IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DAVID J. CLARK,

OPINION and ORDER

Petitioner,

06-C-419-C

v.

GAIL STEVENSON, JOHN JONES
JAMIE L. JACOBS, WANDA W.
BALDWIN, COLLEEN COLLIER,
BYRON BARTOW, CHRISTI BARMEJO,
SINIKKA SANTALA and JAMES D.
YEADON,

Respondents.

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This is a proposed civil action for declaratory, monetary and injunctive relief, brought under 42 U.S.C. § 1983. Petitioner David Clark is detained as a patient at the Wisconsin Resource Center in Winnebago, Wisconsin, awaiting trial to determine whether he will be civilly committed as a sexually violent person under Wis. Stat. Ch. 980. Petitioner contends that respondents violated his due process rights under the Fourteenth Amendment and his rights under Wis. Admin. Code § HFS 94.24(2)(h) by issuing him "warnings" and "counsels" for acts he did not know violated any rules of the institution. In addition, petitioner

contends that respondents Stevenson, Jones, Jacobs and Baldwin issued him "counsels" and "warnings" in retaliation for his refusal to answer to his last name and his filing of a lawsuit against respondent Baldwin. Petitioner seeks leave to proceed without prepayment of fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Because he is a patient and not a prisoner, petitioner is not subject to the 1996 Prison Litigation Reform Act.

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 a litigant is requesting leave to proceed in forma pauperis, the court must deny leave to proceed if the action is frivolous or malicious, fails to state a claim on which relief may be granted or seeks money damages from a respondent who is immune from such relief. 28 U.S.C. § 1915(e). Because respondents did not deprive petitioner of any protected liberty interest, petitioner will be denied leave to proceed on his due process claim. Because petitioner was not "disciplined" by respondents, he will be denied lave to proceed on his claim that respondents violated his rights under Wis. Admin. Code § HFS 94.24(2)(h). Because petitioner's refusal to answer to his last name was not a protected activity, petitioner will be denied leave to proceed on his claim that respondents retaliated against him because of his behavior. However, because it is possible that the warnings and counsels issued by respondents

Stevenson, Jacobs, Jones and Baldwin were made in retaliation for plaintiff's filing of a lawsuit against respondent Baldwin, petitioner will be granted leave to proceed in forma pauperis on that claim alone.

From petitioner's complaint, the documents attached to it and Wisconsin circuit court records information publicly available on the Internet, I draw the following facts.

FACTUAL ALLEGATIONS

A. Parties

Petitioner David Clark is a patient at the Wisconsin Resource Center in Winnebago, Wisconsin.

Respondents Gail Stevenson and Jamie Jacobs are psychiatric care technicians at the Wisconsin Resource Center.

Respondents John Jones and Wanda Baldwin are psychiatric care supervisors at the Wisconsin Resource Center.

Respondent Colleen Collier is the Wisconsin Resource Center's client rights specialist.

Respondent Byron Bartow is superintendent of the Wisconsin Resource Center.

Respondents Christi Barmejo, Sinikka Santala and James Yeadon are employed by the Wisconsin Department of Health and Family Services, Division of Disability and Elder Services in Madison, Wisconsin. Respondent Barmejo is a client rights specialist.

Respondent Santala is an administrator. Respondent Yeadon is a supervisor.

B. Petitioner's Conduct at the Wisconsin Resource Center

In 1997, petitioner was sentenced to five years' imprisonment for two counts of first degree sexual assault of a child in Waukesha County Case No. 90CF383. Since completing his prison sentence, petitioner has been detained at the Wisconsin Resource Center awaiting trial on November 2, 2006, to determine whether he will be civilly committed as a sexually dangerous person.

Petitioner arrived at the Wisconsin Resource Center in April 2005. From that time until August 11, 2005, petitioner received only one disciplinary warning. On August 11, 2005, petitioner became irritated when staff members referred to him by his last name, a practice he found disrespectful. Petitioner raised his voice and received a second "warning" which was documented on his "Awareness Report." Although petitioner was given a warning for his behavior on August 11, respondent Jones directed Wisconsin Resource Center staff members to refer to petitioner as "David" or "Mr. Clark" instead of "Clark" from that time onward.

Despite respondent Jones's directive, staff members continued to call petitioner by his surname. According to notations made in petitioner's case file by respondent Jacobs on October 13, 2005, "Clark continues to get on his peers['] and staff[']s nerves. He does not

want to be called by his last name. He says it is disrespectful. He will not respond to this."

On August 8, 2005, petitioner filed Winnebago County Case No. 05SC3163, in which he named respondent Baldwin and two other individuals as respondents. (Petitioner does not say what issues were in controversy in that case.) On September 9, 2005, the Circuit Court for Winnebago County notified the parties that a hearing would be held on September 23, 2005.

Three days after the notice of hearing was mailed, petitioner was moved from Unit 17 to Unit 18. (Respondent Baldwin's office is located on Unit 18.) Shortly after petitioner arrived on the new unit, he began receiving "counsels" and "warnings" for various behaviors, all of which were documented on petitioner's Awareness Report and mentioned in his weekly progress notes. These incidents were as follows:

1. Bathroom attire

At 5:10 a.m. on September 26, 2005, respondent Stevenson noted on petitioner's Awareness Report that petitioner was given a "counsel" for not wearing a robe over his nightwear when he walked from his room to the bathroom. At 3:45 a.m. on October 2, 2005, respondent Stevenson noted on petitioner's Awareness Report that petitioner was given a "counsel" for wearing his robe and nothing else when he walked from his room to the bathroom.

On October 3, 2005, respondent Jones made the following notation in petitioner's patient progress notes:

> Mr. Clark will no longer be wearing his bathrobe or union suit without proper clothing over or under them. He has been wearing his bathrobe to and from the bathroom on third shift without any underclothes, or clothes of any kind under it. The Handbook was a little blurry on this by using the word "may." I assured him this was a typo and should be a "MUST." I gave him a direct order to wear clothing under his robe and union suit, or to wear a robe over his union suit when he comes out of his room . . . B[ehavioral] D[isposition] R[ecord]s will be written for future violations.

The edition of the Wisconsin Resource Center patient handbook effective in the fall of 2005 stated:

> Bath robes, pajamas, or other suitable nightwear may be worn to and from the bathroom and shower room only. Pajamas, gym shorts, sweat pants or greens may be worn underneath a robe.

2. Interactions with respondent Jacobs

On October 13, 2005, respondent Jacobs passed petitioner's room "moments after [petitioner] returned from the shower and had disrobed and was lotioning skin and combing hair before dressing for the day." Petitioner did not notice respondent Jacobs pass his room. On October 14, 2005, petitioner was given a warning for changing his clothes while in his room. In petitioner's progress notes, respondent Jacobs described these incidents in the following manner:

> I have observed Patient Clark standing naked in his room with an erection. The second time he did it, it was during formal count. It should be noted that patient Clark had asked me earlier today about me writing warnings or b[ehavioral] d[isposition] r[eport]s. If I was pen happy about writing BDR's. I told him I would give a warning or a BDR if necessary. Patient was given a warning for this behavior.

Petitioner's Awareness Report reflects that on October 14, 2005, he was given a warning for sexual conduct.

On November 1, 2005, respondent made a "lighthearted compliment" to respondent Jacobs "in jest." She described the incident in petitioner's progress notes as follows:

> While I was doing the 1700 census check to make sure everybody went down for supper. [sic] I stopped at Patient Clark's room he was laying on his bed. I asked him if he was going down for supper. He replied with, "only if you're on the menu." I just walked away from his room. I notified the P[sychiatric] C[are] S[upervisor]. . .

Respondent Baldwin investigated the incident and "infused it with disrespect." Petitioner's Awareness Report reflects that because of the November 1, 2005 incident, respondent Baldwin gave him a warning for "disrespect to female staff."

