen, Doe, Rowe, Mason, and Schultz.

I will also allow plaintiff to proceed on claims against defendants Mohr and Baenen for denying plaintiff's grievance about the retaliation, because I can infer that they could have issued rulings putting a stop to the harassment but acted with deliberate indifference by failing to do so. Plaintiff argues that defendant Hamblin was also deliberately indifferent, but his allegations and attached documents show that Hamblin designated another prison official to rule on the grievance. Because Hamblin was not personally involved in denying the grievance, plaintiff may not proceed on a claim against him.

At the preliminary pretrial conference that will be held later in this case, Magistrate Judge Stephen Crocker will explain the process for plaintiff to use discovery to identify the name of the Doe defendant and to amend the complaint to include the proper identity of that defendant.

B. Equal protection

Plaintiff contends that defendants' retaliatory actions violated his right to equal protection under a "class of one" theory because they singled him out for harassment. A plaintiff may bring a class-of-one equal protection claim for being treated "intentionally . . .

differently from others similarly situated" for no rational reason. *D.S. v. E. Porter Cty. Sch. Corp.*, 799 F.3d 793, 799 (7th Cir. 2015) (citations and internal quotation marks omitted).

This will be a difficult claim for plaintiff to prove, because class-of-one claims are generally disfavored in the prison context, at least where they involve discretionary decision-making by prison officials. *See, e.g.*, *Shaw v. Wall*, No. 12-cv-497-wmc, 2014 WL 7215764, at *3 (W.D. Wis. Dec. 17, 2014) (class-of-one claim failed where prison officials used discretion in denying prisoner phone call); *Taliaferro v. Hepp*, No. 12-cv-921-bbc, 2013 WL 936609, at *6 (W.D. Wis. Mar. 11, 2013) ("class-of-one claims are likely never cognizable in the prison disciplinary context"). In both *Shaw* and *Taliaferro*, the court cited *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 603 (2008) for the proposition that class-of-one claims are not available for discretionary decisions that are "based on a vast array of subjective, individualized assessments." But because plaintiff alleges that he was singled out for constant harassment for *no* rational reason, I will allow him to proceed on these class-of-one claims.

As with plaintiff's retaliation claims, I will allow plaintiff to proceed on claims that defendant examiners Mohr and Baenen acted with deliberate indifference by denying plaintiff's grievance about the harassment.

C. Eighth Amendment

Plaintiff contends that most of the misconduct he describes in his complaint violated his Eighth Amendment right against cruel and unusual punishment. But much of what he alleges (for instance, much of the harassment, or falsification of his urinalysis and a conduct report) did not directly subject him to conditions of confinement that would violate the Eighth Amendment. Most of the alleged violations of his rights are discussed elsewhere in

this opinion in the context of other claims. However, construing plaintiff's complaint generously, I conclude that he alleges two potential Eighth Amendment violations: being subjected to repeated strip searches and being placed in segregation.

1. Strip searches

Plaintiff alleges that defendants Swiekatowski, Ericksen, and Baenen harassed him by subjecting him to strip searches before and after meals. A strip search violates the Eighth Amendment when it is "conducted in a harassing manner intended to humiliate and inflict psychological pain." *Calhoun v. DeTella*, 319 F.3d 936, 939 (7th Cir. 2003); *Fillmore v. Page*, 358 F.3d 496, 505 (7th Cir. 2004). Because plaintiff alleges that the strip searches were performed to harass him, I take him to be saying that defendants did not perform those strip searches for a legitimate penological purpose, so I will allow him to proceed on Eighth Amendment claims regarding these searches. *See Mays v. Springborn*, 719 F.3d 631, 633-34 (7th Cir. 2013) ("There may have been a valid penological reason for the search, yet it may not have been the reason or a reason; the reason may have been to humiliate the plaintiff.").

2. Conditions of segregation

Plaintiff alleges that he suffered from substandard conditions of confinement while placed in segregation in temporary lockup at the Green Bay Correctional Institution and later when he was sent to WSPF following his conviction for use of intoxicants. To state a claim that prison conditions violate the Eighth Amendment, plaintiff must show that the conditions are less than "the minimal civilized measure of life's necessities," *Farmer v. Brennan*, 511 U.S. 825, 833-34 (1994), and that defendants acted with deliberate indifference to these conditions, *Dixon v. Godinez*, 114 F.3d 640, 644 (7th Cir. 1997).

Plaintiff states that while he was in temporary lockup, he was repeatedly exposed to pepper spray when it was used on other prisoners. He also complained about a disruptive fellow inmate. But even assuming that these are problems that denied plaintiff of "the minimal civilized measure of life's necessities," he does not explain how any of the named defendants were deliberately indifferent to the problems. Plaintiff does not say that any of the defendants knew about the disruptive inmate. He does allege that defendants Mohr, Baenen, and Facktor denied plaintiff's grievance about the pepper spray, but plaintiff was no longer at GBCI by the time any of these defendants could have issued a ruling helping him; plaintiff submitted his grievance on February 28, 2012, and was moved out of GBCI the next day. I conclude that plaintiff fails to state a claim about these conditions.

With regard to plaintiff's allegations about the conditions at WSPF, he does not explain how any of the named defendants could have acted with deliberate indifference toward the conditions at WSPF, and he does not name any WSPF official responsible for the conditions as a defendant, so he fails to state a claim for relief about those conditions as well.

D. Due process

1. Procedural due process

Plaintiff alleges that his due process rights were violated in several ways in his disciplinary proceedings for use of intoxicants. The Fourteenth Amendment prohibits a state from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "A prisoner challenging the process he was afforded in a prison disciplinary proceeding must meet two requirements: (1) he has a liberty or property interest that the state has interfered with; and (2) the procedures he was afforded upon that

deprivation were constitutionally deficient." *Scruggs v. Jordan*, 485 F.3d 934, 939 (7th Cir. 2007).

The Supreme Court has explained that a prisoner's cognizable liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 483-484 (1995). Plaintiff states that he was given 360 days of disciplinary separation, which at this point I will assume qualifies as a deprivation of a liberty interest. *See Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 697-99 (7th Cir. 2009) ("periods of confinement that approach or exceed one year may trigger a cognizable liberty interest without any reference to conditions," and issue whether 240 days in disciplinary segregation is "atypical, significant hardship" cannot be decided at the pleading stage).

The next question is whether plaintiff received the process he was due given the liberty interest at issue. This area has not been well developed in the context of the disciplinary consequences faced by plaintiff in this case. When a prisoner loses good-time credits, courts have held that a prisoner is entitled to: (1) written notice of the claimed violation at least 24 hours before the hearing; (2) an opportunity to call witnesses and present documentary evidence (when consistent with institutional safety) to an impartial decision maker; and (3) a written statement by the fact-finder of the evidence relied on and the reasons for the disciplinary action. *Wolff v. McDonnell*, 418 U.S. 539, 563-69 (1974); Scruggs, 485 F.3d at 939 (7th Cir. 2007). However, plaintiff does not allege that he lost good-time credits, so that standard does not necessarily apply.

In *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005), the Supreme Court considered the process a prisoner was due before being transferred to a "supermax" prison and concluded it

was sufficient if the prisoner received notice of the reasons for the transfer and an opportunity to rebut those reasons. *See also Westefer v. Neal*, 682 F.3d 679, 684 (7th Cir. 2012) ("*Wilkinson* thus stands for a more general proposition: Inmates transferred to a supermax prison are entitled to informal, nonadversarial due process."). The Seventh Circuit explained further in *Westefer*:

> Informal due process requires "some notice" of the reasons for the inmate's placement, and enough time to "prepare adequately" for the administrative review . . . .
>
> * * *
>
> In other words, only a single prison official is needed as the neutral reviewer—not necessarily a committee. Informal due process requires only that the inmate be given an "opportunity to present his views"—not necessarily a full-blown hearing. If the prison chooses to hold hearings, inmates do not have a constitutional right to call witnesses or to require prison officials to interview witnesses. . . .
>
> Nor does informal due process necessarily require "a written decision describing the reasons" for an inmate's placement, or mandate an appeal procedure.

682 F.3d at 684-86 (citations omitted).

In the certiorari proceeding, Judge Colas suggested that plaintiff's due process rights were violated when his hearing time was moved up with no warning, he was given a new, unprepared advocate for the hearing, and he was denied witnesses for the reason that they unavailable for a second-shift hearing even though the hearing was ultimately moved to the first shift. Not all of these problems are due process violations under *Wilkinson* and *Westefer*, but at the very least, plaintiff has an arguable claim that his right to notice was violated by the abrupt change in hearing time. The parties are free to argue about the precise scope of this claim going forward, but for now I will allow plaintiff to proceed on a due process claim

against defendant Schultz for allowing the hearing to be held without proper notice, and for Schultz being biased against plaintiff in favor of his friends Swiekatowski and Ericksen, contra to the "neutral" decision-maker contemplated in *Westefer*.

I will also allow plaintiff to proceed on claims against defendants Mohr, Baenen, and Facktor for denying plaintiff's appeal and grievance about the retaliation, because they could have reversed plaintiff's conviction for lack of due process. Plaintiff again alleges that defendant Hamblin also denied his grievance, but because Hamblin delegated this task to another official, I will not allow him to proceed again Hamblin.

A major aspect of plaintiff's due process claim on which he will not be allowed to proceed is his contention that defendant prison officials and lab workers tampered with his urine sample and later destroyed the evidence that could have shown the falsification. "[E]ven assuming fraudulent conduct on the part of prison officials, the protection from such arbitrary action is found in the procedures mandated by due process." *Lagerstrom v. Kingston*, 463 F.3d 621, 625 (7th Cir. 2006) (quoting *McPherson v. McBride*, 188 F.3d 784, 787 (7th Cir. 1999); *see also Hanrahan v. Lane*, 747 F.2d 1137, 1141 (7th Cir. 1984) ("We find that an allegation that a prison guard planted false evidence which implicates an inmate in a disciplinary infraction fails to state a claim for which relief can be granted where the procedural due process protections . . . are provided."). Because plaintiff's claim is limited to the process he should have received in the disciplinary hearing, I will deny him leave to proceed on his claims regarding falsification of evidence.

For similar reasons, plaintiff also fails to state a due process claim for other process he did not receive that he thinks could have proven the fraudulent behavior, such as DNA testing of the urine sample or handwriting analysis of the sample cup and seal. Nothing in

Wilkinson, *Westefer*, or *Wolff* suggests that due process requires that prisoners have the right to present scientific testing at a disciplinary hearing. *See*, *e.g.*, *Portee v. Vannatta*, 105 F. App'x 841, 843 (7th Cir. 2004) (due process does not require allowing plaintiff to present DNA evidence); *Fisher v. Superintendent*, No. 3:12-CV-183 JD, 2013 WL 351197, at *6 (N.D. Ind. Jan. 28, 2013) ("Fisher's request for lie detector tests, DNA testing, and fingerprint evidence were also properly denied, because an inmate is not entitled to the creation of favorable evidence in a disciplinary proceeding."); *see also Allen v. Purkett*, 5 F.3d 1151, 1153 (8th Cir. 1993) (due process does not require prison officials to provide second drug test by impartial laboratory); *Freitas v. Auger*, 837 F.2d 806, 812 n. 13 (8th Cir. 1988) (prisoner not entitled to polygraph tests in disciplinary hearings).

2. Substantive due process

Prisoners generally may not bring substantive due process claims for receiving a false conduct report, but courts have suggested that such a claim may be possible where the false charges were issued in retaliation for the exercise of a constitutional right. *Lagerstrom*, 463 F.3d at 623, *Black*, 22 F.3d at 1402-03. Because I am already allowing plaintiff to proceed on retaliation claims against the defendants involved in falsifying his conduct report and his urinalysis, there is no need to proceed on parallel substantive due process claims. *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (where a particular constitutional amendment "provides an explicit textual source of constitutional protection against a particular sort of government behavior, that amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.").

E. Fourth Amendment

Plaintiff contends that being subjected to repeated drug tests violated his Fourth Amendment rights. Prisoners retain a limited expectation of privacy in their persons. *Forbes v. Trigg*, 976 F.2d 308, 312 (7th Cir. 1992). Body searches must therefore be reasonable under the Fourth Amendment. *Id*. at 312-13. Deciding what is reasonable "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). Courts must consider the scope of the intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *Id*. There is little doubt that prison staff may generally conduct random drug testing of prisoners, but plaintiff alleges that he was intentionally subjected to repeated tests to harass him rather than for legitimate purposes, which I conclude states a Fourth Amendment claim. Plaintiff's allegations are not completely clear, but I can infer that he intends to bring these claims against Swiekatowski, Ericksen, and Baenen for orchestrating the "campaign of harassment" against him.

Plaintiff also alleges that defendant Rowe and Mason violated his Fourth Amendment rights because they "had no right to search [his] body contents." Dkt. 1, at 22, 23. Applying the reasonableness standard at the heart of the Fourth Amendment, I will not allow plaintiff to proceed on claims against the defendant lab technicians. They were not the officials who forced plaintiff to give a urine sample, and it is reasonable for technicians to test the urine samples that are sent to the lab. To the extent that plaintiff thinks that these defendants acted as part of a scheme to retaliate against him, that theory is not a Fourth Amendment concern, but rather one I address in other parts of this opinion.

F. Defendants Alere Labs, Hamblin, and Jess

Plaintiff alleges that defendant Alere Labs performed the "confirmation" urinalysis that also tested positive for cocaine, and destroyed the sample prematurely. Plaintiff says that the lab did this intentionally to cover up the misconduct by the state defendants. Plaintiff does not explain how he knows this, and it is not an inference that can be reasonably drawn from the other facts plaintiff sets forth. But in any event, a "private corporation cannot be held liable under § 1983 unless the constitutional violation was caused by an unconstitutional policy or custom of the corporation itself." *Shields v. Illinois Dep't of Corrections*, 746 F.3d 782, 789 (7th Cir. 2014). Plaintiff does not allege that Alere took these actions pursuant to a policy or custom, so I will dismiss it from the case.

Plaintiff also attempts to bring claims against defendants Hamblin and Jess. As discussed above, plaintiff fails to show that Hamblin had any personal involvement in denying any of his grievances, so I will dismiss Hamblin from the case. Plaintiff does allege that he sent multiple letters directly to Jess about the due process violations and requests for further testing of his urine sample. But I have already concluded that plaintiff had no due process right to further testing. As for the due process problems, plaintiff sought relief for the through the formal channels of his appeal and grievance. Defendant Jess was not an official involved in these formal procedures, and there is no reason to think that she should be held liable for those problems merely because plaintiff wrote her letters outside of the formal procedures. *Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009) ("[P]risoner's view that everyone who knows about a prisoner's problem must pay damages implies that he could write letters to the Governor of Wisconsin and 999 other public officials, demand that every one of those 1,000 officials drop everything he or she is doing in order to investigate a single

prisoner's claims, and then collect damages from all 1,000 recipients if the letter-writing campaign does not lead to better medical care. That can't be right."). Accordingly, I will also dismiss Jess from the case.

G. Recruitment of counsel

Plaintiff has filed a motion for appointment of counsel, Dkt. 4. I do not have the authority to appoint counsel to represent a pro se plaintiff in this type of a case; I can only recruit counsel who may be willing to serve voluntarily in that capacity.

To show that it is appropriate for the court to recruit counsel, plaintiff must first show that he has made reasonable efforts to locate an attorney on his own. *See Jackson v. Cty. of McLean*, 953 F.2d 1070, 1072-73 (7th Cir. 1992) ("the district judge must first determine if the indigent has made reasonable efforts to retain counsel and was unsuccessful or that the indigent was effectively precluded from making such efforts"). To meet this threshold requirement, this court generally requires plaintiffs to submit correspondence from at least three attorneys to whom they have written and who have refused to take the case. Plaintiff has submitted three such letters, so this requirement has been satisfied.

Second, this court will seek to recruit counsel for a pro se litigant only when the litigant demonstrates that his case is one of those relatively few in which it appears from the record that the legal and factual difficulty of the case exceeds his ability to prosecute it. *Pruitt v. Mote*, 503 F.3d 647, 654-55 (7th Cir. 2007). It is too early to tell whether plaintiff's claims will outstrip his litigation abilities. In particular, the case has not even passed the relatively early stage in which defendants may file a motion for summary judgment based on exhaustion of administrative remedies, which often ends up in dismissal of cases such as plaintiff's before they advance deep into the discovery stage of the litigation. Should the case

pass the exhaustion stage and plaintiff believes that he is unable to litigate the suit himself, he may renew his motion.

ORDER

IT IS ORDERED that:

1. Plaintiff Martin Bub is GRANTED leave to proceed on the following claims:

    a. Defendants Swiekatowski, Ericksen, Baenen, Doe, Rowe, Mason, and Schultz retaliated against him for successfully defending himself on a disciplinary charge, and defendants Mohr and Baenen ruled against his grievance about the harassment.

    b. Defendants Swiekatowski's, Ericksen's, Baenen's, Doe's, Rowe's, Mason's, and Schultz's retaliatory actions violated his right to equal protection under a "class of one" theory, and defendants Mohr and Baenen ruled against his grievance about the harassment.

    c. Defendants Swiekatowski, Ericksen, and Baenen subjected plaintiff to unnecessary strip searches, in violation of the Eighth Amendment.

    d. Defendants Schultz, Mohr, Baenen, and Facktor violated his procedural due process rights.

    e. Defendants Swiekatowski, Ericksen, and Baenen violated his Fourth Amendment rights by subjecting him to repeated non-random urine tests.

2. Plaintiff is DENIED leave to proceed on the remainder of the claims in his complaint.

3. Defendants Alere Labs, Hamblin, and Jess are DISMISSED from the case.

4. Plaintiff's motion for the court's assistance in recruiting him counsel, Dkt. 4, is DENIED without prejudice.

5. Under 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 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 on behalf of defendants.

6. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve defendants' lawyer directly rather than defendants themselves. The court will disregard any documents submitted by plaintiff unless he shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

7. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

8. If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendants or the court are unable to locate him, his case may be dismissed for his failure to prosecute it.

Entered March 4, 2016.

BY THE COURT:

/s/

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JAMES D. PETERSON
District Judge