IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROBERT G. SMITH,

Plaintiff,

v.

WELCOME ROSE, Examiner,
WILLIAM POLLARD, Warden, and
MR. M. DELUAUX, Security Captain,

Defendants.

ORDER

09-cv-233-bbc

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This is a proposed civil action for injunctive and monetary relief, brought under 42 U.S.C. § 1983. Plaintiff Robert G. Smith Jr., who is presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit plaintiff has given the court, I conclude that he is unable to prepay the full fee for filing this lawsuit. He has paid the initial partial payment of $7.67 as required under § 1915(b)(1).

As an initial matter, I note that plaintiff has filed a motion for an order directing prison officials to pay the remainder of his filing fee from his release account. Dkt. #5. According to plaintiff, he should be allowed to use his release account funds to pay the filing

fee in this case because the Wisconsin Court of Appeals held in Spence v. Cook, 587 N.W.2d 904 (Wis. Ct. App. 1998), that the prisoner litigants in that case could use release account funds to pay the fees for filing their appeal. In this court, however, plaintiff cannot use his release account funds in this manner. The language in 28 U.S.C. § 1915(b)(1) suggests that prison officials are required to use a prisoner's release account to satisfy an *initial partial payment* if no other funds are available. Carter v. Bennett, 399 F. Supp. 2d 936, 936-37 (W.D. Wis. 2005). However, with the exception of initial partial payments, I do not have the authority to tell state officials whether and to what extent a prisoner should be able to withdraw money from his release account. Because plaintiff cannot use his release account funds to pay the remaining balance of the $350 filing fee, I will deny his motion.

Turning now to plaintiff's complaint, 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, because plaintiff is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny him leave to proceed if he has had three or more lawsuits or appeals dismissed for lack of legal merit, 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. After examining plaintiff's complaint, I conclude that he states a claim against defendant Deluaux for violating his procedural due process rights. However, he fails to state an Eighth Amendment

claim and his access to the courts claim is not ripe because this current lawsuit is the underlying lawsuit that plaintiff alleges has been impeded.

In addition, in the last paragraph of his complaint plaintiff requests that he be provided court appointed counsel. Plaintiff's request will be denied because he has failed to show that he has made reasonable efforts to find a lawyer on his own and at this early stage counsel does not appear necessary.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Plaintiff Robert G. Smith is a prisoner confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. However, most of his allegations against defendants concern events that occurred while he was confined at the Green Bay Correctional Institution in Green Bay, Wisconsin. Defendants Welcome Rose, William Pollard and M. Deluaux are employed at the Green Bay Correctional Institution. Rose is a corrections complaint examiner; Pollard is the warden; and Deluaux is the security captain.

B. Plaintiff's Due Process Hearing

On June 11, 2008, plaintiff was provided with a copy of conduct report #1973574.

The report charged plaintiff with violating Wis. Admin. Code § DOC 303.26, Soliciting Staff. The conduct report was written by Captain Brant on June 6, 2008. The report states in part:

> On 4-20-08 a search was conducted of Inmate Smith's cell. During the course of that search, two envelopes were found. Inside each of the envelopes, an interview request was found. The first request was dated 4-13-08. In it, Smith had written to GBCI staff member Angela Laufenberg requesting copies of conduct reports. Smith writes, "I need to ask you a huge favor!" He goes on to ask for copies of reports related to three other inmates. Smith informs Ms. Laufenberg that he wants to use these at his Adjustment Committee Hearing. Smith makes a marginal comment on the request form of, "Please give me some good news? Purty Pleez." He also includes a hand-drawn smiley face emoticon following the text.
>
> Ms. Laufenberg responded to Smith that she was instructed by her superior that she should write Smith up but stated that she would not do so. She further instructs him to route an[y] further correspondence to her in a sealed envelope.
>
> . . . .
>
> Furthermore, the style of writing Smith used in both of the interview requests, i.e. asking for favors and, "Hey! Ain't heard back from ya yet!" exemplifies a relationship between Inmate Smith and Ms. Laufenberg that is well outside the bounds of professional decorum.

Cpt., dkt. #1, at 4.

Upon receipt of the conduct report, plaintiff submitted an "Offender's Request for Attendance of Witness" requesting that Laufenberg be present to testify at his due process hearing. With his witness request form, plaintiff included a list of eighteen questions that he wanted to ask Laufenberg. On June 18, 2009, defendant Deluaux denied plaintiff's witness request. The reason for the denial was because "testimony would be irrelevant. Mrs.

Laufenburg does not believe you were soliciting her but the investigation revealed otherwise."

After plaintiff was informed that his request that Laufenberg appear as a witness was denied, he filed a second witness request. In the second request, plaintiff explained that Laufenberg's answers to his submitted questions were "vital" to his defense. Also, plaintiff requested that Captain Brant be present at the hearing because he was the officer who wrote the report. Defendant Deluaux denied plaintiff's second witness request as untimely because it was not received until June 23, 2008.

Plaintiff received a due process hearing on June 27, 2008. Plaintiff attended the hearing along with his assigned staff advocate and the hearing officer. Plaintiff was found guilty of violating § DOC 303.26(6). The hearing officer based his decision in part on the following reasoning:

> I considered the inmate statement, advocate statement evidence and conduct report. No conflict of interest. Inmate submitted 3 pages of questions for OOA Laufenberg, but she was denied as a witness.
>
> . . . .
>
> I find the inmate guilty of 303.26(6) as I believe it is more likely than not the inmate asked for a "favor" of OOA Laufenberg by writing, "Hey, I need to ask you a huge favor!" . . . The inmate statement is not believable that he did not know that he could not have the information that he asked for. Evidence supports the report.

Cpt., dkt. #1, at 7, exh. 6. The finding of guilt led to a sentence of 360 days in disciplinary segregation and consideration for transfer to the Wisconsin Secure Program Facility in

Boscobel, Wisconsin.

C. Plaintiff's Lost Legal Documents

On July 2, 2008, plaintiff appealed the guilt determination made at the June 27, 2008 hearing. To file the appeal, plaintiff gave the filled-out appeal form to mail pick-up staff on his segregation unit.

On August 27, 2008, plaintiff submitted a letter to defendant Pollard asking about his appeal. On August 28, 2008, plaintiff received a note saying that no appeal was ever received. Plaintiff filed a complaint about the loss of his appeal, but the complaint was returned because the complaint office did not have the power to allow plaintiff to submit a late appeal. The letter with plaintiff's returned complaint said that it was up to the warden's office to decide whether to accept a late filed appeal. Plaintiff then wrote to defendant Pollard, requesting permission to file an untimely appeal. Plaintiff received the following response: "No evidence provided that would show GBCI lost any appeal."

On September 10, 2008, plaintiff filed a second inmate complaint about the loss of his appeal and the denial of his request to file a late appeal. In the complaint, plaintiff contended that he was being denied access to the courts. On September 15, 2008, he was transferred to the Wisconsin Secure Program Facility in Boscobel, Wisconsin. On September 22, 2008, plaintiff's complaint was rejected as untimely. Plaintiff filed an appeal

of the rejected complaint on September 26, 2008. On October 1, 2008, plaintiff's appeal was denied because his complaint had been appropriately rejected as untimely.

D. Conditions of Segregation

While plaintiff was in segregation at the Green Bay Correctional Institution from April 8, 2008 until September 15, 2008, his cell was illuminated 24 hours a day by a 60-watt light-bulb. This constant illumination caused plaintiff to suffer sleep deprivation. Furthermore, the segregation unit was "in a constant state of uproar," which caused plaintiff to suffer "constant headaches and mental fatigue." Cpt., dkt. #1, at 12.

DISCUSSION

A. Procedural Due Process

I understand plaintiff to be claiming that his procedural due process rights were violated when he received 360 days in disciplinary segregation after a hearing that did not provide him an opportunity to present witnesses. "A prisoner challenging the process he was afforded in a prison disciplinary proceeding must meet two requirements: (1) he has a liberty or property interest that the state has interfered with; and (2) the procedures he was afforded upon that deprivation were constitutionally deficient." Scruggs v. Jordan, 485 F.3d 934, 939 (7th Cir. 2007). The Court of Appeals for the Seventh Circuit has 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). Plaintiff alleges that he was sentenced to 360 days in segregated confinement, which is a "substantial" amount of time in segregated confinement. Id. at 698-99 (prisoner's 240-day disciplinary segregation required at least inquiry into whether conditions of confinement were unusually harsh to determine whether he had liberty interest). Thus, he may have a cognizable liberty interest. Id. at 699 ("[P]eriods of confinement that approach or exceed one year may trigger a cognizable liberty interest without any reference to conditions.").

To provide a prisoner due process in disciplinary proceedings, the institution must give him:

> "(1) advance (at least 24 hours before hearing) written notice of the claimed violation; (2) the opportunity to be heard before an impartial decision maker; (3) the opportunity to call witnesses and present documentary evidence (when consistent with institutional safety); and (4) a written statement by the fact-finder of the evidence relied on and the reasons for the disciplinary action."

Scruggs, 485 F.3d at 939 (quoting Rasheed-Bey v. Duckworth, 969 F.2d 357, 361 (7th Cir. 1992)). Plaintiff alleges that defendant Deluaux denied him the opportunity to have either of two important witnesses testify at his hearing, Laufenberg or Captain Brant. This allegation is sufficient to state a due process claim against defendant Deluaux.

B. Access to the Courts

Plaintiff alleges that defendants Pollard denied him access to the courts by losing plaintiff's institutional appeal and refusing to let him file another. I understand plaintiff to be claiming that defendant Pollard's refusal to address the loss of his appeal document denied him access to the courts because the refusal undermined his ability to exhaust all administrative remedies for his present federal claim.

It is well established that prisoners have a constitutional right of meaningful access to the courts to pursue non-frivolous actions. Lewis v. Casey, 518 U.S. 343, 350-51 (1996). A claim for denial of access to the courts requires a non-frivolous underlying cause of action that has been lost or impeded. Christopher v. Harbury, 536 U.S. 403, 415 (2002). In this case, the action that has been potentially "lost or impeded" is *this very case*. Plaintiff cannot claim that the action has been lost or impeded because I have not decided whether petitioner has failed to exhaust his administrative remedies. Thus, petitioner's access to the courts claim is not ripe and he will be denied leave to proceed on it. Further, although plaintiff lists defendant Rose as involved in denying him access to the courts, he does not allege how she was involved. Without such allegations, plaintiff has failed to state a claim against defendant Rose. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995) (liability under § 1983 must be based on defendants's personal involvement in constitutional violation).

Nonetheless, this decision does not mean that defendant Pollard's loss of plaintiff's

appeal will be irrelevant to his case. If defendant Deluaux moves for summary judgment on the ground that plaintiff has failed to exhaust, Pollard's behavior may be a basis for arguing that plaintiff has exhausted all *available* remedies as required. 42 U.S.C. § 1997(e); see also Harbury, 536 U.S. at 415 (suggesting that petitioners are usually better served attempting to raise access to courts concerns in context of underlying case first).

C. Conditions of Confinement

Plaintiff alleges that while he was in segregation at the Green Bay Correctional Institution he was subject to constant illumination, which caused him sleep deprivation, and constant loud noise, which caused him headaches and mental fatigue. The Eighth Amendment prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Depending on the exact circumstances, constant illumination and loud noise may subject a prisoner to an unnecessary infliction of pain. E.g., King v. Frank, 328 F. Supp. 2d 940, 946 (W.D. Wis. 2004) (severe and prolonged noise causing sleep deprivation may state Eighth Amendment claim; constant illumination may violate Eighth Amendment if it causes sleep deprivation). However, it is well established that liability under § 1983 must be based on a defendants's personal involvement in the constitutional violation, Gentry, 65 F.3d at 561, and plaintiff fails to allege any facts from which an inference may be drawn that defendants were

personally involved in subjecting him to the constant illumination or loud noises. Plaintiff's complaint is devoid of any allegations about defendants' involvement in the allegedly unconstitutional conditions of confinement. Therefore, plaintiff has failed to state a Eighth Amendment conditions of confinement claim against defendants.

D. Appointment of Counsel

In his complaint, plaintiff requests the appointment of counsel. In deciding whether to appoint counsel, I must first find that plaintiff 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, 1072 (7th Cir. 1992). To show that he has made reasonable efforts to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers that he has asked to represent him in this case and who turned him down. Until plaintiff provides the required proof that he has made reasonable efforts to find a lawyer on his own, I cannot consider whether it is appropriate for the court to request a lawyer to represent him.

However, even if plaintiff had shown that he made a reasonable effort, 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 plaintiff's demonstrated ability to prosecute the case. Pruitt v. Mote, 503 F.3d 647, 655 (7th Cir.

2007). Plaintiff does not contend that he lacks the ability to prosecute his case. Instead, he contends that it is difficult for him to access the law library and other "legal assistance." Despite plaintiff's failure to say as much, his due process claim potentially could involve complex issues of law that would exceed his demonstrated abilities; however, it is too early to determine the complexity this case. Without the benefit of defendant's answer to the complaint or discovery, it is difficult to assess the complexity of this case. Thus, I am not persuaded 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. Plaintiff Robert G. Smith's request for leave to proceed in forma pauperis on his Eighth Amendment claim is DENIED for failure to state a claim upon which relief can be granted;

2. Plaintiff's request for leave to proceed in forma pauperis on his claim that defendant William Pollard denied him access to the courts is DENIED because the claim is not ripe for adjudication;

3. Plaintiff's request for leave to proceed in forma pauperis against defendant Welcome Rose is DENIED for failure to state a claim upon which relief can be granted against her;

3. Defendants Pollard and Rose are DISMISSED from this case;

4. Plaintiff's request for leave to proceed in forma pauperis is GRANTED with respect to his claim that defendant M. Deluaux violated his procedural due process rights;

5. Plaintiff's request for appointment of counsel is DENIED without prejudice to his renewing his request at a later time;

6. A strike will be recorded under 28 U.S.C. § 1915(g) because one or more claims have been dismissed for failure to state a claim upon which relief may be granted;

7. For the remainder of this lawsuit, plaintiff must send defendant a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendant or to defendant's attorney;

8. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents;

9. Pursuant to an informal service agreement between the Wisconsin Attorney

General and this court, copies of petitioner's complaint and this order are being sent today to the Attorney General for service on defendant Deluaux.

Entered this 20th day of May, 2009.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge