IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EUGENE CHERRY,

OPINION AND ORDER

Plaintiff,

03-C-129-C

v.

MATTHEW FRANK, GERALD BERGE, PETER HUIBREGTSE, GARY BOUGTON, BRAD HOMPE, JOAN GERL, COREY J. HANEY,[1] THOMAS BELZ and HENRY BRAY,

Defendants.

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Plaintiff Eugene Cherry, an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, brought this civil action under 42 U.S.C. § 1983. In an order dated April 25, 2003, I allowed plaintiff to proceed on the following claims: (1) defendants Thomas Belz, Henry Bray, Matthew Frank, Gerald Berge, Peter Huibregtse, Brad Hompe and Gary Boughton violated his right to be free from cruel and unusual punishment when

[1] In his complaint, plaintiff identified this defendant as "Sgt. C. Haney." Defendants have since advised the court that his full name is Corey J. Haney. I have amended the caption accordingly.

Belz and Bray placed needles and staples in his food and the other defendants were aware of their misconduct but refused to intervene; (2) defendants Belz and Bray violated plaintiff's rights of access to the courts and free speech when they put needles and staples into his food in retaliation for his having filed lawsuits against other prison officials and complaining about prison conditions; (3) defendant Hompe violated plaintiff's rights of access to the courts and free speech when he issued false conduct reports to plaintiff in retaliation for plaintiff's having filed a lawsuit against Hompe's wife and complaining about Belz's and Bray's misconduct; (4) defendants Corey Haney and Joan Gerl violated plaintiff's right to be free from excessive force and unreasonable searches and seizures when Haney performed a strip search on plaintiff and Gerl refused to intervene; and (5) defendant Gerl violated plaintiff's right to adequate medical care when she refused to provide him with medication.

Included with plaintiff's complaint was a motion for a preliminary injunction with respect to his claim of food tampering. After a hearing held on July 17, 2003, I denied plaintiff's motion for a preliminary injunction because I concluded that he had not shown any likelihood that he would succeed on the merits of that claim.

Presently before the court are several motions filed by plaintiff to (1) issue a preliminary injunction or temporary restraining order; (2) appoint counsel; (3) strike an amendment to defendants' proposed findings of fact and the affidavit on which the

amendment is based; (4) grant summary judgment in his favor. In addition, defendants have filed their own motion for summary judgment on all of plaintiff's claims.

Plaintiff's first three motions require little discussion. In his motion for a temporary restraining order, plaintiff alleges that members of the prison staff have searched his person, confiscated his legal documents and planted nails in his cell, all because plaintiff filed this suit against defendants. He requests an order "to remove plaintiff away from defendan[t] Berge's staff, who continu[e] to retaliate and try to 'set plaintiff up.'" There are several reasons why plaintiff is not entitled to relief. First, plaintiff fails to identify *who* is taking these alleged actions against him. He does not allege that it is the defendants; rather, he refers only to "the escorting officers" and "staff." I could not provide injunctive relief to plaintiff without knowing to whom the order would be directed. Second, as I have explained to plaintiff many times in previous orders, in situations in which a plaintiff alleges that the defendants have retaliated against him for initiating a lawsuit, it is the policy of this court to require the claim to be presented in a lawsuit separate from the one which is alleged to have provoked the retaliation. This is to avoid the complication of issues which can result from an accumulation of claims in one action.

The court recognizes an exception to this policy only where it appears that the alleged retaliation would directly, physically impair the plaintiff's ability to prosecute his lawsuit. Plaintiff does not allege that prison officials are attempting to physically harm him with the

nails. He does allege that officials are confiscating legal documents; if defendants were confiscating plaintiff's legal documents that were necessary to this case, he could be entitled to injunctive relief. However, plaintiff does not identify with any specificity what documents were taken and he does not explain how his loss of these documents will keep him from prosecuting this lawsuit. Accordingly, I conclude that plaintiff has failed to show that he is entitled to injunctive relief at this time. If he believes that prison officials are retaliating against him, he may file a separate lawsuit on this issue.

Plaintiff's motion for appointment of counsel is at least his seventh such motion in this case. It will be denied for the same reasons as his previous motions: I do not believe that plaintiff is incapable of representing himself or that appointing counsel will likely make a difference in the outcome of the case. See Zanes v. Rhodes, 64 F.3d 285 (7th Cir. 1995).

Plaintiff's motion to strike arises in response to an amendment that defendants made to one of their proposed findings of fact. Specifically, defendants changed the date on which they assert plaintiff was taken off mail monitoring in 2002 from July 24 to May 24. Plaintiff argues that the court should strike this amendment as well as the affidavit on which it is based because defendants are lying about the correct date, which he identifies as June 12. Plaintiff's "motion to strike" is really nothing more than a factual dispute. If a party disagrees with a proposed finding of fact, the proper course of action is to file a response to that proposed factual finding, in which the party states that the fact is disputed and then

cites the evidence supporting his version of the fact. A court may not "strike" a piece of evidence simply because a party has contrary evidence. Therefore, plaintiff's motion to strike will be denied. (In any event, it is not material to either plaintiff's or defendants' motion for summary judgment whether plaintiff was taken off mail monitoring in May, June or July.)

Both plaintiff's and defendants' motions for summary judgment will be denied with respect to plaintiff's claim that defendants Belz and Bray violated his Eighth Amendment rights by putting needles and staples in his food. There is a genuine issue of material fact with respect to whether Belz and Bray tampered with plaintiff's food. Although plaintiff's allegations may be unlikely, I cannot conclude that he is not credible as a matter of law.

With respect to his remaining claims, plaintiff has failed to adduce sufficient evidence to allow a reasonable jury to find in his favor. Accordingly, plaintiff's motion for summary judgment will be denied and defendants' motion for summary judgment will be granted on the remaining claims.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed. (To make the section comprehensible, I have included the disputed facts in parentheses.)

UNDISPUTED FACTS

Plaintiff Eugene Cherry is an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. He has been housed in the alpha unit, or level one, of the prison since December 2002. Level one is the most restrictive level in the prison, with the greatest limitations on property. Defendants believe that plaintiff fails to move to higher levels because he has a propensity to make inappropriate sexually oriented comments and to act out sexually in front of staff. At least since January 2, 2003, plaintiff has been subject to a "mail monitoring" program, meaning that the unit manager, security director or a designee may inspect and read all of plaintiff's non-legal mail. Prison staff have never found plaintiff "fishing," a practice in which inmates attempt to move items from one cell to another via string or other means.

A. Sewing Needles and Staples

On January 2, 2003, defendant Henry Bray, a correctional officer, wrote plaintiff a warning for threatening Bray's wife, who is also an employee at the prison. That same day, plaintiff asked prison staff to speak with a captain because he had found staples in his food. He was told to "shut up and quit complaining."

On January 7, 2003, plaintiff received his meal tray from defendant Bray and defendant Thomas Belz, another correctional officer. Belz's and Bray's job responsibilities

include distributing meals to inmates in the alpha unit during second shift, though they do not prepare the meals or deliver them to the unit. Some time after plaintiff received his meal, he pressed the emergency button in his cell; he told the sergeant on duty that he needed to see the nurse. (The parties dispute whether plaintiff's meal had staples in it and whether plaintiff was stabbed in the gums by the staples when he unknowingly put them into his mouth.)

An hour later, nurse Ken Lange arrived at plaintiff's cell with defendant Bray. Plaintiff showed the nurse a tissue with the staples in it. (The parties dispute whether the tissue had blood on it and whether Bray took the staples from plaintiff.) After examining plaintiff through the door, Lange determined that plaintiff was not injured. Lange ordered salt water for plaintiff upon his request.

(Plaintiff avers that on numerous occasions after January 7, 2003, including on February 16, 2003, and February 17, 2003, he found staples and sewing needles in his food when defendants Belz and Bray delivered his food. In addition, he says that after Belz and Bray delivered his meal, they would often laugh at him and ask, "How was your food, queer boy?" Defendants Belz and Bray admit that they would sometimes ask inmates whether they liked their meal, but they denied laughing at plaintiff or putting staples or needles into his food on any occasion.) Plaintiff no longer eats food during the second shift because he is afraid of being harmed.

Plaintiff complained to defendant Gerald Berge (the warden), defendant Peter Huibregtse (the deputy warden) and defendant Gary Boughton (the security director) that defendants Belz and Bray were tampering with his food. In addition, plaintiff contacted the Grant County Sheriff's Department. In response, defendant Hompe wrote:

> I have found no support to your claims of staff tampering with your meals. In the future, if you should have a complaint about your food you are directed to bring it to the attention of the unit sergeant immediately. You are also directed to contact the Unit Manager about unit issues. I would also caution you about making false statements about staff as it may result in a conduct report and discipline.

In February 2003, plaintiff wrote defendant Huibregtse again, asking him to retrieve sewing needles and staples that he found in his food. Huibregtse did not respond. On February 21, 2003, defendant Huibregtse was on alpha unit, accompanying a tour of the prison that included Matthew Frank, Secretary of the Wisconsin Department of Corrections. Plaintiff asked to speak with Huibregtse as the tour group was passing by his cell. Plaintiff told Huibregtse that he had sewing needles in his cell, after which he turned over two needles to Huibregtse. (The parties dispute whether defendant Frank witnessed plaintiff giving the needles to Huibregste.)

Defendant Huibregtse authorized defendant Boughton to investigate plaintiff's allegations of food tampering. Defendant Brad Hompe, the alpha unit manager and Captain Horner conducted the investigation. On February 26, 2003, Hompe and Horner spoke with plaintiff. Hompe and Horner doubted plaintiff's allegations because he had threatened

defendants Belz and Bray in the past, saying that he would "get them," though plaintiff has never received a conduct report from defendants Belz or Bray for making threats. (Hompe avers also that he was suspicious because plaintiff admitted that he did not know how the needles and staples got into his food and because he did not report his discovery of the needles and staples as soon as he found them. In addition, he avers that plaintiff's story was inconsistent. According to Hompe, plaintiff said first that he had been poked by the needles. Later, he said that he found the needles before eating his food. Plaintiff denies all of these assertions.) In a report, Hompe and Horner concluded that plaintiff's allegations were "unsubstantiated." Defendant Boughton reviewed the report and agreed with its conclusion. As a result of the conclusions in the report, defendant Hompe issued a conduct report to plaintiff for lying about staff. In 2002, plaintiff filed a lawsuit against Kathryn McQuillian, who is now married to defendant Hompe.

On March 4, 2003, and March 12, 2003, defendants Belz and Bray delivered legal supplies to plaintiff. (The parties dispute whether Belz and Bray gave plaintiff adhesive stamps, which are considered contraband, and told plaintiff, "There's more where they come from if you learned to keep your trap shut.") Plaintiff complained to defendants Boughton and Hompe about Belz's and Bray's alleged bribe. In response, defendant Hompe issued another conduct report to plaintiff for lying about staff.

On several occasions in June 2003, defendants Belz and Bray gave plaintiff

medication that was not prescribed to him. (The parties dispute whether defendants did this intentionally.) After plaintiff complained to the sheriff's department and defendants Berge and Huibregtse, defendant Hompe issued plaintiff another conduct report for lying about staff.

B. Strip Search

On February 8, 2003, between 5:30 p.m. and 6:00 p.m., correctional officer T. Brown ordered plaintiff to come out of his cell to be searched. After initially refusing to comply, plaintiff came out of his cell when a supervising officer, defendant Joan Gerl, arrived. Defendant Gerl decided that plaintiff should be strip-searched. She believed that plaintiff might be hiding contraband because he had been in possession of staples and because he objected to the cell search. In the strip search cage, plaintiff complied with requests to remove his clothing and glasses, lift his scrotum and spread his buttocks for visual inspection. However, plaintiff refused Brown's request to take his braids out. After plaintiff defied Brown's repeated orders to remove his braids, defendant Gerl instructed the officers to give plaintiff time to calm down. Defendant Gerl left the unit, returning at approximately 7:30 p.m. Plaintiff continued to refuse orders to undo his braids. Instead, he began masturbating in front of Gerl, stating, "I wanna fuck you up the ass!"

Defendant Boughton authorized the use of force to complete the strip search. A cell

extraction team was assembled, led by defendant Corey Haney. The team removed plaintiff from the cell and placed him in wrist and ankle restraints so that Haney could perform the search safely. Plaintiff knelt on a mat placed on the floor. Defendant Haney began the search with plaintiff's hair and then searched the rest of his body, including his genitals and buttocks. (Defendant Haney admits that he "touched" plaintiff's genitals "in order to expose areas hidden from sight" and that he pulled apart plaintiff's buttocks to visually inspect his anus. However, he denies plaintiff's averment that he "grabb[ed]" and "tugg[ed]" plaintiff's penis and testicles during the search and inserted his gloves into plaintiff's anus.) While plaintiff was being searched by defendant Haney, he called to defendant Gerl, but she did not intervene to help plaintiff.

Plaintiff was in the strip search cell naked for at least two hours. The search itself lasted approximately five minutes. Several officers observed the search, but it occurred outside the view of other inmates. After defendant Haney completed the search, plaintiff asked to see a nurse. Nurse Lange examined plaintiff and reported that he found no injuries. Plaintiff was returned to his cell in time for the nightly medication pass.

As of February 8, 2003, plaintiff had prescriptions for three medications: (1) for dyssomina, two capsules of Benadryl at bedtime; (2) for herpes, one tablet of Acyclovir four times a day (8:00 a.m., 12:00 p.m., 4:00 p.m., 8:00 p.m.); (3) for epigastric pain, one tablet of Zantac twice a day (one in the morning and one at bedtime). Prison staff distribute

plaintiff's Benadryl medication each night before bedtime. Plaintiff is permitted to keep quantities of Acyclovir and Zantac in his cell. (The parties dispute whether plaintiff asked defendant Gerl for his medications while he was in the strip search cage. Plaintiff avers that he asked Gerl for all three of them, as well as back pain medication, but she told him that he could not have his medication until he took his braids out. Defendant Gerl denies these averments.) According to the prison's medication records, plaintiff refused his Benadryl on the evening of February 8. (Plaintiff denies that he refused his medication.)

In a letter dated February 23, 2003, plaintiff complained to defendant Frank about the food tampering and the strip search. He asked Frank to transfer him to another prison. He wrote to defendant Frank again in March 2003, stating that defendants Belz and Bray had given him legal and mailing supplies so that he would not implicate them in his allegations regarding the needles. In response, defendant Hompe wrote, "Your allegations have been appropriately addressed and the matter is closed. Future correspondence regarding these matters will not be answered." In addition, defendant Berge informed plaintiff that his allegations had been found to be false and that defendant should stop lying about staff.

OPINION

A. Cruel and Unusual Punishment and Retaliation

In the order granting plaintiff leave to proceed, I concluded that plaintiff had stated a claim upon which relief could be granted with respect to three claims arising out of his allegations of food tampering: (1) defendants Belz, Bray, Frank, Berge, Huibregtse, Hompe and Boughton violated his Eighth Amendment rights when Belz and Bray attempted to harm plaintiff by placing needles and staples in his food and the other defendants knew about Belz's and Bray's misconduct but refused to intervene; (2) defendants Belz and Bray put needles and staples in plaintiff's food because he filed lawsuits against other prison officials and complained about the mistreatment he received in prison; and (3) defendant Hompe issued conduct reports to plaintiff because he complained about Belz's and Bray's misconduct and because he filed a lawsuit against defendant Hompe's wife.

1. Eighth Amendment claim against defendants Belz and Bray

The Eighth Amendment prohibits "unnecessary and wanton inflictions of pain," which includes pain that is inflicted "totally without penological justification." Hope v. Pelzer, 536 U.S. 730, 737 (2001). Although this is the general test under the Eighth Amendment, the Supreme Court has applied the test differently, depending on the type of claim involved. For claims involving the adequacy of medical care and general conditions

of confinement, the Court has held that the question is whether the defendant was deliberately indifferent to a substantial risk of serious harm. Farmer v. Brennan, 511 U.S. 825, 829 (1994); Helling v. McKinney, 509 U.S. 25 (1993); Wilson v. Seiter, 501 U.S. 294 (1991); Estelle v. Gamble, 429 U.S. 97 (1976). For claims involving allegations of excessive force, the question is whether the defendant inflicted at least a minimal injury "maliciously and sadistically for the very purpose of causing harm." Hudson v. McMillan, 503 U.S. 1, 6 (1992); Whitley v. Albers, 475 U.S. 312, 321 (1986).

The alleged facts giving rise to plaintiff's claim of cruel and unusual punishment do not fit squarely into either of these tests. Plaintiff is alleging that defendants Belz and Bray attempted to harm him intentionally, suggesting that the standard in Hudson and Whitley is appropriate for this case. However, in Hudson and Whitley, the Supreme Court explained that a heightened mental state requirement was appropriate because, in the excessive force context, "corrections officials must make their decisions 'in haste, under pressure, and frequently without the luxury of a second chance.'" Hudson, 503 U.S. at 6 (quoting Whitley, 475 U.S. at 320). These considerations would not be present in this case. In fact, it is difficult to imagine any legitimate reason for putting sharp objects into an inmate's food. Therefore, I see no reason to require plaintiff to meet a heightened standard. His allegations may be consistent with a showing of malicious and sadistic behavior, but such a showing is not required to prove an Eighth Amendment violation in this case. Rather, plaintiff may

satisfy the mental state requirement by showing that defendants acted with deliberate indifference to his health or safety, meaning that they actually knew of a substantial risk of harm to plaintiff and acted or failed to act in disregard of that risk. Haley v. Gross, 86 F.3d 630, 641 (7th Cir. 1996).

Regardless whether a standard of maliciousness or deliberate indifference is employed, there is sufficient evidence in the record to allow a reasonable to jury to find that defendants Belz and Bray put needles and staples into plaintiff's food and acted with the requisite mental state. In his affidavit, plaintiff avers that he began finding staples in his food on the same day that defendant Bray warned him for threatening Bray's wife, that he found staples or needles in his food on several other occasions in January and February 2003, but only when Belz and Bray delivered his food and that Belz and Bray would ask plaintiff, "How was your food, queer boy?" while laughing at him after they delivered his meals. In addition, plaintiff avers that Belz and Bray tried to bribe him with stamps in March 2003 if he "learned to keep [his] trap shut" and that in June 2003, they gave him medication that was not prescribed to him. Although each of these pieces of evidence would not necessarily be sufficient by itself, together they are sufficient to show that there is a genuine issue regarding whether defendants Belz and Bray tampered with plaintiff's food.

It is true, as defendants note in their brief, that there is no evidence that plaintiff or anyone else *saw* defendants Belz and Bray tampering with plaintiff's food. However, plaintiff

does not need direct evidence to survive a motion for summary judgment or even to prevail on his claim. The Supreme Court has stated repeatedly that circumstantial evidence may be as or even more persuasive than direct evidence. Desert Palace, Inc. v. Costa, 123 S.Ct. 2148, 2154 (2003) (citing Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147 (2000), Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 508 n.17 (1957), and Holland v. United States, 348 U.S. 121, 140 (1954)).

It is also true that virtually all of plaintiff's evidence is disputed by defendants, but again, this has little bearing on whether defendant is entitled to summary judgment. In deciding whether to grant defendants' motion, I must view all evidence in the light most favorable to plaintiff. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Nevertheless, defendant suggests that plaintiff cannot be believed because there are many reasons why defendants Belz and Bray would not try to tamper with plaintiff's food. For example, they argue that it would be very difficult for officers distributing meals to put foreign objects into an inmate's food without being seen by another staff member, visitor or prisoner and that it would be foolish to give an inmate an object that potentially could be used as a weapon. In addition, they offer several possibilities for how plaintiff could have obtained contraband, such as through the mail, from another inmate through "fishing" or from a prison at which plaintiff was previously incarcerated.

I agree with defendants that the scenario asserted by plaintiff seems unlikely. This

is largely why I denied plaintiff's motion for a preliminary injunction. However, I did not conclude that plaintiff was not credible as a matter of law. To do so, I would have to conclude first that "the testimony sought to be withheld from the trier of fact [was] not just implausible, but utterly implausible in light of all relevant circumstances." In re Chavin, 150 F.3d 726, 728 (7th Cir. 1998) (stating that testimony may be disregarded in "extreme" and "exceptional" cases only). Although plaintiff's version of events has problems, I cannot say it is "utterly implausible." It is not beyond belief that correctional officers would wish to harm or harass an inmate by tampering with his food, particularly when the inmate is recalcitrant and verbally abusive, as defendants believe plaintiff is. Further, although it may be difficult for an officer to put objects in an inmate's meal without detection, defendant adduced no evidence that it would be impossible for one to do so.

I also agree with defendants that it would be foolish to give an inmate items that could be used as weapons. However, I am aware of no authority that would allow me to disbelieve a plaintiff as a matter of law because accepting his evidence would call the defendants' wisdom into question. Furthermore, despite evidence that plaintiff is often noncompliant, defendants point to no evidence in the record that he has any history of violence; it is therefore conceivable that an officer would believe that plaintiff would not use needles to hurt prison staff. Finally, although defendants offer several theories regarding how plaintiff may have obtained needles, each theory has its own weakness. Plaintiff has

been on mail monitoring since December 2002 (undermining the mail theory), he has been at the Secure Program Facility since 1999 (undermining a theory that he brought the needles from another institution and hid them for more than three years) and he has never been found to have engaged in "fishing" with another inmate (undermining a theory that he obtained the needles from another inmate). Thus, although it is certainly possible that a resourceful inmate could obtain contraband in spite of intense security, there is a substantial enough question regarding the origin of the needles and staples to allow plaintiff to present his case to a jury.

It may be true, as defendants suggest, that "inmates frequently lie in prison rights cases." Dfts. Br., dkt. # 98, at 9 (citing Bruscino v. Carlson, 854 F.2d 162, 166 (7th Cir. 1988)). It may also be true that prison officials sometimes lie as well. In any event, although the perceived credibility of prisoners as a group may influence a jury, it is not relevant for the purpose of summary judgment. The court made its observation in Bruscino in the context of a request by the inmate plaintiffs to overturn the fact finder's credibility determinations. Not surprisingly, the court declined to do so. Id. (citing Bullard v. Sercon Corp., 846 F.2d 463, 466 (7th Cir. 1988) ("We shall reject a district judge's decision to believe oral testimony only where the testimony is seriously inconsistent internally, or contrary to established laws of nature or otherwise fantastic, or irreconcilably in conflict with indubitable documentary or physical evidence, stipulations of fact, admissions, or evidence

of equivalent certainty.")). However, neither the court of appeals nor the Supreme Court has ever held that prisoners bear a heavier burden than do non-prisoners in demonstrating that there is a triable issue of fact. Cf. Crawford-El v. Britton, 523 U.S. 574 (1998) (court of appeals erred in placing heightened burden of proof on prisoner in case brought under § 1983). Although it is defendants' position that plaintiff's story has been inconsistent from the start, at least since he filed this lawsuit, it has not wavered significantly. Therefore, I reject defendants' argument that I may find as a fact at the summary judgment stage that plaintiff is not telling the truth.

The remaining question with respect to plaintiff's Eighth Amendment claim against defendants Belz and Bray is whether plaintiff has adduced sufficient evidence regarding an injury. If a jury believes that defendants Belz and Bray acted maliciously and sadistically, plaintiff would have to show only a minimal injury. See Hudson, 503 U.S. at 9 ("When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated. This is true whether or not significant injury is evident.") (Citation omitted). Plaintiff's evidence that the staples caused his mouth to bleed would be sufficient to satisfy this standard. However, if plaintiff could prove only that defendants Belz and Bray acted with deliberate indifference (for instance, if a jury believed that Belz and Bray put sharp objects in plaintiff's food as a joke rather than for the purpose of causing harm), he would then have to show that defendants subjected him to a substantial risk of

serious harm. Farmer, 511 U.S. at 829. Although there is no credible evidence that plaintiff sustained a substantial physical injury, a reasonable jury could find that plaintiff was subjected to a substantial *risk* of serious harm by having needles placed in his food. Although the absence of a substantial physical injury could limit plaintiff's monetary damages, see Doe v. Wellborn, 110 F.3d 520 (7th Cir. 1997), it would not prevent him from obtaining appropriate injunctive relief, see Helling, 509 U.S. 23 (1993) (holding that inmates stated claim under Eighth Amendment when they alleged that exposure to second-hand smoke subjected them to substantial risk of serious harm). Accordingly, I conclude that defendant's motion for summary judgment will be denied with respect to plaintiff's claim that defendants Belz and Bray violated plaintiff's Eighth Amendment when they placed needles and staples in plaintiff's food.

Plaintiff's motion for summary judgment on this claim will be denied as well. As noted above, most of plaintiff's evidence is genuinely disputed. Considering only the evidence that is undisputed, I could not conclude that plaintiff is entitled to judgment as a matter of law. Even considering plaintiff's disputed evidence, which I may not do on a motion for summary judgment, I could not conclude that plaintiff's evidence was so strong that no reasonable jury could find in favor of defendants Belz and Bray.

2. Eighth Amendment claims against remaining defendants

Plaintiff's remaining claims arising out of his food tampering allegations cannot survive defendants' motion for summary judgment. Plaintiff's claim that defendants Frank, Berge, Huibregtse, Hompe and Boughton violated his Eighth Amendment rights is premised on his allegations that he complained to each of these defendants about the conduct of defendants Belz and Bray but they failed to take corrective action. See Windle v. City of Marion, Indiana, 321 F.3d 658 (7th Cir. 2003) (quoting Yang v. Hardin, 37 F.3d 282, 285 (7th Cir. 1994)) (state actor may be liable for preventing another state actor from committing constitutional violation if he or she "'had a realistic opportunity to intervene to prevent the harm from occurring'"); see also Doyle v. Camelot Care Centers, 305 F.3d 603, 614-15 (7th Cir. 2002) (supervisory officials may be held liable under § 1983 only if they "had some personal involvement in the constitutional deprivation, essentially directing or consenting to the challenged conducted").

Plaintiff's claim fails because he has adduced no evidence that defendants Frank, Berge, Huibregtse, Hompe or Boughton could have stopped plaintiff from being harmed or that they directed or consented to any unconstitutional behavior. None of these defendants knew about plaintiff's allegations of food tampering until after the date on which plaintiff alleges he was stabbed in the gums with sharp objects. Once plaintiff showed the needles to defendant Huibregtse, Huibregtse authorized an investigation into plaintiff's allegations. This is evidence that defendants were not deliberately indifferent to plaintiff's health and

safety. Although plaintiff disagrees with the conclusion of that investigation, he has adduced no evidence that the investigation was not conducted in good faith. Further, after defendant Hompe concluded that plaintiff was making a false accusation, there would be no need in defendants' eyes to take further action. Accordingly, plaintiff's motion for summary judgment will be denied and defendants' motion for summary judgment will be granted with respect to plaintiff's claim that defendants Frank, Berge, Huibregtse, Hompe and Boughton violated his Eighth Amendment rights by failing to protect him from defendants Belz and Bray.

3. Retaliation claims

A prison official who takes action against an inmate to retaliate against him for exercising a constitutional right may be liable to the prisoner for damages. See Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). To prevail on a retaliation claim, a prisoner must prove that his constitutionally protected conduct was a substantial or motivating factor in a defendant's actions, that is, that the prisoner's protected conducted was one of the reasons a defendant took adverse action against him. Johnson v. Kingston, __ F. Supp. 2d __ , No. 03-C-143-C, slip. op. at 15 (W.D. Wis. Nov. 20, 2003); see Mt. Healthy Board of Education v. Doyle, 429 U.S. 274, 287 (1977).

Plaintiff's retaliation claims fail because he has no evidence that any of the defendants

were retaliating against him for exercising a constitutional right. With respect to defendants Belz and Bray, plaintiff identifies no constitutionally protected behavior that may have motivated them to place needles and staples in his food. Although in his complaint he alleged that they were retaliating against him for filing lawsuits against other prison officials, he has supplied no evidence showing this to be the case. He has shown only that defendant Bray warned him for threatening Bray's wife. Inmates do not have a First Amendment right to make threats. See Ustrak v. Fairman, 781 F.2d 573, 580 (7th Cir. 1986). Therefore, even if Bray's conduct were motivated by plaintiff's threat, it would not support a claim for retaliation.

With respect to defendant Hompe, the facts show that plaintiff complained to Hompe about Belz's and Bray's alleged misconduct and filed a lawsuit against Hompe's wife in 2002. Complaining about prison conditions and filing non-frivolous lawsuits are protected by the Constitution. Tarpley v. Allen County, Indiana, 312 F.3d 895, 899 (7th Cir. 2002); Walker v. Thompson, 288 F.3d 1005 (7th Cir. 2002). Generally, however, the First Amendment would not protect lying, see Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510-11 (1991), which is what defendant Hompe believed plaintiff was doing. Although plaintiff alleged in his complaint that Hompe accused plaintiff of lying to cover up for defendants Belz and Bray, he has no evidence to support this allegation. Further, the existence of a lawsuit filed one year earlier is insufficient by itself to prove retaliation.

Johnson, slip. op. at 17. In plaintiff's case, even a lawsuit that was filed close in time to the disciplinary action would have little probative value when one takes into account the number of lawsuits that plaintiff files. See Cherry v. Litscher, No. 02-C-71-C (W.D. Wis. 2002); Cherry v. Litscher, 02-C-394-C (W.D. Wis. 2002); Cherry v. Berge, No. 02-C-544-C (W.D. Wis. 2002); see also Hashim v. Berge, No. 01-C-705-C (W.D. Wis. 2001) (plaintiff included in multiple plaintiff suit); Hashim v. Berge, No. 01-C-314-C (W.D. Wis. 2001) (same).

Accordingly, I will deny plaintiff's motion for summary judgment and grant defendants' motion with respect to plaintiff's claim that defendants retaliated against him for exercising a constitutional right.

B. Strip Search

The Court of Appeals for the Seventh Circuit has held that a strip search of a prisoner may violate either the Eighth Amendment or the Fourth Amendment. Calhoun v. Detella, 319 F.3d 936 (7th Cir. 2003); Peckham v. Wisconsin Dept. of Corrections, 141 F.3d 694, 697 (7th Cir. 1998). In assessing whether a search of a prisoner's person violates the Eighth Amendment, the court of appeals has applied a standard similar to that of excessive force. In other words, petitioner must show that the search was "conducted in a harassing manner intended to humiliate and inflict psychological pain." Calhoun, 319 F.3d at 939. With respect to the Fourth Amendment, the court of appeals has stated that "it is difficult to

conjure up too many real life scenarios where prison strip searches of inmates could be said to be unreasonable." Peckham, 141 F.3d 694. In assessing the reasonableness of any search, the court should balance "the scope of the particular intrusion, the manner in which it was conducted, the justification for initiating it, and the place in which it is conducted." Bell v. Wolfish, 441 U.S. 520, 559 (1979).

In the order granting plaintiff leave to proceed on this claim, I concluded that plaintiff had failed to allege any facts from which it could be reasonably inferred that defendant Haney searched him for the sole purpose of humiliating him or causing him pain. However, I allowed plaintiff to proceed on a claim that Haney conducted the search in an abusive fashion because he subjected plaintiff to a manual strip search without giving plaintiff a chance to a comply with a visual bodily inspection. In addition, I allowed him to proceed against defendant Gerl, who was observing the search, on a theory that she knew defendant Haney was violating plaintiff's rights but she refused to intervene.

The undisputed facts show that plaintiff did allow defendant Haney to visually inspect his genitals and anus before Haney performed the manual search; plaintiff refused only to take down his braids. Thus, plaintiff argues that the second search was unnecessary and overly intrusive. However, as defendants point out, it was not unreasonable to perform a second search. There was a significant length of time between the visual inspection and the forced search of plaintiff's braids. In the interim, plaintiff could have transferred

contraband from his braids to another part of his body. Further, because plaintiff's noncompliance regarding his braids required defendant Haney to restrain him during the search, a solely visual inspection was not an option. Prison officials may use physical force in response to an inmate's noncompliance with an order. Soto v. Dickey, 744 F.2d 1260, 1267 (7th Cir. 1984). Without additional evidence from plaintiff, I cannot conclude that defendant Haney performed the second search to harass and humiliate plaintiff.

The only remaining issue is whether defendant Haney violated the Eighth or Fourth Amendments in the manner that he performed the search. Plaintiff avers that during the search, defendant Haney "grabbed" and "tugged" plaintiff's penis and testicles and inserted his gloves into plaintiff's anus. Defendant Haney avers that he "touched" plaintiff as minimally as possible to expose hidden areas from sight. It may be that the only difference between the parties' version of events is their characterization of the way defendant Haney touched plaintiff. Nonconsensual contact will always seem more intrusive to the object of that contact. In any event, I cannot conclude that the search, even as plaintiff describes it, was so abusive or excessive that it violated the Constitution. Any manual search of an individual's body will require some amount of manipulation of the genitals in order to accomplish the purpose of the search. Although "grabbing" and "tugging" could cause some discomfort and embarrassment, it does not rise to the level of "unnecessary and wanton infliction of plain" so long as it occurs as part of an otherwise justified search.

If the search itself did not violate the Constitution, defendant Gerl cannot be held liable for failing to intervene to stop the search. Accordingly, plaintiff's motion for summary judgment will be denied and defendants' motion for summary judgment will be granted with respect to plaintiff's claim that defendants Haney and Gerl violated his rights to be free from excessive force and unreasonable searches and seizures.

C. Medication

Plaintiff avers that while he was in the strip search cage, he asked defendant Gerl for his medication but she refused to give it to him. "Deliberately [ignoring a] request for medical assistance has long been held to be a form of cruel and unusual punishment . . . provided that the illness or injury for which assistance is sought is sufficiently serious or painful to make the refusal of assistance uncivilized." Cooper v. Casey, 97 F.3d 914,916-17 (7th Cir. 1996). A refusal to provide medication may violate the Eighth Amendment if doing so constitutes deliberate indifference to a serious medical need. Walker v. Benjamin, 293 F.3d 1030, 1040 (7th Cir. 2002).

Defendant Gerl denies that plaintiff asked for medication while he was in the strip search cage. Although at this point I must credit plaintiff's version of events, his claim fails nevertheless because he has failed to adduce sufficient facts demonstrating that he was suffering from a serious medical need at the time he made his request and that defendant

Gerl was deliberately indifferent to such a need.

Under Fed. R. Civ. P. 56(e), a plaintiff must support his claim with "specific facts" in order to survive a motion for summary judgment; plaintiff may not rely on the same conclusory allegations that are in his complaint. See Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990) ("The object of [summary judgment] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."). Plaintiff's only evidence on this issue is one line in his affidavit that he suffered from "excruciating pain" as a result of not receiving his medication. Although this bare allegation would be sufficient to satisfy the liberal pleading standard of Fed. R. Civ. P. 8, I doubt whether it would be sufficient to survive a motion for summary judgment. Plaintiff was on three medications: one for a sleeping disorder, one for herpes and one for a stomach condition. It is not immediately apparent how his sleeping disorder could have caused him pain or how antiviral medication for plaintiff's herpes could immediately alleviate discomfort caused by that condition. It is possible that plaintiff's stomach condition could cause him pain and that Zantac could provide him with relief. However, plaintiff provides no evidence that this is what happened. In fact, plaintiff provides no explanation for the nature of his pain (for example, where did he hurt?) and no basis for inferring that the pain he felt could be addressed by his prescribed medication. At the summary judgment stage, I cannot simply presume facts that plaintiff has not proposed.

Even assuming that plaintiff was experiencing acid reflux and that his medication could have alleviated his pain, he proposes no facts that he told defendant Gerl that he was in pain; he says only that he asked for his medication. (Plaintiff avers that he asked for back pain medication as well. However, there is no evidence that he was prescribed back pain medication or that he told defendant Gerl he was experiencing back pain.) Plaintiff cannot hold a prison official liable for being deliberately indifferent to his health if he did not explain the urgency of his medical need to that official. Further, plaintiff's prescription for Zantac required one tablet in the morning and one at bedtime. There is no dispute that plaintiff was returned to his cell in time to take his bedtime dose of Zantac. Thus, without evidence that plaintiff told defendant Gerl his pain was so great that he needed to change his prescribed regiment, no reasonable jury could find that defendant Gerl was deliberately indifferent to plaintiff's health or safety by denying his request for medication. Plaintiff's motion for summary judgment will be denied and defendants' motion for summary judgment will be granted with respect to plaintiff's claim that defendant Gerl violated his Eighth Amendment rights by refusing to give him his prescribed medication.

ORDER

IT IS ORDERED that

1. Plaintiff Eugene Cherry's motion for a temporary restraining order and preliminary

injunction is DENIED.

2. Plaintiff's motion for appointment of counsel is DENIED.

3. Plaintiff's motion to strike is DENIED.

4. Plaintiff's motion for summary judgment is DENIED.

5. Defendants' motion for summary judgment is DENIED with respect to plaintiff's claim that defendants Thomas Belz and Henry Bray violated his right to be free from cruel and unusual punishment when they placed needles and staples in his food.

6. Defendants' motion for summary judgment is GRANTED in all other respects.

7. Defendants Matthew Frank, Gerald Berge, Peter Huibregtse, Gary Boughton, Brad Hompe, Joan Gerl and Corey Haney are DISMISSED from this case.

Entered this 4th day of December, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge