IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROGER DALE GODWIN,

ORDER

Petitioner,

05-C-493-C

v.

JIM SUTTON, JANEL NICKIELS, RANDY MCGOWAN and MATTHEW FRANKS,

Respondents.

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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 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 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 resondent 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 Roger Dale Godwin is an inmate at the Columbia Correctional Institution in Portage, Wisconsin. Respondent Randy McGowan, also an inmate at the Columbia Correctional Institution, shared a cell with plaintiff from April 16, 2005 until mid or late June 2005. Respondents Janel Nickiels and Jim Sutton are employed by the Wisconsin Department of Corrections at the Columbia Correctional Institution. Respondent Matthew Frank is Secretary of the Wisconsin Department of Corrections.

On April 16, 2005, petitioner was transferred between units at the Columbia Correctional Institution. When petitioner arrived at his new unit, Sgt. Koss and another correctional officer named Kratz placed him in a cell with respondent McGowan, who is black. Neither Koss nor Kratz asked petitioner whether he would get along with McGowan and neither officer checked petitioner's face card to see whether petitioner was "red-flagged." Petitioner and respondent McGowan argued the first day they were celled together. Petitioner ignored respondent McGowan until May 10, 2005, when McGowan began making homosexual "jokes, moves and passions" on petitioner and began masturbating in front of him. Petitioner asked McGowan to stop this behavior but McGowan thought he was funny and continued it. At this point, petitioner wrote a letter to respondent Sutton asking that he come speak with petitioner. Respondent Sutton did not respond to the letter and did not come to petitioner's cell. At some point, petitioner wrote to Dr. Scott Reuben-Asch and asked for a meeting. At the meeting, petitioner told Dr. Reuben-Asch that McGowan was masturbating, making homosexual advances toward him and threatening to rape him. Dr. Reuben-Asch referred petitioner to Dr. Reynolds, a psychiatrist, on petitioner's complaints of stress, depression and difficulty sleeping. Petitioner was given a medication that was intended to make him sleepy.

In June 2005, respondent McGowan continued to try to have sexual contact with petitioner. At this time, petitioner wrote a letter to respondent Frank in which he explained

what respondent McGowan was trying to do him and stated that staff at the institution had not taken any action. He did not receive a response to the letter. On June 18, 2005, petitioner awoke around 1:30 a.m. At that time, McGowan held him down and sexually assaulted him. After the assault, petitioner bled from his anus. Respondent McGowan threatened to kill petitioner if petitioner told any prison staff about the incident. Petitioner did not tell anyone for several days. However, on June 18, 2005 and again on June 21, 2005, petitioner filled out an "interview/information request" form, asking to see Dr. Reuben-Asch. Reuben-Asch responded to petitioner's requests by saying that he had informed unit staff of his concerns and that he would meet with petitioner in his office on June 23, 2005. On June 19, 2005, petitioner completed a "double-celling request form" asking to be housed in a cell with inmate Rolf Smart. On June 20, 2005, petitioner completed an "interview/information request" form addressed to Capt. Nickiels, asking whether she had received "the double-up and letters I wrote you." Also on June 21, 2005, petitioner filed an inmate complaint about being celled with McGowan. On June 23, 2005, inmate complaint examiner Amy Millard recommended that petitioner's complaint be dismissed. In the summary of facts, Millard stated,

> The ICE spoke with [Unit Manager Sutton]. Mr. Sutton indicated that the complainant had requested to be celled up with his current room mate through the double-celling request form. In addition the complainant and his room mate had been currently celled up when they submitted the request. The double-celling request form informs offenders that if approved they

> understand that they may not request another cell placement for a period of 90 days from the date the request is honored. The ICE believes that the complainant was fully aware of what he was requesting and the rules and regulations that went along with it. Therefore the ICE recommends that this complaint be dismissed.

Meanwhile, on June 22, 2005, a C. Neuhauser responded to petitioner's June 20 inquiry addressed to Captain Nickiels,

> Capt. Nickels forwarded your requests to me to answer. Since you have filed an inmate complaint, the investigation will be in their hands. In one of the letters is what appears to be an original doubling request, I am not sure how they could process this if it is sent to security. I am returning the original to you and address as the [unintelligible] unit.

At some point, McGowan was removed from petitioner's cell. Subsequently, petitioner wrote to respondents Nickiels, Sutton, Frank, warden Gram and Dr. Reuben-Asch and filed inmate complaints. He asked the security department for a "separation form" that he completed and sent to respondent Nickiels

On August 1, 2005, petitioner went to the health services unit, where he was seen by a nurse named Steve, who noted that petitioner had been visiting the unit since the date of the assault because he was having problems with his stomach and trouble defecating. Petitioner told the nurse that respondent McGowan had sexually assaulted him on June 18. The nurse gave petitioner some medication. Petitioner visited the health services unit again on August 5 complaining of continued stomach problems and trouble defecating.

On August 4, 2005, petitioner spoke with respondent Sutton for the first time since

the assault. He told Sutton about the assault and Sutton told petitioner that he would investigate the matter and get back to him. That same day, petitioner filed an inmate complaint against the health services unit and respondents Sutton and Nickiels. On August 7, 2005, he contacted the Columbia County Sheriff's Department to press charges against McGowan.

DISCUSSION

A. Liability Under § 1983

Before I address the substance of petitioner's allegations, one matter concerning liability under §1983 warrants brief discussion. First, petitioner has named inmate McGowan as a defendant in this case. However, only state actors may be sued under § 1983. Gayman v. Principal Financial Services, Inc., 311 F.3d 851, 852 (7th Cir. 2003). A private citizen may be held liable under § 1983 only if he acted with or obtained aid from state officials. Morfin v. City of East Chicago, 349 F.3d 989, 1003 (7th Cir. 2003). Petitioner has alleged no facts from which an inference can be drawn that respondent McGowan was acting under such state authority when he sexually assaulted petitioner. Therefore, respondent McGowan will be dismissed from this case.

B. Eighth Amendment

I understand petitioner to allege that respondents Sutton, Nickiels and Frank violated his Eighth Amendment protection against cruel and unusual punishment by failing to prevent respondent McGowan from sexually assaulting him. Prison officials may be liable under the Eighth Amendment for failing to prevent one inmate from assaulting another if they exhibit deliberate indifference to the inmate's safety. Farmer v. Brennan, 511 U.S. 825 (1994); see also Washington v. LaPorte County Sheriff's Department, 306 F.3d 515, 517 (7th Cir. 2002) ("prison officials have a duty to protect inmates from violence at the hands of other inmates"). To state a claim under the Eighth Amendment based on a prison official's failure to prevent an assault, an inmate must allege that he faced a substantial risk of serious harm and that the official was deliberately indifferent to that risk. Brown v. Budz, 398 F.3d 904, 909 (7th Cir. 2005).

1. Substantial risk of serious harm

Clearly, petitioner suffered serious harm when he was sexually assaulted by respondent McGowan. However, that is only half of the analysis. In determining whether petitioner has alleged that he faced a substantially serious risk, the other critical question is whether "there was a substantial risk beforehand that [the] serious harm might actually occur." Brown, 398 F.3d at 910. The Court of Appeals for the Seventh Circuit has read the phrase "substantial risk" to mean a risk so great that it is "almost certain to materialize

if nothing is done." Id. at 911 (citations omitted).

Petitioner has not alleged that respondent McGowan had a history of assaulting his cellmates or, assuming he did have such a propensity, that any of the respondents knew about it. Moreover, although he has alleged that the officials who assigned him to a cell with respondent McGowan did not inquire whether the two inmates would get along, he provides no facts that would suggest the need for such an inquiry. Indeed, it appears that petitioner may have asked to be housed with inmate McGowan. However, petitioner has alleged that, beginning on May 10, 2005, McGowan repeatedly tried to have sexual contact with him, masturbated in front of him and threatened to rape him. These allegations are sufficient to suggest that petitioner faced a substantial risk of serious harm.

2. Deliberate indifference

The next question is whether petitioner's allegations are sufficient to satisfy the deliberate indifference prong. Deliberate indifference requires more than an allegation that prison officials made a mistake or were negligent or even grossly negligent. Fisher v. Lovejoy, 414 F.3d 659, 662 (7th Cir. 2005). Deliberate indifference requires an allegation that prison officials were criminally reckless. Id. In other words, the officials must have known of the substantial risk and disregarded it; "the official must both be aware of the facts from which an inference could be drawn that a substantial risk of serious harm exists, and he must

also draw the inference." Farmer, 511 U.S. at 838.

Petitioner has alleged that, before he was assaulted, he wrote letters to respondents Sutton and Frank. The contents of these letters are critical in determining whether respondents knew of the substantial risk petitioner faced. Unfortunately, his allegations regarding the contents of the letters are sparse. He alleges that he wrote to respondent Sutton to ask to speak with him and that he wrote to respondent Frank explaining what respondent McGowan was trying to do him. At this stage of the litigation, I must draw all reasonable inferences in petitioner's favor. Brown, 398 F.3d at 912. Therefore, I will infer that petitioner provided each respondent with enough factual detail in his communications to make them aware of the substantial risk he faced. If this turns out not to be the case, it will be all but impossible for petitioner to prove that respondents were deliberately indifferent to a substantial risk of serious harm. The fact that petitioner complained to respondents after the assault is irrelevant. Nonetheless, I conclude that petitioner's allegations are sufficient to state a claim under the Eighth Amendment against respondents Sutton and Frank. He will be granted leave to proceed on this claim.

C. Motion for Access to Law Library

Along with his complaint, petitioner has filed a document entitled "Motion For Three Hours of Law Library At Columbia Correctional Institution." In this motion, petitioner

states that he has been denied time in the law library, that his mail has been withheld and that he has been the subject of other retaliatory actions. I will construe petitioner's motion as requesting an injunction prohibiting prison officials from violating his constitutional right of access to the courts. Petitioner's motion will be denied. The law governing petitioner's Eighth Amendment claim is set forth above. There is little more for plaintiff to learn from the law library. Moreover, from this point forward, plaintiff should be focusing his energy on gathering the facts that will be necessary to withstand a motion for summary judgment.

If petitioner believes that prison officials are depriving him of his constitutional right of access to the courts and retaliating against him, he will have to raise those claims in a lawsuit separate from this one. I will make and exception to this requirement only when an inmate shows by affidavit or other documentary evidence that prison officials are directly and physically impairing his ability to prosecute his lawsuit. In this case, petitioner's unsworn assertions of interference do not make the necessary showing.

ORDER

IT IS ORDERED that petitioner Roger Dale Godwin's request for leave to proceed in forma pauperis is GRANTED on his claim that respondents Jim Sutton and Matthew Frank violated his rights under the Eighth Amendment by failing to protect him from sexual assault on June 18, 2005. FURTHER, IT IS ORDERED that respondents Randy McGowan

and Janel Nickiels are DISMISSED from this case and that petitioner's motion for access to the law library is DENIED.

- 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 respondents'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 $249.06; 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 12th day of September, 2005.

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