IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIE C. SIMPSON,

Petitioner,

v.

JANEL NICKEL, TIMOTHY DOUMA, PHILIP KINGSTON, WILLIAM NOLAND, MATTHEW J. FRANK,

Respondents.

ORDER

05-C-232-C

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This is a proposed civil action for declaratory and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Columbia Correctional Institution in Portage, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid 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 leave

to proceed if the prisoner 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 the prisoner's complaint is legally frivolous, 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. 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). 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).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Willie C. Simpson is an inmate at the Columbia Correctional Institution in Portage, Wisconsin. Respondent Janel Nickel is a correctional officer captain at the institution. Respondent Timothy Douma is the Security Director at the institution. Respondent Philip Kingston is Warden at the Waupun Correctional Institution in Waupun, Wisconsin. Respondent William Noland is an institution complaint examiner at the Columbia Correctional Institution. Respondent Matthew J. Frank is Secretary of the

Wisconsin Department of Corrections.

On February 18, 2004, petitioner and other inmates in disciplinary segregation witnessed officers at the Columbia Correctional Institution under the command of Captain Salter sexually assault, sodomize and batter inmate Freddie McLaurin. After the assault, petitioner took the responsibility to complain about the assault because he was the only person in segregation who had legal knowledge. He questioned the other inmates as to what they saw and heard. Petitioner asked the inmate witnesses whether they would be willing to submit a written statement as to what they saw and heard and they agreed. Petitioner wrote what each witness told him and had them sign the affidavit. Petitioner did not have the witnesses' statements notarized out of fear of intimidation and retaliation from correctional officers.

On February 19, 2004, petitioner filed a group complaint against the correctional officers who assaulted inmate McLaurin. On February 22, 2004, petitioner filed a John Doe complaint with Judge Richard L. Rehm in the City of Portage, Wisconsin, alleging that a crime had been committed against inmate McLaurin. On February 24, 2004, petitioner wrote Peggy A. Lautenschlager, the Attorney General of Wisconsin, alleging that Columbia Correctional Institution officers committed a crime against inmate McLaurin.

On March 17, 2004, Judge Rehm responded to petitioner's John Doe complaint and scheduled John Doe proceedings. Attorney General Lautenschlager referred the assault to

Assistant Attorney General Charles Hoornstra, who in turn referred the matter to Kevin Potter of the Wisconsin Department of Corrections. Potter referred the matter to Sam Schneiter, Chief of the Division of Adult Investigations, who appointed respondent Timothy Douma to investigate the matter. Douma appointed respondent Nickel to conduct an internal investigation of petitioner's allegations. Once the investigation began, correctional staff separated petitioner and the other inmate witnesses to the alleged assault against inmate McLaurin. Correctional officers began to threaten and harass inmate McLaurin and petitioner.

On April 2, 2004, respondent Nickel wrote petitioner a conduct report for filing the John Doe complaint with the judge, for writing the attorney general and for filing an inmate complaint about the alleged sexual assault of inmate McLaurin. Nickel alleged in the conduct report that petitioner had violated Wis. Admin. Code § DOC 303.271, lying about staff, and § DOC 303.28(c), disruptive conduct. He stated that petitioner and inmate McLaurin lied about the assault in order to get money, a sentence reduction and to harm the reputations of correctional staff. Respondent Nickel failed to prove that petitioner's allegations or those of the other inmate witnesses were false. Although Nickel wrote that inmate McLaurin had confessed that he had not been assaulted, McLaurin's confession was the result of threats from Nickel and other correctional staff. Respondent Nickel wrote that she interviewed petitioner twice and that both times he was uncooperative. In both

interviews, petitioner informed respondent Nickel that he had a First Amendment right to file complaints to the court on his behalf and on behalf of others and warned her that if she would take any action against him, she would be in violation of his First Amendment rights.

On April 16, 2004, a hearing was held on the conduct report against petitioner. Petitioner did not attend the hearing because he was afraid of being attacked by correctional staff. The adjustment committee found petitioner guilty of lying about staff and disruptive conduct and sentenced petitioner to 25 days' loss of recreation and 300 days of disciplinary segregation without proving that petitioner's complaint about the assault was false. Petitioner appealed the committee's decision to respondent Kingston on April 18, 2004, citing relevant federal law regarding First Amendment retaliation and asserting that the committee had failed to prove that petitioner lied about the assault. Respondent Kingston modified the committee's decision, dismissing the disruptive conduct charge and affirming the committee's decision that petitioner had lied about staff. Respondent Kingston disregarded the law that petitioner cited in his appeal and ignored petitioner's First Amendment right to petition the courts and file grievances.

On April 19, 2004, Judge Rehm conducted the John Doe hearings. Petitioner was subpoenaed to testify about the assault against inmate McLaurin. Petitioner informed the court that correctional staff were threatening and harassing him and McLaurin and that correctional staff had issued him a conduct report for complaining about the assault against

McLaurin.

On May 16, 2004, petitioner filed an inmate complaint with respondent Noland regarding respondent Kingston's decision to affirm the adjustment committee's decision, complaining that the decisions violated his First Amendment right to petition the court and file grievances. Noland dismissed petitioner's complaint and respondent Kingston affirmed Noland's decision. On May 31, 2004, petitioner requested that respondent Frank review the decisions of the adjustment committee, Kingston and Noland. Once again, petitioner argued that the conduct report violated his First Amendment right to petition the court and file grievances. Respondent Frank dismissed petitioner's appeal with modification to have Captain Salter answer petitioner's questions. However, respondent Frank affirmed the conduct report with regard to the lying about staff charge. Respondent Frank ignored petitioner's First Amendment right to petition the court and file grievances.

After petitioner reported the assault on inmate McLaurin, correctional staff began to harass petitioner and threatened to spit and urinate in his food and juice. Petitioner filed a complaint about these threats, which was subsequently dismissed on the ground that petitioner had lied when he complained about the assault against inmate McLaurin.

On February 20, 2005, in order to prove that the assault on McLaurin occurred, petitioner asked to review the log of the disciplinary segregation unit, which would show strip searches and cell extractions of inmate McLaurin. Petitioner made the request pursuant

to Wisconsin's open records law. Jill Greene of Offender Records declined petitioner's request in order to hide the truth of the correctional officers' actions against McLaurin.

DISCUSSION

Petitioner alleges that respondents wrote and upheld the conduct report accusing him of lying about staff and of disruptive conduct not because he lied about the assault on inmate McLaurin, but because he requested a John Doe proceeding, wrote the Attorney General and filed an inmate grievance about the assault. According to petitioner, issuing the conduct report constituted retaliation for exercising his First Amendment right to petition the court and file inmate grievances.

A prison official who takes action in retaliation for a prisoner's exercise of a constitutional right may be liable to the prisoner for damages. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). The official's action need not independently violate the Constitution. Id. Otherwise lawful action "taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000). See also Zimmerman v. Tribble, 226 F.3d 568, 573 (7th Cir. 2000) ("[O]therwise permissible conduct can become impermissible when done for retaliatory reasons.") 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.

To state a claim for retaliation, an inmate petitioner need not allege a chronology of events from which retaliation could be plausibly inferred. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). However, he must allege sufficient facts to put the defendants on notice of the claim so that they can file an answer. Id. A petitioner satisfies this minimal requirement when he specifies the suit or complaint he filed and the act of retaliation. Id. However, falsehoods do not constitute protected speech. To prevail on his retaliation claim, petitioner will have to prove that his complaint about the sexual assault was truthful. Hasan v. United States Dept. of Labor, 400 F.3d 1001, 1005 (7th Cir. 2005) (holding that inmate could not pursue retaliation claim because defendants presented uncontradicted evidence that they punished him not because he tried to exercise free speech but because his accusation was a lie in violation of Wis. Admin. Code § DOC 303.271).

Petitioner alleges that respondents issued the conduct report without proving that his complaint about the assault was false. He admits that respondent Nickel wrote that inmate McLaurin confessed that the assault did not occur. However, petitioner alleges that McLaurin made the confession only because Nickel threatened him and that respondents accused petitioner of lying about the assault to protect their own interests. At this stage of the proceedings, I am unable to determine whether petitioner's complaints were or were not protected speech. Because petitioner has specified the complaints that sparked the

retaliatory acts by each respondent, he will be allowed to proceed in forma pauperis on his First Amendment retaliation claim against all respondents.

ORDER

IT IS ORDERED that petitioner Willie C. Simpson's request for leave to proceed in forma pauperis is GRANTED on his claim that respondents Janel Nickel, Timothy Douma, Philip Kingston, William Noland and Matthew Frank violated his First Amendment rights by retaliating against him for filing a complaint about a sexual assault against inmate McLaurin.

- For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. 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.
- 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.
- The unpaid balance of petitioner's filing fee is $248.60; petitioner is obligated to pay

this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

- Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants.
- Petitioner submitted documentation of exhaustion of administrative remedies with his complaint. Those papers are not considered to be a part of petitioner's complaint. However, they are being held in the file of this case in the event respondents wish to examine them.

Entered this 18th day of May, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge