

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

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REGINALD A. MOTON,

Plaintiff,

v.

OPINION AND ORDER

10-cv-666-slc

GREGORY GRAMS, JANEL NICKEL,  
DR. CURT SCHWEBKE, CAPTAIN  
RADTKE, LORI ALSUM, DALIA SULIENE,<sup>1</sup>  
R.N. D. BURRESON, MARY LEISER,  
JOANNE LANE, AMY MALLARD, SGT.  
TIMM, OFFICER GRANT, JOHN DOE,  
JANE DOE, DET. ANTHONY BELAY and  
SAMUEL UPTHEGROVE,

Defendants.

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This is a proposed civil action in which plaintiff Reginald A. Moton alleges that defendant correctional institution employees, a Columbia County Sheriff and an inmate violated his constitutional rights. Moton asks for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915. From the financial affidavit Moton has given the court, the court concludes that he is unable to prepay the full fee for filing this lawsuit. Moton has made the initial partial payment of \$8.08 required of him under § 1915(b)(1).

The next step is determining whether Moton's proposed action is frivolous or malicious, fails to state a claim on which relief may be granted or seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). 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).

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<sup>1</sup>Defendant Dalia Suliene is added to the caption because she is listed as a defendant in the complaint.

In his complaint, Moton alleges, and the court assumes for purposes of this screening order, the following facts:

#### ALLEGATIONS OF FACT

Plaintiff Reginald A. Moton is an inmate at the Columbia Correctional Institution in Portage, Wisconsin. Defendant Gregory Grams is CCI's warden and defendant Janel Nickel is the security director. Defendant Dr. Curt Schwebke is the psychological services supervisor. Defendant Dylan Radtke is the administrative captain. Defendants Sgt. Timm and Officer Grant are correctional officers. Defendant Detective Anthony Belay is an investigative detective at the Columbia County Sheriff's Department. Defendant Samuel Upthegrove is an inmate at the institution.

Defendant Lori Alsum is the institution's health services supervisor and defendant Dalia Suliene is the medical doctor. Defendant R.N. D. Burreson is a nurse. Defendants Mary Leiser, Joanna Lane, Amy Mallard, John Doe and Jane Doe are reviewers of inmate complaints.

On April 4, 2010, inmate Samuel Upthegrove displayed anger and aggressive behavior toward Officer Merrill. Upthegrove was placed in observation status for clinical monitoring. Defendants Grams and Nickel knew that inmate Upthegrove had a history of violence against institution staff and other inmates and that when placed in general population he was risk to the safety of other inmates.

On April 13, 2010, defendant Sgt. Timm was working in the control bubble on housing unit four and was responsible for monitoring inmate movement. At approximately 11:30 a.m. he opened the cell doors for the lunch meal but failed to properly monitor inmate movement. Defendant Officer Grant also was working on unit four but failed to properly monitor inmate

movement. As a result, inmate Upthegrove entered Moton's cell and stabbed him with a shank numerous times in the back and shoulder. Upthegrove also bit Moton's left arm. Moton hit Upthegrove to stop the biting.

When correctional officers arrived at the cell, Moton was taken to segregation, where photographs were taken of his injuries. Moton was examined by defendant Burreson, who treated Moton's injuries on his back and shoulder but failed to treat his bite mark. Burreson did not give him a tetanus shot. Defendant Alsum did nothing to correct the failure to treat Moton's bite. She also failed to note the stabbing incident in Moton's medical record.

Moton's injuries became infected and he treated them himself with some homemade remedies, while continuing to submit request forms to be seen in health services. On April 19, 2010, it was noted in Moton's medical file that he had refused treatment, but Moton never refused treatment. Thirty days after the incident, on May 13, 2010, Moton was examined by defendant Suliene. Suliene failed to treat Moton's bite mark or give him a tetanus shot. As a result, Moton suffers on-going neck pain, paranoia and sleeplessness.

On April 15, 2010, defendant Detective Belay interviewed Moton about the incident when defendant Radtke was present. Belay refused to do a full investigation and relied heavily upon the information provided by the institution staff. Defendant Radtke issued Moton a conduct report for battery. On August 16, 2010, he was found guilty of the offense and sentenced to 120 days in segregation status.

Radtke incorrectly noted in Moton's record that he had a fight with his cellmate to cover up the fact that defendant Upthegrove came into Moton's cell. Moton filed an inmate complaint to correct this falsification, but his complaint was dismissed.

## OPINION

### I. FAILURE TO PROTECT CLAIM

Moton claims that defendants failed to protect him from an assault by another inmate. 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) 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 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.*

Moton alleges that defendants Grams and Nickel knew that inmate Upthegrove had a history of violence against institution staff and other inmates and that when placed in general population he was a risk to the safety of other inmates. Moton also alleges that he was assaulted by inmate Upthegrove. These allegations sufficiently support an inference that defendants Grams and Nickel knew of a substantial risk to inmate safety by inmate Upthegrove but disregarded it. In *Farmer*, the court stated that a prison official cannot escape liability for deliberate indifference if he was aware of an obvious, substantial risk to inmate safety even if he did not know that the victim would be especially liked to be assaulted by the specific prisoner. *Farmer*, 511 at 843.

Moton has not alleged that defendants Timm and Grant knew of any substantial risk to inmate safety posed by Upthegrove or that they disregarded this risk. Rather, he alleges that they did not properly monitor the flow of inmates. This allegation does not rise to the level of an Eighth Amendment violation under *Farmer*. Further, Moton does not allege that defendant Dr. Curt Schwebke, the psychologist supervisor, knew of, then disregarded any risk created to inmate safety by Upthegrove.

Moton alleges that defendant Upthegrove violated his constitutional rights, but he has not alleged that Upthegrove was acting under color of state law. This is a necessary allegation to state a claim for relief under 42 U.S.C. § 1983. Moton will be allowed to proceed on his failure to protect claim against only defendants Grams and Nickel.

## **II. DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEED**

Moton claims that defendants Suliene, Burreson and Alsum failed to provide him with constitutionally adequate medical care. The Eighth Amendment prohibits prison officials from showing deliberate indifference to prisoners' serious medical needs or suffering. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). To state a deliberate indifference claim, a plaintiff must allege facts from which it may be inferred that he had a serious medical need and that prison officials were deliberately indifferent to that need. *Gutierrez v. Peters*, 111 F.3d 1364, 1369 (7th Cir. 1997).

"Serious medical needs" include (1) conditions that are life-threatening or that carry risk of permanent serious impairment if left untreated; (2) those in which the deliberately indifferent withholding of medical care results in needless pain and suffering; and (3) conditions that have been "diagnosed by a physician as mandating treatment." *Gutierrez*, 111 F.3d at 1371-73.

A prison official has acted with deliberate indifference when the official “knew of a substantial risk of harm to the inmate and acted or failed to act in disregard of that risk.” *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006) (citing *Walker v. Benjamin*, 293 F.3d 1030, 1037 (7th Cir. 2002)).

Moton alleges that the injuries he suffered in the April 15 attack became infected and were not treated for a month. Also, he alleges the bite he received was not treated, that he was not given a tetanus shot and that he suffers ongoing neck pain. These allegations sufficiently support an inference that Moton had a serious medical need and that defendants Suliene, Bureson and Alsum knew of this need and refused to treat it. Therefore, Moton will be allowed to proceed on his Eighth Amendment deliberate indifference claim against these defendants

### III. CONDUCT REPORT

Moton claims that he was denied his Fourteenth Amendment rights by defendant Radtke when he was unfairly given a conduct report in order to allow CCI to minimize and cover up the stabbing incident and by Alsum when she intentionally declined to note the stabbing incident in plaintiff’s medical progress notes. This allegation is sufficient to support a claim that Motion was deprived oh his liberty without due process if defendants intentionally deep-sixed inconvenient evidence then brought false charges against plaintiff in order to cover up the fact that inmate Upthegrove came into plaintiff’s cell with a shank.

Apart from this, Moton attempts to raise a retaliation claim concerning the conduct report that led to his placement in segregation. Prison officials may not retaliate against a prisoner for exercising a constitutional right. *Pearson v. Welborn*, 471 F.3d 732, 738 (7th Cir.

2006). Moton does not allege that he was retaliated against for exercising a constitutional right. Thus, he cannot proceed on this claim.

#### **IV. OTHER CLAIMS**

Moton contends that his inmate complaint concerning Radtke's false statement on his record was improperly dismissed. He does not allege how this dismissal violated his rights under federal or state law. Because this allegation does not support a claim for relief, he will not be allowed to proceed on any claim concerning it against defendants Mary Leiser, Joanna Lane, Amy Mallard, John Doe and Jane Doe.

Moton also names Detective Anthony Belay as a defendant. Moton's allegation that Belay failed to fully investigate the April 13 incident does not support a claim that Belay violated his constitutional rights. Moton will not be allowed to proceed against him.

#### **V. MOTION FOR APPOINTMENT OF COUNSEL**

With respect to Moton's motion to appoint counsel, litigants in civil cases do not have a constitutional right to a lawyer; federal judges have discretion to determine whether appointment of counsel is appropriate in a particular case. *Pruitt v. Mote*, 503 F.3d 647, 654, 656 (7th Cir. 2007). In determining whether to appoint counsel, the court must find first that Moton 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, Moton 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. Although he has attempted to meet this prerequisite, his 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 it. *Pruitt*, 503 F.3d at 655. It is far too early to make that determination in this case. Accordingly, Moton's motion for appointment of counsel will be denied without prejudice.

### ORDER

IT IS ORDERED that:

- (1) Plaintiff Reginald A. Moton's request to proceed is GRANTED with respect to his failure to protect claims against defendants Gregory Grams and Janel Nickel, his deliberate indifference claims against defendants Dalia Suliene, D. Burreson and Lori Alsum and his due process claims against defendants Alsum and Captain Radtke.
- (2) Plaintiff's request to proceed on his claims against defendants Dr. Curt Schwebke, Mary Leiser, Joanna Lane, Amy Mallard, Sgt. Timm, Officer Grant, Samuel Upthegrove, John Doe and Jane Doe is DENIED.
- (3) Moton's motion for appointment of counsel is DENIED without prejudice.
- (4) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.
- (5) 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.
- (6) Plaintiff 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 his institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

- (7) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

Entered this 15<sup>th</sup> day of March, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER  
Magistrate Judge