IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JEFFREY A. VOIGT,

Petitioner,

v.

DANIEL BENIK, Warden,
BRIAN MILLER, Security Director,
Stanley Correctional Institution,

Respondents.

ORDER

05-C-356-C

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This is a proposed civil action for injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Stanley Correctional Institution in Stanley, 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 he is unable to prepay the full fees and costs of starting this lawsuit. He has 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 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 Jeffrey A. Voigt is a prisoner at Stanely Correctional Institution in Stanley, Wisconsin. Respondent Daniel Benik is Warden and respondent Brian Miller is Security Director at the institution.

On February 15, 2005, petitioner went to the back table in the day room to ask inmate Bearheart Weasley to apologize for the remarks he had made to petitioner during meal time and to inform Weasley that institution rules do not permit inmates to reserve

tables. In response to petitioner's comments, inmate Weasley spit in petitioner's face. When Weasley tried to do so a second time, petitioner shielded his face with a magazine. Weasley left the table and petitioner walked to the desk to report the incident to officer Patzoldt. While petitioner was waiting for officer Patzoldt to respond to him, Weasley assaulted petitioner from behind, causing him to be hospitalized for a grade 3 concussion, as well as lacerations, loosened teeth and contusions.

On February 18, 2005, petitioner sent respondent Miller a request to be separated from inmate Weasley. On Feburary 23, 2005, while petitioner was in temporary lock-up status, Lieutenant Kasten asked petitioner to recall the events of February 15. Kasten informed petitioner that four inmates had submitted written statements stating that petitioner had spit in Weasley's face in order to start a fight and that petitioner was looking for people in Unit 1B to beat him up. (It is not clear from petitioner's allegations whether the other inmates meant their statements literally or whether they meant them in the sense that "petitioner was looking for trouble.")

On March 2, 2005, prison staff issued petitioner conduct report #1637093, alleging that petitioner was engaged in battery contrary to Wis. Admin. Code § DOC 303.12(2) and fighting contrary to Wis. Admin. Code § DOC 303.17. The adjustment committee dismissed the conduct report on March 8, 2005 and discredited the statements submitted by the four inmates. On March 8, 2005, respondent Benik wrote petitioner concerning his

separation request, which had not been granted.

On April 10, 2005, petitioner wrote respondent Miller asking to be separated from inmate Weasley and the inmates who had submitted false statements. On April 29, 2005, respondent Miller wrote petitioner, stating "I have received your correspondence stating you are trying to secure a SPN [separation request]. I am enclosing a DOC-1803 offender request for separation form. Please fill out completely and return it to me. Once I have received it, your concerns will be investigated." On May 1, 2005, petitioner submitted the DOC-1803 form to respondent Miller.

On May 7, 2005, security staff informed petitioner that he was being released to the general population, Unit 1B. The next day, petitioner was informed that he was being punished with an additional sixty days in segregation until July 7, 2005, for refusing to go to the general population. Petitioner was not issued a conduct report for his refusal. On May 31, 2005, petitioner filed inmate complaint #SCI-2005-16862 stating that respondent Miller had not responded to his DOC-1803 separation request and that releasing him to general population, Unit 1B,1 was unreasonable because that unit housed the inmates who thought petitioner was "looking for inmates to beat him up."

On June 8, 2005, petitioner wrote respondent Miller, reiterating his need for a separation from inmate Weasley and the other inmates who submitted false testimony. Petitioner was scheduled to be released to general population, Unit 1B, on July 7, 2005. His

release will require him to choose between segregation status if he complains about the placement or about being assaulted again.

On June 10, 2005, petitioner received a copy of a report outlining the incident that occurred on February 15, 2005. The report supports the fact that inmate Weasley and four other inmates submitted false statements about the incident and that other inmates informed Lieutenant Kasten that petitioner was looking for people to beat him up.

DISCUSSION

Petitioner alleges that respondents Benik and Miller violated his Eighth Amendment right to be free from cruel and unusual punishment by ignoring his request to be separated from inmate Weasely and other inmates. "Prisoners may obtain relief under the Eighth Amendment for injuries sustained in prison if the injury is objectively serious and the prison official acted with deliberate indifference to the safety and health of the inmate." Peate v. McCann, 294 F.3d 879, 882 (7th Cir. 2002) (citing Farmer v. Brennan, 511 U.S. 825, 834 (1995)); Jelinek v. Greer, 90 F.3d 242, 244 (7th Cir. 1996). In a case alleging an official's failure to protect a prisoner from harm, "[t]he inmate must prove a sufficiently serious deprivation, i.e., conditions which objectively 'pos[e] a substantial risk of serious harm.'" Pope v. Shafer, 86 F.3d 90, 92 (7th Cir. 1996). In addition, the inmate must prove that the prison official acted with deliberate indifference to the inmate's safety, "effectively

condon[ing] the attack by allowing it to happen." Langston v. Peters, 100 F.3d 1235, 1237 (7th Cir. 1996) (quoting Haley v. Gross, 86 F. 3d 630, 640 (7th Cir. 1996)). A prison official may be liable for knowing of a substantial likelihood that the prisoner would be assaulted and failing to take reasonable protective measures. Farmer, 511 U.S. at 847; Peate, 294 F.3d at 882 ("[Plaintiff] must demonstrate only that 'the defendants actually knew of a substantial risk that [the prisoner] would seriously harm him.'") (citing Haley, 86 F. 3d at 641 (emphasis in original)).

Petitioner states an Eighth Amendment claim by alleging that respondent Miller refused to respond to his separation requests and instead put him in the position of having to disobey an order to return to his unit on May 7, 2005, in order to protect himself from harm. It can be presumed that as the security director of the institution, Miller had knowledge of the February 15 incident and that petitioner had been placed in temporary lockup pending an investigation of the incident. It can be presumed also that Miller would have been told that the conduct report issued against petitioner was dismissed on March 8, 2005, because the statements of Weasley and his supporters had been discredited. Miller took no action on petitioner's separation request. On April 10, 2005, petitioner wrote to Miller asking again to be separated from inmates Weasley and the others who had submitted false statements against him. Miller told him to fill out a department separation form, which petitioner did and which he submitted to Miller on May 1. Nevertheless, on May 7, 2005,

petitioner was advised that he was to leave temporary lockup status and return to the unit on which Weasley and the others were housed. It is possible to infer from these allegations that Miller was deliberately indifferent to a substantial risk of serious harm that petitioner faced if he returned to his former unit. See, e.g., Brown v. Budz, 398 F.3d 904, 910-11 (7th Cir. 2005) (finding "serious harm" to include beatings suffered at hands of fellow detainee and "substantial risk" to include risks attributable to detainees with known propensities of violence toward particular individual or class of individuals). Therefore, petitioner will be allowed to proceed on his claim against respondent Miller.

However, I will deny petitioner's request for leave to proceed against respondent Benik. The only allegations against Benik are that he wrote petitioner on March 8, 2005, acknowledging that petitioner had submitted a separation request to Miller. Because petitioner does not allege that Benik had any knowledge that Miller would refuse to act on the request before May 7, 2005, when petitioner was directed to return to the unit housing Weasley and his supporters, petitioner fails to state a claim of deliberate indifference against Benik.

In his request for relief, petitioner asks that the court enjoin Miller from placing him in a housing unit with Weasley and the others who gave false statements against him when his 60-day term in segregation ends on July 7, 2005. Because petitioner appears to seek emergency injunctive relief, I will construe petitioner's complaint as including a motion for

a preliminary injunction.

A district court must consider four factors in deciding whether a preliminary injunction should be granted. These factors are: 1) whether the plaintiff has a reasonable likelihood of success on the merits; 2) whether the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue; 3) whether the threatened injury to the plaintiff outweighs the threatened harm an injunction may inflict on defendant; and 4) whether the granting of a preliminary injunction will disserve the public interest. Pelfresne v. Village of Williams Bay, 865 F.2d 877, 883 (7th Cir. 1989). At the threshold, petitioner must show some likelihood of success on the merits and the likelihood that irreparable harm will result if the requested relief is denied. If petitioner were to make both showings, the court would move on to balance the relative harms and public interest, considering all four factors under a "sliding scale" approach. In re Forty-Eight Insulations, Inc., 115 F.3d 1294, 1300 (7th Cir. 1997).

Petitioner supports his motion for a preliminary injunction with the averments in his verified complaint. However, he has not observed the procedures of this court for obtaining preliminary injunctive relief, including providing the adverse parties with a copy of all materials filed and the development and submission of proposed findings of fact. Moreover, because the date by which he was to be released from segregation status has now passed, it is not clear whether petitioner has been released to another unit as he requested, in which

case his motion for preliminary injunction would be moot, or whether there remains a live controversy about his safety that could be resolved on a motion for preliminary injunction. Therefore, I will deny petitioner's motion without prejudice to his refiling the motion in accordance with this court's Procedure To Be Followed On Motions For Injunctive Relief, a copy of which is attached to this order, if he believes a request for emergency injunctive relief is still warranted. Petitioner should pay particular attention to those parts of the procedure that require him to submit proposed findings of fact in support of his motion and to refer to admissible evidence in the record to support each factual proposition.

ORDER

IT IS ORDERED that

1. Petitioner Jeffrey A. Voigt's request for leave to proceed in forma pauperis is GRANTED on his Eighth Amendment claim against respondent Brian Miller that he was deliberately indifferent to petitioner's safety when he ignored his separation request from inmate Weasley and other inmates;

2. Petitioner's request for leave to proceed against respondent Daniel Benik is DENIED;

3. Petitioner's request for a preliminary injunction is DENIED without prejudice. 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 $245.35; 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.

Entered this 25th day of July, 2005.

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