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

DAVID DEBAUCHE,

Plaintiff,

v.

CORRECTIONAL OFFICER JAMES and JOHN DOES 1-100,

Defendants.

OPINION & ORDER

13-cv-553-wmc

Plaintiff David DeBauche brings this proposed civil action alleging retaliation by defendant Correctional Officer James and various unnamed staff members at Columbia Correctional Institution ("CCI"). DeBauche is eligible to proceed *in forma pauperis* and has made an initial partial payment toward the full filing fee for this lawsuit. *See* 28 U.S.C. § 1915(b)(1). Because DeBauche is incarcerated, the court must also screen his complaint as required by the Prison Litigation Reform Act ("PLRA") to determine whether it: (1) is frivolous or malicious; (2) fails to state a claim on which relief can be granted; or (3) seeks money damages from a defendant who is immune from such relief. Additionally, DeBauche has filed a Supplement to his Complaint (dkt. #8), as well as a Motion for Reconsideration that the court construes as an additional supplement (dkt. #13). For reasons set forth below, the court will allow DeBauche to proceed on claims that James and Sgt. John Doe retaliated against him in violation of the First Amendment.

ALLEGATIONS OF FACT

In addressing a *pro se* litigant's pleadings, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For the purposes of this order, the court accepts the plaintiff's well-pled allegations as true and assumes the following facts.

Plaintiff David DeBauche is currently incarcerated at CCI and was there at all times relevant to this complaint. DeBauche has a long history of heart problems, including chest pains. Defendant Correctional Officer James is a correctional officer at CCI; John Does 1 through 100 are prison staff members at CCI.

On August 21, 2012, while DeBauche was sitting in his cell drafting legal documents for a harassment lawsuit he brought against James and the John Does, the defendants appeared and announced that they were removing him from his cell so that they could search it. DeBauche was forced to leave his legal papers on his desk, and when the defendants ordered him to "cuff up" to be removed for a cell search, he complied.

While DeBauche was being escorted to the holding area, James searched DeBauche's cell and saw a draft restraining order against him that DeBauche had been working on. Allegedly in response, James and the John Does ransacked DeBauche's cell, confiscating and destroying a large amount of his property. The seized property included a wide variety of books, food items and personal property, as well as envelopes, mailing labels, files to various civil cases and some documents related to his criminal case.

Following the filing of this lawsuit, DeBauche also alleges by supplemental filing that he has been repeatedly given cell mates who are listed as "Cell with Care": (1) Tony (last name unknown); (2) Nick Aiken; (3) Francisco Torres; (4) Dale (last name unknown); and (5) Lance Pikens. Aiken and Torres are also affiliated with another inmate who has sworn

to "get him." When celled with Dale, DeBauche lasted only thirty minutes before he had to be removed. Apparently, DeBauche was removed after he begged not to be celled with him for his own safety.

Pikens and DeBauche also began having problems almost immediately. Pikens did not allow DeBauche to leave his cot unless he was going to leave the cell or use the toilet, nor did he allow him to turn on a light or use the desk. DeBauche asked to be moved and tried to cell up with another inmate. He was told that the move was approved on September 20, 2013, but after multiple delays, he found out he was no longer going to be moved, allegedly due to the decision of the sergeant in Unit 9 on first shift ("Unit 9 Sergeant").

On September 23, 2013, two inmates from another cell were sent to segregation, but the Unit 9 Sergeant still refused to move DeBauche away from Pikens. The next day, DeBauche and Pikens had a verbal argument over Pikens' then refusal to allow DeBauche into his cot, apparently while Pikens was using it to hang wires in the cell. Pikens then allegedly jumped down from DeBauche's cot and threw his bedding on the floor. When DeBauche picked the bedding up, Pikens allegedly ripped it from his arms and threw it on the floor again.

Due to their argument, Pikens and DeBauche were both sent to segregation and issued conduct reports for fighting and disruptive conduct. DeBauche alleges that the Unit 9 Sergeant intentionally refused to move DeBauche away from Pikens in hopes of causing him bodily harm and to leave him under the control of all of the officers involved in DeBauche's lawsuit. DeBauche also alleges that he is innocent of fighting and disruptive conduct.

After being placed in segregation, DeBauche requested access to his inmate complaints, his medical files, his lawsuit file and other legal documents, a dictionary, a deck of cards, a magazine and a comb. He received none of the items requested. DeBauche also alleges his law library time is limited to "1 hour [each week] if they feel like it," and that paperwork disappears when segregation staff search his cell. Additionally, segregation staff are blocking his access to case law by charging him fifteen cents per page when other inmates receive case law for free.

Finally, in his so-called motion for reconsideration, DeBauche alleges that his right to due process is being violated by prison staff member Mary Leisure's repeated refusal to respond to his inmate complaints. He also alleges that: staff intentionally went through his property and destroyed his legal files relating to the present case; he is being denied paper with which to write to the court; the retaliation against him prevented him from litigating his cases; and he will be unable to replace the personal photographs and artwork that defendants took and destroyed. As a result of this retaliation, DeBauche alleges that he suffers from the fear of further retaliation.

As a remedy, DeBauche requests injunctive relief preventing further retaliation, moving him out of segregation and granting him access to all of his property. He also requests compensatory damages of $100,000 and punitive damages of $100,000 from each defendant. Finally, he asks the court to order the Portage Police or the Columbia County Sheriff's Department to investigate his alleged "fight" with Pikens; order that DeBauche be housed only in single cells for his protection; and order that his punishment for fighting be served in a single cell with library and personal property access.

OPINION

DeBauche's pleadings suggest a number of possible claims under 42 U.S.C. § 1983. The court considers each of these possible claims in turn.

I. First Amendment Retaliation: Destruction of Property

DeBauche first alleges that James and various other unnamed staff members retaliated against him for exercising his right to file a lawsuit. A First Amendment retaliation claim requires a prisoner to show that: (1) he engaged in protected First Amendment activity; (2) he suffered a deprivation that would likely deter First Amendment activity in the future; and (3) the First Amendment activity was at least a motivating factor in defendants' decision to take the retaliatory action. *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009).

Here, DeBauche has stated a claim for retaliation against James that survives screening. First, the court notes that "[f]iling a lawsuit challenging a condition of confinement is a protected activity." *Johnson v. Kingston*, 292 F. Supp. 2d 1146, 1152 (W.D. Wis. 2003). Second, DeBauche alleges that, as a result of his lawsuit, James took and destroyed much of his personal property, including legal materials and irreplaceable artwork and photographs. Third, one might reasonably infer that such a deprivation would deter First Amendment activity in the future. This is enough, at screening, to allow DeBauche to proceed on a retaliation claim against defendant James.

Even as to James, DeBauche should be aware, however, that he will have a difficult burden in proving his First Amendment retaliation claim going forward. A plaintiff may not prove his claim with the allegations in his complaint, *Sparing v. Village of Olympia Fields*, 266 F.3d 684, 692 (7th Cir. 2001), or his personal beliefs, *Fane v. Locke Reynolds, LLP*, 480 F.3d

534, 539 (7th Cir. 2007). Rather, DeBauche will need to come forward with admissible evidence indicating some causal connection between his First Amendment activity and the allegedly retaliatory destruction of his property. The timing between the two events that DeBauche alleges will likely not be enough, since even when the exercise of the right and the adverse action occur close in time, it is rarely enough to prove an unlawful motive without additional evidence. *Sauzek v.Exxon Coal USA, Inc.,* 202 F.3d 913, 918 (7th Cir. 2000) ("The mere fact that one event preceded another does nothing to prove that the first event caused the second."). Without admissible evidence of unlawful motive, DeBauche will be unable to prevail on his First Amendment claim.

DeBauche also asks to proceed against one hundred unnamed John Does on these same allegations. The problem with this maneuver is that, to state a claim for relief under 42 U.S.C. § 1983, a defendant must be "personally involved" in the alleged constitutional violation. *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995). If a state official does not directly deprive an individual of a constitutional right, then to find personal involvement, the official in question must at least (1) have known about the unconstitutional conduct, and (2) facilitated it, approved it, condoned it or turned a blind eye to it. *Id.* Here, DeBauche has not plausibly alleged that any particular "John Doe" was personally involved in the retaliatory destruction of his property, let alone *one hundred* different John Does. Nor does he allege any facts suggesting that the John Does in question knew about the retaliatory conduct and approved or condoned it. Accordingly, the court will not allow him to proceed against any of the John Doe defendants on this claim.

II. First Amendment Retaliation: Cellmates

In DeBauche's supplement to his complaint, he claims to have now suffered from additional retaliatory actions as a result of filing this lawsuit against James. Specifically, he alleges that defendants retaliated by intentionally assigning him cellmates who are known to be dangerous, in the hope that they would cause him bodily harm. As above, his filing of the lawsuit is a protected First Amendment activity, and the court will assume for screening purposes that being deliberately placed in harm's way would be likely to deter First Amendment activity in the future.

For the most part, however, DeBauche fails to name any particular individuals who were involved in this alleged retaliatory conduct. The exception is the John Doe Unit 9 Sergeant, who DeBauche specifically alleges refused to move him to a different cell even after his fifth cellmate, Pikens, began to threaten him. At least at the screening stage, these facts are enough for the court to infer this particular John Doe's personal involvement in the alleged constitutional violation. Accordingly, DeBauche will be allowed to proceed against John Doe Unit 9 Sergeant on a First Amendment retaliation claim.

The remainder of the alleged retaliatory actions against DeBauche are not tied closely enough to any discrete individuals to be plausible. For example, DeBauche alleges only that "they" are blocking his access to case law, and "they" are requiring him to pay for case law when everyone else receives it for free. Without some allegations making plausible, specific claims of retaliatory actions by individually identified defendants, DeBauche will not be allowed to proceed.

III. Access to Courts

DeBauche also alleges more generally that he is being prevented from litigating his lawsuits, suggesting he may have intended to bring a claim for denial of access to the courts. In *Bounds v. Smith*, 430 U.S. 817 (1977), the Supreme Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828. To state a claim for denial of access to the courts, a plaintiff must allege facts suggesting that the actions of prison officials have caused him an "actual injury" in the form of prejudice to an underlying cause of action. *Eichwedel v. Chandler*, 696 F.3d 660, 673 (7th Cir. 2012) ("[A]n inmate may prevail on a right-of-access claim only if the official actions at issue hindered his efforts to pursue a legal claim." (internal citation and quotation marks omitted)). "*Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims," however. *Lewis v. Casey*, 518 U.S. 343, 355 (1996). Rather, "[t]he tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." *Id.* Therefore, a "prisoner's complaint [must] spell out, in minimal detail, the connection between the alleged denial of access to legal materials and an inability to pursue a legitimate challenge to a conviction, sentence, or prison conditions." *Pratt v. Tarr*, 464 F.3d 730, 732 (7th Cir. 2006) (quoting *Marshall v. Knight*, 445 F.3d 965, 968 (7th Cir. 2006)).

For the most part, DeBauche has not met this standard. In his original complaint, he alleges that case files from various cases were taken from him, but he does not allege or even

suggest that these cases involved any legitimate challenges to his conviction, sentence or prison conditions. (*See* Compl. (dkt. #1) 2.) He has, therefore, failed to provide the "minimal detail" required by *Pratt*.

Assuming that DeBauche wishes to allege he has been prevented from litigating the restraining order against James (though it is not clear from his complaint whether *those* materials were taken from his cell, or whether they were merely spotted on his desk), he still has not demonstrated that he has been prevented from pursuing a *legitimate* challenge to prison conditions. In fact, he has provided no detail as to the grounds for that proceeding at all. Accordingly, the court also cannot say that he has plausibly alleged an inability to pursue a *legitimate* challenge, as *Pratt* requires.

In DeBauche's supplemental complaint, he has alleged that he is being denied case law, law library time and other legal materials. (*See* dkt. #8.) However, this claim suffers from the same deficiency as his second retaliation claim: DeBauche does not identify any specific individual involved in this alleged deprivation. Furthermore, DeBauche does not state *how* these alleged deprivations are preventing him from litigating a legitimate challenge to prison conditions.[1] "*Bounds* did not create an abstract, freestanding right to a law library or legal assistance." *Lewis*, 518 U.S. at 350. As a result, "an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense." *Id.* at 351. Without spelling out in at least minimal detail the required connection between the denial of case law and library time, and

[1] For example, DeBauche again fails to make clear which of his many lawsuits he is being prevented from litigating.

his ability to litigate a legitimate lawsuit, these general allegations do not rise to the level required to plead denial of access to the courts.

Finally, in DeBauche's motion for reconsideration, he alleges that staff members went through his property on September 24 and November 8, 2013, and maliciously removed and destroyed his legal files relating to this case. He also alleges that they are denying him paper, which, if true, could state a claim for denial of access to the courts. *See Bounds*, 430 U.S. at 824 ("It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents[.]"). However, DeBauche *still* neither names particular staff members, nor provides any information by which they could be identified, such as a physical description, rank, and shift. It is not even clear from his pleadings where he was celled when these alleged deprivations occurred. The court is unwilling to allow DeBauche to proceed against an indiscrete, unidentified mass of John Doe defendants uncertain not only in name but in number. Accordingly, unless DeBauche is able to amend his complaint timely with information naming or identifying some particular defendant(s) who were personally involved in this deprivation, he will not be able to proceed with this claim now.[2]

IV. Deprivation of Property

DeBauche also alleges that much of his personal property was taken without any process, which suggests he may also intend to bring a due process claim against James. "Generally, the due process clause of the fourteenth amendment requires that a hearing be

[2] Given that these allegations might state a claim for denial of access to the courts with respect to unrelated litigation, and even if not, given the real possibility that these allegations may not be sufficiently related to the retaliation, allowing DeBauche to go forward here without *any* information on the defendant or defendants being sued would likely make his pursuing an access to court claim in this case messy, if not unmanageable.

held *before* the state deprives a person of liberty or property." *Kirby v. O'Keefe*, No. 91-C-119, 1991 WL 476393, at *3 (E.D. Wis. Oct. 24, 1991) (citing *Zinermon v. Burch*, 494 U.S. 113, 127 (1990)). Where the deprivation is the result of a "random and unauthorized act" by a state employee, however, a plaintiff's right to procedural due process is not violated provided the state makes available adequate post-deprivation remedies. *See Hudson v. Palmer,* 468 U.S. 517, 533 (1984); *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). Here, James' alleged actions were not taken pursuant to any official policy, making them unpredictable and thus random. Indeed, James is alleged to have acted without justification and outside of any clear policy, both in conducting the search and taking property.

Since "Wisconsin provides post deprivation procedures for challenging the alleged wrongful taking of property," *Jackson v. Raemisch*, No. 10-cv-212-slc, 2010 WL 3062971, at *8 (W.D. Wis. Jul. 30, 2010) (citing Wis. Stat. ch. 893), DeBauche may not proceed on this claim either.

V. Due Process

Finally, DeBauche alleges that staff member Mary Leisure is ignoring his grievances in violation of due process. There is no substantive due process right to an inmate grievance procedure. *Grieveson v. Anderson*, 538 F.3d 763, 772 (7th Cir. 2008); *Antonelli v. Sheahan*, 81 F.3d 1422, 1430 (7th Cir. 1996). Therefore, he may not proceed on any due process claim against Leisure.

ORDER

IT IS ORDERED that:

1. Plaintiff David DeBauche is GRANTED leave to proceed on his First Amendment retaliation claims against defendant James and defendant Sgt. John Doe. The clerk shall amend the caption in this case accordingly.

2. Plaintiff is DENIED leave to proceed on all other claims and against all other defendants.

3. The clerk's office will prepare summons and the U.S. Marshal Service shall effect service, though it shall effect service upon nominal defendant CCI Warden solely to determine the identity of the John Doe defendant, consistent with this opinion. Summons will not issue against Sgt. John Doe until plaintiff discovers the real name of that party and amends his complaint accordingly.

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 defendant's 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's motion for reconsideration (dkt. #13) is DENIED AS MOOT.

Entered this 24th day of September, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge