IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL E. WILLIAMS,

Petitioner, ORDER

v. 09-cv-202-bbc

ROBERT HUMPHREY, JASON ALDANA,
CUS HOWARD, NANCY PADGETT,
CAPT. GEGEAR and ROBERT CHRISTMAN,

Respondents.

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In this action for monetary, declaratory and injunctive relief brought under 42 U.S.C. § 1983, petitioner Michael Williams, a prisoner at the Columbia Correctional Institution in Portage, Wisconsin, has filed a proposed complaint in which he alleges that respondents Robert Humphrey, Jason Aldana, Cus Howard, Nancy Padgett, Captain GeGear and Robert Christman violated his rights under the Eighth and Fourteenth Amendments by failing to investigate his sexual assault by a guard and then covering it up. Petitioner has requested leave to proceed in forma pauperis and has made the initial partial payment required of him under 28 U.S.C. § 1915. In addition, he has asked for the appointment of counsel.

Because petitioner is an inmate, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if his complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a respondent who by law cannot be sued for money damages. 28 U.S.C. § 1915(e). However, petitioner is also suing on his own behalf, without counsel, so his complaint must be construed liberally as it is reviewed for these potential defects. Haines v. Kerner, 404 U.S. 519, 521 (1972).

Having reviewed petitioner's complaint, I conclude that petitioner may proceed on his Eighth Amendment claim that respondents Humphrey, Aldana, Howard and GeGear failed to protect him from sexual abuse. Because petitioner has failed to show that respondent Padgett knew about the assault or had the authority to stop it, he may not bring a failure to protect claim against her. Similarly, because respondent Christman had no duty to protect petitioner, petitioner may not proceed on his Eighth Amendment claim against him. Petitioner has alleged sufficient facts to state a procedural due process claim against respondents Humphrey, Aldana, Howard, GeGear and Padgett. Finally, I am denying petitioner's request for appointment of counsel because he has not shown that he made reasonable efforts to find a lawyer on his own and it is too early in the proceedings to determine whether the legal and factual difficulty of the case exceeds his demonstrated ability to prosecute it.

In a separate document, petitioner has asked the court to order the Racine Correctional Institution to provide him all the records related to his grievances and discipline between May 28 and December 30, 2008. Dkt. #5. The motion is essentially a discovery request, which is not appropriate at this stage of the lawsuit. Therefore, petitioner's request will be denied without prejudice. He may refile a similar request under the Federal Rules of Civil Procedure after the court has held a preliminary pretrial conference and set the deadlines for trial preparation.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

In 2008, petitioner was incarcerated at the Racine Correctional Institution. At some point, a female correctional officer brought petitioner tobacco and had sex with him. On October 27, 2008, petitioner was placed in temporary lockup without notice or explanation. When he asked officials why he was in lockup, he was given a DOC-67 form stating the reason for confinement was "investigation." That same day, petitioner wrote to respondent Jason Aldana, the security director at the Racine Correctional Institution, to ask him why he was in temporary lockup. Petitioner did not receive a response from Aldana. Also on October 27, petitioner filed a grievance, alleging that he repeatedly had been placed in temporary lockup for investigations on unfounded allegations that he was trafficking

contraband. Respondent Nancy Padgett, an inmate complaint examiner, returned his grievance and told him that staff had a right to search his cell and that he should address his concerns to respondent Aldana or a Captain Weber. Although petitioner requested interviews with Aldana and Weber, neither responded. Petitioner filed two more inmate grievances, alleging that respondent Padgett was unfair and impartial because she refused to consider his complaints.

On November 5, 2008, petitioner requested copies of the October 27 DOC-67 form and other relevant documents. Petitioner received a copy of a DOC-67 form dated October 27, 2008 but that form stated the reason for temporary lockup was "investigation into trafficking contraband" instead of just "investigation."

On November 17, 2008, respondent Cus Howard, a unit manager, and Weber interviewed petitioner in lockup and asked him whether Officer Geironoth, a female corrections officer, had brought him tobacco and had a sexual relationship with him. Although this was true, petitioner said that he did not know anything. The next day, petitioner was issued a conduct report for "disrespect," stating that three confidential informants had heard petitioner call a female officer a "bitch" and that petitioner had been placed in temporary lockup as a result. Petitioner complained to respondents Aldana and Captain GeGear, head of administrative segregation at the Racine Correctional Institution. GeGear met with petitioner and told him that Aldana had asked him to handle the situation.

GeGear promised petitioner that he would expunge the conduct report if petitioner would tell him how tobacco was being brought into the prison. Petitioner told him part of the story.

On November 26, 2008, petitioner had a conduct hearing on the disrespect charge before respondent GeGear, who found him guilty and gave him 180 days in disciplinary segregation. Petitioner appealed that decision to respondent Robert Humphrey, warden of the Racine Correctional Institution. According to petitioner, respondent Howard fabricated the conduct report and respondent GeGear ignored exculpatory evidence and helped falsify evidence against him.

Soon after the conduct hearing, petitioner submitted a written complaint to the Racine County Sheriff's Department and District Attorney's Office, stating that he had been sexually assaulted and then brought up on false charges. About a month later, respondent Robert Christman, an investigator, interviewed petitioner and told him that there was not enough evidence to charge the female officer. Within 15 minutes of the conclusion of the interview, petitioner was transferred to the Columbia Correctional Institution, a maximum security institution, and placed in segregation, where he still remains. Petitioner was not brought before a prison review committee before the transfer.

Petitioner was later told that the female officer who assaulted him was suspended with pay. All of the respondents knew that the female officer had been suspended from another facility for the same behavior.

DISCUSSION

Petitioner asserts that respondents Aldana, Humphrey, Howard and GeGear were aware that he was sexually assaulted by a female officer and deliberately tried to cover it up by bringing false disciplinary charges against him, resulting in his being placed in segregation at a maximum security prison for 180 days. He asserts that respondent Padgett failed to address the procedural error that he pointed out in the conduct report and "conspired to cover up facts." Petitioner asserts that respondent Christman failed to protect him by refusing to criminally charge the female officer.

A. Eighth Amendment

The Eighth Amendment to the United States Constitution requires the government to "provide humane conditions of confinement; prison officials must . . . 'take reasonable measures to guarantee the safety of the inmates.'" Farmer v. Brennan, 511 U.S. 825, 832 (1994) (quoting Hudson v. Palmer, 48 U.S. 517, 526-27). In Farmer, 511 U.S. at 825, the Supreme Court held that the Constitution requires prison officials to protect prisoners from

"substantial risk[s] of serious harm," such as a physical or sexual assault. When prison officials have actual knowledge of a substantial risk of harm, they must take reasonable steps to prevent that harm. Langston v. Peters, 100 F.3d 1235, 1237-38 (7th Cir. 1996) (citing Farmer, 511 U.S. at 837). Failure to do so constitutes deliberate indifference and violates an inmate's Eighth Amendment rights. Id.

To state an Eighth Amendment claim of failure to protect, petitioner must prove that 1) he faced a "substantial risk of serious harm"; and 2) respondents knew of the risk and disregarded it by failing to take reasonable measure to abate it. Farmer, 511 U.S. at 844; see also Brown v. Budz, 398 F.3d 904, 910 (7th Cir. 2005) (petitioner must allege respondents knew beforehand of substantial risk that serious harm might occur). A correctional officer's sexual assault of an inmate may constitute a substantial risk of a serious harm. In fact, Wisconsin treats sexual contact by a correctional staff member with an inmate as second degree sexual assault. Wis. Stat. § 940.225(2)(h). Although a staff member's sexual contact with an inmate is considered a crime, coercion may be an important issue in deciding the rights to which an inmate is entitled under the Constitution. Strong v. Wisconsin, 544 F. Supp. 2d 748, 760 (W.D. Wis. 2008) (noting same in fundamental due process case where plaintiff was civilly committed). In questions involving the intersection of law and sex, the answers are often controlled by the presence or absence of consent. Id.

Although petitioner alleges that he was sexually assaulted, he does not explain whether there was more than one incident or describe what happened, indicating only that the officer brought him tobacco and had sex with him. However, because a correctional officer is in a position of power over an inmate and petitioner alleges that the female officer in this case used her power to smuggle in contraband in exchange for sex with him, I can infer that the officer's sexual contact with petitioner was coerced. Petitioner has alleged sufficient facts to satisfy the first prong of a failure to protect claim.

The second prong is often harder to meet because "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer, 511 U.S. at 847. "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.2d 344, 349 (7th Cir. 1991).

Petitioner contends generally that respondents knew that a female correctional officer had had sex with petitioner in exchange for bringing him tobacco. He does not explain how each respondent knew about the assault or allege that he complained about the assault before he was placed in temporary lockup. However, petitioner does allege that while he was in temporary lockup, respondent Howard asked him about a possible sexual relationship with a female officer and respondent GeGear asked him about how tobacco had been brought into

the institution. At the same time, he says he lied to them about the contact with the officer. Therefore, it may be difficult for him to prevail on a claim that they failed to protect him.

Petitioner also alleges that he complained to respondents Aldana and Humphrey during this period. It is unclear whether petitioner specifically reported the assault before filing complaints with the Racine County Sheriff's Department and District Attorney's Office in late November 2008. However, at this early stage, it is possible to infer that respondents Howard, Aldana, GeGear and Humphrey knew about the assault while petitioner was in temporary lockup.

I also can infer that petitioner continued to face a substantial risk of serious harm while he was in lockup because the perpetrator was a corrections officer, who presumably had access to petitioner. Assuming that petitioner's allegations are true that respondents Howard, GeGear, Aldana and Humphrey failed to take steps to stop the abuse and actively tried to cover it up, he could state a claim for failure to protect. Therefore, I will allow petitioner to proceed on his Eighth Amendment claim against respondents Howard, GeGear, Aldana and Humphrey.

Although petitioner also complained to respondent Christman about the abuse, his only claim against Christman is that he failed to charge the female officer with a crime. The complaint does not make it clear whether Christman is an investigator for the sheriff's department or the district attorney's office. Either way, petitioner cannot state a claim

against Christman. Generally, public officials do not have a duty under the Constitution to protect people from dangerous conditions. DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 196 (1989). There is an exception for people in state custody, as previously discussed. However, "[t]he affirmative duty to protect arises not from the State's knowledge of individual's predicament . . . but from the limitation which it has imposed on his freedom to act on his own behalf." Id. at 200. Even if Christman is a police officer and knew about petitioner's predicament, he did not have custody over petitioner and, therefore, had no duty to protect him. Further, petitioner has not alleged any facts from which I can infer that a police officer would have had a constitutional duty to arrest the female corrections officer in this case. Lunini v. Grayeb, 395 F.3d 761, (7th Cir. 2005) (refusing to recognize general constitutional police duty to arrest in isolated domestic violence case); Whitehouse v. Piazza, 397 F. Supp. 2d 935, 940 (N.D. Ill. 2005) (recognizing in dicta that individual has no constitutionally protected right in the prosecution of another). Finally, if Christman works for the district attorney's office, he would be entitled to absolute immunity with respect to his decision to not initiate a prosecution. Van De Kamp v. Goldstein, __ U.S. __, 129 S.Ct. 855, 860 (2009); Buckley v. Fitzsimmons, 509 U.S. 259, 273-73 (1993); Imbler v. Pachtman, 424 U.S. 409 (1976). Because petitioner has failed to state a claim against respondent Christman, he must be dismissed.

Finally, petitioner has not shown that respondent Padgett had any knowledge about the assault or that she ever received a complaint related to it. In fact, petitioner alleges only that she failed to act fairly and impartially in resolving his initial complaints about being placed in temporary lockup. Therefore, petitioner may not proceed on an Eighth Amendment claim against respondent Padgett.

B. Fourteenth Amendment

Plaintiff contends that respondents Howard and GeGear violated his due process rights by falsely charging him and subjecting him to flawed disciplinary proceedings and that respondents Humphrey, Aldana and Padgett failed to intervene. The Fourteenth Amendment prohibits states from depriving "any person of life, liberty or property without due process of law." U.S. Const. Amend. XIV. A procedural due process claim against government officials requires proof of inadequate procedures as well as interference with a liberty or property interest. Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 460 (1989). In the absence of a protected liberty or property interest, "the state is free to use any procedures it chooses, or no procedures at all." Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001). Therefore, the first question in any due process analysis is whether a protected liberty or property interest has been infringed.

In Sandin v. Conner, 515 U.S. 472, 484 (1995), the Supreme Court held that prisoners are not entitled to any process under the Constitution unless the discipline they receive increases their duration of confinement or subjects them to an "atypical and significant" hardship. If the discipline does not fall into one of these categories, a prisoner has no recourse under the due process clause, even if he did not receive a hearing or even if the charge against him was a lie. In addressing what satisfies the "atypical and significant" hardship standard the Court of Appeals for the Seventh Circuit recently explained that "a liberty interest *may* arise if the length of segregated confinement is substantial and the record reveals that the conditions of confinement are unusually harsh." Marion v. Columbia Correction Institution, 559 F.3d 693, 697-98 (7th Cir. 2009) (emphasis in original). Although the appellate court did not set forth what specific length of segregated confinement crosses into the "substantial" realm, it held that the prisoner's 240-day disciplinary segregation required at least an inquiry into whether the conditions of confinement were unusually harsh. Id. at 698-99. The court explained that even though "six months of segregation is 'not such an extreme term' and, standing alone, would not trigger due process rights," it would be necessary for the district court to undertake "a factual inquiry as to whether the conditions of the prisoner's confinement 'were significantly altered when he was placed in segregation.'" Id. at 698 (quoting Whitford v. Boglino, 63 F.3d 527, 533 (7th Cir. 1995)).

Like the punishment given the inmate in Whitford, petitioner's punishment was of relatively short and definite duration. Although petitioner did not disclose in his complaint the nature of the conditions he has endured in segregation, he is not required to do so under liberal notice pleading standards. Therefore, at this stage, I find that petitioner's allegations are sufficient to state a protected liberty interest.

There is no bright line test for determining what constitutes adequate process in the context of placement in disciplinary segregation. The Supreme Court has held that at a minimum, prisoners "must receive notice of the factual basis leading to consideration for . . . placement and a fair opportunity for rebuttal." Wilkinson, 545 U.S. at 225-26. The Court has stated that those two requirements "are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations. . . . Requiring officials to provide a brief summary of the factual basis for the classification review and allowing the inmate a rebuttal opportunity safeguards against the inmate's being mistaken for another or singled out for insufficient reason." Id. at 226 (citations omitted). The Court of Appeals for the Seventh Circuit has suggested that so long as a "prisoner [i]s given sufficient notice of the reasons for his transfer to afford meaningful opportunity to challenge his placement," his placement in segregation in a high security institution will satisfy due process under Wilkinson. Westefer v. Snyder, 422 F.3d 570, 588 (7th Cir. 2005).

In this case, petitioner alleges that he was falsely charged, given incorrect notice of the charges against him until the last minute, not provided with an unbiased hearing officer and not brought before a prison review committee before being transferred to a maximum security institution. This is sufficient to state a procedural due process claim. Because petitioner alleges that respondents Humphrey, Aldana, Howard, GeGear and Padgett either took part in bringing the false charges and conducting a sham hearing or refused to intervene even though they had the authority to do so, I will allow him to proceed on a procedural due process claim against these respondents. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995) (prison official who "know[s] about the conduct and facilitate[s] it, approve[s] it, condone[s] it, or turn[s] a blind eye" to it may be held personally liable under § 1983).

C. Appointment of Counsel

In deciding whether to appoint counsel, I must find that petitioner has made reasonable efforts to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To prove that he has made reasonable efforts to find a lawyer, petitioner must give the court the names and addresses of at least three lawyers who he asked to represent him in this case and who turned him down. Petitioner has not met this prerequisite.

Moreover, the motion is premature. Appointment of counsel is appropriate in those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds the petitioner's demonstrated ability to prosecute it. Pruitt v. Mote, 503 F.3d 647, 655 (7th Cir. 2007). Petitioner contends that he cannot effectively present his case because he is on medications for psychological problems, he does not have the resources or knowledge to conduct the factual investigation that will be required and the case involves difficult legal issues and will turn on credibility determinations and require expert testimony.

Plaintiff has done an adequate job of representing himself to this point. His submissions are coherent and articulate. Although he may lack legal knowledge, that is not a good reason to appoint counsel, as this handicap is almost universal among pro se litigants. As this case progresses, plaintiff will improve his knowledge of court procedure. To help him, this court instructs pro se litigants at the preliminary pretrial conference about how to use discovery techniques available to all litigants so that he can gather the evidence he needs to prove his claim. In addition, pro se litigants are provided a copy of this court's procedures for filing or opposing dispositive motions and for calling witnesses, both of which were written for the very purpose of helping pro se litigants understand how these matters work.

Although petitioner's case potentially could involve complex issues of law, it is too early to make that determination in this case. Without the benefit of respondents' answer to the complaint or discovery, it is difficult to assess how complex this case will be. The

general law governing his claims is straightforward and has been explained to petitioner in this order. Plaintiff has personal knowledge of most of the circumstances relevant to his claims and possesses, or should be able to obtain through discovery, the documentation he needs to prove his claim.

In sum, I am not persuaded that plaintiff's case is so complex or his skills so lacking that appointment of counsel is warranted at this time. The motion will be denied without prejudice to petitioner bringing it at a later stage in his lawsuit.

ORDER

IT IS ORDERED that:

1. Petitioner Michael Williams's request for leave to proceed in forma pauperis is GRANTED with respect to his claim that respondents Robert Humphrey, Jason Aldana, Cus Howard and Captain Gegear failed to protect him from a substantial risk of serious harm in violation of the Eighth Amendment.

2. Petitioner's request for leave to proceed on an Eighth Amendment claim against respondent Robert Christman is DENIED. Respondent Robert Christman is DISMISSED because petitioner has failed to state a claim against him.

3. Petitioner's request for leave to proceed on an Eighth Amendment claim against respondent Nancy Padgett is DENIED.

4. Petitioner's request for leave to proceed on a claim that respondents Humphrey, Aldana, Howard, GeGear and Padgett violated his right to procedural due process is GRANTED.

5. Petitioner's motion to subpoena records is DENIED as premature.

6. Petitioner's motion for appointment of counsel is DENIED WITHOUT PREJUDICE.

7. 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 respondents or to respondents' attorney.

8. 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.

9. Petitioner is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at the Columbia Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

10. 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 the state respondents.

11. A strike will be recorded against petitioner pursuant to § 1915(g) because one or more claims has been dismissed for failure to state a claim upon which relief may be granted.

Entered this 20th day of May, 2009.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge