IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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STEVEN D. STEWART,

ORDER

Petitioner,

05-C-293-C

v.

GERALD BERGE, JEFFREY P. ENDICOTT, RICHARD SCHNEITER, PETER HUIBREGTSE, GARY BOUGHTON, TIM HAINES, SGT. CARPENTER, SGT. MCDANIELS, SGT. HUIBREGTSE, SGT. GEPHART, SGT. HOFFMAN, SGT. HOTTENSTAIN, SGT. ROBINSON, C.O. BARR, C.O. GODFREY, JOANNE GOVIERE, C.O. MCDANIELS, C.O. STOWELL, ELLEN RAY, KELLY TRUMM, BURTON COX, JR., CINDY SAWINSKI, NURSE PAT, NURSE KEN, NURSE AMY, NURSE MERRIAM, B. STOBNER, NURSE JANE DOE and LINDA HODDY,

Respondents.

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This is a proposed civil action for declaratory, injunctive 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 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

A. The Parties

Petitioner Steven D. Stewart is a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Petitioner practices the Rastafarian religion and is African American. Respondents are or were employed at the Wisconsin Secure Program Facility in the following positions: 1) Gerald Berge and Jeffrey Endicott are former wardens; 2) Richard Schneiter is the current warden; 3) Peter Huibregtse is the deputy warden; 4) Gary Boughton is the security director; 5) Tim Haines and Linda Hoddy are unit managers; 6) respondents Carpenter, Gephart, Hoffman, Hottenstain, McDaniels, Huibregtse and Robinson are sergeants; 7) Ellen Ray and Kelly Trumm are institution correctional examiners; 8) Burton Cox, Jr. is a physician; 9) Cindy Sawinski is the medical director; and 10) respondents Pat, Ken, Amy, Merriam and Stobner are nurses.

B. Publications

Petitioner purchased two books entitled "The Mammoth Book of Erotica" and "The Mammoth Book of Best New Erotica." The books do not contain any pictures but have references to murder and prostitution. The Wisconsin Secure Program Facility library has hundreds of books that contain incest, murder, rape, pornography, and prostitution with authors such as Jackie Collins, Judith Krants, Harold Robbins and James Patterson. Respondent Sgt. Huibregtse of the mail room sent plaintiff a DOC-237 form denying petitioner these books because they contained pornography as defined in Wis. Admin. Code

§ DOC 309.02(16). Petitioner filed inmate complaint #2004-32144, citing Aiello v. Litscher, Case No. 98-C-791, for the proposition that sexually explicit written material is allowed except when it violates obscenity laws. Respondent Kelly Trumm upheld the denial of the two books. Respondents Gerald Berge and Peter Huibregtse are responsible also for denying petitioner his books.

C. Deliberate Indifference to Medical Treatment

On July 28, 2004, petitioner saw respondent Cox for severe stomach pain and heavy bleeding from the bowels. Cox did not examine petitioner but determined that petitioner had hemorrhoids and gave him Dibucaine and a six-day supply of suppositories. Petitioner continued to have severe stomach and rectal pain from August through November 2004. Respondent Cox lied to petitioner when Cox told petitioner in July 2004 that he would be seeing an outside specialist for his condition. Petitioner did not see a specialist and the bleeding increased, requiring petitioner to go to the hospital in Boscobel on November 9, 2004. Petitioner saw Dr. Rademacher, a hemorrhoidal specialist, who performed a rectal exam and recommended a colonoscopy and hemorrhoidal surgery. Petitioner had a colonoscopy on November 22, 2004, but Rademacher was unable to perform hemorrhoidal surgery because petitioner had no obvious hemorrhoids. Rademacher stated that petitioner had rectal mucosa prolapse that required sleeve resection at the University of Wisconsin

Hospital. Because of Rademacher's diagnosis, petitioner concluded that respondent Cox misdiagnosed petitioner's condition because Cox never examined him. Petitioner filed two complaints about this incident, but the complaints were dismissed by respondents Kelly Trumm and Ellen Ray.

On November 24, 2004, petitioner was bleeding badly. Correctional officers Dana and Johnson pulled petitioner from his cell. Respondent nurse Merriam told petitioner not to flush the toilet because she wanted to see how much blood there was. Instead of receiving medical treatment, petitioner was placed back into his cell where he continued to bleed. Petitioner pushed the emergency button and the third shift sergeant, who refused to reveal his name, said that the health services unit was aware of the problem.

On November 26, 2004, petitioner saw respondents Dr. Cox and nurse Pat because he was bleeding. Cox told petitioner that he could not alleviate petitioner's pain or bleeding but gave him dibucaine ointment.

On January 14, 2005, petitioner informed respondent nurse Amy at 11:30 a.m that he was bleeding. Nurse Amy responded that petitioner was scheduled to see respondent Cox that afternoon. When petitioner saw respondent Cox and nurse Jo, Cox stated that he could do nothing about the bleeding or pain. He did not perform a physical examination but provided petitioner with some Dibucaine ointment. Petitioner continued to bleed into the evening. Petitioner saw respondent nurse Ken, who brought petitioner a urine sample cup

at 7:00 p.m. At 10:30 p.m., petitioner saw respondents nurse B. Stobner and C.O. McLimans and showed them blood on his hands, clothes and tissue paper. Nurse B. Stobner stated that there was nothing that she could do.

On March 30, 2005, during the 2:00 a.m. count, petitioner showed respondent C.O. Gilardi massive amounts of blood on tissue papers and in the toilet. Gilardi said that he would get the nurse immediately. At 2:30 a.m, the nurse arrived and petitioner told her that he was having severe stomach and side pains. The nurse refused to provide her name and told petitioner that the blood was caused by hemorrhoids. Petitioner told the nurse that the doctor at the Boscobel Hospital had determined that petitioner did not have hemorrhoids and showed her the medical report. Instead of examining petitioner, the nurse argued with him. Petitioner told the nurse that he was in too much pain to argue and laid down. At 6:45 a.m., at breakfast, petitioner showed blood to respondent Schaffer, who retrieved respondent nurse Amy. Nurse Amy went into petitioner's cell to view the blood in the toilet. Petitioner asked nurse Amy to take pictures of the blood but she refused. No one logged this medical incident.

On March 31, 2005, petitioner saw respondent Cox, who told him that there was nothing he could do. Petitioner asked Cox whether Cox had made an appointment for surgery concerning petitioner's rectal mucosa prolapse because Dr. Rademacher had informed Cox that petitioner needed the surgery immediately. Otherwise, petitioner could

bleed to death. Petitioner's rectal mucosa prolapse has not been addressed since November 22, 2004.

When petitioner lost his ability to urinate, he asked to see doctors but was prescribed medication without an examination. Petitioner was taken to the University of Wisconsin Hospital on November 15, 2003 and December 7, 2004 where staff inserted a catheter and took x-rays that showed plaintiff to have large diverticula in his stomach. Respondent Cox could have prevented this condition had he sent petitioner to a urologist. Now petitioner must push in the right side of his stomach to urinate. Respondents scheduled petitioner to see a urologist.

On December 8, 2004, petitioner became infected from the catheter and started experiencing extreme pain and urinating blood. Respondent Cox gave petitioner antibiotics but no medication for the pain. On December 13, 2004, respondent nurse Merriam gave petitioner pain medication. However, petitioner was denied medication on December 15 and 16, 2004. Although respondent Tim Haines was responsible for petitioner's unit and aware of the denials of medication to petitioner, he did not do anything. Respondents Godfrey and McDaniels denied petitioner medication and told him that he must ask for it, even though petitioner's records show that he was scheduled to have medication.

On December 23, 2004, respondent Goviere failed to deliver petitioner his medication and inmate Gomez had to inform her of the mistake.

On January 5, 2005, petitioner had three teeth pulled. Petitioner asked respondent Sgt. Hoffman for his Vicodin, but Hoffman failed to comply with the request. Petitioner told Hoffman that he felt sick from having his teeth pulled and that he had swallowed a lot of blood. Respondent nurse B. Stobner came to petitioner's cell and told him that she could not do anything but that the Vicodin should help. Petitioner told her that he threw up everything, but Stobner just left the scene.

Petitioner asked to be tested for H. Pylori, which required staff to draw his blood. Respondent Godfrey asked petitioner whether he wanted a blood draw and petitioner asked Godfrey to repeat the question. Godfrey understood petitioner's response to be a refusal for the blood draw. Petitioner exclaimed that he did not refuse. Respondent Hottenstain came to petitioner's cell and said that he had heard the exchange between petitioner and Godfrey, but supported the actions of respondent Godfrey. As a result, petitioner has not been tested for H. Pylori.

On January 7, 2005, at 6:30 a.m., petitioner asked his medication to treat the pain resulting from his tooth extraction. The Wisconsin Secure Program Facility has a policy that requires staff to provide inmates with their medication within 30 minutes of receiving a request. Respondent Gephart stated that petitioner's medication would be on the meds-cart. At 6:40 a.m., respondent Godfrey stated that petitioner's medication would be available in 15 minutes. At 7:20 a.m., petitioner asked respondent Godfrey about his medication and

Godfrey replied that he would check. Petitioner asked respondent Goviere about his medication and she stated that she would find out where it was. At 8:30 a.m., petitioner asked respondent Barr about his medication, but Barr stated that staff are unable to give what they do not have. At 11:20 a.m., respondent nurse Amy came to petitioner's cell and told him that she had brought the medication to be dispensed at 7:00 a.m. and had informed Echo unit, the unit on which petitioner was housed, of that fact.

On January 13, 205, respondent Barr took petitioner's medication, doxycycline, from petitioner's cell even though his gum disease was severe enough that his doctor and dentist thought he might die from it if he did not continue his medication. Petitioner's medication did not expire until January 16, 2003.

Petitioner wrote to the health services unit about his severe medical problems. Respondent Cindy Sawinski stated that petitioner's situation is not life threatening and refused to provide petitioner with medical assistance. According to petitioner's doctor and dentist, petitioner's situation is life-threatening.

On January 14, 2005, at 6:00 p.m., petitioner asked respondent Hottenstain for his pain medication. At 7:00 p.m., petitioner asked respondent Juergens for the medication. Petitioner did not receive his medication until 10:30 p.m.

D. Excessive Force

On February 6, 2005, petitioner was experiencing chest pains. Respondent Robinson came to petitioner's cell to escort him to the nurse. Robinson asked petitioner to stick out his hands to be handcuffed. When petitioner stuck out his hands, Robinson bent petitioner's hand and wrist back, causing petitioner extreme pain. This treatment caused petitioner to fear exiting his cell because he may be abused. Petitioner was taken to see the nurse and asked for an x-ray. Respondent nurse Merriam told petitioner that the prison does not perform x-rays. Respondent Robinson did not believe that petitioner was having chest pains. On February 8, 2005, petitioner was prescribed Naproxen for his chest pain. No one examined petitioner's hand or wrist.

E. Retaliation

On February 16, 2005, at 12:05 p.m., respondent McDaniels threatened "to get" petitioner in retaliation for his filing complaint #2004-39700, a complaint about his medical situation. Petitioner was moved on January 27 and 29, 2005, February 8, 2005 and March 24, 2005 within the Echo and Delta units in the prison in retaliation for complaining about his medical situation.

F. Dreadlocks and Rastafarianism

On December 17, 2004, petitioner was scheduled to see a urologist. At 6:30 a.m.,

respondent Carpenter asked petitioner to take out the braids in his hair or he would not go to his appointment. At 8:30 a.m., respondent McDaniels asked petitioner why he had not removed the braids from his hair. After 9:00 a.m., respondents Goviere, Stowell, McDaniels escorted petitioner to intake. The officers told petitioner to remove his braids. Petitioner told the officers that he had dreadlocks and that he had been to an outside hospital 11 times with dreadlocks. Dreadlocks are a part of a culture and religion. Petitioner practices the Rastafarian religion. Respondents interpreted petitioner's response as a refusal of his appointment with the urologist. The Department of Corrections does not have a policy or rule about dreadlocks. Petitioner does not have dreadlocks but has braids. Respondents Haines, Hoddy and Cox tried to convince petitioner to cut his dreadlocks. Respondents Sawinski, Boughton and Peter Huibregtse told petitioner that he may not "start" dreadlocks. Petitioner was finally taken to the hospital on April 8, 2005, but in the interim his condition worsened.

DISCUSSION

A. First Amendment

1. Publications

I understand petitioner to allege that respondents Sgt. Huibregtse, Trumm, Berge and Peter Huibregtse violated his First Amendment right of freedom of expression by denying

him the ability to purchase two books entitled "The Mammoth Book of Erotica" and "The Mammoth Book of Best New Erotica." According to petitioner, denying petitioner access to these books broke the settlement agreement in Aiello v. Litscher, Case No. 98-C-791, which stated that sexually explicit written material is allowed except when it violates obscenity laws.

On April 24, 2003, in Kaufman v. McCaughtry, case no. 03-C-27-C, WL 23218305, I considered whether it was proper for this court to review claims brought in independent lawsuits by individual members of the class in Aiello v. Litscher, case no. 98-C-791-C, in which the members challenged post-settlement characterizations of mail as pornography. I concluded that such claims could not be decided without affecting the Aiello class as a whole and that in any event, the settlement agreement precludes lawsuits based solely on isolated misinterpretations of the rule or its successor regulations by line staff. Therefore, I will deny petitioner leave to proceed in forma pauperis on his claim that respondents Sgt. Huibregtse, Trumm, Berge and Peter Huibregtse violated his First Amendment rights when they denied him certain publications.

2. Dreadlocks and Rastafarianism

Petitioner seems to allege that respondents McDaniels, Haines, Hoddy, Cox, Sawinski, Boughton and Huibregtse violated his First Amendment right to freely express

himself and exercise his Rastafarian religion when they asked him to remove the braids from his hair or eliminate his dreadlocks. (Petitioner's allegations suggest that he has both braids and dreadlocks.) He alleges further that because he refused to comply with their request, respondents Goviere, Stowell and McDaniels prohibited him from going to his urology appointment on December 17, 2004.

In general, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89 (1987). The Supreme Court has held that "it [is] important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." Id. at 90. Prison officials violate the First Amendment when for reasons unrelated to legitimate penological interests, they engage in "censorship of . . . [the] expression of 'inflammatory political, racial, religious, or other views,' and matter deemed 'defamatory' or 'otherwise inappropriate.'" Procunier v. Martinez, 416 U.S. 396, 415 (1974). The First Amendment prohibits prison regulations that burden an inmate's right to freely exercise the religion of his choosing unless the regulation is reasonably related to the prison's legitimate penological interests. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (citing Turner, 482 U.S. at 89). Rastafarianism is a religious sect that originated among black people of Jamaica but has many African American adherents in the United States. Reed v. Faulkner, 842 F.2d 960,

962 (7th Cir. 1988). One of the tenets of this faith is that men should not shave, cut or comb their hair, a practice that results in the formation of dreadlocks. Id.; see also Wyatt v. Terhune, 315 F.3d 1108, 1112 (9th Cir. 2002) (Rastifarian inmate stated free exercise claim in challenging prison grooming standards requiring him to cut his hair). In addition, I understand that petitioner is alleging that respondents violated his First Amendment right to free expression by prohibiting him from keeping his hair in a particular style.

The Court of Appeals for the Seventh Circuit has held that regulations on hair length are "plausibly supported considerations of safety and security" because "requiring prisoners to wear their hair short makes it harder for them to change their appearance, should they escape, by cutting their hair short." Reed, 842 F.2d 963; see also Hill v. Blackwell, 774 F.2d 338, 343-44 (8th Cir. 1985) (prohibition on inmate facial hair reasonably related to legitimate penological interest in identifying inmates quickly). However, this penological interest is not applicable in this case; it appears that inmates are not prohibited from wearing braids or dreadlocks or from keeping their hair long but are barred from keeping their hair bound up only when they are transferred between facilities. The most likely reason for the rule is to prevent inmates from transporting small items of contraband in their bound up hair. Wilson v. Schillinger, 761 F.2d 921, 926 (3d Cir. 1985) (contraband can be hidden in long hair). Preventing contraband from entering a prison is a legitimate penological interest that justifies some intrusions on an inmate's First Amendment rights. E.g., Gaines

v. Lane, 790 F.2d 1299, 1304 (7th Cir. 1986) (inspection of incoming mail for contraband).

Given the government's likely interest and the deference accorded to prison officials, Pell v. Procunier, 417 U.S. 817, 827 (1974), petitioner's claim has little chance of success. Nonetheless, the court of appeals has warned that it is improper to dismiss a claim in the absence of evidence of the purpose for the regulation. Alston v. DeBruyn, 13 F.3d 1036, 1039-40 (7th Cir. 1994) (concluding that district court abused its discretion by dismissing petitioner's free-exercise complaint as frivolous where record did not contain evidence of prison's need for restriction). However, respondents Haines, Hoddy, Cox, Sawinski, Boughton and Huibregtse did not burden petitioner's right to freely exercise his religion; they merely tried to convince petitioner to cut his hair or told him to not "start" dreadlocks. According to petitioner, respondents Goviere, Stowell and McDaniels did burden his right to freely exercise Rastafarianism by failing to take him to his urology appointment because he refused to remove his braids. Accordingly, I will grant petitioner leave to proceed on his claim that respondents McDaniels, Goviere and Stowell violated his First Amendment free exercise and free expression rights.

3. Retaliation

Petitioner alleges that respondent McDaniels threatened "to get" petitioner in retaliation for his filing complaint #2004-39700, a complaint about petitioner's medical

situation. In addition, petitioner alleges that he was moved on January 27 and 29, 2005, February 8, 2005 and March 24, 2005 within the Echo and Delta units in the prison in retaliation for complaining about his medical situation.

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. Although petitioner identifies the complaint upon which respondent McDaniels based his

threat to "get" him, a threat of retaliation is not actionable. There must be some showing of an actual injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (stating prerequisites for establishing standing to sue under "case or controversy" requirement of Article III of Constitution). Furthermore, petitioner fails to identify which respondents moved him on January 27 and 29, 2005, February 8, 2005 and March 24, 2005 within the Echo and Delta units and upon which complaints those moves were based. Without that key information, plaintiff fails to allege sufficient facts to put respondents on notice to file an answer. Fed. R. Civ. P. 8. "The primary purpose of [Rule 8] is rooted in fair notice: a complaint 'must be presented with intelligibility sufficient for a court or opposing party to understand whether a valid claim is alleged and if so what it is.'" Vicom, Inc. v. Harbridge Merchant Servs., Inc., 20 F.3d 771, 775 (7th Cir. 1994). Because petitioner has not alleged a sufficient injury from respondent McDaniels's threat or which respondents or complaints were involved in moving petitioner within the Echo and Delta units, he will be denied leave to proceed on his First Amendment retaliation claims. (The denial will be without prejudice. If petitioner as or can obtain the missing information, he may move to amend his complaint to add this claim.)

B. Eighth Amendment

Plaintiff alleges that respondents violated his Eighth Amendment rights by being

deliberately indifferent to his serious medical needs and by using excessive force.

1. Deliberate indifference

To state an Eighth Amendment claim of cruel and unusual punishment arising from improper medical treatment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). A condition is serious if "the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain." Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997). Deliberate indifference requires that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). Inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes v. DeTella, 95 F.3d 586, 590-91 (7th Cir. 1996).

Most of petitioner's claims of inadequate medical treatment are claims of negligence, not deliberate indifference. For example, petitioner alleges that Cox did not examine petitioner but determined that petitioner had hemorrhoids and gave him dibucaine and suppositories on July 28, 2004, November 26, 2004 and January 14, 2005, and that Cox

misdiagnosed petitioner's rectal mucosa prolapse condition because Cox never examined him. Claims of medical malpractice or negligence are cognizable in state court. However, they do not give rise to an Eighth Amendment claim.

In other instances, petitioner alleges that prison medical staff did not address his bleeding adequately, such as respondents Schaeffer, nurse Amy, nurse Merriam, nurse Ken, nurse Jo, nurse B. Stobner, nurse Jane Doe and Dr. Cox on November 24, 2004, January 14, 2005, March 30, 2005 and March 31, 2005. Each of these respondents observed petitioner's blood but determined that there was nothing they could do about it. Respondent Cox provided petitioner with Dibucaine ointment because he believed petitioner to suffer from hemorrhoids and the staff nurses followed suit. Again, although petitioner may disagree with the conclusions of medical staff, this disagreement does not rise to the level of deliberate indifference.

However, petitioner does state an Eighth Amendment claim against respondents Cox and Sawinski for their roles in denying him surgical treatment of his rectal mucosa prolapse condition. Petitioner alleges that he asked respondent Cox to make an appointment for the rectal mucosa prolapse condition and that Dr. Rademacher from the Boscobel hospital informed Cox that petitioner needed surgery for that condition immediately. Petitioner alleges also that he wrote respondent Sawinski about his severe medical problems and that she responded that his situation is not life-threatening and refused to provide him with

medical assistance. According to petitioner, his rectal mucosa prolapse conditions has not been addressed since November 22, 2004. Petitioner alleges enough facts to suggest that both Cox and Sawinski knew about the serious nature of petitioner's condition and the recommendation of immediate surgery but chose to ignore that recommendation. Therefore, I will allow petitioner leave to proceed on his deliberate indifference claim against respondents Cox and Sawinski regarding petitioner's treatment needs for his rectal mucosa prolapse condition.

Petitioner complains of numerous occasions when respondents denied or delayed providing him his medication. The cases in which petitioner's medication was merely delayed in violation of a prison policy that requires staff to respond to inmate requests within 30 minutes are at best claims for violation of state law that may be brought in state court. "[N]ot every violation of state law or state-mandated procedure is a violation of the Constitution." Massey v. Helman, 259 F.3d 641, 647 (7th Cir. 2001). Hence, petitioner fails to state constitutional violations against respondents Goviere, Hoffman, B. Stobner, Gephart, Godfrey, Barr, nurse Amy, Hottenstain and Juergens when they caused a delay in the provision of his medication on December 23, 2004, January 5, 2005, January 7, 2005 and January 14, 2005.

Denial of pain medication may amount to deliberate indifference to a serious medical need, as long as petitioner alleges facts from which an inference may be drawn that

respondents knew of a risk to petitioner's health and disregarded that risk. Attempting to define "serious medical needs," the Court of Appeals for the Seventh Circuit has held that they encompass not only conditions that are life-threatening or that carry risks of permanent serious impairment if left untreated, but also those in which the deliberately indifferent withholding of medical care results in needless pain and suffering. Gutierrez v. Peters, 111 F.3d 1364, 1371 (7th Cir. 1997). Petitioner alleges that on December 8, 2004, he became infected and started experiencing extreme pain and urinating blood. Respondent Cox gave petitioner antibiotics but no medication for the pain. On December 13, 2004, respondent nurse Merriam gave petitioner pain medication. However, petitioner was denied medication on December 15 and 16, 2004. Despite being responsible for petitioner's unit and being aware of these denials of medication, respondent Tim Haines did not do anything. Respondents Godfrey and McDaniels denied petitioner medication and told him that he must ask for it, even though petitioner's records show that he was scheduled to have medication. In addition, on January 13, 2005, respondent Barr took petitioner's antibiotic, Doxycycline, from petitioner's cell even though his gum disease was severe enough that his doctor and dentist thought he might die from it and the medication did not expire until January 16, 2003.

Assuming petitioner's allegations of the severity of his condition are true, the failure of respondent Cox, a physician, to provide petitioner with pain medication at the time he

prescribed antibiotics is still not enough to suggest deliberate indifference. The question is whether the denial of medical treatment is "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition," Snipes, 95 F.3d at 592, giving rise to a claim of deliberate indifference. See also Estelle, 429 U.S. at 104 (holding that deliberate indifference "is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed"). Cox took some action by prescribing antibiotics to treat the underlying infection, which is another way to alleviate pain resulting from the infection. Therefore, Cox's treatment was not inappropriate.

However, respondent Barr's removal of petitioner's prescribed Doxycycline for his gum disease from his cell three days before the medication expired raises a question of possible deliberate indifference. It is not clear whether gum disease constitutes a serious medical need. At this stage, however, petitioner has alleged sufficient facts to imply that Barr's removal of his medication was inappropriate. I will allow petitioner leave to proceed on his deliberate indifference claim against respondent Barr.

As to plaintiff's claims regarding the denial of his medication on December 15 and 16, 2004 and by respondents Godfrey, McDaniels and Haines, plaintiff fails to allege who denied his medication on those specific dates, what type of medication respondents Godfrey,

McDaniels and Haines denied him or why he even required his medication. Nothing in petitioner's complaint suggests that these respondents actually knew of a substantial risk of harm to petitioner and acted or failed to act in disregard of that risk. Haley v. Gross, 86 F.3d 630, 641 (7th Cir. 1996). Because of these scant factual allegations regarding these denials of medication, petitioner fails to meet the minimal pleading standards to allow respondents to file an answer. Fed. R. Civ. P. 8; Vicom, Inc., 20 F.3d at 775. Therefore, I will deny him leave to proceed on his Eighth Amendment claim against respondents Godfrey, McDaniels and Haines.

Petitioner fails to allege any facts showing that respondents Godfrey and Hottenstain knew of a substantial risk of harm to petitioner when they denied him a test for H. Pylori. According to the Centers for Disease Control, H. Pylori is a bacterium that causes ulcers and can be cured with a one or two week course of antibiotics. Centers for Disease Control, Helocobacter pylori and Peptic Ulcer Disease, http://www.cdc.gov/ulcer/myth.htm. Because respondents Godfrey and Hottenstain are not medical staff, there is no reason to believe that they would know the significance of petitioner's being tested for H. Pylori. If petitioner requires the test, he should speak with prison medical staff.

Finally, petitioner fails to state a claim against respondents Trumm and Ray. He alleges that respondents Trumm and Ray were deliberately indifferent to his serious medical needs when they dismissed his complaints about respondent Cox's misdiagnosis. I have

concluded that the persons making recommendations for the disposition of inmate complaints are entitled to absolute immunity. See, e.g., Banks v. B. McCreedy, Case No. 04-C-737-C, Dec. 9, 2004; Borzych v. Frank, Case No. 04-C-632-C, Oct. 14, 2004; Koutnik v. Brown, Case No. 04-C-911-C, Dec. 30, 2004. Hence, I will deny petitioner leave to proceed on his Eighth Amendment claim against respondents Trumm and Ray.

2. Excessive force

Petitioner alleges that on February 6, 2005, when he was experiencing chest pains. Respondent Robinson caused him extreme pain in the course of handcuffing him. I understand petitioner to allege that respondent Robinson used excessive force in violation of the Eighth Amendment when he handcuffed petitioner.

The Eighth Amendment protects inmates from the "the unnecessary and wanton infliction of pain." Hudson v. McMillian, 503 U.S. 1, 5 (1992) (citations omitted). In deciding whether petitioner has alleged an arguable basis for his Eighth Amendment claim of excessive force by prison officials, it is necessary to determine whether the facts alleged in petitioner's complaint support an inference that the alleged force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically to cause harm. However, "not every malevolent touch by a prison guard gives rise to a federal cause of action." Id. at 9. The standard for determining which malevolent touches are de minimus

or are protected under the Eighth Amendment is whether the touching is "repugnant to the conscience of mankind." Id. at 9-10 (citations omitted).

It is not reasonable to infer from the fact that petitioner felt fleeting pain in his wrists while he was being handcuffed that respondent Robinson was acting sadistically or maliciously and intending to cause petitioner harm. Indeed, it is not repugnant to the conscience of mankind that prisoners or other persons taken captive may experience some pain during the cuffing process. Therefore, I will dismiss this claim as de minimus.

B. Motion for Appointment of Counsel

Petitioner has moved for the appointment of counsel to represent him in this case in which he is proceeding pro se and in forma pauperis. In support of the request, petitioner argues that he has no experience in the law, that he reads at a seventh grade reading level, that because of his extreme medical problems he is unable to sit or stand for long periods of time and he has only the help of a few jailhouse lawyers who know only half of what they are doing. He believes that without court-appointed counsel, he will be unable to prosecute his case.

Petitioner has attached to his motion ten letters from attorneys who have turned down his request for help. Although petitioner has made a sufficient showing that he has tried to retain counsel, the court must consider whether the petitioner is competent to

represent himself given the complexity of the case, and if he is not, whether the presence of counsel would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285, 288 (7th Cir. 1995) (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). This case is too new to allow me to assess petitioner's abilities. Although he states that he is unskilled in the law and has no understanding of court proceedings, most pro se litigants are similarly disadvantaged. In this court, persons representing themselves are given guidance about the rules applying to their cases and are instructed in procedures to be followed with responses to dispositive motions and trial. Therefore, petitioner's motion will be denied at this time.

ORDER

IT IS ORDERED that

1. Petitioner Steven D. Stewart's request for leave to proceed in forma pauperis is DENIED as to his claim that respondents Sgt. Huibregtse, Kelly Trumm, Gerald Berge and Peter Huibregtse violated his First Amendment rights when they denied him certain publications;

2. Petitioner's request for leave to proceed in forma pauperis is GRANTED on his First Amendment claim against respondents Sgt. McDaniels, Joanne Goviere and C.O. Stowell for their alleged violations of his right to freedom of expression and free exercise

under the First Amendment;

3. Petitioner's request for leave to proceed in forma pauperis is DENIED on his First Amendment retaliation claim against respondent McDaniels;

4. Petitioner's request for leave to proceed in forma pauperis is GRANTED on his Eighth Amendment deliberate indifference claims against respondents Burton Cox, Cindy Sawinski and C.O. Barr;

5. Petitioner's request for leave to proceed in forma pauperis is DENIED on his Eighth Amendment excessive force claim against respondent Robinson;

6. Petitioner's motion for appointment of counsel is DENIED;

7. Respondents Gerald Berge, Jeffrey Endicott, Richard Schneiter, Peter Huibregtse, Sgt. Carpenter, Sgt. Huibregtse, Sgt. Gephart, Sgt. Hoffman, Sgt. Hottenstain, Sgt. Robinson, C.O. Godfrey, Gary Boughton, Ellen Ray, Kelly Trumm, Nurse Pat, Nurse Ken, Nurse Amy, Nurse Merriam, Nurse Jane Doe, Tim Haines, Linda Hoddy and B. Stobner are DISMISSED from this case.

- 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 $100.00; 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 petitioner'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 22nd day of June, 2005.

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