IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CHAD BOUMAN,

Petitioner, OPINION AND ORDER

v. 07-C-367-C

S. ROBINSON, Unit Manager;
SPROUL, Unit Manager;
J. SHOOK, Assistant Warden;
M. JACOBS, Correctional Officer;
R. MARTINEZ, Warden;
M. NALLEY, Regional Director, Federal Bureau of Prisons,
Kansas City, Kansas;
H. WATTS, Administrator, National
Inmate Appeals, Federal Bureau of Prisons,
Washington, D.C.,

Respondents.

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This is a proposed civil action for monetary, declaratory and injunctive relief brought pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), in which the Supreme Court held that parties may sue federal officials directly under the Constitution in some situations. Petitioner Chad Bouman, a federal prisoner, contends that respondents placed him in segregation and removed him from a prison job

because he made negative comments about Free Masons. Petitioner has paid his initial partial payment in accordance with 28 U.S.C. § 1915.

Because petitioner is a prisoner, I am required under the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any claims that are legally frivolous, malicious, fail 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. 28 U.S.C. §§ 1915 and 1915A. I conclude that petitioner has stated a claim upon which relief may be granted with his respect to his claim that respondents Robinson, Sproul, Jacobs and Martinez retaliated against him in violation of his right to free speech under the First Amendment and 28 C.F.R. § 550.91. In addition, I will allow petitioner to proceed on his claim that respondents Martinez, Nalley and Watts knew that Robinson, Sproul and Jacobs had retaliated against petitioner and failed to intervene.

Petitioner will be denied leave to proceed with respect to any other legal theory for his failure to state a claim upon which relief may be granted. In addition, the complaint will be dismissed with respect to respondent Shook because petitioner has not alleged any facts from which I may infer reasonably that Shook was personally involved in the alleged constitutional violation.

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). In his complaint,

petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Chad Bouman is confined at the Federal Correctional Institution in Oxford, Wisconsin.

On April 27, 2006, petitioner was planning to give a speech for a course he was taking at the prison. The purpose of the speech was "to inform [the] audience about Free Masonry." Before he gave the speech, an officer who was a Free Mason confiscated petitioner's written materials. Although petitioner gave the speech anyway, respondent R. Martinez put petitioner in the special housing unit after petitioner told him the content of the speech. Officials at the prison have retaliated against petitioner numerous times because of his "religious and political beliefs."

On August 25, 2006, respondent M. Jacobs (a correctional officer) searched petitioner's cell, finding tomatoes, peppers and bread that petitioner had purchased from the commissary or received as part of his meals. Jacobs issued petitioner a conduct report for possession of unauthorized items.

Petitioner received a disciplinary hearing before respondents S. Robinson and Sproul (both unit managers), who found petitioner guilty. As a sanction, they removed petitioner

from his prison job for a period of 720 days, even though the "usual" sanction would be loss of commissary and telephone privileges for 30 days. Jacobs issued the conduct report and Robinson and Sproul found petitioner guilty and imposed such a harsh sanction because of petitioner's "religious and political beliefs."

As the assistant warden, respondent J. Shook "would have to . . . approv[e]" any decision "concerning an inmate['s] job in the Federal Prison Indu[s]tries."

Petitioner complained to respondents Martinez, Michael Nalley and Harrell Watts that his religious and political reviews were the reason for the discipline, but each of them refused to overturn the sanction.

DISCUSSION

A. Free Speech

Petitioner alleges that respondents disciplined him because of his "religious and political beliefs." Although petitioner does not identify precisely what those beliefs are, construing his complaint liberally, I understand him to mean that he opposes freemasonry and that respondents disciplined him because he gave a speech in which he expressed that opinion. Further, despite petitioner's reference to his "religious" beliefs, I understand him to be raising a claim for the violation of his right to free speech. Cpt., dkt. #3, at 6 (identifying "freedom of speech" under "first cause of action"). This conclusion is bolstered

by petitioner's failure to allege any facts suggesting his religion was substantially burdened (as he would be required to do to state a free exercise violation, Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989)), or to even identify what his religion is. To the extent petitioner did mean to bring a claim for free exercise (or a claim under the establishment clause), he has failed to allege enough facts to provide notice of this claim to respondents.

With respect to petitioner's free speech claim, the Court of Appeals for the Seventh Circuit has held that federal prisoners may assert a claim for retaliation under the First Amendment and Bivens. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). Of course, petitioner has a First Amendment right to hold whatever religious or political beliefs he wishes. However, his ability to express those views in the context of prison is somewhat constrained.

To begin with, the court of appeals has limited the protected speech of a prisoner to matters of public concern. McElroy v. Lopac, 403 F.3d 855 (7th Cir. 2005). This means essentially what it sounds like: the statement must be of some interest to the "public" rather than a "personal grievance" of petitioner. Miller v. Jones, 444 F.3d 929, 935 (7th Cir. 2006). However, in the context of a prison, the "public" includes other prisoners, so that a request to change prison policy qualifies as matter of public concern, even if non-prisoners might not be interested in the matter. Pearson v. Welborn, 471 F.3d 732, 740 -741 (7th

Cir. 2006) (concluding that statement was matter of public concern when it related to concern of "all . . . prisoners" in plaintiff's section of prison).

It is too early to tell whether petitioner will be able to meet this standard. A speech about freemasonry could be a matter of public concern, depending on the nature of petitioner's comments. For example, petitioner's speech could satisfy the test if he were stating his opinion that Free Masons exerted too much influence in the prison or that the beliefs of Free Masons were contrary to prisoners' well being. (If the duration of a debate supports a finding of public concern, there is no question that strong feelings about Free Masons are deeply rooted in history. However, perhaps ironically from petitioner's point of view, it was the Free Masons and not their detractors who faced suppression initially. Barenblatt v. United States, 360 U.S. 109, 152 (1959) (Black, J., dissenting) (collecting materials addressing "antimasonry" in England and early America.).)

Because petitioner does not identify the precise content of his speech, I cannot say conclusively whether his speech related to a matter of public concern. Despite petitioner's lack of specificity, I conclude that he has given sufficient notice of his claim to respondents. He has identified the reason for the alleged retaliation, the time and place it occurred and each of the respondents' personal involvement. This was all he was required to do to meet the requirements of Rule 8. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). Further, in determining whether a statement is a matter of public concern, a court must look not just

at the content of the statement (what was said), but also its form (how the statement was made) and its context (where, when and to whom the statement was made). Youg-Qian v. Board of Trustees of the University of Illinois, 473 F.3d 799 (7th Cir. 2007). These are questions to be developed as the case proceeds and resolved at summary judgment or at trial.

If the speech meets the test for a matter of public concern, the next question is whether the respondents disciplined petitioner because of the speech. Johnson v. Kingston, 292 F. Supp. 2d 1146, 1153-54 (W.D. Wis. 2003). At the pleading stage, petitioner has to do no more than allege that retaliatory motives led to his discipline, which petitioner has done. At summary judgment or trial, however, petitioner will have to come forward with evidence supporting his allegation.

The connection between petitioner's speech and his discipline is a relatively straightforward question with respect to respondent Martinez's decision to place petitioner in the special housing unit (segregation). This allegedly occurred as soon as Martinez learned of the content of petitioner's speech. However, the other discipline petitioner received occurred several months later and was imposed for an offense unrelated to petitioner's speech. Thus, an initial obstacle for petitioner is to prove that the other respondents *knew* about his speech. Salas v. Wisconsin Dept. of Corrections,– F.3d –, 2007 WL 2048945, *8 (July 18, 2007) (in retaliation case, plaintiff must show that defendant knew that plaintiff was engaging in protected conduct).

Of course, knowledge of the speech does not mean necessarily that the speech was a reason for the discipline. Petitioner appears to believe that the contraband charge was a pretext to punish him for his views on freemasonry. This belief will be insufficient to prove pretext, Mills v. First Federal Savings & Loan Association of Belvidere, 83 F.3d 833, 841-42 (7th Cir. 1996), as will the affidavit of one other prisoner who says that he has consistently received lesser sanctions for contraband violations. (Petitioner attached such an affidavit to his complaint.)

Petitioner is on the right track: one way of proving a retaliation claim is to show that others received more favorable treatment. Scaife v. Cook County, 446 F.3d 735, 739 (7th Cir. 2006). But there is a significant limitation on this method of proof. Petitioner must show that he and those receiving more favorable treatment are "similarly situated." Humphries v. CBOCS West, Inc., 474 F.3d 387, 404-06 (7th Cir. 2007). In the context of this case, this means that petitioner will have to show that both he and the other prisoners were disciplined by respondents. If other officials besides respondents gave other prisoners more lenient sentences, this sheds no light on whether respondents were singling out petitioner for harsher treatment; it may well be that respondents consistently impose more significant penalties for misconduct. In addition, petitioner will have to show that he and the other prisoners had a similar disciplinary record and were involved in the same conduct under similar circumstances.

If petitioner is unable to prove retaliation by showing differential treatment of similarly situated prisoners, he may provide other evidence suggesting a retaliatory motive, such as suspicious timing or statements by a respondent suggesting that he was bothered by the protected conduct. E.g., Mullin v. Gettinger, 450 F.3d 280, 285 (7th Cir. 2006); Culver v. Gorman & Co., 416 F.3d 540, 545-50 (7th Cir. 2005).

Finally, even if respondents disciplined petitioner because of his speech, there is no constitutional violation if the censorship was "reasonably related to a legitimate penological interest." Turner v. Safley,482 U.S. 78 (1987). The reasonableness of the censorship examined under the Turner standard will depend on both the statement petitioner made and respondents' rationale for the censorship. Again, these are questions to be addressed at summary judgment. E.g., Beard v. Banks, 126 S. Ct. 2572 (2006); Lindell v. Frank, 377 F.3d 655, 658 (7th Cir. 2004).

In addition to his First Amendment claim, petitioner raises a claim under 28 C.F.R. § 551.90, which prohibits "Bureau staff" from discriminating against prisoners for a number of reasons, including "political belief." The Court of Appeals for the Seventh Circuit has never considered the reach of § 551.90 and it is far from clear whether it creates a private right of action. Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991). For the purpose of this screening order, I will assume that prisoners may sue under that regulation. However, because there is nothing in the regulation that suggests that it extends any further than does

the First Amendment, there is no need to conduct a separate analysis of that claim. If respondents have reason to believe that petitioner may not proceed under § 551.90, they may move to dismiss that claim at a later date.

B. Personal Involvement

The remaining question raised by petitioner's free speech claim is which respondents were personally involved in the alleged retaliation. Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994) (personal involvement requirement under 42 U.S.C. § 1983 applies to Bivens actions). "An official satisfies the personal responsibility requirement . . . if the conduct causing the constitutional deprivation occurs at [his] direction or with [his] knowledge and consent." Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). Petitioner alleges that respondent Martinez placed him in segregation because of the speech on freemasonry, that respondent Jacobs issued the conduct report because of the speech and that respondents Sproul and Robinson found him guilty and sanctioned him harshly because of the speech. These actions are all sufficient to constitute personal involvement under Bivens.

Petitioner names respondents Nalley and Watts (and Martinez again) because they denied the appeal of his grievance, even though he told them that he was disciplined for his political beliefs. A prison official may be held liable for a constitutional violation if he or she

knows about it and has the ability to intervene, but fails to act. Fillmore v. Page, 358 F.3d 496, 505-06 (7th Cir. 2004).

Although petitioner's allegation is enough to satisfy Rule 8, it will not be sufficient to prove his claim at summary judgment or at trial. In order to succeed on a failure to intervene theory, a complainant must prove that the government employee failed to intervene because of his deliberate or reckless disregard for the complainant's constitutional right. Fillmore, 358 F.3d at 505-06. This means that petitioner must show not just that he told Martinez, Nalley and Watts that he was the victim of retaliation, but that they *believed* that Sproul, Robinson and Jacobs had retaliated against him. Prison officials are not constitutionally required to believe a prisoner over an officer. Riccardo v. Rausch, 375 F.3d 521, 525 (7th Cir. 2004). Thus, if Martinez, Nalley or Watts denied petitioner's grievance because they found his allegation of retaliation to be unconvincing, they did not violate his constitutional rights simply because they did not take his side.

Respondent Shook's involvement was even more peripheral. Petitioner says only that Shook "would have . . . approve[d]" the decision to remove petitioner from his job. Even if I construe this allegation to mean that Shook *did* approve the decision, I cannot infer reasonably from petitioner's allegations that Shook approved the discipline with any intention of retaliating against petitioner for making a speech. Shook cannot be held liable simply because he is the deputy warden and the supervisor of some of the other respondents;

under Bivens he can be held liable for his own conduct only. Gentry, 65 F.3d at 561.

C. Other Legal Theories

Petitioner identifies a number of other legal theories in his complaint, but none of them is viable. Under a heading for "second cause of action," petitioner says that respondents have acted with "deliberate indifference," in violation of the Eighth Amendment and 18 U.S.C. § 4042. The Eighth Amendment prohibits prison officials from subjecting prisoners to "cruel and unusual punishment," but in the context of prison life, the Supreme Court has never interpreted the Amendment to extend beyond dangers to a prisoner's health or safety. E.g., Hope v. Pelzer,536 U.S. 730 (2002); Farmer v. Brennan, 511 U.S. 825 (1994); Hudson v. McMillian, 503 U.S. 1, 8-9 (1992).

In the context of sentencing for crimes, the Court has held that the Eighth Amendment imposes some limitations of excessive sentences, but the standard is an extremely narrow one. The Amendment does not prohibit sentences that many might find to be unfair or harsh. For example, in Rummel v. Estelle, 445 U.S. 263 (1980), the Court held that the Eighth Amendment was not violated by the imposition of a life sentence on a person who had been convicted of several petty theft crimes involving a total of approximately $200. More recently, the Court rejected an Eighth Amendment challenge to a prison sentence of 25 years to life for the theft of three golf clubs. Ewing v. California,

538 U.S. 11 (2003). Thus, even if I concluded that the Eighth Amendment applies to prison discipline that does not subject the prisoner to physical or psychological harm, I could not conclude that it violates the Eighth Amendment to remove a prisoner from his job because of a finding that he possessed contraband.

Like the Eighth Amendment, § 4042 imposes a requirement on the Bureau of Prisons to keep federal prisoners safe from harm. Calderon v. United States, 123 F.3d 947, 950 (7th Cir. 1997). It has no application in a case in which the harm alleged is the loss of a prison job.

Petitioner cites sections 241, 242 and 1509 of Title 18 of the United States Code, but these are criminal statutes, not civil laws creating a cause of action for individuals. They may be enforced by the federal government only. Maine v. Taylor, 477 U.S. 131, 136 (1986) ("the United States and its attorneys have the sole power to prosecute criminal cases in the federal courts").

Next, petitioner cites the Administrative Procedures Act, 5 U.S.C. § 702, but this law allows review of "agency" action only. Petitioner has not named the Bureau of Prisons as a respondent.

Finally, petitioner points to numerous program statements that he believes respondents violated. Although petitioner is free to rely on program statements in making arguments during the grievance process, they do not provide a basis for relief in federal court.

Miller v. Henman, 804 F.2d 421, 426 (7th Cir. 1986) (holding that BOP program manual "not promulgated under the Administrative Procedure Act or published in the Code of Federal Regulations . . . does not create legally enforceable entitlements"). See also Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("policy statements, agency manuals, and enforcement guidelines, all . . . lack the force of law").

C. Motion for a Preliminary Injunction

Accompanying petitioner's complaint is a motion for a preliminary injunction in which he seeks an order directing respondents not to retaliate against him for filing this lawsuit. In particular, petitioner wants to prevent respondents from transferring him to another prison.

Petitioner's motion will be denied as unnecessary. Prison officials are already prohibited by the Constitution from retaliating against petitioner for exercising his right of access to the courts; it is not this court's practice to issue injunctions that do no more than order a party to do what is already required. Further, it would be well beyond the scope of this lawsuit to prohibit petitioner's transfer to another prison. There could be many reasons for a transfer unrelated to this lawsuit. If petitioner is transferred or is subjected to any other adverse treatment that he believes was brought about by the exercise of his right of access to the courts, he may file another lawsuit challenging that action.

ORDER

IT IS ORDERED that

1. Petitioner Chad Bouman is GRANTED leave to proceed on the following claims:

a. because of a speech petitioner gave regarding Free Masons, respondent R. Martinez placed petitioner in the special housing unit, in violation of his right to free speech under the First Amendment and 28 C.F.R. § 551.90;

b. because of a speech petitioner gave regarding Free Masons, respondent M. Jacobs issued petitioner a conduct report for possessing contraband, in violation of his right to free speech under the First Amendment and 28 C.F.R. § 551.90;

c. because of a speech petitioner gave regarding Free Masons, respondents S. Robinson and Sproul found petitioner guilty of possessing contraband and removed petitioner from his prison job, in violation of his right to free speech under the First Amendment and 28 C.F.R. § 551.90.

d. respondents Martinez, M. Nalley and H. Watts refused to intervene even though they knew that respondents Robinson, Jacobs and Sproul were retaliating against petitioner for exercising his right to free speech.

2. Petitioner is DENIED leave to proceed on all other claims and the complaint is DISMISSED as to respondent J. Shook.

3. Petitioner's motion for a preliminary injunction is DENIED as unnecessary.

4. The unpaid balance of petitioner's filing fee is $338.72; petitioner is obligated to pay this amount as described in 28 U.S.C. § 1915(b)(2).

5. 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. 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.

6. 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.

7. Copies of petitioner's complaint and this order are being sent today to the United States Marshal for service on respondents.

Entered this 10th day of August, 2007.

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