IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BERRELL FREEMAN,

Petitioner, ORDER

v. 02-C-348-C

WISCONSIN DEPARTMENT OF
CORRECTIONS; JON E. LITSCHER;
CINDY O'DONNELL; JOHN RAY;
STEPHEN CASPERSON; CLYDE MAXWELL;
GERALD BERGE; PETER HUIBREGTSE;
TIM HAINES; ELLEN RAY; DIANA BENISCH;
and RANDALL HEPP,

Respondents.

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This is a proposed civil action for declaratory and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Berrell Freeman, who is presently confined at Supermax Correctional Institution in Boscobel, Wisconsin, contends that respondents violated his rights to due process and equal protection by re-labeling a disciplinary infraction as a "disturbance review" and retaining him in administrative confinement on the basis of that review. He contends further that respondents conspired to deprive him of his rights and subjected him to cruel and unusual punishment in doing so. He alleges that respondents

retaliated against him because "inmates" had brought a successful challenge to the disciplinary infraction in Curtis v. Litscher.

Petitioner seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. 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, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner's complaint 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. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

A decision will be stayed on petitioner's request for leave to proceed in forma pauperis

on his claim that respondents retaliated against him for "inmates" challenging the disciplinary infraction by retaining him in administrative confinement and at Supermax. Petitioner's request for leave to proceed on his remaining claims will be denied because the claims are legally frivolous.

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

ALLEGATIONS OF FACT

A. Parties

Petitioner Berrell Freeman is an inmate at Supermax Correctional Institution. Respondent Department of Corrections is a state agency. Respondent Jon E. Litscher is Secretary of the department. Respondent Cindy O'Donnell is Deputy Secretary of the department. Respondent John Ray is a corrections complaint examiner. Respondents Stephen Casperson and Randall Hepp are employed by the Division of Adult Institutions. Respondent Clyde Maxwell is an employee of the Department of Corrections. The remaining respondents are employed at Supermax: respondent Gerald Berge is the warden; respondent Peter Huibregtse is the security director; respondent Tim Haines is a unit manager; and respondents Ellen Ray and Diana Benisch are institution complaint examiners.

B. Expungement of Disciplinary Records

In a letter dated August 5, 2001, respondent Hepp stated that the disciplinary infractions for which petitioner was sent to Supermax were expunged. This decision resulted from a state court case, Curtis v. Litscher, 00-CV-1604, in which the disciplinary infractions were successfully challenged. Respondents did not release petitioner from Supermax and return him to a medium security classification.

On August 5, 2001, respondents Hepp and Maxwell re-labeled the disciplinary infractions of November 30, 1999, as a "disturbance review." In a letter dated August 8, 2001, respondent Berge stated that because of newly discovered evidence, petitioner would be granted a new administrative confinement review. The "new evidence" were the disciplinary infractions of November 30, 1999 re-labeled as a "disturbance review." On August 9, 2001, Lt. Gerl recommended that petitioner be placed in administrative confinement. He falsified documents by stating that it was petitioner's "initial placement" in administrative confinement. On September 4, 2001, the administrative confinement committee, of which respondent Haines is the supervisor, decided to keep petitioner in administrative confinement on the basis of the expunged disciplinary infraction of November 30, 1999, that had been re-labeled a disturbance review. Respondent Haines knew that 75% of the inmates whose disciplinary infractions of November 30, 1999 were expunged were released from administrative confinement and Supermax. On September 24, 2001, petitioner appealed the decision of the administrative confinement committee to respondent

Berge, who affirmed the committee's decision. Petitioner appealed the decisions of the committee and Berge to respondent Casperson. After not getting a response from Casperson on at least three occasions, petitioner was told to consider his appeal denied.

Respondents are continuing to use the re-labeled disciplinary infractions to keep petitioner at Supermax. In Curtis v. Litscher, the defendants were ordered to release the plaintiffs from administrative confinement after expunging their disciplinary records regarding the November 30, 1999 incident. Respondents are retaliating against petitioner for inmates challenging the disciplinary records in Curtis.

C. Inmate Complaints

On July 30, 2001, petitioner filed inmate complaint #SMCI-2001-22676, in which he complained that releasing other inmates but not him was a violation of his equal protection rights. Respondent Ellen Ray recommended that the complaint be dismissed. She stated falsely that an independent investigation was continuing of the Supermax inmates who were transferred to Corrections Corporation of America custody. Respondent Huibregtse dismissed the complaint. Respondent John Ray affirmed the dismissal and stated falsely that all references to the November 30, 1999 incident were expunged from petitioner's file. Respondent O'Donnell adopted the dismissal as the decision of the secretary, respondent Litscher.

On August 15, 2001, petitioner filed inmate complaint #SMCI-2001-24314, in which he complained that defendants' actions were retaliatory, violated due process and equal protection and would lead to cruel and unusual punishment. Respondent Ellen Ray recommended that the complaint be dismissed, stating that petitioner had received a new administrative confinement hearing on September 4, 2001 and that the decision relied on new evidence discovered by respondent Hepp. Respondent Ray knew that the new evidence was the re-labeled disciplinary infractions of November 30, 1999. Respondent Berge dismissed petitioner's complaint. Respondent John Ray affirmed the dismissal, stating falsely that all references to the November 30, 1999 incident were expunged from petitioner's file. Respondent O'Donnell adopted Ray's dismissal as the decision of the secretary.

On September 7, 2001, petitioner filed inmate complaint #SMCI-2001-26915, in which he complained that his rights were violated by the use of the disciplinary infractions of November 30, 1999. Respondent Diana Benisch recommended that the complaint be dismissed, stating that no procedural errors were found. Respondent Huibregtse dismissed the complaint. Respondent John Ray affirmed the dismissal and stated falsely that all references to the November 30, 1999 incident were expunged from petitioner's file. Respondent O'Donnell adopted Ray's dismissal as the decision of the secretary.

DISCUSSION

A. Due Process

Petitioner alleges that all respondents violated his right to due process by supposedly expunging the disciplinary records regarding the November 30, 1999 incident from his file, but re-labeling the record a "disturbance review" and keeping him in administrative confinement on the basis of the "disturbance review."

Although petitioner frames this allegation as a due process violation, he seems to allege that respondents are keeping him in administrative confinement despite the state court proceeding Curtis v. Litscher, in which the state court allegedly ordered the expungement of disciplinary reports stemming from the November 1999 incident. Thus, it appears that petitioner is alleging that respondents are in contempt of the state court proceeding. Under this reading of petitioner's complaint, petitioner will not be granted leave to proceed on this claim because this court does not have jurisdiction over it. Instead, petitioner must file such an allegation with the state court judge who entered the order.

To the extent that petitioner is alleging a due process violation, he will be denied leave to proceed on that claim. The Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Before petitioner is entitled to Fourteenth Amendment due process protections, he must first have a protected liberty or property interest at stake. Averhartv. Tutsie, 618 F.2d 479, 480

(7th Cir. 1980). Liberty interests are "generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484 (1995) (citations omitted). After Sandin, in the prison context, protected liberty interests are essentially limited to the loss of good time credits because the loss of such credit increases the length of an inmate's incarceration despite his having earned an earlier release date. Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, Sandin does not allow suit complaining about deprivation of liberty). In this case, petitioner has not alleged that respondents' acts increased the length of his incarceration. Therefore, the allegations do not suggest that respondents' acts implicate a protected liberty interest under Sandin. Petitioner's request for leave to proceed in forma pauperis on his claim that respondents violated his right to due process by re-labeling his disciplinary records as a "disturbance review" will be denied as legally frivolous.

B. Equal Protection

The equal protection clause of the Fifth Amendment prohibits state actors from applying different legal standards to similarly situated individuals because of their

membership in a suspect class or "definable minority" or because of the exercise of a fundamental right. Nabozny v. Podlesny, 92 F.3d 446, 457 (7th Cir. 1996); see also Smith on behalf of Smith v. Severn, 129 F.3d 419, 429 (7th Cir. 1997). If a petitioner demonstrates he has been treated differently from similarly situated persons because of his membership in a suspect class or the exercise of a fundamental right, the court applies heightened scrutiny to the constitutionality of the act or statute. See Nabozny, 92 F.3d at 454. However, "when reviewing class distinctions drawn in social legislation not pertaining to a fundamental right or a suspect class, '[a court's] review is limited to determining whether the statute is rationally related to legitimate legislative goals.'" Hassan v. Wright, 45 F.3d 1063, 1068 (7th Cir. 1995) (quoting Lindley for Lindley v. Sullivan, 889 F.2d 124, 132 (7th Cir. 1989)).

Petitioner does not allege that he was treated differently from similarly situated persons because of his membership in a suspect class or the exercise of a fundamental right. To the contrary, he alleges that respondents violated his right to equal protection when they did not remove him from administrative confinement and from Supermax unlike 75% of the other inmates whose disciplinary records regarding the November 30, 1999 incident were also expunged. Petitioner's allegations do not lend themselves to an equal protection claim. Although 75% of the inmates whose disciplinary records were expunged were removed from administrative confinement, the remaining 25% of those inmates were not. This means that

petitioner was treated similarly to one-fourth of the inmates in petitioner's situation. From petitioner's allegations, it is not possible to infer that respondents isolated petitioner from all other similarly situated inmates and treated him in a manner that is not rationally related to a legitimate goal. Petitioner's request for leave to proceed on his claim that respondents violated his right to equal protection by not removing him from administrative confinement and Supermax will be denied as legally frivolous.

C. Conspiracy

Petitioner alleges that all respondents conspired to deprive him of his right to equal protection and due process by re-labeling the disciplinary records regarding the November 30, 1999 incident as a "disturbance review" and keeping him in administrative confinement on the basis of that review. To state a claim of civil conspiracy, a petitioner must allege "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'" Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979) (citation omitted). Claims of conspiracies to effect deprivations of civil or constitutional rights may be brought in federal court under § 1983. However, a bare allegation of conspiracy is insufficient to support a conspiracy claim if it does not provide the "bare minimum facts

necessary to put the defendant on notice of the claim so that he can file an answer." Higgs v. Carver, 286 F.3d 437, 438 (7th Cir. 2002).

Nothing in petitioner's complaint supports an inference that two or more respondents had a meeting of the minds to re-label his disciplinary record as a "disturbance review." Moreover, because I have found that petitioner's due process and equal protection challenges are legally frivolous, his claim for conspiracy must also fail. In a conspiracy claim, two or more persons must act in concert to commit an unlawful act or to commit a lawful act by unlawful means. The acts respondents are alleged to have conspired to commit are not unlawful. Petitioner has failed to allege that they were committed by unlawful means. Petitioner's request for leave to proceed on his conspiracy claim will be denied because the claim is legally frivolous.

D. Cruel and Unusual Punishment

The Eighth Amendment imposes a duty on prison officials to provide adequate shelter and prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain" or that are "grossly disproportionate to the severity of the crime warranting imprisonment." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Although prisoners are entitled to "the minimal civilized measure of life's necessities," Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997) (citing Farmer v. Brennan, 511 U.S. 825, 833-34 (1994)),

conditions that create "temporary inconveniences and discomforts" or that make "confinement in such quarters unpleasant" are insufficient to state an Eighth Amendment claim. Adams v. Pate, 445 F.2d 105, 108, 109 (7th Cir. 1971).

Petitioner alleges that respondents acted with deliberate indifference with the full knowledge that they were violating petitioner's constitutional rights and that their conduct exceeded all bounds of decency, thereby violating the Eighth Amendment's prohibition on cruel and unusual punishment. Even taking petitioner's allegations as true and construing them liberally, they do not amount to cruel and unusual punishment. The fact of being in administrative confinement may make confinement unpleasant, but in and of itself, it does not involve the wanton and unnecessary infliction of pain. Petitioner's request for leave to proceed in forma pauperis on his claim that respondents subjected him to cruel and unusual punishment by violating his constitutional rights and retaining him in administrative confinement will be denied because the claim is legally frivolous.

E. Retaliation

Prison officials may not retaliate against inmates for the exercise of a constitutional right. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). To state a claim of retaliatory treatment for the exercise of a constitutionally protected right, petitioner need not present direct evidence in the complaint. Nor is it necessary, the Court of Appeals for the Seventh

Circuit decided recently, for inmates to allege a chronology of events from which retaliation may be inferred. Walker v. Thompson, No. 01-2361, 2002 WL 818853, at *2 (7th Cir. May 1, 2002). However, it is insufficient simply to allege the ultimate fact of retaliation. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002).

Petitioner alleges that all respondents retaliated against him for "inmates" successfully challenging the disciplinary infractions of November 30, 1999 in Curtis v. Litscher. It is unclear whether petitioner was one of the plaintiffs in Curtis. If so, I would construe his complaint to allege that he exercised his constitutional right to access the courts by taking part in the state court case and that, as a result, respondents retaliated against him by re-labeling the disciplinary report as a "disturbance review" and retaining him in administrative confinement at Supermax. However, if petitioner was not a plaintiff in Curtis, he does not have standing to assert this claim because he himself was not exercising a constitutional right. A decision on petitioner's request for leave to proceed on his retaliation claim will be stayed. Petitioner may have until August 9, 2002, in which to inform the court whether he was a plaintiff in Curtis v. Litscher. If petitioner does not inform the court of this fact by August 9, 2002, his request for leave to proceed in forma pauperis on his retaliation claim will be denied.

In his complaint, petitioner alleges that all respondents are in either management or authoritative positions, each knew about the alleged violations of petitioner's constitutional

rights and each had the power to prevent them. Petitioner concludes that all of the respondents are liable for damages caused him by all of the alleged violations. It is well established that liability under § 1983 must be based on the defendant's personal involvement in the constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). In a § 1983 action, there is no place for the doctrine of respondeat superior, under which a supervisor may be held responsible for the acts of his subordinates. Id. Under this authority, if petitioner informs the court of his involvement in Curtis by August 9, 2002, and if he was a plaintiff in that case, he will be allowed to proceed on this claim against respondents Hepp and Maxwell (who re-labeled the disciplinary infraction), respondent Haines (who supervised the administrative confinement committee hearing), respondent Berge (who dismissed petitioner's appeal of the administrative confinement committee's decision) and respondent Ellen Ray (who recommended dismissing petitioner's inmate complaint regarding retaliation). Petitioner will not be allowed to proceed on this claim against any other individual respondents unless he adds additional allegations showing precisely what these respondents knew about the alleged retaliation.

Petitioner has named the Wisconsin Department of Corrections as a defendant in this case. The Supreme Court has held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." Will v. Michigan Department of State Police, 491 U.S. 58, 71 (1989). Furthermore, "[i]t is well-settled that a claim against a state or local

agency or its officials may not be premised upon a respondeat superior theory." Rascon v. Hardiman, 803 F.2d 269, 274 (7th Cir. 1986) (citing Monell v. Dept. of Social Services, 436 U.S. 658, 694 (1978)). "The agency must be culpable in its own right, for example by having a policy of violating such rights." Bailey v. Faulkner, 765 F. 2d 102, 104 (7th Cir. 1985). Petitioner has not alleged that the Department of Corrections has any such policy. Therefore, he may not proceed against respondent Wisconsin Department of Corrections.

ORDER

IT IS ORDERED that

1. A decision is STAYED on petitioner Berrell Freeman's request for leave to proceed in forma pauperis on his claim that respondents Randall Hepp, Clyde Maxwell, Tim Haines, Gerald Berge and Ellen Ray retaliated against him for the successful challenge of the disciplinary infractions stemming from the November 1999 incident by retaining him in administrative confinement and at Supermax. Petitioner may have until August 9, 2002, in which to inform the court whether he was a plaintiff in Curtis v. Litscher. If petitioner does not inform the court of this fact by August 9, 2002, his request for leave to proceed in forma pauperis on his retaliation claim will be denied.

2. Petitioner's request for leave to proceed is DENIED on his claims that respondents violated his right to due process and equal protection, conspired to deprive him of those

constitutional rights and subjected him to cruel and unusual punishment because the claims are legally frivolous;

3. Respondents Wisconsin Department of Corrections, Jon E. Litscher, Cindy O'Donnell, John Ray, Stephen Casperson, Peter Huibregtse and Diana Benisch are DISMISSED from this case;

4. 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; and

5. The unpaid balance of petitioner's filing fee is $147.69; this amount is to be paid

in monthly payments according to 28 U.S.C. § 1915(b)(2) when the funds become available.

Entered this 29th day of July, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge