

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

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THOMAS D. HARRIS,

Plaintiff,

OPINION AND ORDER

v.

15-cv-397-wmc

C.O. SCHALLER, CAPTAIN HEITZKEY,  
CAPTAIN STEVENS, C.O. VANLOO,  
C.O. C. FRAPPIER, NURSE S. SEQUIN,  
NURSE M. VANTERKINTER, WARDEN  
WILLIAM POLLARD, MICHAEL DELVAUX,  
WILLIAM SWIEKATOWSKI, C.O. KAZIK,  
C.O. SCHILLER, and ALAN DEGROOT,

Defendants.

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In this proposed civil action, plaintiff Thomas D. Harris alleges that various correctional officers, nurses and other employees of Green Bay Correctional Institution (“GBCI”) violated his rights under the First, Eighth and Fourteenth Amendments of the United States Constitution by (1) using excessive force against him, (2) acting with deliberate indifference to his medical needs, (3) retaliating against him after he lodged complaints and a lawsuit about the use of excessive force, and (4) denying him access to courts to challenge his sentence by destroying his legal materials.

Harris requested leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915. From the financial affidavit Harris has provided, the court concluded that he was unable to prepay the full fee for filing this lawsuit, and he has since made the initial partial payment of \$178.59 required of him under § 1915(b)(1). Because Harris was incarcerated at the time he filed the complaint, however, this court must also screen the merits of his complaint and dismiss any aspect of the complaint that is: (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a

defendant who is immune from such relief. 28 U.S.C. § 1915A. For the reasons set forth below, the court finds Harris meets this step as to certain defendants and claims, and he will, therefore, be allowed to proceed and the state required to respond except as limited by Federal Rule of Civil Procedure 20.

## ALLEGATIONS OF FACT<sup>1</sup>

### A. The Parties

Plaintiff Thomas D. Harris is an inmate housed at the Green Bay Correctional Institution (“GBCI”). All of the defendants are (or were during all times relevant to plaintiff’s complaint) employees of the Wisconsin Department of Corrections working at GBCI. Defendants Schaller, VanLoo, Frappier, Kazik and Schiller are (or were) correctional officers; defendants Heitzkey and Stevens are (or were) captains; defendants Delvaux and Swiekatowski are (or were) lieutenants; defendant Sequin and Vanterkinter are (or were) nurses; and defendant Degroot is (or was) the inmate complaint examiner. Defendant Pollard was the warden of GBCI, but is now the warden of Waupun Correctional Institution (or, at least, held that position at the time Harris filed this lawsuit).

### B. Assault on February 20, 2007

On February 20, 2006, Harris was housed in the transition unit of GBCI. Captain Heitzkey came to the unit to investigate loud banging and kicking of the doors. Harris

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<sup>1</sup> While portions of Harris’s complaint appear to be somewhat inconsistent, or at least incomplete, the court construes his *pro se* complaint generously as follows, given this early phase of the lawsuit. See *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

complained to Heitzkey that the banging and yelling was constant. During that exchange, Heitzkey allegedly said, “Okay, that’s it.” (Compl. (dkt. #1) ¶ 5.) He then placed a bar of soap on Harris’s cell window, and announced that “if the soap falls[,] you[‘re] going to the hill (segregation).” (*Id.*) Heitzkey then banged on Harris’s door, but the soap did not fall.

About five minutes later, C.O. Schaller also allegedly placed soap on Harris’s and other inmates’ cell doors. After Harris informed Schaller that Heitzkey’s experiment did not work, Schaller stepped back from Harris’s door, which Harris interpreted as giving the okay to show Schaller that the banging would not dislodge the soap. Harris then banged on the door, but the soap did not fall. Schaller responded by telling Harris that he was going to segregation. This prompted Harris to request a “white shirt” (a captain or lieutenant), assert that Schaller was lying, and indicate that he was going to file a complaint. Schaller then stated that he was joking at first, but now he *was* sending Harris to segregation for threatening to file a complaint.

At that time, Captain Heitzkey returned to the unit. Harris relayed the story to him, including Schaller’s invitation to bang on the door to see if the soap would fall. Schaller denied this, reporting instead that Harris was pounding on his door, becoming increasingly disruptive, and screaming, “I didn’t do anything you bitch ass[;] call the captain.” (*Id.* at ¶ 13.) Heitzkey then ordered Harris to place his hands on the trap door of his cell to be placed in restraints. While Harris did as required, he also continued to explain to Heitzkey that Schaller was retaliating because Harris had said he was going to

file a complaint. Heitzkey then left to assemble an extraction team that consisted of Captain Stevens and Officers Rhoades, VanLoo and Frappier.

When the extraction team approached Harris's cell, Harris again complied as directed by placing his hands on the trap. Stevens placed the handcuffs on Harris's wrist; the handcuffs were in turn attached to a tether outside of Harris's cell door. Upon Stevens' order, Harris pulled his hands in, stating "this is bullshit, I didn't do anything." (*Id.* at ¶ 21.) Heitzkey then stated, "that's it," while pulling Harris's cell door open in a forceful manner and causing Harris to fall out into the hall, face down, hanging from the handcuffs, which were in turn attached to the tether. In response, Harris told the officers assembled that he was going to sue them for what they were doing.

Frappier then twisted Harris's legs and feet, "causing a severe sprain or minor fracture to Harris's right knee and left ankle." (*Id.* at ¶ 25.) Two officers proceeded to place their knees on his lower back, causing severe pain, and Stevens hit Harris in the mouth, drawing blood. Stevens also put his fingers in Harris's mouth, choking him. Stevens then put his fingers in Harris's nostrils, and pulled back on his head, banging Harris's head on the floor and pressing his hands and weight down on his head. VanLoo pressed his boots against Harris's mouth, cutting Harris's face. Finally, during this same timeframe, Heitzkey shot Harris with a Taser "repeatedly." (*Id.* at ¶ 30.)

Harris claims further that he could not walk on his own, due to a broken leg, and was actually carried to HSU, where nurses had to assist Harris in breathing. Harris also alleges being so distraught from the attack that he threatened to commit suicide. As a

result, he remained in four-point restraints until the following day, February 21, and he was then placed on clinical observation until the 26th.

### **C. Denial and Delay of Medical Treatment**

While on observation, Harris told Officer Schaller that he wanted to see a doctor because of his injuries to his legs, thumbs, neck, lower back, mouth and right side of his face. Schaller allegedly responded that Harris should “lick his wounds, he couldn’t see the doctor.” (*Id.* at ¶ 35.) Harris also told nurses Vanterkinter and Sequin about his injuries and pain, but the nurses declined to schedule an appointment with the doctor. Harris further alleges that he repeatedly complained to all three of these defendants about his injuries from February 20th to the 25th. On March 7, Harris filed a complaint about his lack of medical treatment, and was finally seen by a nurse on March 15. After continuing to experience pain from his injuries, Harris was seen again by a nurse on April 10, but he was not given medicine to reduce his pain until May 23.

### **D. Retaliation**

Harris also filed a complaint on March 7, stating that despite being in compliance with orders and in restraints, he was attacked by Captains Heitzkey and Stevens and Officers Frappier and VanLoo. On April 24, Officer Gerber, who is not named as a defendant, informed Harris of the investigation procedure for officer misconduct. He also allegedly told Harris that he could either drop the complaint or it would be forwarded to Warden Pollard for his review. Harris opted for the latter. On May 2, Harris received a memo from Pollard stating that Harris was being written up in a conduct report due to the

allegations in his complaint, and that “Harris is to cease his allegations including in the inmate Complaint (IC) process.” (*Id.* at ¶ 48.) On May 14, Harris received a formal conduct report from Delvaux for violation of DOC Code 303.271, lying about staff. At his disciplinary hearing, Harris offered various defenses. Lieutenant Swiekatowski found Harris guilty and ordered him to serve 300 days in segregation. Harris appealed, but Warden Pollard affirmed the decision.<sup>2</sup>

On June 1, 2013, Harris filed a lawsuit based on the February 2007 attack. *See Harris v. Schaller*, No. 13-cv-408-wmc (W.D. Wis. June 11, 2013). On June 18, Harris was placed on temporary lockup. Officers Kazik and Schiller (a different correctional officer, *not* Schaller) packed and transferred some of Harris’s property to his new cell, but failed to provide him with his legal materials. On August 5, 2013, Harris was given the rest of his property, but none of his legal materials were present, including materials concerning his newly-filed § 1983 lawsuit, as well as his criminal case. Schiller told Harris that he would look for his legal materials, but that he should sign the DOC-236 property form to receive the rest of Harris’s property.

On August 6, 2013, Harris filed another inmate complaint regarding the loss of his legal materials. On September 10, the ICE recommended dismissal, in part because Harris had signed the DOC-236 form on which Schiller had noted the return of legal materials. Plaintiff appealed that decision, but the dismissal was affirmed. Harris complains that he

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<sup>2</sup> Harris also contends that the February 20th assault itself was in retaliation for his threatening to file a complaint against Officer Schaller.

did not receive letters from this court informing him that his civil action would be dismissed if he did not pay the filing fee until well after the time period allowed to pay the fee.<sup>3</sup>

Harris complains of other instances of retaliation. On September 16, 2013, Kazik and Harris' cellmate were arguing. During that argument, Kazik told Harris's cellmate that "he (Kazik) could make things hard for him by coming in his cell and take his property and write him a ticket," and in response to Harris's cellmate's statement that he would sue him, Kazik responded, "Mr. Harris can tell you I'll make you regret filing suits," and then said to Harris, "you need to let him know what happened to your legal property and lawsuit." (*Id.* at ¶¶ 76-77.) On September 21, Harris approached Schiller asking him again about his legal material, Officer Schiller responded, "if you ask me about your legal property again, I'll write your ass a ticket." (*Id.* at ¶ 79.) As he walked away, he said, "those are the consequences of filing law suits and pissing us off." (*Id.* at ¶ 80.)

On October 22, Harris wrote to Cathy Jess, the DOC Administrator of the Division of Adult Institutions, informing her that his legal materials had been destroyed. On November 1, Harris received a memo from Warden Baenen advising that (1) Jess had forwarded his letter to him and (2) Schiller told him that he searched for Harris's legal materials, but could not find them. Harris continued to pursue his legal materials and remedies for the loss of his legal property in 2014 and 2015, including several exchanges

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<sup>3</sup> On July 30, 2013, Harris's prior lawsuit, No. 13-cv-808, was dismissed without prejudice pursuant to Fed. R. Civ. P. 41(a) due to Harris failing to make initial partial filing fee. *Harris v. Schaller*, No. 13-cv-808 (W.D. Wis. July 30, 2013) (dkt. #7).

with ICE Degroot, who was tasked with working with Harris to identify and replace legal materials, but ultimately failed to do so.

## OPINION

From his complaint, plaintiff pursues four causes of action: (1) an Eighth Amendment claim based on the February 20th assault; (2) an Eighth Amendment claims based on the denial and delay of medical treatment following that assault; (3) a First Amendment retaliation claim based on both his threat to file and his filing of an inmate complaint, as well as his filing of a § 1983 lawsuit in this court, and (4) a denial of access to courts, which appears related to his First Amendment retaliation claim. The court addresses each in turn below.

### **I. Eighth Amendment Excessive Force Claim**

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). Because prison officials must sometimes use force to maintain order, the central inquiry for a court faced with an excessive force claim is whether the force “was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992). To determine whether force was used appropriately, a court considers factual allegations revealing the safety threat perceived by the officers, the need for the application of force, the proportionate amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity



of the force. *Whitley v. Albers*, 475 U.S. 312, 321 (1986); *Outlaw v. Newkirk*, 259 F.3d 833, 837 (7th Cir. 2001).

Here, Harris alleges that the use of force by defendants Heitzkey, Stevens, Frappier, VanLoo and Schiller on February 20 was not a good-faith effort to maintain discipline, but rather applied maliciously to cause Harris harm. At this early stage of the proceedings, Harris's allegations are sufficient to state a claim of excessive force under the Eighth Amendment against these five defendants. Harris should be aware, however, that to be successful on this claim he will have to introduce evidence proving that defendants used force maliciously and sadistically to cause him harm. *See Hudson*, 503 U.S. at 6-7.

## **II. Eighth Amendment Deliberate Indifference to Medical Needs**

Next, Harris asserts a claim for deliberate indifference to his medical needs in the days and weeks following the February 20th attack. The Eighth Amendment also 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). Here, Harris claims that defendants Schaller, Vanterkinter and Sequin's refusal to treat his pain and injuries caused by the February 20th attack amounted to deliberate indifference.

"Serious medical needs" include (1) conditions that are life-threatening or that carry risk of permanent serious impairment if left untreated, (2) withholding of medical care that results in needless pain and suffering, or (3) conditions that have been "diagnosed by a

physician as mandating treatment.” *Gutierrez*, 111 F.3d at 1371-73. A prison official acts 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)).

The court will allow Harris to proceed on his Eighth Amendment claim against the three defendants identified above, having sufficiently alleged: that he was experiencing severe pain as a result of the February 20th injuries to his legs, back, neck and face; that he informed all three defendants of his need for medical treatment; that he did not receive any medical treatment for about three weeks; and that he did not receive any medication to address his pain for over two months. While these allegations are enough to pass muster under the court’s lower standard for screening, Harris will have to prove not just that he had these serious medical needs, but defendants’ actual, deliberate indifference to these alleged needs, since inadvertent error, negligence or gross negligence are insufficient grounds for invoking the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996). In particular, Harris will carry the burden to prove: (1) his medical conditions constituted serious medical needs, which may well require expert testimony rebutting medical evidence to the contrary; and (2) perhaps even more daunting, that the defendants knew his condition was serious and deliberately ignored his condition and related pain.

### **III. Retaliation**

Harris also alleges First Amendment retaliation claims against a number of defendants based on his engaging in three protected actions by threatening to file a complaint, filing an inmate complaint, and filing a § 1983 lawsuit. “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). To state a claim for retaliation under the First Amendment, Harris must allege that: (1) he was engaged in a constitutionally protected activity; (2) he suffered a deprivation that would likely deter a person from engaging in the protected activity in the future; and (3) the protected activity was a motivating factor in defendants’ decision to take retaliatory action. *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009) (citing *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008)).

Here, Harris alleges that defendants Heitzkey, Stevens, Frappier, VanLoo and Schaller attacked him on February 20 based on his statement that he was going to file a complaint against Officer Schaller. Relatedly, Harris alleges that defendants Heitzkey, Stevens, Frappier, Rhoades, Schaller, Delvaux, Swiekatowski, and Pollard all retaliated against him for filing an inmate complaint about the February 20th attack by subjecting him to a conduct report and disciplinary action.

A prisoner’s right to use available grievance procedures has been recognized as a constitutionally protected activity. *Hoskins v. Leneer*, 395 F.3d 372, 375 (7th Cir. 2005). Harris’s February 20th verbal complaint to Schaller could also constitute protected speech if made “in a manner consistent with legitimate penological interests.” *Watkins v. Kasper*, 599 F.3d 791, 794-95 (7th Cir. 2010) (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987) (prison regulation restricting speech is valid if “reasonably related to legitimate penological interests”)). Moreover, the alleged February 20th assault and being subjected to disciplinary proceedings are certainly enough for a reasonable person to be deterred from

engaging in the same protected speech going forward. Finally, Harris adequately alleges that his complaint to Schiller motivated defendants' attack on February 20th, as well as the subsequent inmate complaint about the attack and disciplinary actions.

Harris separately alleges that defendants Schiller and Kazik also retaliated against him by losing or destroying his legal materials in response to his filing of a § 1983 lawsuit in this court, which is also a well-established, protected activity. *See Carter v. Radtke*, No. 10-cv-510-wmc, 2014 WL 5494679 (W.D. Wis. Oct. 30, 2014) (citing *Bridges*, 557 F.3d at 551-52) (filing complaint over prison policies protected activity). So, too, the loss of legal materials necessary to press both his civil claim and appeal his criminal conviction would likely deter a person from filing such lawsuits in the future, or at least a reasonable jury could so find. Finally, Harris has sufficiently alleged that both Schiller and Kazik were motivated by Harris's filing of the lawsuit in losing or destroying his legal materials based largely on their own alleged statements.

Accordingly, the court will grant Harris leave to proceed on his First Amendment retaliation claims against defendants Heitzkey, Stevens, Frappier, VanLoo, Schaller, Rhoades, Delvaux, Swiekatowski, Pollard, Kazik and Schiller as described above.

#### **IV. Denial of Access to Courts**

This leaves Harris's claim against defendants Schiller, Kazik and Degroot for violating his right to access the courts. A prisoner's right to access the courts is limited to the ability to file claims challenging a sentence or conditions of confinement. *See Lewis v. Casey*, 518 U.S. 343 (1996); *Bounds v. Smith*, 430 U.S. 817 (1977). Accordingly, any claim would be limited to Harris's challenge to his criminal conviction or sentence.

Harris alleges that defendants’ actions “frustrated and impeded plaintiff’s ability to file a sentence modification based on inaccurate information in [the] presentence report in plaintiff’s criminal appeal.” (Compl. (dkt. #1) p.17.) These allegations are also sufficient to tie his allegation of denial of access to courts to his criminal case because Harris alleges that the lost or destroyed legal materials included documents relating to his criminal conviction. Moreover, the allegation satisfies, albeit barely, the actual injury requirement. *See Marshall v. Knight*, 445 F.3d 965, 968 (7th Cir. 2006) (explaining that an access-to-courts claim must “spell out . . . [a] 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”). However, Harris will be denied leave to pursue a claim based on his earlier civil rights lawsuit filed in this court, since that claim is best addressed under the First Amendment retaliation claim.

Consistent with this opinion, therefore, plaintiff will be allowed to proceed against the following defendants as to the following causes of action:

<b>Claim</b>	<b>Defendants</b>
Excessive force in violation of the Eighth Amendment	Heitzkey, Stevens, Frappier, Van Look and Schiller
Deliberate indifference to serious medical needs under the Eighth Amendment	Schaller, Vanterkinter and Sequin
First Amendment retaliation	Heitzkey, Stevens, Frappier, VanLoo, Schaller, Rhoades, Delvaux, Swiekatowski, Pollard, Kazik and Schiller
Denial of access to courts	Schiller, Kazik and Degroot

ORDER

IT IS ORDERED that:

- 1) Plaintiff Thomas D. Harris's request to proceed on the claims listed in the table above is GRANTED.
- 2) 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.
- 3) 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.
- 4) 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 1st day of August, 2017.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge