IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARLON POWELL,

Petitioner,

v.

MATTHEW FRANK - SEC. OF DOC,
GREG GRAMS - WARDEN,
CAPT. RADTKE - SECURITY,
JIM SPANGBERG - UNIT MANAGER and
OFFICER JOHN DOE;

Respondents.

OPINION and ORDER

07-C-389-C

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This is a proposed civil action for monetary, declaratory and injunctive relief brought under 42 U.S.C. § 1983. Petitioner Marlon Powell, a prisoner at the Columbia Correctional Institution in Portage, Wisconsin, alleges that respondent John Doe violated his rights under the equal protection clause of the Fourteenth Amendment when he made "a racial comment/statement that was clearly heard over the unit P.A. system." He contends that the other respondents are liable because they supervised respondent John Doe. Petitioner requests leave to proceed in forma pauperis under 28 U.S.C. § 1915 and has made the initial partial payment required under that statute.

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 defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2).

In his complaint, petitioner alleges the following facts.

FACTUAL ALLEGATIONS

Petitioner Marlon Powell was a prisoner incarcerated at the Columbia Correctional Institution in Portage, Wisconsin. Respondent John Doe is a correctional officer who worked in unit 10 A/B at the Columbia Correctional Institution. Respondent Jim Spangenberg is the 10 A/B unit manager at the Columbia Correctional Institution. Respondent Capt. Radke is the security director and respondent Greg Grams is the warden at the Columbia Correctional Institution. At all relevant times, respondent Matthew Frank was the secretary of the Wisconsin Department of Corrections.

At approximately 12:10 p.m. on April 18, 2007, respondent John Doe called for inmate workers to report for work over the unit loud speaker system. During this

announcement, he stated that "only the white inmates" should report for work. After the announcement, petitioner felt fearful when dealing with the correctional officers at the Columbia Correctional Institution because he was concerned that he would be subjected to racial discrimination by other correctional officers. The comment has also "mentally and emotionally left [petitioner] feeling as if all the jobs that pay more will only be given to the white individuals in prison as well as in society." Since the announcement, another officer was written up for his language and behavior.

DISCUSSION

Petitioner contends that respondent John Doe violated his constitutional right to equal protection when he announced over the prison loudspeaker system that only white prisoners should report to work. Petitioner's complaint is the third this court has received relating to an allegedly discriminatory statement about the race of volunteers for outdoor work made on April 18, 2007 at the Columbia Correctional Institution. Murphy v. Sainsbury, No. 07-C-0283-C (W.D. Wis. June 6, 2007); Bullock v. Franks, No. 07-C-381-C (W.D. Wis. July 18, 2007). As I said in the two earlier cases, racism in any form is reprehensible and should not be condoned in any part of society. Although prisoners are expected to endure many "harsh" and "restrictive" conditions as "part of the penalty . . . for their offenses," Rhodes v. Chapman, 452 U.S. 337, 347 (1981), bigotry and intolerance

should not be among them. Santiago v. Miles, 774 F. Supp. 775, 777 (W.D.N.Y. 1991) ("Racism is never justified; it is no less inexcusable and indefensible merely because it occurs inside the prison gates.")

Nevertheless, not all racial insensitivity violates the Constitution. The Court of Appeals for the Seventh Circuit has stated flatly that "the use of racially derogatory language, while unprofessional and deplorable, does not violate the Constitution. Standing alone, simple verbal harassment does not constitute cruel and unusual punishment, deprive a person of a protected liberty interest or deny a prisoner equal protection of the laws." DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2002). Petitioner does not describe in his complaint in this case, or in the grievance filed with the institution (which he attached to his complaint), any other offensive behavior by respondents other than Doe's grossly inappropriate statement. He does not allege that he was deprived of an opportunity to earn money or other benefits for volunteering for the work crew. Instead, petitioner is concerned strictly with the fact that respondent made an unprofessional and inappropriate comment and that, as a result, he feared that other correctional officers would subject him to racial discrimination. Accordingly, petitioner's claim against respondent John Doe will be dismissed for failure to state a claim upon which relief may be granted.

Petitioner's claims against the other respondents will likewise be dismissed. His sole theory regarding their liability appears to be that they were respondent John Doe's

supervisors and therefore were responsible for his comment and its effect. This theory fails for two reasons. First, the doctrine of respondeat superior, under which a supervisor may be held responsible for the acts of his or her subordinates, is not applicable in § 1983 cases. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690-695 (1978). Liability under § 1983 arises only through a respondent's personal involvement in a 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). In any event, because respondent John Doe's statement did not violate petitioner's constitutional rights, it could not form the basis for others' liability. Therefore, petitioner has failed to state a claim against respondents Spangenberg, Radke, Grams and Frank.

ORDER

IT IS ORDERED that:

1. Petitioner Marlon Powell's request for leave to proceed in forma pauperis on his equal protection claim against respondents John Doe, Jim Spangenberg, Capt. Radke, Greg Grams and Matthew Frank is DENIED and this case is DISMISSED with prejudice for petitioner's failure to state a claim upon which relief may be granted;

2. The unpaid balance of petitioner's filing fee is $347.28; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

3. A strike will be recorded against petitioner pursuant to § 1915(g); and

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

Entered this 6th day of August, 2007.

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