

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

ALGENONE WILLIAMS,

Petitioner,

ORDER

v.

02-C-0010-C

GERALD BERGE, JON LITSCHER,
JAN MINK, CHRISTI DIETZ,
STEVE SCHNEIDER, JOHN PACQUIN,
PETER HUIBREGTSE, LINDA TRIPP,
ELLEN RAY, KELLY COON, JULIE BIGGAR,
JOHN RAY, CHRIS O'DONNELL, JOHN BELL,
CHRIS KRUEGER, TOM ?, Institution Complaint
Examiner, KAREN GOURLIE, SERGEANT CARPENTER,
CO II LOMEN, SERGEANT BENISCH,
SERGEANT BOWDEY, DIANA BENISCH,
CO I SANDER, CO I GILARDI, JOLENE
MILLIN, JOHN SHARPE, CO I HILGER,
CO II DAWSON, SERGEANT PRIMMER,
SHAUN ?, Institution Complaint Examiner,
in their individual and official capacities,

Respondents.

This is a civil action for monetary relief brought pursuant to 42 U.S.C. § 1983.
Petitioner Algenone Williams, who is currently an inmate at Supermax Correctional
Institution in Boscobel, Wisconsin, alleges that respondents violated his (1) Eighth

Amendment rights by using excessive force on him; (2) First and Eighth Amendment rights by denying him breakfast meals during Ramadan; (3) First Amendment rights by retaliating against him for filing grievances; (4) Eighth Amendment rights regarding the conditions of confinement at Supermax Correctional Institution; and (5) rights under Wisconsin law by intentionally inflicting emotional distress on him. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, the prisoner's complaint must be dismissed if, even under a liberal construction, it is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief. See 42 U.S.C. § 1915e.

As a preliminary matter, further proceedings on the merits of petitioner's conditions of confinement claims will be stayed because of petitioner's membership in the class in Jones 'El v. Berge, No. 00-C-421-C, where those claims are being considered. In addition, I will stay petitioner's request for leave to proceed in forma pauperis on his First and Eighth Amendment claims of denial of breakfast meals until March 20, 2002, so that he may provide this court with additional information. For the claims that will be stayed, I will also stay petitioner's corresponding state law claim of intentional infliction of emotional distress. Because petitioner's claims of excessive force and retaliation fail to state a claim upon which

relief can be granted, I will deny his request for leave to proceed in forma pauperis as to these claims. Petitioner has included in his complaint numerous allegations of incidents involving other inmates, which will not be recounted in this opinion because they are irrelevant to his claims.

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

ALLEGATIONS OF FACT

Petitioner is an inmate at the Supermax Correctional Institution in Boscobel, Wisconsin, and was an inmate at North Fork Correctional Facility in Sayre, Oklahoma, when some of the incidents at issue in this action took place. Respondents are all employees or agents of the Wisconsin Department of Corrections or the Supermax Correctional Institution. The identities of the 30 named respondents are as follows:

1. Gerald Berge, warden, Supermax Correctional Institution
2. Jon Litscher, secretary, Department of Corrections
3. Jan Mink, contract monitor
4. Christi Dietz, contract monitor
5. Steve Schneider, contract monitor
6. John Pacquin, probation and parole supervisor
7. Peter Heibregtse, deputy warden
8. Linda Tripp, unit manager
9. Ellen Ray, institutional complaint examiner
10. Kelly Coon, institutional complaint examiner
11. Julie Biggar, institutional complaint examiner

12. John Ray, correctional complaint examiner
13. Chris O'Donnell, secretary's complaint reviewer designee
14. John Bell, institutional complaint examiner
15. Chris Krueger, institutional complaint examiner
16. Tom ?, institutional complaint examiner
17. Karen Gourlie, DOC complaint coordinator
18. Carpenter, Sergeant
19. Lomen, C/O II
20. Benisch, Sergeant
21. Bowdey, Sergeant
22. Diana Benisch, institutional complaint examiner
23. Sander, C/O I
24. Gilardi, C/O I
25. Jolene Millin, nurse
26. John Sharpe, unit manager
27. Hilger, C/O I
28. Dawson, C/O II
29. Primmer, Sergeant
30. Shaun ?, institutional complaint examiner

I. North Fork Correctional Institution

As of January 1998, the Department of Corrections had entered into a contractual relationship with Corrections Corporation of America. All respondents have authorized and condoned Corrections Corporation of America's policy of using excessive force.

On or about July 22, 1998, petitioner was "assaulted" by unnamed CCA prison officials. (Petitioner litigated this issue in this court previously, see Case No. 98-C-823-C.)

On or about September 23, 1998, petitioner was sprayed with chemicals by unnamed, Corrections Corporation of America prison officials even though he allowed these officers to handcuff him. During the incident, petitioner was beaten about the head and face with

a closed fist, yanked around by his hair while handcuffed, rammed into metal bars, slammed to the floor, stomped on the back of the knee joint, pushed to the wall and had his head banged continuously against a concrete floor. The officials sprayed petitioner continuously with pepper spray even after he had been incapacitated. Petitioner received a cut above his left eye. A few hours later, the unnamed officers returned to petitioner's cell and sprayed large amounts of chemical agents into the cell after removing petitioner's clothes from his body and every removable object in the cell. (Petitioner litigated this issue in this court previously, see Case No. 98-C-823-C.)

On April 19 and 30, 1999, unnamed Corrections Corporation of America prison officials sprayed chemical agents into petitioner's cell with petitioner inside.

On May 4, 1999, unnamed Corrections Corporation of America officers assaulted petitioner while he was restrained in handcuffs and leg shackles. During the incident, petitioner was hit with a knee in the head, choked with a blue surgical mask (which contained a piece of metal in it) and choked by the hands of an unnamed officer and smothered with a towel. Also, the unnamed officials wrenched his wrists and neck, jammed their thumbs between his jawbone and ear lobe, crawled down his body with their knees and one officer placed his knee in the back of petitioner's right knee, causing excruciating pain, and yanked petitioner's arm by the handcuffs through the door chute. The unnamed officers placed the surgical mask on petitioner's face and pulled fiercely on it until the "very tough"

material broke. One officer told another officer to turn off the video camera and to lie that the battery had died.

As a result of these incidents with the unnamed CCA officers, petitioner has suffered injury to his right shoulder rotator cuff, eye, neck, base of skull, back and other parts of his body as well as suffered emotional distress and psychological injuries. (It is unclear which injuries were the result of which alleged assault.)

2. Supermax Correctional Institution

Respondents Linda Tripp and Peter Huibregtse attempted to legitimize retention of petitioner on level 3 status for arbitrary and capricious reasons.

On December 8, 2000, petitioner gave respondent Sander an “interview request” form in which he threatened to sue Sander and others if they kept harassing and denying Muslims their meals while they were fasting. As a result, respondents Sander, Gilardi, Bowdy and Benisch subjected petitioner to numerous instances of retaliation, harassment and denied him an unspecified number of breakfast meals during Ramadan. Respondent Millin harassed petitioner. On December 8, 2000, respondent Sander fabricated a conduct report against petitioner and respondent Millin fabricated a statement in support of the conduct report. On January 9, 2001, the charges made by respondent Sander against petitioner in the conduct report were dismissed.

On January 9, 2001, respondents Sander and Millin stopped in front of petitioner's cell door and harassed petitioner intentionally by talking very loudly and waking him.

On January 11, 2001, respondent Sander yelled in front of petitioner's cell door, "if you don't keep the noise down you'll get another conduct report but this one will stick."

On January 15, 2001, respondent Millin retaliated against petitioner.

On December 18, 2000, petitioner realized that he had not received a response to grievances he had filed regarding the denial of his meals during Ramadan. As a result, petitioner began noting which officer picked up his grievances. On December 18, 2000, petitioner placed an inmate complaint in an envelope under his door that was addressed to the warden. Respondent Sanders retrieved the inmate complaint. On December 22 and 23, 2000, petitioner placed an inmate complaint in an envelope under his door that were addressed to the warden. Respondent Sanders retrieved the inmate complaint on each occasion.

On numerous occasions, petitioner wrote to respondent Sharpe and no response was ever received.

On December 14, 15 and 18, 2000, petitioner attempted to mail an appeal to "Director, Office of Offender Classification." On December 15, 2000, the envelope was returned to petitioner with a notation that an address had to be written on the disbursement. On December 18, 2000, respondent Sander sent it back with a note attached

stating that petitioner had to leave the envelope open “so we can read it.” Petitioner then wrote on the envelope “sealed per 309.05(4)(g)” and sent it again. Respondent Gilardi retrieved it. Respondent Sanders then returned it to petitioner, stating once again that petitioner had to leave the envelope open.

On September 6, 2000, respondent Hilger fabricated a conduct report against petitioner in retaliation for petitioner’s refusal to throw away his property. Respondent Carpenter fabricated a statement in support of respondent Hilger’s conduct report.

On June 28, 2000, petitioner filed an inmate complaint against respondent Lomen because Lomen denied him a roll of toilet tissue in a nasty and unprofessional tone.

On September 25, 2000, respondent Lomen squeezed petitioner’s left bicep muscle while escorting him from a hearing room, causing him undue pain. In addition, Lomen removed petitioner’s door restraint cuff improperly by raking the cuff across petitioner’s wrist and hand, causing petitioner to suffer a painful sensation in his hand, wrist and arm.

On October 8, 2000, respondent Lomen retaliated against petitioner for his toilet tissue complaint by attempting to slam petitioner’s hand in the door trap after serving and retrieving petitioner’s breakfast bag. That same day, respondent Lomen attempted to slam petitioner’s hand in the door trap while passing out linens and closed petitioner’s shutter.

On or about October 13, 2000, respondent Lomen attempted to slam petitioner’s hand in the door trap while serving and retrieving petitioner’s breakfast bag. That same day,

respondent Lomen gave petitioner dirty cleaning items that had just been used by the inmate in the next cell. In addition, respondent Lomen slammed petitioner's shutter window closed.

"Approximately one month prior to 9-25-00," respondent Lomen raked the handcuffs across petitioner's wrists and hands.

On October 17, 2000, respondent Lomen kicked petitioner's cell door, which startled petitioner causing an increase in his heart rate and sleep deprivation.

On October 19, 2000, respondent Lomen slammed petitioner's shutter open and subjected petitioner to a rude awakening. Petitioner told respondent Lomen, "Have your fun because I'll have mine in court." Respondent Lomen stated, "Yeah, whatever" and slammed petitioner's shutter window closed.

On November 9, 2000, respondent Lomen slammed petitioner's door trap extremely hard after retrieving his breakfast bag causing a loud echo that causes excruciating headaches.

On November 28, 2000, petitioner filed an inmate complaint (SMCI-2000-29666) regarding respondent Lomen's continual harassment.

On March 2, 2001, petitioner was denied his lunch by respondents Lomen, Primmer and Dawson even though he was standing at his cell door. Petitioner complained, but they ignored him. Petitioner then complained to respondent Benisch and he refused to make respondents feed petitioner.

At Supermax Correctional Institution, petitioner receives no outdoor exercise and is

not permitted to go outside. The exercise space reflects the current outdoor temperature and petitioner chooses to remain locked in his cell 24 hours a day. The cell has a “sliver” of window only and is illuminated 24 hours a day. The 24-hour illumination causes sleep deprivation and constant headaches. When petitioner covers his eyes to block out the light, he is awakened every 30 minutes throughout the night. In the summer months, petitioner is in a state of perpetual perspiration in his cell. This causes a heat rash on his neck and elbow pits, hand tremors, sleep deprivation and excessive use of an asthma inhaler, which, in turn, causes an increased heart rate. Petitioner has a heart condition that requires daily medication. Petitioner’s bed linens are soaked with perspiration and he gets approximately three hours of sleep a night. In the winter months, “it is so cold that your feet feel like blocks of ice even though you are wearing socks.” Petitioner must sleep fully clothed and under two blankets and he is still cold. Because of the frigid temperatures, petitioner has suffered severe muscle deterioration.

OPINION

A. Excessive Force

As petitioner describes the April 19 and 30 and May 4, 1999 episodes of excessive force, they are attributable to persons who are not named as respondents in this case. Ordinarily, a petitioner can proceed against a high-ranking official for the purpose of

allowing him to conduct formal discovery to uncover the names of the persons directly responsible for violating his constitutional rights. See Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981) However, petitioner has not named a high-ranking official at the Corrections Corporation of America facility in Oklahoma as a respondent. (Interestingly, when petitioner sued previously for damages resulting from the July 22 and September 23 incidents, he named the individuals involved in these two incidents. See Case No. 98-C-823-C.)

Leave to amend is “freely given when justice so requires,” Fed. R. Civ. P. 15(a), but “need not be given if there is an apparent reason not to do so, such as . . . futility of amendment.” Chavez v. Illinois State Police, 251 F.3d 612, 632 (quoting Payne v. Churchich, 161 F.3d 1030, 1036 (7th Cir. 1998)). As petitioner is well aware from his earlier lawsuits filed in this court against Corrections Corporation of America and its employees, this court lacks personal jurisdiction over persons living and working in Oklahoma and the Western District of Wisconsin is an improper venue for deciding claims that arose in Oklahoma against respondents who reside there. See Williams v. Ball, 98-C-823-C (transferring case filed here to Western District of Oklahoma) and Williams v. Corrections Corporation of America, 99-C-806-C (same). I am unwilling to allow petitioner to amend his complaint to name a high-ranking official at the Corrections Corporation of America facility as a respondent, and then again after he has conducted discovery to add

Correctional Corporation of America employees as respondents. Petitioner will be denied leave to proceed in forma pauperis on his claims of excessive force occurring on April 19 and 30 and May 4, 1999, because none of the named respondents in this lawsuit is alleged to have been involved personally in these incidents.

B. Denial of Breakfast Meals

Petitioner alleges that respondents Sander, Gilardi, Bowdy and Benisch denied him an unspecified number of breakfast meals during Ramadan in violation of his First and Eighth Amendment rights. Because petitioner failed to alleged the number of meals he was allegedly denied, a determination of this claim will be stayed until March 20, 2002, so that he may (1) allege the dates on which he was denied his breakfast meals; (2) allege whether on those dates he was also denied a lunch and dinner meal; and, in addition, (3) allege how the denial of his breakfast meals related to his ability to practice his religion.

C. Retaliation for Filing Grievances

Petitioner alleges that he was retaliated against by various individuals for filing grievances in violation of his First Amendment rights. In some instances, petitioner makes conclusory allegations without providing any specifics. For example, petitioner alleges that respondent Millin “retaliated against him” or that respondents Sander, Gilardi, Bowdy and

Benisch subjected him to “numerous instances of retaliation and harassment.” As discussed earlier, a mere conclusory allegation is not enough to state a claim upon which relief can be granted. See Hill, 93 F.3d at 421; see also Benson v. Cady, 761 F.2d 335, 342 (7th Cir. 1985) (ultimate fact of retaliation insufficient to state a claim).

Petitioner also makes two slightly more specific retaliations claims. First, petitioner alleges that respondent Sander retaliated against him by denying him an unspecified number of breakfast meals because petitioner had given Sander an interview request slip that threatened to sue Sander if Sander kept denying meals to fasting Muslims during Ramadan. Second, petitioner alleges that respondent Lomen retaliated against him by attempting to slam petitioner’s hand in the door trap on several occasions because he had filed an inmate complaint against Lomen three months earlier after Loman had denied him toilet tissue using a nasty and unprofessional tone.

Retaliation inquiries are undertaken in light of Sandin v. Conner, 515 U.S. 472 (1995), in which the Supreme Court disapproved of excessive judicial involvement in day-to-day prison management. See Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). Courts should “‘afford appropriate deference and flexibility’ to prison officials in the evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory.” Id. (citing Sandin, 515 U.S. at 482) (other internal citations omitted).

To state a claim of retaliatory treatment for the exercise of a constitutionally

protected right, plaintiff need not present direct evidence in the complaint; however, he must “allege a chronology of events from which retaliation may be inferred.” Black v. Lane, 22 F.3d 1395, 1399 (7th Cir. 1994) (quoting Benson, 761 F.2d at 342). In this case, petitioner filed his toilet tissue complaint against Lomen three months before the alleged retaliation occurred. This three-month time gap does not establish a chronology of events that links the filing of his grievance to the alleged retaliatory acts of attempting to slam his hand in the door trap. As to the alleged retaliation by respondent Sander, despite petitioner’s assertions otherwise, petitioner’s threats to sue Sanders by petitioner’s informal communication in an “interview request slip” does not constitute the exercise of a constitutionally protected right, as required to pursue a viable retaliation claim. Because petitioner has not alleged facts sufficient to support a claim of retaliation, his First Amendment claim will be denied as legally frivolous.

D. Intentional Infliction of Emotional Distress

Petitioner has alleged that respondents have intentionally inflicted emotional distress on him in violation of Wisconsin law. Because I am staying petitioner’s claims that (1) his First and Eighth Amendment rights were violated when respondents Sander, Gilardi, Bowdy and Benisch denied him breakfast meals and (2) his Eighth Amendment rights were violated because of the conditions of confinement at Supermax, I will also stay his state law claim of

intentional infliction of emotional distress as to these two claims with respect to respondents Berge (conditions of confinement) and Sander, Gilardi, Bowdy and Benisch (denial of breakfast meals). See 28 U.S.C. § 1367(c)(3); see also Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (district court has discretion to retain or refuse jurisdiction over state law claims).

ORDER

IT IS ORDERED that

1. Petitioner Algenone Williams' request for leave to proceed in forma pauperis on his Eighth Amendment conditions of confinement claims is GRANTED against respondent Gerald Berge; however, the proceedings relating to the merits of these claims are STAYED until this court has ruled on the constitutionality of the alleged conditions at Supermax in Jones 'El v. Berge, No. 00-C-421-C; the stay will take effect immediately with two exceptions: respondent Berge may file an answer if he wishes to do so or he may exercise his right to file a motion permitted under Fed. R. Civ. P. 12 that does not go to the merits of the claims raised, in which case a briefing schedule will be set;

2. Petitioner's request for leave to proceed in forma pauperis on his First and Eighth Amendment claims of denial of breakfast meals is STAYED until March 20, 2002, against respondents Sander, Gilardi, Bowdy and Benisch so that he may provide the requested

information; if petitioner fails to respond to the court's request by March 20, 2002, I will deny his request for leave to proceed as to this claim for failure to state a claim upon which relief can be granted;

3. Petitioner's request for leave to proceed in forma pauperis on his state law claim of intentional infliction of emotional distress is STAYED as follows: (a) until March 20, 2002, as to his denial of breakfast claims, and (b) until the court rules in Jones 'El v. Berge, as to his conditions of confinement claim.

4. Petitioner's request for leave to proceed in forma pauperis as to his retaliation and excessive force claims are DENIED;

5. All respondents except respondents Berge, Sander, Gilardi, Bowdy and Benisch are dismissed from this cause of action.

6. The unpaid balance of petitioner's filing fee is \$147.67; petitioner is obligated to pay this amount in monthly payments according to 28 U.S.C. § 1915(b)(2);

7. Petitioner should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyers who will be representing respondents, he should serve the lawyers directly rather than respondents. Petitioner should retain a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents. The court will disregard any papers

or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondents or to respondents' lawyers.

Entered this 6th day of March, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge