IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SPENCER McCLAIN,

Plaintiff,

v.

STATE OF WISCONSIN, CATHY A. JESS, EDWARD F. WALL, LARRY L. JENKINS, MARK HEISE, MICHAEL BAENEN, P. ERICKSON, BUD WALDRON, MICHAEL MOHR, DEIRDRE MORGAN, CAPTAIN BRANDT and GARY H. HAMBLIN,

Defendants.

OPINION AND ORDER

13-cv-755-bbc

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This is a proposed civil action in which plaintiff Spencer McClain alleges that various state prison officials have failed to protect him from other inmates. Plaintiff has filed also motions for preliminary injunctive relief, for leave to take depositions and for appointment of counsel. It has already concluded that plaintiff qualifies financially to proceed in forma pauperis in this case and plaintiff has made the required initial partial payment of his filing fee.

The next step is to screen the complaint 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. §§ 1915. In addressing any pro se litigant's complaint, the court must read the allegations of

the complaint generously. McGowan v. Hulick, 612 F.3d 636, 640 (7th Cir. 2010).

After considering plaintiff's allegations, I will allow him to proceed on failure to protect claims against the prison officials named as defendants in this lawsuit, but deny his motions for preliminary injunctive relief, for leave to take depositions and for appointment of counsel.

Plaintiff alleges the following facts in his complaint.

ALLEGATIONS OF FACT

Plaintiff Spencer McClain is a prisoner housed in the Wisconsin Department of Corrections. In a previous federal criminal case, plaintiff "cooperated with authorities" in eleven felony cases involving 32 defendants, "most of them dangerous gang members."

In February 2011, plaintiff was transferred from federal custody to the Dodge Correctional Institution. Plaintiff informed staff that he had "multiple keep-separates/SPN's" (I understand this term to refer to other inmates from whom plaintiff needed to be kept separate to avoid harm). Only three of his SPNs were approved. Plaintiff refused to be transferred to the dormitory housing unit because he believed at least one of the inmates against whom he testified was housed there. The staff at the Dodge instituion Institution did not approve a separation order relating to this prisoner until he and several Vice Lord gang members attempted to attack plaintiff in the dining hall. Because of these problems, plaintiff was transferred to the Waupun Correctional Institution on June 13, 2011.

On June 14, 2011, plaintiff was attacked by several gang members. Plaintiff "foiled" the attack but was given a conduct report and placed in "punitive segregation."

In July 2011, plaintiff was transferred to the Green Bay Correctional Institution. Staff assured him that none of the "keep separate" inmates were housed with him. Plaintiff again filed requests regarding the 32 inmates he was concerned about. Plaintiff's social worker, defendant Bud Waldron, reviewed plaintiff's requests. Waldron told him that he consulted with the detectives and the United States Attorney and forwarded the relevant information to defendant Captain Brandt and the security director (who I understand to be defendant P. Erickson). Waldron told plaintiff that none of the 32 inmates were housed at the Green Bay prison. However, several weeks later plaintiff started receiving threats from one of these inmates and two of that inmate's gang-member friends.

Plaintiff wrote defendants Waldron, Gary Hamblin (a former Department of Corrections secretary), Edward Walls (the current department secretary), Cathy Jess (an administrator), Mark Heise (the "BOCM director"), Larry Jenkins (an assistant administrator), Michael Baenen (the warden), Captain Brandt and P. Erickson (the security director), but none of them acted.

In July 2012, plaintiff escaped an attempted stabbing. He informed all of the above-mentioned defendants but they refused to act. Plaintiff filed inmate grievances about the threats he faced, but defendant Michael Mohr (an institution complaint examiner) and defendant Deirdre Morgan (a corrections complaint examiner) rejected or dismissed them.

Plaintiff was placed in temporary lockup on August 3, 2012 (I understand plaintiff

to be saying that he was placed there while prison staff investigated further threats made against him). A few weeks later he was told he was being released from segregation. At this time, staff had not questioned "him about anything." Plaintiff refused to go back into general population. Over the next fifteen months, he received multiple conduct reports and punitive segregation time (as I understand it, for refusing to place himself in danger by going into general population or stay in the dining hall when told to do so). Plaintiff asked to be placed in administrative segregation but his requests were denied.

Numerous outside parties, such as an assistant United States attorney, United States marshal and plaintiff's attorneys, contacted prison officials, including defendant Erickson, but they did not solve the security problem. Plaintiff's conduct reports kept him from being transferred to a medium security prison.

OPINION

A. Screening Plaintiff's Claims

At the outset, I note that although plaintiff's entire complaint reads as a civil rights action under 42 U.S.C. § 1983, plaintiff includes a request for habeas corpus relief at the end. In other circumstances it might be appropriate to ask plaintiff to clarify whether he means to brings this case as a civil rights action for money damages and injunctive relief oras a habeas corpus action for quicker release from prison, it seems clear that plaintiff means to bring a civil case. This is particularly so because plaintiff's overriding concern seems to be protection from other inmates, which is a kind of injunctive relief that can be granted in a

civil case. He goes so far as to say that he is invoking the "imminent danger clause," by which I understand him to mean 28 U.S.C. § 1915(g)'s imminent danger exception to the in forma pauperis filing bar for prisoners who have filed three or more frivolous lawsuits. This clause does not apply to plaintiff because he does not have three strikes against him, but his invocation of the rule emphasizes that he believes he is in danger from other inmates. Accordingly, I will treat this case as a civil rights action under § 1983.

I understand plaintiff to be bringing claims against all of the named defendants for failing to protect him from harm at the hands of other inmates despite knowing plaintiff's role as an informant. To state an Eighth Amendment failure to protect claim, a prisoner must allege that (1) he faced a "substantial risk of serious harm" and (2) the prison officials identified acted with "deliberate indifference" to that risk. Farmer v. Brennan, 511 U.S. 825, 834 (1994); Brown v. Budz, 398 F.3d 904, 909 (7th Cir. 2005). "'[O]ne does not have to await the consummation of threatened injury to obtain preventive relief.'" Farmer, 511 U.S. at 845 (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923)).

Plaintiff seems to say that he faced danger at three separate institutions, but the only location at which he alleges that the defendants named in this lawsuit failed to protect him is the Green Bay Correctional Institution. At this point, I conclude that he may proceed against each of the individuals he names as a defendant in this lawsuit because he alleges that he asked for help from each of them yet was repeatedly placed in danger from gang-member inmates who continue to target him. As the case proceeds to summary judgment or trial, plaintiff will have to present proof that each defendant was in position to do something to

help plaintiff but failed to do so through deliberate indifference to the danger.

I will dismiss the state of Wisconsin as a defendant because it is not a "person" who may be sued for constitutional violations under § 1983. Will v. Michigan Department of State Police, 491 U.S. 58, 65-71 (1989).

B. Motion for Preliminary Injunctive Relief

Plaintiff has filed a motion for preliminary injunctive relief in which he asks the court to direct defendants to approve all 32 "keep-separate" requests, dismiss his conduct reports and transfer him to a minimum security institution. However, his motion does not comply with this court's Procedure to be Followed on Motions for Injunctive Relief, a copy of which will be provided to plaintiff with this order. Accordingly, I will deny plaintiff's motion without prejudice to his refiling it in compliance with the court's procedure.

Under the court's procedure, plaintiff will need to submit proposed findings of fact along with evidence supporting those proposed findings. Plaintiff should keep in mind that a party asking for emergency or preliminary injunctive relief is required to show some likelihood of success on the merits on his underlying claim, that he has no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied and that the granting of an injunction is in the public interest. Ezell v. City of Chicago, 651 F.3d 684, 694 (7th Cir. 2011).

C. Motion for Depositions

Plaintiff has filed a motion seeking leave to depose some of the defendants as well as several third parties. I will deny the motion as it is premature—defendants have not yet been served, the court has not held a preliminary pretrial conference and plaintiff has not provided any reason why it might be necessary to entertain such an early discovery motion. At the preliminary pretrial conference, Magistrate Judge Stephen Crocker will provide more information about the various other discovery tools that are available to the parties. This information may persuade plaintiff that he does not need to depose all of these parties, at significant cost. Also, plaintiff asks also for the court to waive the costs of holding and recording the depositions, but I will deny this request because no statutory authority allows courts to waive these costs.

D. Motion for Assistance in Recruiting Counsel

Finally, plaintiff has filed a motion he styles as one for appointment of counsel. Although a court does not have the authority to compel a lawyer to represent a plaintiff in this type of case, it may assist an indigent plaintiff in recruiting a lawyer. 28 U.S.C. § 1915(e)(1). However, a plaintiff must make reasonable efforts to find a lawyer on his own before the court will intervene. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To prove that he has made reasonable efforts to find a lawyer, the plaintiff should give the court rejection letters from at least three lawyers. In this case, plaintiff states that he has written to three lawyers but has not heard back from any of them. He does not

explain how long ago he made these inquiries. It may well be that he has not given these lawyers enough time to write him back.

In any case, even if plaintiff had three rejection letters in hand, it is far too early to tell whether the complexity of this case will outstrip plaintiff's ability to litigate it himself. Accordingly, I will deny the motion without prejudice. Plaintiff may refile his motion at a later date, but he will have to include three rejection letters (or an affidavit explaining when he sent the letters and that he has received no response) and further explanation of why he is unable to litigate the case himself.

ORDER

IT IS ORDERED that

1. Plaintiff Spencer McClain is GRANTED leave to proceed on his Eighth Amendment failure-to-protect claims against defendants Bud Waldron, Gary Hamblin, Edward Walls, Cathy Jess, Mark Heise, Larry Jenkins, Michael Baenen, Captain Brandt, P. Erickson, Michael Mohr and Deirdre Morgan.

2. Defendant State of Wisconsin is DISMISSED from the lawsuit.

3. Plaintiff's motion for preliminary injunctive relief, dkt. #4, is DENIED without prejudice.

4. Plaintiff's motion to take depositions, dkt. #8, is DENIED.

5. Plaintiff's motion for the court's assistance in recruiting counsel, dkt. #6, is DENIED without prejudice.

6. Under an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's second amended complaint and this order are being sent today to the Attorney General for service on the state 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 on behalf of the state defendants.

7. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer or lawyers will be representing defendants, he should serve the lawyers 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.

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. Plaintiff is obligated to pay the balance of his unpaid filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust

fund account until the filing fee has been paid in full.

Entered this 2d day of January, 2014.

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