IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOSIAH L. WASHINGTON,

Petitioner,

ORDER

v.

02-C-0386-C

SGT. DALDEC, CAPTAIN TIGGLES, J. NORDAHL and CAPTAIN SCHULZ, sued in their individual capacities, and PHILLIP KINGSTON sued in his individual and official capacities,

Respondents.

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This is a proposed civil action for monetary and injunctive relief brought pursuant to 42 U.S.C. § 1983. Petitioner Josiah L. Washington, who is currently an inmate at the Waupun Correctional Institution in Waupun, Wisconsin, alleges that (1) respondents Tiggles and Schulz denied him due process in a disciplinary hearing in violation of the Fourteenth Amendment and (2) respondents Daldec, Nordahl and Kingston failed to provide him with adequate medical care in violation of the Eighth Amendment and Wisconsin tort law. In addition, I understand petitioner is alleging that respondents failed to protect him from an inmate assault in violation of his Eighth Amendment rights.

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.

Because I find that petitioner's constitutional claims are legally frivolous, I will deny his request for leave to proceed in forma pauperis. Because petitioner does not have any viable federal claims, I decline to exercise supplemental jurisdiction over his state law claim. In addition, petitioner's motion for appointment of counsel and request for production of documents will be denied as moot.

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

ALLEGATIONS OF FACT

At the time of the events in question, petitioner Josiah L. Washington was an inmate at the Jackson Correctional Institution in Black River Falls, Wisconsin. Respondents are employees of the Jackson Correctional Institution. Defendants Sergeant Daldec, Captain Tiggles and Captain Schulz are correctional officers, defendant J. Nordahl is the medical administrator and defendant Phillip Kingston is the warden.

On October 3, 2000, petitioner's cellmate, Michael Lewis, told petitioner that he had an atrocious prison record of beating his cellmates dating back to 1990. This was the first day that petitioner was in a cell with Lewis. Lewis told petitioner that he (Lewis) is a robber, that this is his character and that he takes what he wants. In the "senior hours" of October 3, Lewis raped petitioner.

On October 4, 2000, at 6 a.m., Lewis raped petitioner again.

On October 6, 2000, at 3 a.m., petitioner woke up and found Lewis standing on a chair with his penis touching petitioner's lips. Lewis whispered, "Suck it."

On October 17, 2000, petitioner stated (to an unspecified individual) that he had been sexually assaulted and that he had been bleeding from his anus. Petitioner was served with a disciplinary charge of threats. After petitioner met with defendants Schulz and Daldec, they informed him, "Don't tell anyone you got rape[d], keep your mouth closed."

On October 18, 2000, Lewis told petitioner that he was going to beat petitioner's ass in the morning and told him he had better get lots of sleep. That night, petitioner slept with a pencil in his hand because he did not know what was going to happen. At 12:35 a.m., petitioner went to the officer's station and told Sergeant Ingham that his cellmate was going to beat him up and that petitioner was going to stab him if it that occurred. Ingham asked petitioner to go back to his cell. Ingham told petitioner that he had talked to Lewis and that there would be no problem. Petitioner did not resist or threaten the officer in any fashion

or break and prison rules.

That same day, petitioner received a conduct report, which stated that petitioner had approached the officers and said "that Lewis was upset that he was watching T.V. told him to get a good nights sleep, because he was going to take care of him tomorrow" and that "if he grab me I'm going to stab him." The conduct report states that Ingham patted down petitioner and found a sharpened pencil.

Also on October 18, 2000, petitioner saw a nurse and told her that he had been raped and his rectum was bleeding. The nurse told petitioner that he had to fill out a request to see the doctor. Petitioner asked for an AIDS test, DNA test and a rectal exam.

Petitioner was placed in segregation sometime between October 16 and 19, 2000.

On October 19, 2000, petitioner saw a doctor and reported having been sexually assaulted with anal penetration two weeks earlier. The doctor's notes state that petitioner told the doctor that "he didn't tell anyone initially because the assaulter was threatening suicide if he told . . . [and the assaulter was] scheduled to be released soon also. [Petitioner] didn't want him killing himself + didn't want to 'mess up' the other inmate's release." The doctor ordered tests for HIV and hepatitis B and psychological counseling.

On October 26, 2000, petitioner received a written disposition signed by respondent Tiggles, stating, "Guilty as charged based on staff report gave [sic] a full picture of the incident." Respondent Schulz indicated to petitioner that he was going to investigate and

not to worry about the major "ticket" for threatening his cellmate. Petitioner asked that respondent Tiggles, the hearing officer, call inmate Pitte as a witness. Pitte was housed in the cell across from petitioner. Petitioner did not know the names of other witnesses, but he provided their cell locations. The written disposition did not explain the reason for the finding of guilt. Petitioner received 60 days of program segregation. Defendants Nordahl and Schulz refused to let petitioner's inmate complaint be reviewed by an outside review board. Petitioner filed an administrative appeal pointing out the none of his witnesses had been called and that he was going to stab his cellmate if he had been raped.

On November 6, 2000, petitioner received his HIV and hepatitis B test results, which were negative.

On November 9, 2000, petitioner filed an inmate complaint (JCI-2000-32143), alleging that he had been raped by his cellmate, that the nurse had told him he could not get a DNA test and that he had not been given a rectal exam. The inmate complaint examiner found that (1) the allegation of rape was under investigation by security; (2) because the rape had occurred two weeks prior to his reporting it and DNA evidence would now be lost, he was not given a DNA test; and (3) petitioner had been seen and evaluated by a physician.

DISCUSSION

A. Due Process

I understand petitioner to allege that respondents Schulz and Tiggles violated his Fourteenth Amendment due process rights by placing him in program segregation for 60 days for stating that he was going to stab his cellmate after a hearing in which these respondents did not allow him to call witnesses and refused to let his inmate complaint be reviewed by an outside board.

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. Averhart v. 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).

Prisoners do not have a liberty interest in remaining out of segregated confinement so long as that period of confinement does not exceed the remaining term of their incarceration. See 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 Sandin, 515 U.S. at 486, the Supreme Court held that an inmate's "discipline in segregated confinement did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Petitioner does not have a liberty interest in remaining free of program segregation because such confinement does not impose an atypical and significant hardship on him in light of "the ordinary incidents of prison life." Id. at 484. Therefore, petitioner was not entitled to due process protections at his hearing. See Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001) (in absence of liberty interest, "the state is free to use any procedures it chooses, or no procedures at all").

Because petitioner's placement in program segregation for 60 days does not implicate a liberty interest under Sandin, his request for leave to proceed in forma pauperis as to his due process claim against respondents Schulz and Tiggles will be denied as legally frivolous.

B. Adequate Medical Care

I understand petitioner to allege that respondents Nordahl, Kingston and Daldec violated his Eighth Amendment right to be free from cruel and unusual punishment by failing to provide him with adequate medical care. However, petitioner fails to allege that any of these respondents were involved personally in his medical care.

To establish individual liability under 42 U.S.C. § 1983, plaintiff must allege that the individual defendants were involved personally in the alleged constitutional deprivation or discrimination. Under § 1983, individual defendants cannot be held liable under a theory of respondeat superior. See Hearne v. Board of Education of City of Chicago, 185 F.3d 770, 776 (7th Cir. 1999). "'Section 1983 creates a cause of action based on personal liability and predicated upon fault; thus, liability does not attach unless the individual defendant caused or participated in a constitutional deprivation.'" Vance v. Peters, 97 F.3d 987, 991 (7th Cir. 1996) (quoting Sheik-Abdi v. McClellan, 37 F.3d 1240, 1248 (7th Cir.1994)); see also Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983) ("A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary."). Moreover, petitioner fails to allege that the doctor or nurses acted at the direction or with the knowledge and consent of these respondents. See Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985) (official is sufficiently involved "if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent."); see also Kelly v. Municipal Courts of Marion County, 97 F.3d 902, 908 (7th Cir. 1996); Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995).

Because petitioner has failed to allege any personal involvement on the part of respondents Nordahl, Kingston and Daldec, his request for leave to proceed as to his Eighth

Amendment inadequate medical care claim against these respondents will be denied as legally frivolous.

C. Failure to Protect

Liberally construing petitioner's proposed complaint, I understand him to allege that respondent Kingston, the warden, failed to protect him by allowing him to be placed in a cell with a cellmate who claimed to have a history of beating cellmates and who sexually assaulted petitioner.

The Eighth and Fourteenth Amendments give prisoners a right to remain safe from assaults by other inmates. See Langston v. Peters, 100 F. 3d 1235, 1237 (7th Cir. 1996). "'[P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.'" Farmer v. Brennan, 511 U.S. 825 (1994). "Having incarcerated 'persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct,' see Hudson v. Palmer, 468 U.S. 517, 526 (1984), having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." Farmer, 511 U.S. at 833.

In a case alleging a respondent's failure to protect a prisoner from harm, "[t]he inmate must prove a sufficiently serious deprivation, i.e., conditions which objectively 'pos[e] a substantial risk of serious harm.'" Pope v. Shafer, 86 F.3d 90, 92 (7th Cir. 1996). The

inmate also must prove that the prison official acted with deliberate indifference to the inmate's safety, "effectively condon[ing] the attack by allowing it to happen." Langston v. Peters, 100 F.3d 1235, 1237 (7th Cir. 1996) (quoting Haley v. Gross, 86 F. 3d 630, 640 (7th Cir. 1996)). A prison official may be liable for knowing that there was a substantial likelihood that the prisoner would be assaulted and failing to take reasonable protective measures. Farmer, 511 U.S. at 847. In a case alleging failure to protect, "[a] prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety." McGill v. Duckworth, 944 F.3d 344, 349 (7th Cir. 1991); see also Peate v. McCann, No. 00-2937, slip op. at 4 (7th Cir. June 25, 2002) ("[Plaintiff] must demonstrate only that 'the defendants *actually knew* of a substantial risk that [the prisoner] would seriously harm him.'") (citing Haley v. Gross, 86 F.3d 630, 641 (7th Cir. 1996) (emphasis in original).

In this case, petitioner never alleges that he complained about his safety to prison officials *before* the alleged rapes occurred. Petitioner alleges that he and Lewis were put in the same cell together on October 3 and that they engaged in a conversation in which Lewis said that he had a record of beating his cellmates. However, the first alleged rape did not occur until sometime later on October 3, 2000. According to petitioner's own allegations, he did not report the alleged rapes until October 18, 2000, approximately two weeks later. In fact, the doctor's notes petitioner supplied with his complaint indicate that on October 19, 2000,

petitioner told the doctor that "he didn't tell anyone initially because the assaulter was threatening suicide if he told . . . [and the assaulter was] scheduled to be released soon also. [Petitioner] didn't want [the assauter] killing himself + didn't want to 'mess up' the other inmate's release." Because petitioner never informed respondents (or any prison officials) that Lewis was a threat to his safety before the alleged incidents occurred, his failure to protect claim against respondent Kingston will be denied as legally frivolous.

D. State Law Claim

Petitioner alleges that respondents violated Wisconsin tort laws. Because petitioner has no viable federal claim, I decline to exercise jurisdiction over his state law claim. See Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (district court has discretion to retain or to refuse jurisdiction over state law claims).

ORDER

IT IS ORDERED that

1. Petitioner Josiah L. Washington's request for leave to proceed in forma pauperis is DENIED as legally frivolous;

2. I decline to exercise supplemental jurisdiction over petitioner's state law claim;

3. Petitioner's motion for appointment of counsel and request for production of

documents are DENIED as moot.

4. The unpaid balance of petitioner's filing fee is $136.02; petitioner is obligated to pay this amount in monthly payments according to 28 U.S.C. § 1915(b)(2);

5. A strike will not be recorded against petitioner because I am declining to exercise supplemental jurisdiction over his state law claims; thus I did not dismiss the action for on of the reasons set forth in 28 U.S.C. § 1915(g); and

6. The clerk of court is directed to enter judgment dismissing this case.

Entered this 16th day of August, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge