IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DATHAN BEAN,

Plaintiff,

v.

SANDRA HAUTAMAKI, JEFFREY P. ENDICOTT and KELLY MUESKE,

Defendants.

OPINION AND ORDER

04-C-447-C

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This is a proposed civil action for declaratory, injunctive and monetary relief, brought under 42 U.S.C. § 1983. Plaintiff, a prisoner at the Redgranite Correctional Institution, was granted leave to proceed on his claim that defendants violated the Constitution when they failed to protect his safety by double-celling him with inmate Oskar McMillian. Plaintiff's complaint included a request for preliminary injunction for the removal of plaintiff from his double-cell assignment with McMillian. That motion is now ripe for review.

Neither party produced proposed findings of fact to support or oppose the motion as required by this court's "Procedure to be Followed on Motions for Injunctive Relief," a copy of which was sent to the parties with an order of this court dated September 3, 2004.

Instead, plaintiff has filed a document titled "Declaration of Plaintiff Dathan E. Bean, Plaintiff's Record of Proposed Facts, and Statement of Facts Plaintiff intends to Prove at an Evidentiary Hearing." Attached to this document are a number of unauthenticated documents. Plaintiff also supports his motion with the declaration of inmate Oskar B. McMillian and a brief. Defendants filed an opposing brief, to which they attached a notarized copy of a letter addressed to counsel for defendants that is signed by Steven Beck, a deputy warden at the Redgranite Correctional Institution. Finally, plaintiff filed a document in reply titled, "Notice of Intentional Obstruction of Temporary Restraining Order and Preliminary Injunction Pro Se Litigation Before the District Court," to which a number of unauthenticated documents are attached.

Although this court is under no obligation to search the record for factual matters that support either the grant or the denial of plaintiff's motion, I have accepted as true the statements of fact proposed by plaintiff beginning at page 3 of his supporting "Declaration . . . ." that are based on his own personal knowledge. In addition, I have considered defendants' notarized letter as well as unsworn statements in plaintiff's "Notice of Intentional Obstruction. . . ." that appear to corroborate the factual statements made in the letter. From these submissions, I find that the following facts are material and undisputed.

FACTS

At the time that he filed his complaint in this court, plaintiff was double-celled with Oskar B. McMillian. Plaintiff was awake almost every night wondering whether McMillian would attempt to kill him. He will continue to suffer psychological torture if he is forced to remain double-celled with McMillian. On September 28, 2004, plaintiff was removed from his cell with McMillian and moved to a cell on the opposite side of the wing and on a different tier. On September 29, 2004, Security Director Scott Eckstein completed a"Special Placement of Offender" form, indicating that plaintiff is not to be housed with McMillian in the future "due to security concerns." The form insures that there is no realistic probability that Bean and McMillian will ever be celled together again.

Plaintiff concedes in his reply that he is no longer McMillian's cellmate. However, he argues that defendants moved plaintiff to another cell and are now planning to transfer McMillian out of Redgranite Correctional Institution in order to obstruct plaintiff's motion for preliminary injunction. According to plaintiff, if McMillian is transferred, he will not receive the mental health care he needs and he will no longer be able to assist plaintiff with this lawsuit as he has in the past.

Plaintiff appears to be attempting to recharacterize his preliminary injunction as one that addresses McMillian's concerns that defendants revise their double-celling practice to insure compatibility between assigned roommates and stop forcing inmates with documented medical histories to share a cell with another inmate. In addition, plaintiff asks the court to

reconsider his request for appointment of counsel. .

I will not recharacterize plaintiff's preliminary injunction to advance the arguments of inmate McMillian, who plaintiff admits is the force behind his original complaint and motion for preliminary injunction and who appears intent on securing a single cell at the Redgranite Correctional Institution. Plaintiff cannot bring a lawsuit on behalf of McMillian; doing so violates the basic concept of constitutional standing to bring a claim, which requires that the party suing must have sustained some sort of injury as a result of the alleged wrongdoing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Plaintiff's alleged injury was "psychological terror" imposed upon him because he was double-celled with McMillian. Plaintiff does not deny that defendants have removed that threat by transferring him to another cell.

To determine whether plaintiff's request for injunctive and declaratory relief is moot, it must be "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 609 (2001) (internal quotations omitted); see also Global Relief Foundation, Inc. v. O'Neill, 315 F.3d 748, 751 (7th Cir. 2002) (case was not moot "while any possibility remained" that defendant would revert to past conduct). It is defendants' burden to show that the challenged behavior will not recur. Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189 (2000).

As noted above, defendants have submitted a notarized letter from Steven Beck, Deputy Warden at the Redgranite Correctional Institution, stating "there is no realistic probability that Bean and McMillian will ever be celled together again." Notarization enhances the formality of the letter and bolsters defendants' assertion that it is unlikely that plaintiff and McMillian will ever be roommates again. Burbank v. Twomey, 520 F.2d 744, 748 (7th Cir. 1975) (formal, published regulation rather than mere informal promise or assurance on part of defendants that challenged practice will cease moots controversy). Furthermore, defendants provide no indication that their change in practice is insincere. Sasnett v. Litscher, 197 F.3d 290, 291 (7th Cir. 1999) (finding adoption of new regulation insincere because defendants continued litigation to overturn decision invalidating old regulation, preventing court from deeming case moot). In fact, plaintiff does not dispute the statement that defendants are unlikely to house him in the same cell as McMillian ever again. Burbank, 520 F.2d at 748 (plaintiff's failure to contend that defendant adopted new regulations when faced with legal challenges and then reverted back to old procedure when action dropped supported finding claim moot). Rather, he argues that there is a chance that McMillian will be transferred back to Redgranite and that as long as defendants lack a policy that insures compatibility between assigned roommates, defendants have not eliminated the threat that inmates like McMillian impose upon other inmates.

Plaintiff's motion for preliminary injunction rests on plaintiff's claim that he is in

danger when he shares a cell with inmate McMillian. I am satisfied that defendants have met their burden of showing that plaintiff and McMillian will not be celled together in the future. Therefore, I will deny as moot plaintiff's motion for preliminary injunction to be removed from double-celling with McMillian.

Plaintiff's only remaining claim concerns his claim for damages incurred while forced to double-cell with McMillian. "[A] defendant's change in conduct cannot render a case moot so long as the plaintiff makes a claim for damages." Federation of Advertising Industry Representatives, Inc. v. City of Chicago, 326 F.3d 924, 929 (7th Cir. 2003). However, I note that to succeed on his claim for damages, plaintiff will have to show that sharing a cell with McMillian caused him physical injury. The Prison Litigation Reform Act prevents prisoners from bringing claims for mental or emotional injury without a showing of physical injury. 42 U.S.C. § 1997e(e); see also Zehner v. Trigg, 133 F.3d 459 (7th Cir. 1997) (holding constitutional PLRA limitation that forbids recovery for mental or emotional damages without a prior showing of physical injury).

This remaining claim is not complex. Plaintiff should be able to gather the necessary evidence to show whether he sustained a physical injury as a result of having to share a cell with inmate McMillian. Therefore, plaintiff's motion for appointment of counsel will be denied.

ORDER

IT IS ORDERED that

1. Plaintiff Dathan Bean's motion for preliminary injunction to be removed from double-celling with McMillian is DENIED as moot;

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

Entered this 21st day of October, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge