IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROBERT L. COLLINS-BEY,

Petitioner, ORDER

v. 05-C-453-C

MATTHEW J. FRANK, RICHARD SCHNEITER, PETER HUIBREGTSE, GARY BAUGHTON, KELLY TRUMM, TODD BRUDOS, REED TREFZ and CHAD LOMAN, in their individual/ personal and official capacities,

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 Robert Collins-Bey, an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, alleges that respondents violated his constitutional rights under the First, Fourth, Eighth, and Fourteenth Amendments.

Petitioner requests leave to proceed in forma pauperis, as authorized by 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 made the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, when the litigant is a prisoner, the court must dismiss the complaint if the claims contained in it, even when read broadly, are legally frivolous, malicious, fail to state a claim upon which relief may be granted, or seek money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. The claims raised by petitioner in this action fail to state a claim upon which relief can be granted; therefore, he will not be allowed to proceed on any of the claims he has asserted. Furthermore, because I am denying petitioner leave to proceed on his federal claims, I decline to exercise jurisdiction over his state law claims. They will be dismissed without prejudice.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner is incarcerated at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. He is serving a sentence that renders him ineligible for a "good time " sentence reduction. Respondent Matthew J. Frank is Secretary of the Wisconsin Department of Corrections. Respondent Richard Schneiter is Warden at the Wisconsin Secure Program Facility. Peter Huibregtse is Deputy Warden. Respondent Gary Baughton is Associate Warden for Security. Respondent Kelly Trumm is an Inmate Complaint Examiner.

Respondents Todd Brudos, Reed Trefz and Chad Loman are correctional officers.

As a matter of prison policy, if an inmate wishes to receive a meal, he must first dress, turn on his cell light and stand in the center of the cell. On the morning of February 5, 2005, respondent Chad Loman arrived at petitioner's cell and found him lying in bed undressed with the cell light turned off. Loman asked petitioner whether he wished to eat, and when petitioner said yes, Loman directed him to sit at the back of his cell so Loman could open the food trap and deliver the meal. Petitioner objected to Loman's orders and refused to move to the back of the cell. He continued to demand his meal.

Respondent Loman left and contacted respondents Reed Trefz and Todd Brudos. Brudos returned and ordered petitioner to turn on the cell light and sit at the back of the cell. Again, petitioner refused to comply and demanded his meal. Brudos then left, returning a short time later with additional staff. Petitioner was removed from his cell and taken to the prison segregation unit.

Upon arrival in the segregation unit, petitioner was ordered to kneel so his leg restraints could be removed. While petitioner was kneeling, Brudos ordered staff to conduct a strip search of petitioner. Staff "cut, ripped and tore" petitioner's clothes from his body. When a female officer approached petitioner to cut his clothes from him, he demanded that she be replaced with a male officer. Respondent Loman cut petitioner's clothing, "grabbed petitioner's posterior" and "audaciously spreaded [sic] petitioner's buttocks" to perform a

visual inspection of his body cavities. The female officer remained present during this search.

Following the strip search, petitioner "shook himself scoldishly [sic]" from respondent Loman's grasp. Immediately thereafter, at approximately 7:30 a.m., petitioner was placed in a segregation cell wearing only briefs and a pair of socks. Petitioner remained in the cell without incident until approximately 3:00 p.m. when he consulted a nurse. Petitioner informed the nurse that he was shivering and that his joints ached from arthritis. The nurse asked correctional officers whether petitioner could be given additional clothing and was informed that he could not receive any at that time. Petitioner remained dressed only in socks and briefs until 8:55 p.m.

Following his placement in the segregation unit, petitioner was charged with two major conduct violations. At his disciplinary hearing petitioner was not permitted to call certain witnesses on his own behalf and was unable to cross-examine adverse witnesses. The hearing officer was not impartial because in advance of the hearing the officer had spoken with petitioner's proposed witnesses to determine whether they could offer relevant information. Petitioner was found guilty of both conduct violations.

Petitioner filed several complaints through the prison grievance system based on the events of February 5, 2005, alleging the abuses discussed above and claiming in addition that the strip search carried out by respondents Brudos and Loman constituted a sexual assault.

These complaints were reviewed and summarily dismissed by respondent Trumm. The dismissals were affirmed by respondent Peter Huibregtse.

OPINION

I understand petitioner to be raising the following claims of constitutional wrongdoing: (1) respondents Loman, Trefz and Brudos deprived petitioner of a meal as punishment for refusing to comply with an order to move to the back of his cell and turn on his lights, in violation of petitioner's Eighth Amendment right to be free from cruel and unusual punishment; (2) respondents Loman, Brudos and possibly Trefz retaliated against petitioner for refusing to obey the order to move to the back of his cell in violation of petitioner's First Amendment right to free speech; (3) respondent Loman used excessive force in conducting a strip search of petitioner following his removal from his cell while respondent Brudos did nothing to intervene, in violation of the Eighth Amendment; (4) respondents Frank, Schneiter and Brudos violated petitioner's Fourth Amendment rights against unreasonable search and seizure by endorsing policies that permit female staff to be present during strip searches; (5) respondents Brudos and Loman placed petitioner in a cool cell for thirteen hours wearing only briefs and socks in violation of petitioner's Eighth Amendment rights, and were encouraged in this violation by the policies endorsed by respondents Frank, Schneiter, Huibregtse and Boughton; (6) respondents Frank and

Schneiter endorsed policies that allowed petitioner to be deprived of procedural protections during his disciplinary hearing in violation of his Fourteenth Amendment due process rights; and (7) respondents Trumm and Huibregtse failed to provide petitioner a meaningful method of petitioning the government for redress through the inmate complaint system in violation of his First Amendment rights.

A. Deprivation of Food

First, petitioner alleges that his Eighth Amendment rights were violated when he was refused breakfast on February 5, 2005 as a result of his refusal to turn on his light and retreat to the back of his cell. In support of this contention, he relies on this court's opinion in Freeman v. Berge, No. 03-C-21-C (May 16, 2005).

Unfortunately for petitioner, after the jury reached its decision in Freeman that it was a violation of the Eighth Amendment to use food deprivation as a means of controlling an inmate's behavior, the Court of Appeals for the Seventh Circuit decided Rodriguez v. Briley, 403 F.3d 952 (7th Cir. 2005). The court held that withholding food from an inmate who deliberately refuses to comply with a valid prison rule is not punishment under the Eighth Amendment.

Petitioner has acknowledged that he was refused his meal because of his failure to comply with a legitimate prison policy. He has not alleged that he misunderstood the rule,

was mentally ill or in some other way was less than fully responsible for his noncompliance. Under Rodriguez, he cannot force the prison to change its rules by refusing food and thereby engineering an Eighth Amendment violation. Id. Therefore, petitioner will be denied leave to proceed on his food deprivation claim.

B. Retaliation

Petitioner alleges that when he demanded his breakfast, defendants Loman, Brudos and possibly Trefz retaliated against him by extricating him from his cell, strip searching him and placing him in the segregation unit. To succeed on a retaliation claim, petitioner must show that he engaged in constitutionally protected behavior and that his behavior was a substantial or motivating factor in respondents' negative treatment of him. Rasche v. Village of Beecher, 336 F.3d 588, 597 (7th Cir. 2003).

Petitioner alleges that respondents retaliated against him because he demanded his breakfast and stated his refusal to comply with an order. However, demanding one's breakfast and refusing to comply with an order is not constitutionally protected behavior. To support a claim of retaliation, the speech in question must relate to a matter of public concern and not simply to the speaker's own interests. McElroy v. Lopac, 403 F.3d 855, 858 (7th Cir. 2005); Sasnett v. Litscher, 197 F.3d 290, 292 (7th Cir. 1999).

Petitioner's claims in this matter are not unlike those of the plaintiff in McElroy.

McElroy was a state prison inmate assigned to work in the prison's sewing shop. His supervisor announced one day that the sewing shop was going to be closed and that inmates who could not be reassigned immediately to another job were to be placed on a waiting list for a new job. McElroy asked the supervisor whether the laid-off workers would receive "lay-in" pay until new positions opened for them. The supervisor became enraged at McElroy's question, calling him a "troublemaker." Several days later, McElroy was fired from his job, allegedly in retaliation for his question. Following screening of his case under 28 U.S.C. § 1915A, the district court denied McElroy leave to proceed on his retaliation claim.

On appeal, the Court of Appeals for the Seventh Circuit upheld the denial of leave to proceed. In the court's view, McElroy's question about lay-in pay related only to his personal economic interest and not to a matter of public concern. Id. at 858. Although lay-in pay would have affected all of the unemployed prisoners, the court found that McElroy's question was motivated by his own interest and was therefore not of public concern and not subject to First Amendment protection.

Petitioner alleges that he was placed in segregation in retaliation for his stated refusal to comply with an order and demand for breakfast. Like McElroy, he has failed to show that his speech related to a matter of public concern. His desire for a meal was a personal one. As a private concern, his statements are not protected under the First Amendment. Petitioner has therefore failed to state a claim that defendants retaliated against him for

exercising his constitutional right to free speech under the First Amendment.

C. Excessive Force

Petitioner contends that his Eighth Amendment rights were violated when respondent Loman used excessive force in strip searching him and when respondent Brudos failed to intervene. The Eighth Amendment prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Because prison officials must sometimes use force to maintain order, the central inquiry for a court faced with an excessive force claim is whether the force "was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). To determine whether force was used appropriately, a court considers factual allegations revealing the safety threat perceived by the officers, the need for the application of force, the relationship between that need and the amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity of the force. Whitley v. Albers, 475 U.S. 312, 321 (1986); Outlaw v. Newkirk, 259 F.3d 833, 837 (7th Cir. 2001).

Petitioner alleges that when he was taken to the segregation unit, respondent Brudos ordered a "staff-assisted strip search." When respondent Loman performed this search, he cut petitioner's clothing and "audaciously" spread petitioner's buttocks apart to visually

inspect his anal cavity. Petitioner does not allege that he was injured in any way by either the removal of his clothing or the inspection of his body. Furthermore, petitioner admits that he "shook himself" from respondent Loman, an action that indicates petitioner was less than wholly cooperative with the search.

Since petitioner has not alleged harm or any other facts suggesting respondent used more force than necessary to perform a strip search after removing petitioner from his cell, I will deny petitioner leave to proceed on his claim of excessive force.

D. Unreasonable Search and Seizure

Petitioner alleges that his Fourth Amendment rights were violated when respondents Brudos, Schneiter and Frank adopted and maintained policies that permitted petitioner to be strip searched in the presence of a female staff member. There are several problems with this claim. First, the United State Supreme Court has clearly stated that the "Fourth Amendment proscription against unreasonable searches does not apply" within the confines of a prison. Hudson v. Palmer, 468 U.S. 517, 526 (1984). Loss of privacy is an inherent consequence of confinement. Id. at 528; Bell v. Wolfish, 441 U.S. 520, 537 (1979). Furthermore, the Court of Appeals for the Seventh Circuit has clearly stated that permitting female guards to monitor naked inmates does not violate inmates' privacy rights and does not constitute cruel and unusual punishment so long as the monitoring policy has not been

adopted to humiliate or harass the inmate. Johnson v. Phelan, 69 F.3d 144, 147 (7th Cir. 1995).

In this case, petitioner demanded that a male staff member perform his strip search. At petitioner's request, respondent Loman conducted the physical inspection of petitioner's body. Petitioner has made no allegation that the female member present at the time was there for any purpose other than assisting in petitioner's transfer to the segregation unit. Because petitioner has failed to allege facts from which an inference can be drawn that prison policy regarding the presence of female staff has been adopted to harass or humiliate him, petitioner will be denied leave to proceed on his claims of unreasonable search and seizure and invasion of privacy.

E. Cruel and Unusual Punishment

Petitioner alleges that his Eighth Amendment rights were violated when respondents Brudos and Loman placed petitioner in a segregation cell for thirteen hours wearing only briefs and socks. He contends also that respondents Frank, Schneiter, Huibregtse, and Boughton endorse policies that permit inmates to be placed in segregation without outer clothing in violation of the Eighth Amendment.

The Eighth Amendment's prohibition against cruel and unusual punishment imposes upon jail officials the duty to "provide humane conditions of confinement" for prisoners.

Farmer v. Brennan, 511 U.S. 825, 832 (1994). Although prison conditions may be harsh, the Eighth Amendment imposes a duty on prison officials to provide adequate shelter. Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997). When assessing claims based on low cell temperatures, courts should examine factors such as the "severity of the cold; its duration; whether the prisoner has alternative means to protect himself from the cold; the adequacy of such alternatives; as well as whether he must endure other uncomfortable conditions as well as cold." Id. at 644. The Constitution does not mandate that prisons be comfortable. Caldwell v. Miller, 790 F.2d 589, 601 (7th Cir. 1986). As long as conditions do not fall below contemporary standards of decency, they are not unconstitutional. Id.

Petitioner alleges that on February 5, 2005, from 7:30 a.m. until 8:55 p.m. he was placed in a cell wearing only socks and briefs. During that time, he shivered and his joints ached from arthritis. Petitioner admits that he was allowed to consult with a prison nurse and that he was given clothing before the end of the day. Although he was undoubtedly uncomfortable, he has not alleged an injury sufficient to support an Eighth Amendment claim. Therefore, he will not be allowed to proceed on his claim of cruel and unusual punishment.

F. Denial of Due Process

Next, petitioner contends that his Fourteenth Amendment procedural due process

rights were violated when he was not allowed to call and directly question witnesses of his choice at his prison disciplinary hearing. The Fourteenth Amendment prohibits a state from depriving "any person of life, liberty or property, without due process of law." U.S. Const. Amend. XIV. In order to receive protection under the Fourteenth Amendment, a person must have a protected liberty or property interest. Averhart v. Tutsie, 618 F.2d 479, 480 (7th Cir. 1980). Prisoners do not have a liberty interest in remaining out of segregated confinement so long as the period of confinement does not exceed the remaining term of their incarceration. Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997). In Sandin v. Conner, 515 U.S. 472, 486 (1995), the United States Supreme Court held that an inmate's confinement in a segregation unit "did not present the type of atypical, significant deprivation" in which there could be a liberty interest. The Court of Appeals for the Seventh Circuit has held that in the absence of a protected liberty interest, prisoners are not entitled to due process protections at disciplinary hearings. Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001) (in absence of liberty interest, "the state is free to use any procedures it chooses, or no procedures at all").

Petitioner acknowledges that he is not eligible to receive good time credit. As a result, disciplinary actions taken against him do not jeopardize the duration of his sentence. Because he has no protected liberty interest at stake in his prison disciplinary hearing, petitioner's request to proceed on claim that he was denied due process must be denied as

legally meritless.

G. Lack of Meaningful Method of Petitioning for Redress

Nonfrivolous grievances concerning the conditions of a prisoner's confinement are protected by the First Amendment as petitions for redress of grievances. Hasan v. United States Dept. of Labor, 400 F.3d 1001, 1005 (2005). Petitioner does not deny that he has filed grievances or that he has appealed those grievances. In fact, he has petitioned his way through the prison system and into this court.

Petitioner's real complaint is not with the availability of the grievance process, but rather with the results of that process. Petitioner has named as respondents Kelly Trumm, an inmate complaint examiner, and Peter Huibregtse, a prison official who reviewed petitioner's grievances on appeal. It is well established that liability under § 1983 must be based on a defendant's personal involvement in the constitutional violation. 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.

Prison officials are entitled to immunity for acts that are functionally equivalent to

those of judges. Wilson v. Kelkhoff, 86 F.3d 1438, 1443-1445 (7th Cir. 1996). Absolute immunity immunizes government officials from liability completely and is accorded to public officials only in limited circumstances. Burns v. Reed, 500 U.S. 478, 486-87 (1991). In most instances, qualified immunity is regarded as sufficient to protect government officials in the exercise of their duties. Buckley v. Fitzsimmons, 509 U.S. 259 (1993). Qualified immunity protects officials from liability for the performance of discretionary functions when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). "Truly judicial acts" are among the few functions accorded the more encompassing protections of absolute immunity. Forrester v. White, 484 U.S. 219, 226-27 (1988).

In determining whether government officials are entitled to absolute immunity, courts apply a functional approach, evaluating whether the official's action is functionally comparable to that of judges. Wilson, 86 F.3d at 1445. If the acts are ministerial and unrelated to the decision making process, they are not covered. Antoine v. Byers & Anderson, Inc, 508 U.S. 429 (1993) (court reporter not entitled to absolute immunity for failing to provide a transcript promptly even though task is "part of the judicial function"). In deciding whether a government official is entitled to absolute immunity, a court must look at "'the nature of the function performed, not the identity of the actor who performed it.'" Buckley, 509 U.S. at 269 (quoting Forrester, 484 U.S. at 229).

Under the inmate complaint review system described in Wis. Admin. Code Ch. DOC 310, an inmate complaint examiner may investigate inmate complaints, reject them for failure to meet filing requirements or recommend to the appropriate reviewing authority that they be granted or dismissed. Wis. Admin. Code § DOC 310.07(2). If the examiner makes a recommendation, the reviewing authority has the authority to dismiss, affirm or return the complaint for further investigation. Wis. Admin. Code § DOC 310.12. If an inmate appeals the decision of the reviewing authority, the corrections complaint examiner is required to conduct additional investigation where appropriate and make a recommendation to the Secretary of the Wisconsin Department of Corrections . Wis. Admin. Code § DOC 310.13. Within forty-five days after a recommendation has been made, the Secretary must accept it in whole or with modifications, reject it and make a new decision or return it for further investigation.

"[T]he 'touchstone' for [the applicability of the doctrine of judicial immunity] has been 'performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights.'" Snyder v. Nolen, 380 F.3d 279, 286 (7th Cir. 2004) (quoting Antonie, 508 U.S. at 435-36 (additional citations omitted)). When inmate complaint examiners reject inmate complaints for procedural deficiencies or dismiss them as unmeritorious, they perform an adjudicatory function and therefore, are entitled to absolute immunity for those acts. Cf. Imbler v. Patchman, 424 U.S. 409, 430 (1976) (absolute

immunity available for conduct of prosecutors that is "intimately associated with the judicial phase of the criminal process"); Walrath v. United States, 35 F.3d 277 (7th Cir. 1994) (parole board members are entitled to absolute immunity for making parole revocation decisions); Tobin for Governor v. Illinois State Board of Elections, 268 F.3d 517 (7th Cir. 2001) (members of state board of elections entitled to absolute immunity for refusing to certify political candidates; decision was product of process much like court trial). Also, absolute immunity is accorded officials when they make recommendations to dismiss or to affirm dismissals. Tobin, 268 F.3d at 522 (officials making recommendation entitled to immunity just as magistrate judge who makes recommendation to district court would be); Wilson, 86 F.3d at 1445 (absolute immunity protects against both actual decision making and any act that is "part and parcel" of the decision making process).

Because I conclude that the persons making recommendations for the disposition of inmate complaints are entitled to absolute immunity and because petitioner has failed to allege that he has been blocked from petitioning for redress of his many grievances, he will not be allowed to proceed on his First Amendment claim.

ORDER

IT IS ORDERED that:

1. Petitioner Robert Collins-Bey's request for leave to proceed in forma pauperis is

DENIED and this case is DISMISSED with prejudice with respect to petitioner's federal claims for failure to state a claim upon which relief may be granted;

2. Petitioner's request that I exercise supplemental jurisdiction over his state law claims is DENIED and his state law claims are DISMISSED without prejudice;

3. The unpaid balance of petitioner's filing fee is $244.01. This amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

4. 28 U.S.C. § 1915(g) directs the court to enter a strike when an "action" is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." Because petitioner's state law claims are part of the action and the court did not dismiss those claims for one of the reasons enumerated in § 1915(g), a strike will not be recorded against petitioner under § 1915(g).

5. The clerk of court is directed to close the file.

Entered this 2nd day of September, 2005.

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