IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARKUS GRANSBERRY,

OPINION and ORDER

Plaintiff,

10-cv-449-bbc

v.

C/O GOLDSMITH, C/O GRAFF,
C/O JOHNSON and SGT. FRIEND,[1]

Defendants.

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In this proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1983, plaintiff Markus Gransberry contends that defendants C/O Goldsmith, C/O Graff, C/O Johnson and Sergeant Friend are violating his right to free speech under the First Amendment by retaliating against him. Also, plaintiff contends that Goldsmith violated his constitutional rights by damaging his property and using racial slurs against him and that defendants Graff and Friend subjected him to unconstitutional conditions of confinement. Accompanying plaintiff's complaint is a motion for a temporary restraining order against defendants, in which plaintiff seeks an order moving him to another unit and enjoining defendants from harassing him.

[1] Plaintiff filed a supplement to his complaint, dkt. #16, stating that he wishes to add C/O Johnson as a defendant to the case. I have amended the caption accordingly.

Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment.

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his complaint, dkt. #1, and supplement, dkt. #16, and dismiss any portion that 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. § 1915A. 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).

After reviewing the complaint, I conclude that plaintiff may proceed on his claim that defendant Sergeant Friend retaliated against plaintiff in violation of his rights under the First Amendment. However, plaintiff may not proceed on his claims that defendant Johnson retaliated against him, that defendants Friend and Graff subjected him to unconstitutional conditions of confinement or that defendant Goldsmith violated his constitutional rights by damaging plaintiff's property and using a racial slur against plaintiff. These claims will be dismissed for failure to state a claim upon which relief may be granted. Finally, plaintiff's claim that defendants Goldsmith and Graff retaliated against him will be dismissed without prejudice because they violate Fed. R. Civ. P. 8. Plaintiff may have an opportunity to file a supplement to his complaint that provides more information about his retaliation claim against these two defendants.

Also, I will deny plaintiff's motion for a temporary restraining order at this time because

plaintiff has failed to comply with this court's procedures for obtaining preliminary injunctive relief and because plaintiff has not shown that such relief is necessary.

In his complaint and supplement, plaintiff alleges the following facts.

## ALLEGATIONS OF FACT

Plaintiff Marcus Gransberry is incarcerated at the Columbia Correctional Institution in Portage, Wisconsin. Defendants Goldsmith, Graff and Johnson are correctional officers in Unit 10 at the Columbia Correctional Institution and defendant Sergeant Friend is a sergeant in Unit 10. On December 3, 2009, plaintiff filed a lawsuit against defendant Friend in this court, alleging that Friend was deliberately indifferent to plaintiff's medical needs. Gransberry v. Suiliene, 09-cv-730-bbc.

Defendant Goldsmith harasses plaintiff. On January 14, 2010, defendant Goldsmith broke plaintiff's personal reading glasses. Also, Goldsmith placed medication under plaintiff's mattress, causing plaintiff to receive a penalty of 45 days' disciplinary segregation. On May 5, 2010, Goldsmith stopped plaintiff in the corridor outside Unit 10 and told plaintiff that "niggers like [him] should stay out of his way or get hurt."

On July 22, 2010, plaintiff was caught in a rainstorm on his way back from the health service unit, causing all of his clothes to be wet. Defendants Graff and Friend refused to give plaintiff a set of dry clothes, although other inmates received dry clothes. (Plaintiff does not state whether defendants Graff and Friend were the officers who provided dry clothes to other

inmates). Plaintiff had to sit in wet clothes until they dried, which took approximately three hours.

Defendant Johnson opened and read three pieces of mail sent to plaintiff by the district court before delivering the mail to plaintiff.

## DISCUSSION

Plaintiff states that his claims fall into four categories; (1) damage to his property; (2) racial slurs; (3) retaliation; and (4) cruel and unusual punishment. He contends that his claims fall under the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments as well as the "hate crimes statute" and other federal laws. After reviewing plaintiff's complaint, I conclude that he is bringing four possible claims against defendants: (1) defendants Goldsmith, Graff, Johnson and Friend retaliated against him in violation of the First Amendment for filing a lawsuit against defendant Friend; (2) defendants Graff and Friend subjected him to harsh conditions of confinement in violation of the Eighth Amendment by failing to provide him dry clothes; (3) defendant Goldsmith violated his right to equal protection under the Fourteenth Amendment by using racial slurs; and (4) defendant Goldsmith damaged his property in violation of his right to due process under the Fourteenth Amendment.

### A. Retaliation

Plaintiff contends that defendants Friend, Goldsmith, Graff and Johnson retaliated

against him for filing a lawsuit against defendant Friend. "An act taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000). Plaintiff must plead three elements in order to state a claim for retaliation. He must (1) identify a constitutionally protected activity in which he was engaged; (2) identify one or more retaliatory actions taken by each defendant that would deter a person of "ordinary firmness" from engaging in the protected activity in the future; and (3) allege sufficient facts that would make it plausible to infer that plaintiff's protected activity was one of the reasons defendants took the action they did against him. Bridges v. Gilbert, 557 F.3d 541, 556 (7th Cir. 2009) (citing Woodruff v. Mason, 542 F.3d 545, 551 (7th Cir. 2008)); Hoskins v. Lenear, 395 F.3d 372, 375 (7th Cir. 2005).

Although it is a close call, plaintiff's allegations are sufficient to state a claim for retaliation against defendant Friend. Plaintiff has satisfied the first element of a retaliation claim because plaintiff's filing of a lawsuit against defendant Friend is a constitutionally protected activity. With respect to the second element, plaintiff alleges that Friend denied him dry clothing, causing plaintiff to sit in wet clothes for three hours. At this early stage in the case, I can infer that, depending on the circumstances, sitting in wet clothes would deter a person of ordinary firmness from filing a lawsuit in the future. However, plaintiff should be aware that unless it was cold in plaintiff's cell or he suffered other consequences from sitting in his wet clothes, it will be difficult for him to prove that sitting in wet clothes would deter a person of ordinary firmness from engaging in protected activity. Finally, with respect to the third element

of his retaliation claim, I can infer that defendant Friend denied plaintiff dry clothes because plaintiff filed a lawsuit against him. Reading plaintiff's complaint generously, I can infer that Friend was upset by the lawsuit and denied plaintiff dry clothes as punishment.

However, plaintiff's allegations are not sufficient to state a claim for retaliation against defendants Graff, Johnson or Goldsmith. First, with respect to defendant Johnson, plaintiff's allegation that defendant Johnson opened and read plaintiff's mail before delivering it to him is not an adverse action that would deter a person of ordinary firmness from engaging in a protected activity in the future. Prisoners have no freestanding right to be present when prison officials open their mail, legal or otherwise, Vasquez v. Raemisch, 480 F. Supp. 2d 1120, 1138-41 (W.D. Wis. 2007), and plaintiff has not suggested that Johnson used the information in plaintiff's mail to retaliate against him or hinder his ability in any legal proceedings. Thus, plaintiff's allegations do not satisfy the second element of a retaliation claim with respect to defendant Johnson and his claim against Johnson will be dismissed.

Plaintiff's allegations regarding the adverse actions taken by defendants Graff and Goldsmith are sufficient to satisfy the second element of a retaliation claim. In particular, Graff was involved in the same wet clothes incident as defendant Friend, and defendant Goldsmith has taken multiple adverse actions against plaintiff, including breaking his glasses, hiding medication under his mattress and directing a racial slur toward him. I can infer that the actions of Graff and Goldsmith would deter a person of ordinary firmness from engaging in protected activity in the future. However, plaintiff's complaint contains no allegations addressing the third element

of his retaliation claim against defendants Graff or Goldsmith. He does not allege that these defendants ever knew that plaintiff has filed a lawsuit against defendant Friend. Unless defendants have knowledge of the lawsuit, their actions cannot be motivated by plaintiff's protected activity. Moreover, even if defendants Graff and Goldsmith do have knowledge of plaintiff's lawsuit against Friend, plaintiff has not suggested any reason why this would cause them to retaliate against plaintiff. Plaintiff has not filed a lawsuit against them and he has not suggested that the lawsuit affects them in any way. Because plaintiff has failed to plead any allegations addressing defendants' motivations, his complaint violates Fed. R. Civ. P. 8 and must be dismissed. However, pleading deficiencies may sometimes be remedied. Thus, I will dismiss plaintiff's claims against defendants Graff and Goldsmith without prejudice and give plaintiff an opportunity to file a supplement to his complaint explaining why he believes that these defendants' actions were motivated by his lawsuit against defendant Friend.

B. Conditions of Confinement

Plaintiff states that he is bringing a claim under the Eighth Amendment for cruel and unusual punishment. He may be attempting to state a claim against defendants Friend and Graff related to their denial of dry clothes. 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). However, for a prisoner's concerns about conditions of confinement to give rise to an Eighth Amendment claim, the conditions of the cell must create a substantial

risk of serious harm, Farmer v. Brennan, 511 U.S. 825, 847 (1994), or at the very least, the conditions must deprive plaintiff of some "identifiable human need such as food, warmth, or exercise," Wilson v. Seiter, 501 U.S. 294, 304 (1991). Plaintiff's complaint about sitting in wet clothes for three hours does not give rise to a constitutional claim under the Eighth Amendment. Although it may have been uncomfortable for plaintiff to sit in wet clothes for three hours, doing so did not amount to cruel and unusual punishment within the meaning of the Eighth Amendment. Compare Gillis v. Litscher, 468 F.3d 488, 490-91 (7th Cir. 2006) (prisoner left stark naked without bedding for 5 days, among other things); and Dixon v. Godinez, 114 F.3d 640, 644 (7th Cir. 1997) (prisoner left in cells with regularly freezing temperatures for "several winters").

C. Racial Slurs

Plaintiff states that he is bringing a claim under the Fifth and Fourteenth Amendment regarding "racial slurs." I presume plaintiff seeks to bring this claim against defendant Goldsmith, as he is the only defendant who allegedly use a racial slur against plaintiff. As reprehensible Goldsmith's alleged remark was, it does not provide a basis for a constitutional claim. The Court of Appeals for the Seventh Circuit has explained that "[s]tanding 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, 224 F.3d at 612.

To the extent that plaintiff is attempting to raise an equal protection claim based on defendant Goldsmith's alleged acts of breaking plaintiff's glasses and hiding medication under plaintiff's bed, plaintiff has failed to state a claim. A plaintiff asserting a claim of race discrimination under the equal protection clause must establish that (1) he belongs to a protected class such as a racial minority; (2) a state actor treated him differently from other similarly situated individuals; and (3) the state actor was motivated by a discriminatory purpose. Brown v. Budz, 398 F.3d 904, 916 (7th Cir. 2005); DeWalt, 224 F.3d at 618. Plaintiff's allegations provide no basis for inferring that Goldsmith treated plaintiff differently from any other prisoner or that Goldsmith's actions were motivated by a discriminatory purpose. In particular, nothing in plaintiff's complaint ties Goldsmith's alleged decision to break plaintiff's glasses and hide medication under his bed in January 2010 to the racial slur that Goldsmith allegedly made four months later. Thus, plaintiff has not stated a claim that his right to equal protection has been violated.

D. Damage to Property

Plaintiff contends that defendant Goldsmith violated his constitutional rights by damaging his personal reading glasses. The Fourteenth Amendment prohibits states from depriving "any person of life, liberty or property without due process of law." U.S. Const. Amend. XIV. However, as long as state remedies are available for the loss of or damage to property, neither intentional nor negligent deprivation of property gives rise to a constitutional

violation. Daniels v. Williams, 474 U.S. 327, 332-34 (1986); Hudson v. Palmer, 468 U.S. 517, 534-35 (1984). The state of Wisconsin provides post-deprivation procedures for challenging the alleged wrongful taking and destruction of property. Wis. Stat. ch. 893 contains provisions concerning tort actions to recover damages for wrongfully taken or damaged personal property and for the recovery of the property. Because petitioner has post-deprivation procedures available to him in state court, he cannot contend that he was denied due process. Accordingly, his claim regarding damage to his property will be dismissed for failure to state a claim upon which relief may be granted.

E. Motion for Temporary Restraining Order

Turning to plaintiff's motion for a temporary restraining order, I will deny the motion for a couple of reasons. First, at this time, I am granting plaintiff leave to proceed against defendant Friend only. As a general rule, this court will not grant injunctive relief against a person who is not a party to the lawsuit. Thus, I would not grant injunctive relief against Goldsmith, Graff or Johnson. Second, plaintiff's motion for injunctive relief does not comply with this court's procedures for obtaining preliminary injunctive relief. Under these procedures, which I am providing to plaintiff with a copy of this order, plaintiff must file with the court and serve on defendants proposed findings of fact supporting his claim, and submit with his proposed findings of fact any evidence he has to support his request for relief. Although plaintiff has submitted several affidavits from prisoners declaring that defendants have taken certain actions against

plaintiff (the same actions that plaintiff lists in his complaint), plaintiff has not submitted proposed findings of fact to which the defendants could respond. Finally, even if I were to consider the merits of plaintiff's motion at this time, I would deny the motion.

Granting preliminary injunctive relief is "is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." Roland Machinery Co. v. Dresser Industries, 749 F.2d 380, 389 (7th Cir. 1984). The standard applied to determine whether a plaintiff is entitled to preliminary injunctive relief is well established: A district court must consider four factors in deciding whether a preliminary injunction should be granted. These factors are: (1) whether the plaintiff has a reasonable likelihood of success on the merits; (2) whether the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue; (3) whether the threatened injury to the plaintiff outweighs the threatened harm an injunction may inflict on defendant; and (4) whether the granting of a preliminary injunction will disserve the public interest. Pelfresne v. Village of Williams Bay, 865 F.2d 877, 882-83 (7th Cir. 1989). At this stage, I am not persuaded that a injunctive relief is necessary. Although plaintiff states that he feels very unsafe, he has alleged no facts suggesting that he will suffer irreparable harm unless he is transferred to a different unit and defendant Friend is ordered to stop harassing him. The only allegation concerning Friend is that Friend caused plaintiff to sit in wet clothes for three hours. Such an allegation does not suggest that Friend is likely to cause plaintiff irreparable harm. Accordingly, plaintiff's motion for a temporary restraining order will be denied.

ORDER

IT IS ORDERED that

1. Plaintiff Marcus Gransberry's motion for a temporary restraining order, dkt. #7, is DENIED.

2. Plaintiff's motion to supplement his complaint, dkt. #16, is GRANTED. Plaintiff's supplement is incorporated into his original complaint, dkt. #1.

3. Plaintiff is DENIED leave to proceed on the following claims:

(a) Defendant C/O Johnson retaliated against him because he filed a lawsuit against defendant Sergeant Friend;

(b) Defendants Graff and Sergeant Friend violated plaintiff's right to be free from cruel and unusual punishment under the Eighth Amendment by refusing to provide him dry clothes;

(c) Defendant C/O Goldsmith violated plaintiff's right to equal protection under the Fourteenth Amendment by using a racial slur against him;

(d) Defendant Goldsmith violated plaintiff's right to due process by damaging his property.

4. Plaintiff's complaint is DISMISSED as to defendant Johnson.

5. Plaintiff is GRANTED leave to proceed on his claim that defendant Friend retaliated against him by refusing to provide him dry clothes because he filed a lawsuit against Friend.

6. Plaintiff's claim that defendants Goldsmith and Graff retaliated against him because

he filed a lawsuit against defendant Friend is DISMISSED without prejudice for violation of Fed. R. Civ. P. 8. Plaintiff may have until September 20, 2010, in which to file a supplement to his complaint that complies with Rule 8. If plaintiff does not file a supplement to his complaint by that date, the case will proceed on plaintiff's claim against defendant Friend only.

7. Service of the complaint on defendant Friend is STAYED pending receipt and screening of plaintiff's supplement to the complaint.

Entered this 13th day of September, 2010.

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

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PROCEDURE TO BE FOLLOWED ON MOTIONS FOR INJUNCTIVE RELIEF

***NOTE WELL:*** **It is the duty of the parties to present to the court, in the manner required by this procedure, all facts and law necessary to the just, speedy and inexpensive determination of this matter. The court is not obliged to search the record for facts or to research the law when deciding a motion for injunctive relief.**

## I. NOTICE

A. It is the movant's obligation to provide **actual** and **immediate** notice to the opposing party of the filing of the motion and of the date set for a hearing, if any.

B. The movant must serve the opposing party **promptly** with copies of all materials filed.

C. Failure to comply with provisions A and B may result in denial of the motion for this reasons alone.

## II. MOVANT'S OBLIGATIONS

A. It is the movant's obligation to establish the factual basis for a grant of relief.

1. In establishing the factual basis necessary for a grant of the motion, the movant must file and serve:

   (a) A stipulation of those facts to which the parties agree; or

   (b) A statement of record facts proposed by the movant; or

   (c) A statement of those facts movant intends to prove at an evidentiary hearing; or

   (d) Any combination of (a), (b) and (c).

2. Whether the movant elects a stipulation or a statement of proposed facts, it is the movant's obligation to present a precisely tailored set of factual propositions that movant considers necessary to a decision in the movant's favor.[2]

   (a) The movant must set forth each factual proposition in its own separately numbered paragraph.

   (b) In each numbered paragraph the movant shall set cite with precision to the source of that proposition, such as pleadings,[3] affidavits,[4] exhibits, deposition transcripts, or a detailed proffer of testimony that will be presented at an evidentiary hearing.

B. The movant must file and serve all materials specified in II. A with the movant's supporting brief.

D. If, the court concludes that the movant's submissions do not comply substantially with these procedures, then the court, at its sole discretion, may deny summarily the motion for injunctive relief, cancel any hearing on the motion, or postpone the hearing.

## III. RESPONDENT'S OBLIGATIONS

A. When a motion and supporting materials and brief have been filed and served in compliance with Section II, above, the opposing respondent(s) shall file and serve the following:

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[2] These factual propositions must include all basic facts necessary to a decision on the motion, including the basis for this court's jurisdiction, the identity of the parties and the background of the parties' dispute. The movant should not include facts unnecessary to deciding the motion for injunctive relief.

[3] The pleadings, however, are not evidence. Therefore, the movant may use the pleadings as a source of facts *only if* all parties to the hearing stipulate to these facts on the record.

[4] Affidavits must be made on personal knowledge setting forth facts that would be admissible in evidence, including any facts necessary to establish admissibility.

1. Any affidavits or other documentary evidence that the respondent chooses to file and serve in opposition to the motion.

2. A response to the movant's statement of proposed findings of fact, with the respondent's paragraph numbers corresponding to the movant's paragraph numbers.

   (a) With respect to each numbered paragraph of the movant's proposed findings of fact, each respondent shall state clearly whether the proposed finding is not disputed, disputed, or disputed in part. If disputed in part, then the response shall identify precisely which part is disputed.

   (b) For each paragraph disputed in whole or in part, the response shall cite with precision to the evidentiary matter in the record or to the testimony to be presented at the hearing that respondent contends will refute this factual proposition.

B. The response, in the form required by III A., above, shall be filed and served together with a brief in opposition to the motion for injunctive relief no later than the date set by the court in a separately issued briefing schedule.

C. There shall be no reply by the movant.

## IV. HEARING

If the court determines that a hearing is necessary to take evidence and hear arguments it shall notify the parties promptly. It is each party's responsibility to ensure the attendance of its witnesses at any hearing.