IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROBERT DARWYN WHEELER,

ORDER

Petitioner,

03-C-576-C

v.

DEPARTMENT OF CORRECTIONS,
DANIEL BENIN, RANDY HEPP,
JIM GILBERT SON, CAPT. DANKO
LT. JENSEN, RICK GENTZ, and RON KOLLMAN,

Respondents.

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This is a proposed civil action for injunctive, declaratory and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, asks for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that he is unable to prepay the full fees and costs of starting this lawsuit. (Petitioner made the initial partial payment required under § 1915(b)(1).)

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the

litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny him leave to proceed if he has had three or more lawsuits or appeals dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if his complaint is legally frivolous or malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 42 U.S.C. § 1915e. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe 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).

I must deny petitioner's request for leave to proceed on his claim that he was the victim of race discrimination and retaliation for complaining about Kollman's conduct, because beyond bald assertions, petitioner has failed to allege any facts to suggest that race or retaliation was a factor motivating any respondents' conduct. In addition, I conclude that petitioner may not proceed in forma pauperis on his claims that respondents violated his constitutional rights to due process and access to the courts, because petitioner's allegations show that he was not deprived of a liberty interest requiring due process protections and that he has not been prevented from obtaining access to the courts. I conclude that petitioner

may not proceed on his claims that respondents violated his First Amendment free speech rights or his Eighth Amendment right to adequate medical care because he fails to allege that any one of the respondents is personally involved in monitoring his mail or depriving him of medical care and fails to allege facts from which an inference may be drawn that his First and Eighth Amendment rights are being violated. Finally, I conclude that petitioner's request for leave to proceed in forma pauperis against respondent Department of Corrections must be denied because the department is not an entity capable of being sued under 42 U.S.C. § 1983.

However, petitioner will be granted leave to proceed in forma pauperis on his claim that respondent Kollman used excessive force against him when he struck petitioner in the mid-section because petitioner's allegations are sufficient to state a claim of a violation of his Eighth Amendment rights.

From petitioner's complaint and the attachments, I understand petitioner to allege the following facts.

ALLEGATIONS OF FACT

On the morning of August 1, 2003, petitioner Robert Darwyn Wheeler, an African American inmate, was working in the maintenance department tool crib at Stanley Correctional Institution, where he was confined at the time of the incidents giving rise to

this lawsuit. Respondent Ron Kollman, an officer at Stanley, asked petitioner to look for some orange jerseys for the outside workers. As respondent Kollman and petitioner searched through the jerseys, Kollman made comments about the sizes and smells of the jerseys, to which petitioner replied that the jerseys could be washed. At that point, respondent Kollman struck petitioner in his mid-section. Petitioner stepped back so he would not fall on another inmate behind him. Respondent Rick Gentz, a sergeant in charge of the tool crib and maintenance services at Stanley, saw respondent Kollman hit petitioner but failed to file a report or offer petitioner help. Shortly after the incident, petitioner asked Captain Bengal, "hypothetically, what a prisoner should do in a situation where an officer hits an inmate," but petitioner did not tell Captain Bengal specifically about the incident with respondent Kollman.

Approximately one week later, petitioner was placed in temporary lock up status pending an investigation for possible threats to another inmate. While he was in temporary lock up, petitioner wrote a note to a Sgt. Berseth, describing the incident involving respondent Kollman. Respondent Randy Hepp, deputy warden at Stanley, ordered respondents Jim Gilbertson and Lt. Jensen to investigate the incident. As part of the investigation, respondents Gilbertson and Jensen spoke to respondent Gentz, who denied seeing Kollman hit petitioner. Gilbertson and Jensen never spoke directly to respondent Kollman about the incident.

On August 21, 2003, respondent Jensen issued conduct report #1524657, charging petitioner with "Lying about Staff." Respondent Captain Danko conducted a disciplinary hearing on August 29, 2003, at which Danko, petitioner, and four other officers were present. At the conclusion, Danko found petitioner guilty of lying about staff, despite petitioner's denial of the charge and the absence of Kollman's statement. Danko imposed a penalty of 360 days' program segregation. Petitioner appealed Danko's decision on August 29, 2003, and respondent Daniel Benik, warden at Stanley, affirmed Danko's decision on September 18, 2003.

Petitioner is hampered in his ability to obtain access to the courts because respondents Jensen and Gilbertson failed to obtain a statement from Kollman and include it in the conduct report, and respondents Danko and Benik failed to require Kollman to respond to petitioner's claim that he had been struck. In addition, by finding petitioner guilty of lying and confining him to program segregation for 360 days, respondents Danko and Benik are retaliating against petitioner for having complained about respondent Kollman and are depriving petitioner of the ability to earn parole or obtain placement in a minimum security setting.

Ever since petitioner's placement in program segregation, prison officials are monitoring his mail in order to keep this matter quiet and petitioner is unable to get "correct" health care.

DISCUSSION

I understand petitioner to allege that 1) respondents Kollman and Gentz discriminated against him on the basis of his race in violation of the Fourteenth Amendment when Kollman hit him and Gentz stood by and watched; 2) respondent Kollman violated petitioner's Eighth Amendment right to be free of excessive force when he struck petitioner; 3) respondent Hepp discriminated against petitioner on the basis of his race and violated his right to due process and access to the courts by instructing respondents Jensen and Gilbertson to investigate petitioner's claim that he had been struck; 4) respondents Jensen and Gilbertson discriminated against petitioner on the basis of his race and violated his right to due process and access to the courts by failing to obtain respondent Kollman's statement during the investigation of petitioner's complaint and by writing conduct report #1524657; 5) respondents Danko and Benik discriminated against petitioner on the basis of his race and violated his rights to due process and access to the courts by holding a disciplinary hearing that failed to include a statement by Kollman and retaliated against petitioner for complaining about Kollman by finding him guilty of the charge of lying and imposing 360 days' program segregation as a penalty; and 6) unnamed prison officials violated petitioner's First Amendment rights by monitoring his mail and his Eighth Amendment rights by failing to provide "correct" health care while housing him in segregation.

A. Race Discrimination

In his complaint, petitioner states at the tail end of his factual allegations that "[t]his matter is a racial matter, Afro-American claims to be harmed by prison guard and the prison officials cover it up by charging prisoner with lying on the staff. . . ." From this statement, I have construed his complaint liberally as alleging that each named respondent's conduct was motivated by a desire to discriminate against him on the basis of his race.

Racism in any form is reprehensible. Although prisoners are expected to endure many "harsh" and "restrictive" conditions as "part of the penalty . . . for their offenses," Rhodes v. Chapman, 452 U.S. 337, 347 (1981), they should not be expected to endure bigotry and intolerance. See Santiago v. Miles, 774 F. Supp. 775, 777 (W.D.N.Y. 1991) ("Racism is never justified; it is no less inexcusable and indefensible merely because it occurs inside the prison gates."). The equal protection clause of the Fifth and Fourteenth Amendments prohibits government actors from applying different legal standards to similarly situated individuals. See, e.g., City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). Discriminatory intent may be established by showing an unequal application of a prison policy or system, but conclusory allegations of racism are insufficient. Minority Policy Officers Ass'n v. South Bend, 801 F.2d 964, 967 (7th Cir. 1986).

Petitioner does not allege any facts to support his claim that respondents' actions toward him were different from actions they would have taken against a white inmate under

the same or similar circumstances. His unsupported and conclusory claim of racism is the precise kind of discrimination claim that must fail at the outset. Therefore, I will deny petitioner leave to proceed in forma pauperis on his claim that the respondents discriminated against him on account of his race.

B. Excessive Force

Petitioner alleges that respondent Kollman struck petitioner in the mid-section in the middle of a conversation about the smell of inmate jerseys. Although he appears to concede that he did not seek medical attention for the blow or even report it until a week had passed, he does allege that the strike was severe enough to cause him to step back to save himself from falling on an inmate behind him.

"The Eighth Amendment's cruel and unusual punishments clause prohibits the 'unnecessary and wanton infliction of pain,'" Outlaw v. Newkirk, 259 F.3d 833, 837 (7th Cir. 2001), but not the "de minimis use of physical force." Id. at 838. In excessive force cases, an injury must be more than trifling but prison officials are not free to inflict pain without cause so long as they are careful to leave no marks. Williams v. Boles, 841 F.2d 181, 183 (7th Cir. 1988). At this early stage of the proceeding, and construing petitioner's allegations liberally, I conclude that petitioner has alleged sufficient facts to suggest that he was subjected to the unnecessary and wanton infliction of pain when respondent Kollman

struck him. Therefore, petitioner will be granted leave to proceed on his Eighth Amendment claim against Kollman.

C. Procedural Due Process

Petitioner alleges that the actions of respondents Jensen, Gilbertson, Hepp, Benik, and Danko surrounding the issuance of conduct report #1524657 and the subsequent finding of guilt violated his due process rights under the Fourteenth Amendment.

A procedural due process claim against government officials requires proof of inadequate procedures *and* interference with a liberty or property interest. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). Therefore, if respondents did not affect a protected liberty interest, their actions did not violate petitioner's Fourteenth Amendment right to due process.

Petitioner alleges that respondents' actions affected his liberty interest because he was sentenced to 360 days' program segregation, which hampered his ability to earn parole or a chance for placement in minimum security . However, "changes in the conditions of confinement having a substantial adverse impact on the prisoner are not alone sufficient to invoke the protections of the Due Process Clause '[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him.'" Vitek v. Jones, 445 U.S. 480, 493 (1980) (quoting Montanye v. Haymes, 427 U.S. 236, 242

(1976)). A prisoner has no liberty interest in not being kept in segregated confinement because such confinement is "well within the terms of confinement ordinarily contemplated by a prison sentence." Hewitt v. Helms, 459 U.S. 460, 468 (1983). See also Smith v. Shettle, 946 F.2d 1250, 1252 (7th Cir.1991) ("a prisoner has no natural liberty to mingle with the general prison population"). In Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that although "States may under certain circumstances create liberty interests which are protected by the Due Process Clause," those interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."

After Sandin, in the prison context, state-created protected liberty interests are limited essentially to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. 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).

Petitioner has not alleged that his penalty of 360 days' of program segregation will keep him confined beyond the term of his sentence. Furthermore, the loss of his ability to earn good time credits or parole or a lower security rating because of his placement in program segregation does not qualify as lost liberty interests. In Higgason v. Farley, 83 F.3d

807, 809 (7th Cir. 1996), the Court of Appeals for the Seventh Circuit held that a prisoner has no constitutional right to prison educational programs and although completion of these programs may have allowed plaintiffs to earn good-time credits, plaintiffs had no protected liberty interest in those programs. Id. at 809-10. ("Even if Higgason had been given the opportunity, it was not inevitable that he would complete an educational program and earn good time credits. Thus, denying the opportunity to earn credits did not 'inevitably affect the duration of the sentence,' and did not infringe on a protected liberty interest."). Because the actions of respondents Jensen, Gilbertson, Hepp, Benik, and Danko did not affect a protected liberty interest, petitioner may not proceed on his Fourteenth Amendment procedural due process claim.

D. Access to the Courts

Petitioner appears to be alleging that because respondents Jensen, Gilbertson, Hepp, Benik, and Danko failed to obtain or require respondent Kollman's account of what happened on August 1, 2003, he cannot file a lawsuit and is thus being denied access to the courts. However, this claim is legally frivolous.

In order to state an access to courts claim, petitioner must allege facts from which an inference can be drawn of "actual injury." Lewis v. Casey, 518 U.S. 343 (1996). This principle derives ultimately from the doctrine of standing, id., and requires that a plaintiff

demonstrate that he is or was prevented from litigating a non-frivolous case. Id. at 353 nn. 3-4 and related text; Walters v. Edgar, No. 97-2722 (7th Cir. Dec. 15, 1998). In light of Lewis, petitioner must plead at least general factual allegations of injury resulting from respondents' conduct. He cannot do that. The very fact that petitioner has filed this lawsuit challenging respondent Kollman's conduct defeats his claim that respondents deprived him of access to the courts.

E. Retaliation

Petitioner alleges that he was "given a year in seg for trying to do what I have a right to do." From this statement, I understand petitioner to allege that respondents Benik and Danko retaliated against him when they imposed a penalty of 360 days' program segregation for his complaint about the Kollman incident. This is insufficient to state a constitutional claim of retaliation.

State officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future. However, not every claim of retaliation by a disciplined inmate who has filed a lawsuit or grievance against prison officials will state a cause of action for retaliatory treatment. Cain v. Lane, 857 F.2d 1139, 1143 n.6 (7th Cir. 1988). A bare allegation of retaliation is insufficient. Benson v. Cady, 761 F.2d

335, 342 (7th Cir. 1985); see also Murphy v. Lane, 833 F.2d 106, 108 (7th Cir. 1987). Because petitioner offers only a bare allegation of retaliatory treatment, I will deny petitioner leave to proceed on his claim that respondents Benik and Danko retaliated against him when they imposed a penalty after finding his guilty of lying in a written complaint about Kollman's conduct.

F. Monitoring Mail

Petitioner alleges that prison officials are monitoring his mail "to keep this matter quiet." Prisoners have a limited liberty interest in their mail under the First Amendment. Thornburgh v. Abbott, 490 U.S. at 407; Martin v. Brewer, 830 F.2d 76, 77 (7th Cir. 1987). As a general rule, inmate mail can be opened and read outside the inmate's presence, id. at 77. Although legal mail may be subject to somewhat greater protection, petitioner's mail to a court is not protected. Id. at 77 (mailings from courts to litigants are public documents, which prison personnel could inspect in court's files). Moreover, the inspection of personal mail for contraband is a legitimate prison practice, justified by the important governmental interest in prison security. Gaines v. Lane, 790 F.2d 1299, 1304 (7th Cir. 1986); see also Royse v. The Superior Court of the State of Washington, 779 F.2d 573, 575 (9th Cir. 1986) (inspection of inmate mail for contraband does not constitute mail censorship).

It is well established that liability under § 1983 must be based on a defendant's

personal involvement in the constitutional violation. See Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); 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." Wolf-Lillie, 699 F.2d at 869. It is not necessary that a defendant participate directly in the deprivation; the 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." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985).

Petitioner does not provide any names of prison officials who are monitoring his mail and he alleges no facts to suggest that mail is being monitored that cannot be monitored as a matter of course in the prison setting. Therefore, I will deny him leave to proceed in forma pauperis on his claim that his First Amendment rights are being violated because the claim is legally frivolous.

G. Inadequate Medical Care

Finally, petitioner alleges that since the time of his placement in program segregation, he has been unable to get "correct" health care. The Eighth Amendment requires the

government "to provide medical care for those whom it is punishing by incarceration," Snipes v. DeTella, 95 F. 3d 586, 590 (7th Cir. 1996) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)), but this does not mean that prisoners are entitled to whatever medical treatment they desire. Prison officials violate their affirmative Eighth Amendment duty to provide adequate medical care only when they are deliberately indifferent to a prisoner's serious medical needs. Estelle, 429 U.S. at 104. To show deliberate indifference, the plaintiff must establish that the official was "subjectively aware of the prisoner's serious medical needs and disregarded an excessive risk that a lack of treatment posed" to his health. Wynn v. Southward, 251 F.3d 588 (7th Cir. 2001). Petitioner offers nothing more in his complaint than a vague statement about incorrect health care. He does not allege any facts to suggest what his medical needs are and who is denying his requests for treatment, if he is making such requests. Because petitioner fails to allege any facts to suggest that he has a serious medical need and that one or more of the respondents has been deliberately indifferent to that need, I find his Eighth Amendment right to medical care claim legally frivolous. Accordingly, I will deny petitioner leave to proceed in forma pauperis on this claim.

H. Department of Corrections

Petitioner has named the Department of Corrections as a respondent. Under Rule 17(b) of the Federal Rules of Civil Procedure, the capacity to sue or be sued is determined by the law of a party's domicile. In Wisconsin, a governmental unit is considered to be an independent body politic and thus sui juris only if it possesses independent proprietary functions and powers such as the power to levy taxes, to incur liability beyond an amount appropriated by the legislature, to hold title to property in its own name, or to dispose of real and personal property without express authority from the state. Majerus v. Milwaukee County, 39 Wis. 2d 311, 314-15, 159 N.W.2d 86 (1968); Sullivan v. Board of Regents of Normal Schools, 209 Wis. 242, 244, 244 N.W.2d 563 (1932). Petitioner does not allege that the Department of Corrections has such independent powers and is capable of being sued. Therefore, the Department of Corrections will be dismissed from this case.

ORDER

IT IS ORDERED that

1. Petitioner Robert Darwyn Wheeler's request for leave to proceed in forma pauperis on each of his claims against respondents Department of Corrections, Gentz, Jensen, Gilbertson, Hepp, Benik, and Danko are DENIED and these respondents are DISMISSED from the case.

2. Petitioner's request for leave to proceed in forma pauperis against respondent Ron Kollman on his claim that Kollman used excessive force against him in violation of his Eighth Amendment rights is GRANTED; petitioner's request for leave to proceed in forma pauperis against respondent Kollman on his remaining claims of constitutional wrongdoing is DENIED.

3. The unpaid balance of petitioner's filing fee is $126.93; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2).

4. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

5. Petitioner should keep 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.

Entered this 14th day of November, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge