IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GERARD M. MOCNIK,

Petitioner,

v.

MATTHEW FRANK; DR. WILLIAMS; DANIEL BENIK; PAMELA WALLACE; BRIAN MILLER; MELISSA WOODFORD; SANDRA HAUTAMAKI; RICK RAEMISCH; MS. DRESSLER; LT. LUNDMARK; MS. WEBSTER; UNKNOWN SUPERVISOR OF MS. WEBSTER; CO II PECK; and UNKNOWN NURSE,

Respondents.

OPINION AND ORDER

06-C-191-C

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This is a proposed civil action for monetary relief under 42 U.S.C. § 1983. Petitioner Gerard M. Mocnik, a prisoner at the Stanley Correctional Institution in Stanley, Wisconsin, contends that respondent Dr. Williams, a former prison doctor, sexually assaulted him in violation of his rights under the Eighth Amendment and that respondents Matthew Frank, Daniel Benik, Pamela Wallace, Brian Miller, Melissa Woodford, Sandra Hautamaki, Rick Raemisch, Ms. Dressler, Lt. Lundark, Ms. Webster, Unknown Supervisor of Ms. Webster,

and Unknown Nurse violated his rights by retaliating against him for reporting the alleged sexual assault and by failing to respond to his inmate grievances regarding the assault. 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. He 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.

Petitioner will be granted leave to proceed on his claim that respondent Williams violated his Eighth Amendment rights by sexually assaulting him on September 10, 2004. However, petitioner will be denied leave to proceed on his retaliation and failure to protect claims against the remaining defendants because he has not alleged facts from which it can be inferred that any respondent retaliated against him or that respondents Webster, Lundmark, Wallace and Dressler failed to take action to protect him from assault. Furthermore, because petitioner has not alleged that respondents Frank, Benik, Miller,

Woodford, Hautamaki, Raemisch, Unknown Supervisor of Ms. Webster, CO II Peck or Unknown Nurse had any personal involvement in the alleged violations of plaintiff's constitutional rights, these respondents will be dismissed from this lawsuit.

I draw the following facts from petitioner's complaint and the documents attached to it.

ALLEGATIONS OF FACT

A. Parties

Petitioner Gerard Mocnik is a prisoner at the Stanley Correctional Institution in Stanley, Wisconsin.

Respondent Matthew Frank is Secretary of the Wisconsin Department of Corrections.

Respondent Dr. Williams was formerly employed by the Wisconsin Department of Corrections as a prison doctor.

Respondent Daniel Benik is warden of the Stanley Correctional Institution.

Respondent Pamela Wallace is deputy warden of the Stanley Correctional Institution.

Respondent Brian Miller is security director of the Stanley Correctional Institution.

Respondent Melissa Woodford is an inmate complaint examiner employed by the Wisconsin Department of Corrections.

Respondent Sandra Hautamaki is an inmate complaint examiner employed by the

Wisconsin Department of Corrections.

Respondent Rick Raemisch is employed by the "office of the secretary" of the Wisconsin Department of Corrections.

Respondent Ms. Dressler is manager of the Stanley Correctional Institution's Health Services Unit.

Respondent Lt. Lundark is security director of the Stanley Correctional Institution.

Respondent Ms. Webster is a unit manager at the Stanley Correctional Institution.

Respondent Unknown Supervisor of Ms. Webster is an employee of the Wisconsin Department of Corrections.

B. Assault

On September 10, 2004, plaintiff was sexually assaulted by respondent Williams in the prison's health service unit. Respondent Williams placed his finger or fingers into petitioner's anus without petitioner's consent, causing petitioner pain, emotional distress and embarrassment.

Petitioner tried to report the incident immediately, but was ordered to return to his housing unit. He arrived at the unit approximately twenty minutes after the assault, and reported the incident to respondent Webster.

Later that day, petitioner was asked to return to the health services unit. Petitioner

expected he would be interviewed regarding the assault; instead, respondent Unknown Nurse gave him a packet containing medication he had not requested.

When petitioner refused to accept the medication, respondent Peck called respondent Lundmark, who placed petitioner in handcuffs and escorted him to a temporary lock-up cell in the prison segregation unit. As respondent Lundmark placed petitioner in the segregation cell, petitioner explained to Lundmark "why [he] had apprehension." Respondent Lundmark told petitioner he would discuss "the matter" with respondent Webster.

Thirteen days later, petitioner was given a conduct report for alleged violations of three prison rules. At a hearing held on September 28, 2004, petitioner was found guilty of two of the three charges against him. As a penalty, petitioner was placed on "release segregation" status with ten days' room confinement.

On November17, 2004, petitioner filed a grievance through the inmate complaint process, in which he alleged the following:

> On Sept. 10th there was an incident that happened at H[ealth] S[ervices] U[nit]. I reported it to my unit manager Ms. Webster and Lt. Lundmark. Lt. Lundmark told me he was going to talk to the Security Director about the situation. I can't tell on this paper that [sic] happened, but the people I mentioned know whats [sic] going on. I feel messed up about the incident, and I feel that the Lt. and Security Director are not taking it seriously.

On November 19, 2004, the grievance was rejected by respondent Woodford, with the notation, "The inmate does not allege sufficient facts upon which redress may be made."

Petitioner filed a second grievance on November 23, 2004. This complaint stated:

> I wrote I[nmate] C[omplaint] E[xaminer] on 11/17/04 about an incident that happened to me on 9/10/04. I stated in the ICE that something happened to me between the Doctor and myself, I didn't state facts, because the people I mentioned in the ICE, knows whats [sic] going on. I guess you feel you didn't need to ask Lt. Lundma[rk] the security director or Ms. Webster what happened. Anyway I feel I was sexually assaulted by Dr. Williams when I went to see him about some pills for acne.

On November 24, 2004, respondent Woodford dismissed petitioner's second complaint "with modification," stating that the complaint would be forwarded to respondent Wallace. Respondent Woodford wrote that petitioner would be given no further information regarding the investigation of his sexual abuse charges "because the investigative process [wa]s governed by state law and collective bargaining agreements (which protect the privacy and due process rights of staff)." Later that day, respondent Wallace affirmed the dismissal of petitioner's complaint.

On January 28, 2005, petitioner wrote to respondent Wallace, asking what was being done to address the incident he had reported. Petitioner received no response. Again, on March 10, 2005, petitioner wrote to respondent Wallace and asked "what was going on." Petitioner's March 10 letter to respondent Wallace was forwarded to respondent Dressler, manager of the health services unit. Respondent Dressler responded, "[B]ased on the fact that you refuse to be seen by [respondent Williams], you have been reassigned to [a new] primary care provider."

On March 23, 2005, petitioner received a letter from respondent Wallace stating that petitioner would be assigned to a new doctor and that respondent Williams was no longer working at the prison.

On March 28, 2005, petitioner wrote again to respondent Wallace, indicating that he "did not feel that the situation of sexual assault by Williams was resolved simply by dismissing Williams and assigning [petitioner] a different doctor." The following day, respondent Wallace wrote to petitioner, stating:

> [T]his appears to be a loaded question and any answer I give would be taken the wrong way, so I ask you: Do you feel that concerns you had surrounding interactions with Dr. Williams are resolved given the fact that [he] no longer works at S[tanley] C[orrectional] I[nstitution] as a doctor? If not, what specifically are your continuing concerns? I will do my best to have them addressed by the appropriate party.

On April 1, 2005, petitioner responded, stating, "I do not feel the situation was resolved, because the doctor no longer works here. I was still assaulted and want some kind of action taken." On April 7, 2005, respondent Wallace wrote, "Your correspondences, past and present, will be forwarded to the Health Services Manager, for follow up and address."

On May 11, 2005, petitioner wrote to respondent Dressler, asking for an update. He received no response.

On June 29, 2005, petitioner wrote to the inmate complaint examiner at the Department of Corrections Central Office in Madison, Wisconsin. The complaint was

denied on July 18, 2005. A notation indicated that the complaint should have been filed "within 10 days of complaint decision."

On October 9, 2005, petitioner again wrote the department's central office, asking that his complaint be reopened. Inmate Complaint Examiner Karen Gourie denied the request, stating that she "found no provisions under [Wis. Admin Code §] DOC Chapter 310 to Re-open the Complaint."

On October 26, 2005, petitioner wrote to Sharon Zunker, Health Services Coordinator for the Department of Corrections. She responded by stating that the matter had been referred for investigation and that "under D.A.I. Administrative Directives concerning misconduct by employees," petitioner would not receive any information regarding the outcome of the investigation.

DISCUSSION

A. Sexual Assault

First, petitioner contends that his rights under the Eighth Amendment were violated when respondent Williams sexually assaulted him on September 10, 2004. According to petitioner, he had scheduled an appointment with respondent Williams to discuss his acne problems. During the appointment, respondent Williams allegedly placed his fingers into plaintiff's anus without plaintiff's consent.

The Eighth Amendment prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain" or that are "grossly disproportionate to the severity of the crime warranting imprisonment." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). A claim asserting cruel and unusual conditions of confinement must satisfy a two-part test, with a subjective and an objective component. Farmer v. Brennan, 511 U.S. 825, 835 (1994). Petitioner's allegations must suggest both that the conditions to which he was subjected were "sufficiently serious" (objective component) and that each respondent was deliberately indifferent to his health or safety (subjective component). Id. The standard for determining whether prison conditions satisfy the objective component focuses on whether the conditions are contrary to "the evolving standards of decency that mark the progress of a maturing society." Farmer, 511 U.S. at 833-34 (internal quotations omitted).

If respondent Williams took advantage of his position as a doctor to sexually abuse petitioner, then Williams's conduct would violate the Eighth Amendment. Petitioner has adduced sufficient facts to establish a claim that respondent Williams violated his constitutional rights by touching him without consent for a non-medical purpose. Therefore, I will grant petitioner leave to proceed in forma pauperis against respondent Williams.

B. Retaliation

Second, petitioner alleges that he was given a conduct report accusing him of violating

three prison rules thirteen days after he reported to respondents Lundmark and Webster that he had been sexually assaulted by respondent Williams. Petitioner was found guilty of two of the three rule violations with which he was charged and was given a penalty of "release seg[regation] with ten additional day[s] of 24 hour room confinement." Petitioner contends that this discipline was imposed on him "in retaliation" (though for what action, he does not say).

To succeed on a retaliation claim, petitioner must allege facts from which it could be inferred 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 contends that he was retaliated against because he reported respondent Williams's alleged sexual assault to various prison officials. To receive First Amendment protection, petitioner's allegations must relate to a public concern. McElroy v. Lopac, 403 F.3d 855, 858 (7th Cir. 2005); Sasnett v. Litscher, 197 F.3d 290, 292 (7th Cir.1999). Incidents of sexual abuse by prison physician qualify as matters of public concern; therefore, petitioner's report of the alleged abuse was constitutionally protected.

Although petitioner has indicated the protected action that allegedly sparked the retaliation against him, he has not indicated who issued his disciplinary ticket or found him guilty of the prison disciplinary violations. To state a claim for relief, a petitioner must

allege facts sufficient to put respondents on notice of the charges against them. Fed. R. Civ. P. 8(a)(2). Because petitioner has not indicated who wronged him, it is unclear which of the respondents named in this lawsuit, if any, are responsible for allegedly retaliating against petitioner by issuing a conduct report or by finding him guilty of prison disciplinary violations. By not "naming names," petitioner failed to implicate any respondents in the alleged retaliation against him. Therefore, petitioner will be denied leave to proceed on his retaliation claim.

C. Failure to Protect

Third, I understand petitioner to allege that respondents Lundmark, Webster, Woodford, Wallace and Dressler violated his rights under the Eighth Amendment by failing to address his oral complaints and written inmate grievances concerning the alleged September 10, 2004 sexual assault. When a prisoner alleges that a prison official has failed to protect him from harm, 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)).

If a prison official is aware of a substantial risk that a prisoner will be assaulted and fails to take reasonable protective measures, he may be liable for his inaction. Farmer v.

Brennan, 511 U.S. 825, 847 (1994). However, in order to found liable for failure to protect. the prison official must (1) be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and (2) actually draw that inference. Pavlick v. Mifflin, 90 F.3d 205, 207-08 (7th Cir. 1996). In cases alleging a failure to protect, "[a] prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety." McGill v. Duckworth, 944 F.3d 344, 349 (7th Cir. 1991).

In this case, petitioner has not alleged that respondents Lundmark, Webster, Woodford, Wallace and Dressler had reason to suspect before the assault that respondent Williams posed a threat to petitioner or to other prisoners. Rather, he contends that respondents Lundmark, Webster, Woodford, Wallace and Dressler should be held liable for their failure to "take seriously" his allegations against respondent Williams after the assaulted occurred. If respondents Lundmark, Webster, Woodford, Wallace and Dressler had ignored petitioner's complaints entirely and had done nothing to investigate the charges or prevent petitioner from being sexually assaulted in the future, petitioner might state a claim against these respondents. However, petitioner admits that following the alleged assault, respondent Williams stopped working at the prison and petitioner was assigned to a new physician.

In light of these factual allegations, it is difficult to understand petitioner's complaint

against respondents Lundmark, Webster, Woodford, Wallace and Dressler. Perhaps he objects to the prison's policy of not releasing information about employee investigations to inmates. Perhaps his complaint is that respondents did not provide him with monetary reimbursement for the alleged assault. However, neither of these grievances would state a claim for failure to protect.

It is clear by petitioner's own admission that shortly after he reported the assault, prison officials launched an investigation into his allegations against respondent Williams. The exhibits attached to petitioner's complaint reveal that when petitioner filed an inmate complaint concerning the sexual assault of September 10, 2004, respondent Woodford recommended dismissal of the complaint, noting that the matter would be investigated but that petitioner would not be given any further information because the investigation was regulated by state law and collective bargaining agreements that protect staff privacy (a policy respondent Dressler later confirmed). On the basis of respondent Woodford's recommendation, respondent Wallace dismissed petitioner's complaint.

In dismissing petitioner's complaint, respondents Woodford and Wallace did not state that they did not believe petitioner's allegations or that they would or could put a stop to the investigation. They simply affirmed that the investigation procedure did not permit them to disclose the results of the investigation with petitioner. Their failure to do more did not constitute deliberate indifference, particularly in light of the fact that respondent

Williams stopped working at the prison and had no further contact with petitioner. Similarly, the fact that respondents Lundmark, Webster and Dressler did not respond to petitioner's request for additional information does not allow the drawing of an inference that they were deliberately indifference to a serious risk that petitioner would be harmed again by respondent Williams. Because petitioner has not alleged facts from which it can be inferred that respondents Lundmark, Webster, Woodford, Wallace and Dressler failed to protect him from a known risk of serious harm, he will be denied leave to proceed on this claim.

D. Personal Involvement

For a defendant to be liable under § 1983, he or she must have participated directly in a violation of the petitioner's constitutional rights. Hildebrandt v. Illinois Dept. of Natural Resources, 347 F.3d 1014, 1036 (7th Cir. 2003). "Section 1983 creates a cause of action based on personal liability and predicated upon fault; thus, liability does not attach unless the individual defendant caused or participated in a constitutional deprivation." Vance v. Peters, 97 F.3d 987, 991 (7th Cir. 1996). With respect to supervisors,

> an official satisfies the personal responsibility requirement of section 1983 if the conduct causing the constitutional deprivation occurs at [his] direction or with [his] knowledge and consent. That is, he must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye. In short, some causal connection or affirmative link between the action complained about

and the official sued is necessary for § 1983 recovery.

Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995).

Although petitioner has named Frank, Benik, Miller, Hautamaki, Raemisch, unknown supervisor of Ms. Webster, CO II Peck and Unknown Nurse as respondents in this action, he has not alleged facts implicating these individuals in any wrongdoing. Petitioner's complaint makes no reference to Frank, Benik, Miller, Hautamaki, Raemisch, or the unknown supervisor of Ms. Webster. Petitioner's only allegations with respect to respondents Unknown Nurse and C.O. II Peck are that the nurse tried to hand petitioner medication and that when petitioner refused to accept the medication, Peck called respondent Lundstrom. These actions did not violate any of petitioner's rights. Because petitioner's allegations do not implicate respondents Frank, Benik, Miller, Hautamaki, Raemisch, unknown supervisor of Ms. Webster, CO II Peck and Unknown Nurse in any illegal action, these respondents will be dismissed from this lawsuit.

ORDER

IT IS ORDERED that petitioner Gerard Mocnik's request for leave to proceed in forma pauperis is

1. GRANTED with respect to his claim that respondent Dr. Williams violated his Eighth Amendment rights by sexually assaulting him on September 10, 2004;

2. DENIED with respect to his claim that unspecified respondents retaliated against him in violation of the First Amendment; and

3. DENIED with respect to his claim that respondents Lundmark, Webster, Woodford, Wallace and Dressler violated his Eighth Amendment rights by failing to protect him from a known risk of serious harm;

4. Respondents Matthew Frank, Daniel Benik, Pamela Wallace, Brian Miller, Melissa Woodford, Sandra Hautamaki, Rick Raemisch, Ms. Dressler, Lt. Lundark, Ms. Webster, Unknown Supervisor of Ms. Webster, CO II Peck and Unknown Nurse are DISMISSED from this lawsuit;

5. For the remainder of this lawsuit, petitioner must send respondent Williams a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondent, he should serve the lawyer directly rather than respondent. 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.

6. 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.

7. The unpaid balance of petitioner's filing fee is $338.76; petitioner is obligated to

pay this amount when he has the means to do so, as described in 28 U.S.C. § 1915(b)(2).

8. 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 respondent Williams.

Entered this 3d day of May, 2006.

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