3. Requests for bleach

On November 11, 2005, respondent Jones documented a warning in petitioner's progress notes for "a constructive, legitimate request made to a staff member." Respondent Jones described the incident as follows:

> P[yschiatric] C[are] T[echnician] Bump informed me that Patient Clark asked her to bring bleach in from home so that he could clean some stained clothing. PCT Bump immediately notified me. I spoke with Mr. Clark about this incident and let him know that soliciting staff would not be tolerated. He acted surprised that I knew about this incident and claimed that he could not help himself he was impulsive and did not think it through.
>
> I told him to me it appeared obvious his intent, because he initially enquired [sic] about getting bleach the appropriate way through the PCT. He was told that bleach was not available for that purpose.
>
> A short while later the other patients went to lunch[.] Mr. Clark appeared to wait until he was the last one on the unit then asked PCT Bump if she had a purse that she brings in. PCT Bump said yes. Then Mr[.] Clark asked her if she could bring some bleach in that way. PCT Bump terminated the conversation and called me.

Petitioner believes that the disciplinary actions taken against him following his transfer to Unit 18 were acts of retaliation for his refusal to answer to his surname and for his litigation of Winnebago County Case No. 05SC3163.

C. Administrative Grievance Process

On November 13, 2005, petitioner filed a complaint report, #05-WRC-160. In the grievance, petitioner asserted that he had no prior notice of the rules under which he been sanctioned and that the sanctions had therefore violated his due process rights under Wis. Admin. Code § HFS 94.24(2)(h) and under the Fourteenth Amendment to the United States Constitution.

On November 15, 2005, respondent Collier found that the Wisconsin Resource Center's handbook gave petitioner adequate notice of the rules under which he was "warned" and dismissed petitioner's complaint. Petitioner appealed the decision, and on January 30, 2006, respondent Bartow denied petitioner's appeal. Petitioner appealed respondent Bartow's decision to respondent Barmejo, who denied the Stage 3 appeal on May 30, 2006. Petitioner's Stage 4 appeal was dismissed by respondent Santala on June 26, 2006, on the ground that petitioner had filed a lawsuit in state court challenging a behavioral disposition report issued to petitioner on January 16, 2006. Although petitioner's complaint did not challenge the January 16, 2006 behavioral disposition report and petitioner's lawsuit did not challenge the pre-November 13, 2005 disciplinary warnings, respondent Santala (and later respondent Yeadon) found that the "lawsuit and the grievance file . . . were all integrally intertwined" and affirmed dismissal of the grievance.

DISCUSSION

In this lawsuit, petitioner alleges three distinct claims: (1) that his Fourteenth Amendment right to procedural due process was violated when respondents Stevenson, Jacobs, Jones and Baldwin gave him "counsels" and "warnings" without providing him adequate notice of the wrongfulness of the acts with which he was charged and respondents Collier, Bartow, Barmejo, Santala and Yeadon refused to expunge the "counsels" and

"warnings"; (2) that the counsels and warnings violated his right to fair notice under Wis. Admin. Code § HFS 94.24(2)(h); and (3) that unspecified respondents retaliated against him by issuing one or more of his disciplinary warnings because he refused to be called by his last name and because he filed a lawsuit against respondent Baldwin.

A. Procedural Due Process

1. Fourteenth Amendment

The Fourteenth Amendment insures that no state will "deprive any person of life, liberty, or property, without due process of law," and protects individuals against arbitrary governmental action. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). To prevail ultimately on a due process claim, a litigant must demonstrate that the state has interfered with a protected interest and that "the procedures attendant upon that deprivation were constitutionally sufficient." Hewitt v. Helms, 459 U.S. 460, 472 (1983). Of course, "the types of interests that constitute liberty and property for Fourteenth Amendment purposes are not unlimited; the interest must rise to more than an abstract need or desire." Thompson, 490 U.S. at 460.

Although the Fourteenth Amendment protects pretrial detainees from punishment, and entitles them to safe living conditions and minimally adequate opportunities for treatment and medical care, Youngberg v. Romeo, 457 U.S. 307, 320 (1982), it does not

entitle them to be free from all forms of regulation. Bell v. Wolfish, 441 U.S. 530, 537 (1979) ("This Court has recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may."); Allison v. Snyder, 332 F.3d 1076, 1079 (7th Cir. 2003). The Court of Appeals for the Seventh Circuit has held that a pretrial detainee states a procedural due process claim only when he "identif[ies] a right to be free from restraint that imposes atypical and significant hardship in relation to the ordinary incidents of his confinement." Thielman v. Leean, 282 F.3d 478, 484 (7th Cir. 2002). When the rights of a non-prisoner detainee are at stake, the alleged deprivation must be measured against the "ordinary incidents" of civil confinement, which are less stringent than the conditions of criminal incarceration. Even under this more lenient standard, however, the "restraints" petitioner alleges in this lawsuit are insufficient to implicate his right to due process.

Petitioner alleges that he was issued "counsels" and "warnings" for violating rules he believes were insufficiently clear to put him on notice of his obligation to follow them. Specifically, petitioner challenges respondent Stevenson's decision to issue him "counsels" on September 26 and October 2, 2005, regarding his obligation to wear shorts under his bathrobe each time he left his room; respondent Jacob's decision to issue him a "warning" for sexual conduct on October 14, 2005; and respondent Baldwin's decision to give him a "warning" for comments he made to respondent Jacobs that were deemed disrespectful.

Although petitioner might conceivably have a liberty interest in avoiding a behavorial disposition report because it could lead directly to restrictions and other negative consequences for him within the institution, petitioner has no liberty interest in avoiding the counsels and warnings which precede issuance of a behavorial disposition report.

In this case, Wisconsin Resource Center staff members told petitioner that he could be given behavioral disposition reports if he violated institutional rules; however, the notations in his Awareness Record and Progress Notes are limited to "counsels" and "warnings." Because petitioner was not deprived of any protected liberty interest, he had no right to any process before being given the warnings to which he objects. Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001) ("In the absence of a protected liberty interest, "the state is free to use any procedures it chooses, or no procedures at all."). Consequently, petitioner will be denied leave to proceed on his claim that respondents violated his Fourteenth Amendment right to procedural due process when they issued him disciplinary counsels and warnings.

2. Wis. Admin. Code § HFS 94.24(2)(h)

Wisconsin's Administrative Code § HFS 94.24 guarantees that "[n]o patient may be disciplined for a violation of a treatment facility rule unless the patient has had prior notice of the rule." Petitioner contends that respondents violated this rule when respondents

Stevenson, Jacobs, Jones and Baldwin gave him "counsels" and "warnings" for failing to dress appropriately, engaging in sexual conduct and showing disrespect to female staff without first making clear to him that the activities in which he was alleged to have engaged were violations of the rules regarding appropriate attire, sexual conduct and respect to staff members. Furthermore, petitioner alleges that respondents Collier, Bartow, Barmejo, Santala and Yeadon violated his rights under § HFS 94.24(2)(h) when they refused to expunge these "counsels" and "warnings."

Even assuming that the rules contained in the institution's handbook were not adequate to put petitioner on notice of the wrongs of which he was accused, petitioner has failed to state a claim because he admits that he was not disciplined. As discussed above, petitioner received only "counsels" and "warnings"—not behavioral disposition reports. In fact, because these counsels and warnings were pre-disciplinary actions, they constituted the very "notice" petitioner asserts he never received. Petitioner has alleged facts that effectively "plead him out of court" on this claim. Therefore, he will be denied leave to proceed on his claims that respondents violated his rights under Wis. Admin. Code § HFS 94.24. See Doe v. Smith, 429 F.3d 706, 708 (7th Cir. 2005) ("[L]itigants may plead themselves out of court by alleging facts that defeat recovery.")

B. Retaliation

In paragraph 5 of his complaint, petitioner asserts:

> On 10/13/05 at 2030 to 2045 hours Jacobs documented in Clark's P[rogress] N[otes] an obvious motivation for staff to make allegations: "Clark continues to get on his peers [sic] nerves and staffs [sic] nerves. He does not want to be called by his last name . . .

Paragraph 6 states:

> On 9/23/05 had been a primary motivation for staff to begin making allegations: a hearing involving supervisor Respondent Wanda W. Baldwin and other WRC staff . . .

Although it is far from clear, it appears that plaintiff believes that respondents Stevenson, Jones, Jacobs and Baldwin issued him "warnings" and "counsels" for alleged rule violations (the "allegations" to which petitioner makes reference) in retaliation for his filing a lawsuit against respondent Baldwin or refusing to answer to his last name.

"An act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper." Lekas v. Briley, 405 F.3d 602, 614 (7th Cir. 2005). Of course, not all actions are constitutionally protected. Petitioner's allegation that he was retaliated against because he refused to answer to his last name is one such example. In the context of an institutional setting, speech is protected only when it relates to matters of public concern. See, e.g. McElroy v. Lopac, 403 F.3d 855, 858 (7th Cir. 2005) (imputing to inmate free-speech claims requirement of public-employee line of cases that protected speech must be about a

"public concern"); Sasnett v. Litscher, 197 F.3d 290, 292 (7th Cir. 1999) (same). Because petitioner's refusal to answer staff members who called him "Clark" was not protected speech, it cannot form the basis of a retaliation claim.

The same cannot be said with respect to petitioner's claim that he was retaliated against because he filed a lawsuit against respondent Baldwin. Civil pretrial detainees (and even prisoners, for that matter) have a constitutional right of access to the court to litigate nonfrivolous lawsuits. Johnson by Johnson v. Brelje, 701 F.2d 1201, 1207 (7th Cir. 1983), overruled on other grounds by Maust v. Headley, 959 F.2d 644, 648 (7th Cir. 1992),; Lock v. Jenkins, 641 F.2d 488, 498 (7th Cir. 1981). Petitioner contends that respondents Stevenson, Jones, Jacobs and Baldwin issued him "warnings" and "counsels" for his alleged rule violations in retaliation for his filing Winnebago County Case No. 05SC3163 against respondent Baldwin. It is well established that conduct which does not independently violate the Constitution may form the basis for a retaliation claim when undertaken with an improper, retaliatory motive. Hoskins v. Lenear, 395 F.3d 372, 375 (7th Cir. 2005); Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). Although petitioner had no liberty interest in avoiding the warnings and counsels given him by respondents Stevenson, Jones, Jacobs and Baldwin, the warnings were recorded in his awareness report and could be used to justify future disciplinary actions against him. If the warnings were issued solely in retaliation for petitioner's decision to file a lawsuit against respondent Baldwin, the conduct

would violate petitioner's right to be free from retaliation by state actors. Therefore, petitioner will be granted leave to proceed on his claim that respondents Stevenson, Jones, Jacobs and Baldwin issued him "warnings" and "counsels" for alleged rule violations in retaliation for his filing a lawsuit against respondent Baldwin.

ORDER

IT IS ORDERED that

1. Petitioner David J. Clark's request to proceed in forma pauperis is

a) GRANTED with respect to his claim that respondents Stevenson, Jones, Jacobs and Baldwin issued him "warnings" and "counsels" for alleged rule violations in retaliation for his filing a lawsuit against respondent Baldwin;

b) DENIED with respect to his claims that

i. Respondents Stevenson, Jacobs, Jones, Baldwin issued him disciplinary warnings in retaliation for his refusal to answer to his last name; and

ii. Respondents Stevenson, Jacobs, Jones, Baldwin, Collier, Bartow, Barmejo, Santala and Yeadon violated his right to due process and his rights under Wis. Admin. Code § HFS 94.24(2)(h) by issuing and upholding "warnings" and "counsels" to petitioner for his alleged rule violations without providing him adequate notice of the rules;

2. Respondents Collier, Bartow, Barmejo, Santala and Yeadon are DISMISSED from

this lawsuit.

3. Petitioner should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyer who will be representing respondents, he should serve the lawyer directly rather than respondents. Petitioner should retain 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 court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondents or to respondents' attorney.

4. Petitioner is to complete the enclosed Marshals Service and Summons forms and return them to the court so that his complaint can be served on the defendants. Petitioner may have until August 31, 2006, in which to complete and return the requested forms. If, by August 31, 2006, petitioner fails to submit the completed forms, I will dismiss this case for petitioner's failure to prosecute it.

Entered this 15th day of August, 2006.

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