

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

---

NATIVIDAD SILVA,

Plaintiff,

v.

L.C. WARD, MS. BAKER and COUNSELOR JAMES,

Defendants.

---

OPINION AND ORDER

16-cv-185-wmc

Plaintiff Natividad Silva, now a federal inmate incarcerated by the Bureau of Prisons at the Federal Medical Center in Rochester, Minnesota, filed this proposed civil action under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1974). Silva alleges that while incarcerated at the Federal Correctional Institution in Oxford, Wisconsin, he was transferred because of his race to a filthy, unsanitary and smelly unit. On June 7, 2016, the court denied Silva leave to proceed *in forma pauperis* because he had incurred “three strikes” under 28 U.S.C. § 1915(g), and his current complaint did not allege that he was in imminent danger of serious physical injury. On April 12, 2017, Silva filed a motion for reconsideration (dkt. #11), but then paid the filing fee on April 24, 2017. He has since filed a motion to supplement and a proposed supplemental complaint. (Dkt. #15.) The court will deny the motion for reconsideration as moot, but grant the motion to supplement. Taking Silva’s supplemental complaint under advisement for screening under 28 U.S.C. § 1915A, the court will also allow Silva to proceed on his conditions of confinement, equal protection and retaliation claims.

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

At all times relevant to his complaint, Silva was incarcerated at the Federal Correctional Institution in Oxford, Wisconsin, where defendant L.C. Ward was the warden, Ms. Braker was a unit manager, and James was a counselor. During early 2016, inmates at FCI-Oxford were informed that the institution was temporarily closing the Sauk Unit, where Silva was then housed, to save money.

In February 2016, Silva asked Counselor James if he could be moved to one of the “better” housing units, because Silva had been bothered by undisciplined inmates and excessive noise. James told Silva that he would speak to Unit Manager Braker. Silva then emailed an electronic request to Braker to be considered for “better” housing; he also specifically requested that he *not* be placed in the Waushara housing unit, which he considered to be a “disruptive unit and excessively unsanitary.” In contrast, according to Silva, the Waupaca housing unit is one of the nicer units at FCI-Oxford, because it is quiet and clean, had larger cells, and generally houses inmates with long sentences.

On February 29, 2016, Braker asked the inmates already housed on the Waupaca unit to review requests from inmates who wanted to be transferred there. Despite the inmates in the Waupaca unit allegedly identifying Silva as an inmate who would be compatible on the unit, Braker denied Silva’s request to be moved there, and instead he allowed three white inmates with unfavorable disciplinary histories to move to the unit instead. Silva is Hispanic.

---

<sup>1</sup> In addressing any pro se litigant’s complaint, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court assumes the facts above based on the allegations in Silva’s complaint, drawing all reasonable inferences in his favor.

Worse, on March 2, 2016, Silva was ordered to move to the Waushara housing unit, which he not only expressed wanting to avoid, but which, according to Silva, is a rundown unit where many inmates of Hispanic origin are housed. When Silva arrived, he found the unit and his cell were filthy and smelly, trash overflowing, mold on the walls and shower curtains, grease and old food in the sinks, chewing tobacco on the ceiling and dirt everywhere. Silva was also placed with a cellmate who not only was a gang member, but did not shower or wash his clothes or bedding.

When Silva and his cellmate approached Counselor James about moving, he rejected their request. Silva then filed a grievance about his cell, which James also rejected, stating that Silva could help “straighten out” his cellmate. James further denied Silva’s request to have his cell cleaned or for cleaning materials. Silva next appealed to Unit Manager Braker and Warden Ward, but they affirmed denial of his grievance. Silva also requested a TV for the Waushara unit, as most of the other units had at least two TVs, while the Waushara unit has a single TV that was allegedly old and burning out. James denied that request as well.

## OPINION

### **I. Conditions of Confinement**

Prison officials may violate the Eighth Amendment if they knowingly deprive a prisoner of the minimal civilized measure of life's necessities or subject a prisoner to a substantial risk of serious harm. *Gillis v. Litscher*, 468 F.3d 488, 491 (7th Cir. 2006). Here, Silva claims that he was transferred to a unit that was filthy and smelly, with trash

overflowing, mold on the walls and shower curtains, grease and old food in the sinks, chewing tobacco on the ceiling and dirt everywhere. He further alleges that his requests for cleaning supplies were denied, and that he suffered emotional distress and physical injuries as a result of the conditions. Finally, he alleges that he complained about the cell conditions to Warden Ward, Unit Manager Baker and Counselor James, but that they all refused to transfer him to a different unit.

Although Silva does not indicate how long he remained in the Waushara unit or whether conditions ever improved, his allegations are sufficient at the screening stage to plead a conditions of confinement claim under the Eighth Amendment against Ward, Braker and James. Assuming Silva can prove them, allegations that he was housed in filthy, unhygienic conditions with no means to clean might be enough for a reasonable jury to find that he was denied “the minimal civilized measure of life’s necessities,” and are similar to, if not quite as extreme as, allegations in other cases in which plaintiffs have been permitted to proceed with conditions of confinement claims. *See, e.g. Budd v. Motley*, 711 F.3d 840, 842 (7th Cir. 2013) (“unhygienic conditions, when combined with the jail’s failure to provide detainees with a way to clean for themselves with running water or other supplies, state a claim for relief”); *Vinning-El v. Long*, 482 F.3d 923, 924 (7th Cir. 2007) (prisoner held in cell for three to six days with no working sink or toilet, floor covered with water, and walls smeared with blood and feces); *Isby v. Clark*, 100 F.3d 502, 505–06 (7th Cir. 1996) (prisoner held in segregation cell that allegedly was “filthy, with dried blood, feces, urine and food on the walls”); *Jackson v. Duckworth*, 955 F.2d 21, 22 (7th Cir. 1992) (prisoner held in cell that allegedly was filthy and smelled of human waste, lacked adequate

heating, contained dirty bedding, and had “rusted out” toilets, no toilet paper, and black worms in the drinking water).

Additionally, Silva’s allegations that he complained to each of the defendants and that none took any effective measures to clean the unit imply that the defendants were deliberately indifferent to the risk of harm that plaintiff faced, along with other inmates in that unit. Accordingly, plaintiff may proceed with an Eighth Amendment claim against each of the defendants. At summary judgment or trial, however, plaintiff will have to prove not only that the conditions were untenable, but that each of the individual defendants knew Silva was being subjected to unconstitutional conditions of confinement and consciously failed to exercise their authority to help.

## **II. Equal Protection**

On the facts alleged, Silva will also be allowed to proceed on an equal protection claim against Unit Manager Braker. To establish a case of discrimination under the Equal Protection Clause, a plaintiff is required to show (1) “that he is a member of a protected class”; (2) “that he is otherwise similarly situated to members of the unprotected class”; and (3) “that he was treated differently from members of the unprotected class.” *Brown v Budz*, 398 F.3d 904, 916 (7th Cir. 2005) (quoting *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 513 (7th Cir. 1993)). A plaintiff must also plead sufficient facts to show that the defendant “adopted and implemented a policy not for a neutral . . . reason but for the purpose of discriminating on account of race, religion, or national origin.” *Ashcroft v. Iqbal*, 556 U.S. 662, 676-77 (2009). In other words, a plaintiff must allege an improper motive,

and not merely a discriminatory impact. *See Washington v. Davis*, 426 U.S. 229, 245 (1976).

Silva alleges that Braker refused to transfer him to a livable unit at the prison because he is Hispanic, even though he would have been a good fit in that unit. Instead, he alleges, Braker moved him to a filthy unit, where many Hispanic inmates are housed. Although inmates do not have a right to be housed on a particular unit, Silva's allegations allow a reasonable inference that Braker intentionally housed him on the worst unit because of his membership in a protected class. Accordingly, Silva may proceed against Braker with an equal protection claim. Of course, at summary judgment or trial, Silva will have to prove that Braker denied him a spot in a nicer housing unit, and instead placed him in a rundown and filthy unit, *because of his race* and not for some legitimate penological reason.

### **III. Access to Grievances**

Silva also seeks to bring claims regarding prison staff's denial of his access to grievances. In particular, Silva alleges that he attempted to file grievances regarding prison conditions but he was either denied access to the required forms or was unable to submit the grievances. However, these allegations by themselves do not state a claim upon which relief may be granted.

The constitution does not require prisons to enact grievance procedures or to handle grievances in a particular way. *Kervin v. Barnes*, 787 F.3d 833, 835 (7th Cir. 2015) ("[T]he inadequacies of the grievance procedure itself . . . cannot form the basis for a constitutional

claim."); *Owens v. Hinsley*, 635 F.3d 950, 953 (7th Cir. 2011) ("Prison grievance procedures are not mandated by the First Amendment and do not by their very existence create interests protected by the Due Process Clause, and so the alleged mishandling of Owens's grievances by persons who otherwise did not cause or participate in the underlying conduct states no claim."). If a prison official's misconduct prevents a prisoner from completing the grievance process, then the prisoner may be excused from the requirement in 42 U.S.C. § 1997e(a) to exhaust his administrative remedies, *Kervin*, 787 F.3d at 835, but that is not an issue before the court at screening.<sup>2</sup>

#### IV. First Amendment Retaliation

Finally, in his motion for reconsideration of denial of *in forma pauperis* status (dkt. #7), Silva states that he is also asserting a retaliation claim against Unit Manager Braker. Specifically, Silva alleges that after he filed this lawsuit, Braker sent two inmates to threaten him with violence. As an initial matter, this court is generally reluctant to allow prisoners to supplement or amend their complaints to include new claims that they have been retaliated against for filing the underlying lawsuit. These types of retaliation claims risk delaying resolution of the case indefinitely while the parties litigate and conduct discovery on each discrete instance of retaliation that may occur while the lawsuit progresses. *See, e.g., Fitzgerald v. Greer*, No. 07-cv-61, 2007 WL 5490138, at \*1 (W.D. Wis. Apr. 2, 2007)("[A]llowing ongoing claims of retaliation to be added to a lawsuit as the lawsuit

---

<sup>2</sup> Of course, if defendants later seek dismissal of any of plaintiff's claims under § 1997e(a), plaintiff may raise any relevant arguments about the grievance process at that time.

progresses could result in a lawsuit's life being extended indefinitely.”); *Upthegrove v. Kuka*, No. 05-cv-153, 2005 WL 2781747, at \*2 (W.D. Wis. Oct. 21, 2005) (denying leave to add retaliation claims to “avoid complication of issues which can result from an accumulation of claims in one action”). Here, however, Silva filed his supplement before the case was screened, so consideration of his retaliation claim will cause no delay. Thus, the court will consider this as a supplement to his complaint.

To state a claim for retaliation, a plaintiff must: (1) identify a constitutionally protected activity in which he was engaged; (2) identify one or more retaliatory actions taken by defendant that would likely 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 a motivating factor in defendant's decision to take retaliatory action. *Bridges v. Gilbert*, 557 F.3d 541, 555-56 (7th Cir. 2009) (citing *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008)).

Prison officials may not retaliate against a prisoner for filing lawsuits against those officials. *See, e.g., Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002); *Babcock v. White*, 102 F.3d 267, 276 (7th Cir. 1996). Because this is what Silva alleges occurred, the court will allow him to proceed with his retaliation claim against Braker.

#### ORDER

IT IS ORDERED that:

- (1) Plaintiff Natividad Silva's motion to supplement (dkt. #15) is GRANTED.
- (2) Plaintiff's motion for reconsideration (dkt. #11) is DENIED as moot.



- (3) Plaintiff Natividad Silva is GRANTED leave to proceed on his claims that (1) defendants L.C. Ward, Ms. Braker and James subjected him to unconstitutional conditions of confinement; (2) Braker violated his right to equal protection; and (3) Braker retaliated against him. However, he is DENIED leave to proceed on any other claim.
- (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 the 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) The clerk's office will prepare summons and the U.S. Marshal Service shall affect service upon defendants.
- (7) If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendants or the court is unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 30th day of May, 2018.

BY THE COURT:

/s/

---

WILLIAM M. CONLEY  
District Judge