IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TONY WALKER,

ORDER

Petitioner,

02-C-135-C

v.

DEPARTMENT OF CORRECTIONS,
JON E. LITSCHER, CINDY O'DONNELL,
STEVEN CASPERSON, SANDY HAUTAMAKI,
JOHN RAY, DANIEL R. BERTRAND,
PETER ERICKSEN, LORA HALLET,
PATRICK BRANT, DUWAYNE NATZKE,
JENNIFER VOELKEL, FRANCIS LARDINOIS,
RICHARD JAUQUET, GLEN RIPLEY, and
WENDY BRUNS,

Respondents.

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This is a proposed civil action for declaratory, injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Tony Walker, who is presently confined at the Green Bay Correctional Institution in Green Bay, Wisconsin, alleges that respondents violated (1) his Fourteenth Amendment right to due process by subjecting him to disciplinary hearings with no authority to extend his mandatory release date, by depriving him of personal clothing and by subjecting him to an arbitrary inmate complaint review

system; (2) his Eighth Amendment right to be free from cruel and unusual punishment by subjecting him to the following conditions in segregation: extreme temperatures; 24-hour illumination; insufficient recreation; inadequate food; and a lack of water sprinklers; (3) his Eighth Amendment right to adequate medical care by staffing the medical alert system with medically untrained personnel; (4) his First Amendment right to free speech by denying him publications in segregation and by rejecting some of his incoming mail as contraband; and (5) his Fourteenth Amendment right to equal protection by denying him and other segregation inmates water sprinklers in their cell and certain publications.

Petitioner seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. In addition, petitioner's trust fund account statement shows that petitioner has no means at present with which to pay an initial partial payment of the $150 fee for filing his complaint. Therefore, although he has not made the initial partial payment required under § 1915(b)(1), he is permitted to bring this action pursuant to 28 U.S.C. § 1915(b)(4).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed

if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioner's request for leave to proceed will be granted on (1) his Eighth Amendment conditions of confinement claim relating to extreme cell temperatures against respondents Bertrand, Hallet, Natzke, Ripley and Bruns; constant illumination against respondents Bertrand, Hallet, Natzke, Ripley and Bruns; and inadequate food against respondents Litscher, Bertrand, Hallet, Natzke, Ripley and Bruns; and (2) his First Amendment free speech claim relating to contraband against respondents Lardinois, Brant and Jauquet. Because his allegations fail to state a claim upon which relief can be granted, his request for leave to proceed will be denied on (1) his Fourteenth Amendment due process claim as it relates to his disciplinary hearings and the deprivation of personal clothing; (2) his Eighth Amendment conditions of confinement claim as it relates to 24-hour illumination and the lack of recreation; and (3) his Eighth Amendment inadequate medical care claim. His

request for leave to proceed will be denied on (1) his Fourteenth Amendment due process claim as it relates to the inmate complaint review system; (2) his Eighth Amendment conditions of confinement claim as it relates to the lack of sprinklers; (3) his First Amendment free speech claim relating to publications in segregation; and (4) his Fourteenth Amendment equal protection claim. These claims are legally frivolous.

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

A. Parties

Petitioner Tony Walker is an inmate at Green Bay Correctional Institution in Green Bay, Wisconsin. Respondent Department of Corrections is an administrative agency of Wisconsin responsible for the overall treatment of inmates. Respondent Jon E. Litscher is the secretary of the Department of Corrections. Respondent Cindy O'Donnell is the deputy secretary of the department. Respondent Steven Casperson is the administrator of adult institutions. Respondents Sandy Hautamaki and John Ray are corrections complaint examiners. The remaining respondents are employed at the Green Bay facility: respondent Daniel R. Bertrand is the warden; respondent Peter Ericksen is the security director; respondent Lora Hallet is the manager of the disciplinary segregation unit; respondents Patrick Brant and Duwayne Natzke are security supervisors; respondents Jennifer Voelkel,

Francis Lardinois and Richard Jauquet are corrections officers; and respondents Glen Ripley and Wendy Bruns are institution complaint examiners.

B. Fourteenth Amendment Due Process

1. Disciplinary hearing extending petitioner's mandatory release date

Petitioner was arrested in the state of Wisconsin on June 16, 1993, for committing crimes in the state, convicted on September 22, 1993 and was sentenced on October 27, 1993 to serve a term of not more than 14 years. Pursuant to Wis. Stat. § 302.11(1), plaintiff is entitled to mandatory release on parole when he completes two-thirds of his sentence. When this time was computed with petitioner's pre-sentence credit of 145 days, his mandatory release date should have been set at October 2, 2002.

Under Wis. Stat. § 302.11(2)(a), any prisoner who violates a prison regulation is subject to extension of his mandatory release date by 10 days for the first offense, 20 days for the second offense and 40 days for the third and any subsequent offenses. Petitioner has received numerous conduct reports from Green Bay staff. In the years 2000 and 2001, respondents Department of Corrections, Litscher, O'Donnell, Bertrand, Ericksen, Brant, Natzke and Voelkel have initiated, adjudicated and finalized disciplinary proceedings against petitioner. They have punished him with penalties including adjustment and program segregation and have extended his mandatory release date arbitrarily.

2. Personal property

When petitioner was first incarcerated, inmates were allowed to order and possess solid-colored clothing, including t-shirts, shorts, jogging pants, sweaters and underwear. Following the rules and procedures of the Department of Corrections, petitioner ordered and received solid-colored clothing: three t-shirts; two athletic t-shirts; six pairs of underwear; two sweaters; one pair of black shorts and one pair of jogging pants. When he received the clothing, petitioner signed an agreement that is issued by the Department of Corrections to every inmate who receives any approved items at the institutions. The receiving inmate and an officer of the department signs the agreement, which applies throughout the inmate's stay under department custody.

As of October 15, 2001, the department has stopped allowing clothing articles of many different shades of color into the institutions. The department states that inmates with clothing items in their possession before the new policy went into effect will be able to keep them until November 1, 2002. After that time, they must get rid of them or they will have to dispose of the items upon transfer to another institution before November 1, 2002.

Petitioner has followed all of the terms of the agreement between himself and the department. Respondents Department of Corrections, O'Donnell, Casperson, Hautamaki and Bertrand are breaking the agreement in bad faith and for no justifiable reason.

3. Inmate Complaint Review System

Respondents Ripley and Bruns reject inmate complaints as frivolous when the inmates complain about conditions and issues the respondents Ripley and Bruns do not want to address, or when an inmate files a complaint about a current violation that was raised earlier in connection with a separate violation. They do not allow inmates to file complaints about issues that were raised or addressed in the past although the same violation is taking place again at that time, thus leaving the inmates with no available administrative remedy. They do not accept any complaints that are filed beyond the 14-day time limit even when the inmate shows cause for the delay. They send complaints back to inmates with an instruction to try to solve the problem themselves, then reject the complaints as untimely when the inmate attempts to file the complaints again after unsuccessfully trying to solve the problem. They both delay addressing complaints that they cannot reject or easily dismiss, change the inmates' issues and address an issue the inmate did not complain about and dismiss complaints that are well grounded.

Petitioner has complained about all of the violations addressed in this complaint through the inmate complaint review system. Respondents Ripley and Bruns have rejected the complaints as frivolous or untimely, refused to file some and recommended that every complaint filed by petitioner be dismissed in their brief summaries. Respondent Bertrand accepts all recommendations of respondents Ripley and Bruns to dismiss complaints and has

dismissed every complaint filed by petitioner that was accepted and filed by respondents Ripley and Bruns. Respondents Ray and Hautamaki refuse to review and address appeals of complaints that are rejected by the institutions but accept the institutional complaint examiner's brief summaries and recommendations as their own whenever they review timely complaints. They recommend to respondent Litscher that the appeals be dismissed and respondent O'Donnell, acting for respondent Litscher, accepts the recommendations and dismisses the appeals. Respondent O'Donnell has dismissed every appeal that petitioner has submitted to the secretary for review.

C. Eighth Amendment Conditions of Confinement

Petitioner was confined in a solitary cell in Green Bay's "disciplinary segregation unit." There, the cells are constructed with four concrete walls, a solid steel boxcar type door with a narrow vertical window, a built-in steel shower that is turned on twice a week for five minutes, a frosted window that does not allow the inmate to see the outside, a fluorescent light that is constantly illuminated, a small metal desk attached to the wall, a concrete bed, a mattress, a pillow, a combination steel sink and commode fixture and a ventilation system that reflects and circulates outdoor temperatures during the spring, summer and fall seasons.

1. Extreme temperatures

When it is hot and humid outdoors, the ventilation system in the disciplinary segregation unit circulates the humid heat throughout the building. General population inmates are allowed to walk around outside; inmates in the disciplinary segregation unit receive no such relief. On August 8, 2001, petitioner saw the nurse about his aches, dizziness and weakness. The nurse told him that his symptoms were heat-related, ordered him not to exercise in his cell and provided him with some aspirin. When petitioner was taken out of his cell for the appointment, he saw that staff had turned on multiple fans and turned off all overhead lights in their work areas and the halls. At the same time, the lights were turned on in the solitary confinement cells and the ventilation system was pumping very hot air into the cells. The heat caused petitioner to sweat uncontrollably and to suffer aches, weakness, dizziness and burning sensations in his eyes.

Other times it is so cold in the disciplinary segregation unit that staff walks around wearing sweaters, vests, jackets and coats. Inmates are provided no protection from the cold and must rely on a single blanket. Some days when the temperature was as low as the teens, staff would not turn on the heat. Petitioner's hands and feet felt like he had stuck them in the refrigerator. He would wrap up in the small blanket and try to keep himself warm by lying still.

2. Constant illumination

The constant illumination causes petitioner intense migraine headaches, disorientation and sleep disturbance. Even with his eyes closed and a sheet or blanket over his head, petitioner sees a constant fiery glow.

3. Lack of recreation

Inmates placed in disciplinary segregation unit are confined to their solitary cells for 24 hours a day unless they are taken out for recreation (three times a week, weather permitting); disciplinary, administrative confinement or parole hearings; medical appointments including dental and hospital visits; media, law enforcement personnel, family, friends or lawyer visits; clinical appointments for psychological evaluations or treatment; scheduled law library periods; and custody and placement reviews by the program review committee. When outside their cells other than in the recreation area, inmates in the disciplinary segregation unit are manacled by a waist restraint belt with attached handcuffs and a pair of ankle shackles.

Respondents have a written policy of allowing inmates confined in disciplinary segregation unit four hours of outdoor recreation a week only, weather permitting. Recreation lasts one hour and twenty minutes. Inmates who refuse recreation or have an appointment are not offered an opportunity to make up the recreation period. The outdoor recreation cages are constructed with three brick walls and a wire fence front that contains

a wire fence door and a wire fence roof. The cages contain no exercise apparatus, pull-up bars, stationary weights, bike or any equipment for physical exercise. Inmates must wear the same clothes and inadequate canvas shoes outdoors. Petitioner has tried to exercise in the outdoor recreation cages but cannot because the concrete floors are different and more harsh than the ones in the solitary cells. After doing 60 or 70 jumping jacks or running in place or around the cage for a few minutes, his feet, ankles, knees and lower back start to throb and ache so he stops. While in the outdoor recreation cages, petitioner can do approximately two to three times the amount of push-ups as he can do while confined in the solitary cell because the air and sunshine make him feel fresh and alive, clear his mind and allow him to concentrate. The feeling disappears when he returns to his cell and cannot shower but must use a damp, dirty cloth to wash up.

Disciplinary segregation unit solitary cells contain no exercise apparatus, pull up bars, stationary weights, bikes or other equipment for physical exercise. Petitioner has tried to exercise in the disciplinary segregation unit solitary cells but could not because the canvas style shoes are tight and provide no impact absorption protection. Running in place or doing jumping jacks causes pain in petitioner's feet, ankles, knees and lower back. Petitioner has tried to do a lot of push-ups in the cell but because of his headaches, dizziness and weakness caused by the continuous light in the cell and lack of sleep, he was often exhausted after only 60 or 70 push-ups. Petitioner did not do push-ups often.

Inmates who exercise in their solitary cells are not provided with an opportunity to take a shower afterward even though there is a shower in every cell. Inmates in general population are permitted to take showers after recreation. Inmates in disciplinary segregation unit are not provided with a wash cloth, bath towel or change of clothes so that they can wash after exercising. Instead, they have to wear the same clothes they exercised in and use the same damp, dirty wash cloth and bath towel to wash and dry themselves repeatedly because they are not provided with more. When petitioner exercises in the solitary cell, he is not allowed to shower and must use the same cloth or bath towel that he used to wash up the previous day until he receives a change of clothing and towels. He uses the bath towel to remove all the water from the floor of the cell after his shower and will not use it to dry his body again.

The lack of fresh air, exercise and hot and adequate food has caused petitioner to suffer pain and stiffness in his legs, weight loss, reduction in strength and body mass, shortness of breath and dizziness shortly after he begins exercising in his solitary cell.

4. Inadequate food

Inmates in disciplinary segregation unit are supposed to receive the same hot meals as the inmates in general population but they do not. The serving carts that are used to deliver the food trays have electrical cords that are supposed to be plugged in to heat the

food and keep it hot. The guards rarely plug them in and most of the time the food is cold when it is delivered to inmates. The food trays that are passed out in the disciplinary segregation unit are inadequate because they contain smaller portions than those served to the general population and do not meet the daily recommended allowances. Petitioner suffers excruciating and sharp stomach pains that are so strong that he has to hold his arms across his stomach to ease the pain and he has to sleep in a fetal position. Petitioner has scrunched his stomach so much and so often that he has permanent dark creases across his abdominal region.

5. Lack of water sprinklers

The disciplinary segregation unit is constructed of flammable materials. Although the entire building contains water sprinklers in case of fire, the regular solitary cells that hold approximately 144 inmates contain no sprinklers. In approximately 72 disciplinary segregation unit cells, electrical outlets are located 6'5" off the floor and 15 inches away from the shower head. Many times petitioner was afraid to take a shower because there are no safety devices to deflect the water from landing on the outlet, causing an unnecessary hazard.

D. Eighth Amendment Medical Care

Each solitary cell in disciplinary segregation unit has an emergency medical alert

system installed in it. Medical staff do not sit in the control bubble and respond to the medical emergency. Instead, security staff with no medical training responds to any medical emergency by answering the alarm and making the determination whether the complaining inmate will receive medical assistance at that time.

When security staff gets tired of an inmate complaining about his medical problem, the officer simply deactivates the inmate's medical alert system and lets the inmate suffer the illness he may have. On several occasions, security staff deactivated the alarm system of inmates who suffered seizures, asthma attacks and even death.

Petitioner has used the emergency medical alert system to request medical assistance for dizziness, severe stomach and back pains and migraine headaches that were so intense that petitioner would sit and rock himself back and forth allowing his head to hit the wall in an attempt to relieve some of the pain. Each time that petitioner used the medical alert system, the untrained officers told him that his medical problems were not emergencies and that he would not receive medical attention, or the officers responding to the request in the control bubble would pass the request on to the officer-staffed wing where the inmate is housed or to the sergeant on duty and allow them to make the determination whether petitioner would receive medical attention. Petitioner has never received medical assistance from medical staff when he used the medical alert system and was made to suffer.

If an inmate has a prescription for medicine and sees an officer with the medical cart

pass his cell without distributing the prescribed dosage that he is supposed to receive and he makes a request for the medication from the officer, some officers refuse to return to the inmate's cell or they tell the inmate that he missed out, that he should have been up or that they will come back later but never do.

Petitioner has a prescription for "noncontrol" medication that he has to take three or four times a day. If he does not get all of his doses during the 6 a.m. medical round, the officers have refused to give him any medication when they distribute medication during the 10 a.m., 3 p.m. and 8 p.m. medical rounds, which would be appropriate times for plaintiff to receive his medication. When petitioner has aches and pains on those days he is made to suffer.

Respondents Bertrand, Ericksen, Hallet, Natzke and Voelkel have placed petitioner in solitary confinement while he was not under the care of a physician in violation of Wis. Admin. Code § DOC 302.10. Respondents DOC, Litscher, O'Donnell and Casperson permit security staff to confine prisoners in solitary confinement in violation of the same statute.

E. First Amendment Free Speech

1. Denial of publications in segregation

Respondent Department of Corrections has no rules, regulations, policies or

procedures that restrict segregated inmates from receiving publications. Respondents Bertrand, Hallet and Natzke have enacted their own policy at the Green Bay facility that does not permit inmates in disciplinary segregation unit to receive any publications. Other inmates confined in a separate segregated area in the treatment center at Green Bay are allowed to receive publications. Inmates at Supermax Correctional Institution, the most secure institution in the state, are allowed to receive and possess books and publications. Inmates confined in the disciplinary segregation unit are denied access to all newspapers, magazines and personal books. Inmates confined in the disciplinary segregation unit who have subscriptions to publications, such as petitioner, are denied those publications for no reason. The publications are delivered to the disciplinary segregation unit building and placed in a locker assigned to the inmate.

2. Contraband

Green Bay Correctional Institution subscribes to and buys many books, magazines and newspapers that contain articles about gangs that show gang signs and that describe in explicit detail various sexual acts, including rape, adults having sex with children and teenagers, incest, sodomy, bondage, homosexuality and other offensive sexual acts that respondent Department of Corrections forbids. These materials are placed in the library where all inmates can see them.

Between December 1, 2000 and January 11, 2002, respondents Lardinois, Brant and Jauquet rejected a number of publications sent to petitioner allegedly for reasons allowed under the Wisconsin Administrative Code. Although petitioner believes the rejections were invalid, he was not allowed to see the publications for the purpose of appealing these decisions.

Nevertheless, other than a rejection that took place on August 17, 2001, petitioner appealed all of the rejections to respondent Bertrand who denied all of the appeals and affirmed the rejections.

DISCUSSION

A. Respondent Department of Corrections

As an initial matter, I note that petitioner named the Wisconsin Department of Corrections as a respondent in this case. The Supreme Court has held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." Will v. Michigan Department of State Police, 491 U.S. 58, 71 (1989). Furthermore, "[i]t is well-settled that a claim against a state or local agency or its officials may not be premised upon a respondeat superior theory." Rascon v. Hardiman, 803 F.2d 269, 274 (7th Cir. 1986) (citing Monell v. Department of Social Services, 436 U.S. 658, 694 (1978)). "The agency must be culpable in its own right, for example by having a policy of violating such

rights." Bailey v. Faulkner, 765 F.2d 102, 104 (7th Cir. 1985). Because the chaims on which petitioner will be granted leave to proceed do not involve alleged departmental policies, petitioner may not proceed against respondent Department of Corrections.

B. Fourteenth Amendment Due Process

A claim that government officials violated due process requires proof of both inadequate procedures and interference with a liberty or property interest. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). In Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." After Sandin, in the prison context, protected liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, Sandin does not allow suit complaining about deprivation of liberty).

1. Disciplinary proceedings that extended mandatory release date

Petitioner seems to argue that state courts are the only bodies authorized to

adjudicate violations of the law and impose penalties. According to petitioner, it follows that prison disciplinary committees do not have the authority to impose punishments that extend prisoners' mandatory release dates because such punishments have the effect of setting penalties for a crime. This reasoning does not take into account constitutional law, which provides that the government may infringe upon protected liberty interests as long as it provides adequate procedural safeguards. Thompson, 490 U.S. at 460. In other words, as long as petitioner was provided adequate procedural protections at his disciplinary hearings, respondents Litscher, O'Donnell, Bertrand, Ericksen, Brant, Natzke and Voelkel did not violate his Eighth Amendment rights by extending his mandatory release date despite the fact that the committee is not a state court. Petitioner will not be granted leave to proceed on his claim that the prison disciplinary committee violated his right to due process because it does not have the authority to extend his mandatory release date.

Liberty interests are "generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484 (1995) (citations omitted). Because petitioner alleges that his release date was extended as a result of the penalties imposed at various disciplinary proceedings, I understand petitioner to allege that he lost good time credits as a result of the proceedings,

implicating due process procedural protections under Sandin.

Petitioner is silent as to the basic procedural due process protections he received at the disciplinary proceedings. He alleges only that in 2000 and 2001, respondents Department of Corrections, Litscher, O'Donnell, Bertrand, Ericksen, Brant, Natzke and Voelkel "have arbitrarily initiated, adjudicated and finalized disciplinary proceedings against him," have punished him with adjustment and program segregation and have extended his mandatory release date arbitrarily. Petitioner has alleged no facts at all suggesting that respondents did not afford him basic procedural due process protections, such as notice of the charges, an opportunity to be heard, witnesses on his behalf, a written statement by the disciplinary committee of the evidence relied upon and the reasons for the action taken. Wolff v. McDonnell, 418 U.S. 539, 563 (1974). This silence not only suggests that petitioner is not alleging that respondents failed to afford him due process at the disciplinary hearings, but also fails to place respondents on notice of such a claim, even under the liberal pleading requirements of Fed. R. Civ. P. 8. Because nothing in petitioner's allegations allows me to infer that he was denied due process at the disciplinary hearings that extended his mandatory release date, petitioner will be denied leave to proceed on this portion of his due process claim for failure to state a claim upon which relief can be granted.

I note that although petitioner frames his argument as a violation of due process for which he seeks monetary relief under 28 U.S.C. § 1983, his complaint could be understood

to challenge the fact of his imprisonment. However, illegal custody is not a cognizable claim under § 1983. To the extent that petitioner may be arguing that respondents are keeping him in illegal custody, he must file a petition for a writ of habeas corpus under 28 U.S.C. § 2254 after exhausting available state court remedies. See Heck v. Humphrey, 512 U.S. 477, 481 (1994) (petition for habeas corpus under 28 U. S.C. § 2254 "is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release") (citing Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973)).

2. Deprivation of personal clothing

Petitioner alleges that respondents O'Donnell, Casperson, Hautamaki and Bertrand violated his right to due process by not allowing him to possess personal clothing after entering into a contract with petitioner under which he was allowed to have personal clothing as long as he abided by certain rules. Although petitioner is undoubtedly disappointed in the department's policy decision to restrict personal clothing, nothing in petitioner's allegations suggests that respondents' act of phasing out personal clothing rises to the level of a constitutional deprivation. Even if it did, petitioner's property interest in having clothes he purchased on his own instead of clothing distributed by the state is minimal in the prison setting. Petitioner has been given notice of the change and an opportunity to dispose of the property before the new rule takes effect. This is sufficient

process under the circumstances to protect petitioner's property rights. Petitioner will not be granted leave to proceed on this claim because he has failed to state a claim on which relief may be granted.

To the extent that petitioner is alleging that respondents breached a contract, such a claim is based in state law. Because petitioner will not be allowed to proceed on his federal law claim, I decline to exercise supplemental jurisdiction over any state law claims stemming from the same facts pursuant to 28 U.S.C. § 1367(a). See 28 U.S.C. § 1367(c)(3); see also Groce, 193 F.3d at 500.

3. Inmate complaint review system

Petitioner alleges that respondents violated his right to due process under the Fourteenth Amendment by not following proper procedures in the inmate complaint review system. Petitioner alleges that respondents Ripley and Bruns reject inmate complaints without giving them due consideration. Further, petitioner alleges that respondents Ray, Hautamaki, O'Donnell and Litscher each participated in the due process violation by affirming the decisions.

The adoption of mere procedural guidelines does not give rise to a protected liberty interest. Culvert v. Young, 834 F.2d 624, 628 (7th Cir. 1987), cert. denied, 485 U.S. 990 (1988); Studway v. Feltman, 764 F. Supp. 133, 134 (W.D. Wis. 1991). Because

respondents' acts do not implicate a liberty interest, petitioner's right to due process has not been violated. His request for leave to proceed as to his due process claim relating to the inmate complaint review system will be denied because it is legally frivolous.

C. Eighth Amendment Conditions of Confinement

The Eighth Amendment prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain" or that are "grossly disproportionate to the severity of the crime warranting imprisonment." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Because the Eighth Amendment draws its meaning from evolving standards of decency in a maturing society, there is no fixed standard to determine when conditions are cruel and unusual. Id. at 346. The Court of Appeals for the Seventh Circuit has found Eighth Amendment violations when, for example, an inmate was tied to a bed for nine days, had to use a urinal pitcher which was then left full by his bed for two days, had no change of linen or clothes for that period, had no silverware and had to eat with his hands, and had no opportunity to exercise. See Wells v. Franzen, 777 F.2d 1258 (7th Cir. 1985). However, conditions that create "temporary inconveniences and discomforts" or that make "confinement in such quarters unpleasant" are insufficient to state an Eighth Amendment claim. Adams v. Pate, 445 F.2d 105, 108-09 (7th Cir. 1971). In Adams, the court of appeals did not find a constitutional violation when an inmate alleged that his cell was filthy and stunk, that the

water faucet from which he drank was only inches above the toilet and that the ventilation was inadequate. Id.

1. Extreme cell temperatures

Petitioner alleges that the ventilation system in solitary confinement cells reflects and circulates outdoor temperatures during the spring, summer and fall. In warm months, petitioner experienced aches, dizziness, weakness and a burning sensation in his eyes that a nurse told him was heat-related. During the winter months, solitary cells are so cold that petitioner felt like he had stuck his hands and feet in the refrigerator. In segregation, petitioner was provided with only a small blanket to keep warm. Petitioner alleges that he has complained to respondents Bertrand, Hallet, Natzke, Ripley and Bruns about the extreme hot and cold temperatures but that they have done nothing to correct the temperatures.

Prisoners are entitled to "the minimal civilized measure of life's necessities." See Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997) (citing Farmer v. Brennan, 511 U.S. 825, 833-34 (1994)). This includes a right to protection from extreme cold, see id. (holding that cell so cold that ice formed on walls and stayed throughout winter every winter might violate Eighth Amendment), and extreme heat, see Shelby County Jail Inmates v. Westlake, 798 F.2d 1085, 1087 (7th Cir. 1986). "[C]ourts should examine several factors in assessing

claims based on low cell temperature, such as the severity of the cold; its duration; whether the prisoner has alternative means to protect himself from the cold; the adequacy of such alternatives; as well as whether he must endure other uncomfortable conditions as well as cold." Dixon, 114 F.3d at 644. In certain circumstances, extreme hot or cold cell temperature may constitute violations of the Eighth Amendment. At this early stage I cannot say that petitioner could not prove any set of facts entitling him to relief on this claim and will grant him leave to proceed on the claim against respondents Bertrand, Hallet, Natzke, Ripley and Bruns. However, I note that he faces an uphill battle. To succeed on this claim, petitioner will have to garner evidence of the actual temperature in his segregation cell during the days in which he was housed there and be prepared to prove that as a result of the extreme heat or cold he suffered deleterious effects on his health beyond mere discomfort.

2. 24-hour illumination

Petitioner alleges that because of the 24-hour illumination in his cell, he suffers intense migraine headaches, disorientation and sleep disturbance. He has to sleep with his head covered; the light awakens him when his head is not covered. Although such 24-hour illumination may not rise to the level of an Eighth Amendment violation in and of itself, when coupled with the allegations that he suffers migraine headaches and sleep deprivation,

I cannot say that petitioner could not prove any set of facts entitling him to relief on this claim. Petitioner's request for leave to proceed on this claim will be granted against respondents Bertrand, Hallet, Natzke, Ripley and Bruns.

3. Exercise opportunities

Petitioner alleges that while in segregation, he has no meaningful opportunity to exercise, in violation of his Eighth Amendment rights. The Court of Appeals for the Seventh Circuit has recognized that in some circumstances the failure to provide prisoners incarcerated in segregation "with the opportunity for at least five hours a week of exercise outside the cell raises serious constitutional questions." Davenport v. DeRobertis, 844 F.2d 1310, 1315 (7th Cir. 1988); see also Jamison-Bey v. Thieret, 867 F.2d 1046 (7th Cir. 1989) (although 101 consecutive days of segregation does not alone violate Constitution, severe restrictions on exercise may constitute Eighth Amendment violation). However, in Harris v. Fleming, 839 F.2d 1232, 1236 (7th Cir. 1988), the court of appeals found no Eighth Amendment violation when an inmate spent four weeks in segregation and was not permitted outside recreation but was allowed to move about his segregation cell and could have exercised by jogging in place, engaging in aerobics or doing push-ups in his cell.

Petitioner alleges that inmates confined in segregation are given the opportunity to exercise outdoors four times a week, weather permitting. Further, he alleges that the

equipment in the outdoor recreation cage is insufficient, that his clothing and shoes are insufficient and that he is not permitted to shower after exercising. In the absence of an allegation establishing how many days petitioner has spent in the segregation unit, I am not convinced that petitioner has stated a claim for denial of meaningful exercise in violation of his Eighth Amendment rights. Accordingly, petitioner will be denied leave to proceed as to this claim because he fails to state a claim upon which relief can be granted.

4. Food

According to petitioner, inmates confined in segregation do not receive the same hot meals as those in general population. The food is often cold when delivered and the portions contain less than the daily recommended allowances, causing petitioner stomach pains. Petitioner alleges that he has complained to respondents Litscher, Bertrand, Hallet, Natzke, Ripley and Bruns about the inadequate food in segregation but that they have done nothing to correct the problem. Under the Eighth Amendment, prisoners are entitled to "'nutritionally adequate food that is prepared and served under conditions that do not present an immediate danger to the health and well being of the inmates who consume it.'" French v. Owens, 777 F.2d 1250, 1255 (7th Cir. 1985) (quoting Ramos v. Lamm, 639 F.2d 559, 570-71 (10th Cir. 1980)). "'A well-balanced meal, containing sufficient nutritional value to preserve health, is all that is required.'" Lunsford v. Bennett, 17 F.3d 1574, 1580

(7th Cir. 1994) (citations omitted). Petitioner does not allege that he ever became ill after consuming food while incarcerated in Green Bay's segregation unit or that the conditions under which it was served were unsanitary. However, because he alleges that it contained insufficient nutritional value, I cannot say that petitioner could not prove any set of facts entitling him to relief on this claim. Petitioner will be granted leave to proceed on the claim against respondents Litscher, Bertrand, Hallet, Natzke, Ripley and Bruns.

5. Lack of water sprinklers

Petitioner alleges that the solitary cells lack water sprinklers and that there is an electrical outlet in close proximity to the shower. Standing alone and without further elaboration, this allegation does not rise to the level of cruel and unusual punishment in violation of the Eighth Amendment. Petitioner may be uncomfortable with the lack of water sprinklers, but nothing in his allegations suggests that respondents are being deliberately indifferent to his safety.

In a case alleging a respondent's failure to protect a prisoner from harm, "[t]he inmate must prove a sufficiently serious deprivation, i.e., conditions which objectively 'pos[e] a substantial risk of serious harm.'" Pope v. Shafer, 86 F.3d 90, 92 (7th Cir. 1996). The inmate also must prove that the prison official acted with deliberate indifference to the inmate's safety." Langston v. Peters, 100 F.3d 1235, 1237 (7th Cir. 1996) (quoting Haley

v. Gross, 86 F.3d 630, 640 (7th Cir. 1996)). A prison official may be liable for knowing that there was a substantial likelihood that the prisoner would be harmed and failing to take reasonable protective measures. Farmer, 511 U.S. at 847. The prison official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and the official must draw that inference. Pavlick v. Mifflin, 90 F.3d 205, 207-08 (7th Cir. 1996). The prisoner does not have to show that the prison official intended that the prisoner be harmed; it is enough that the official ignored a known risk to the prisoner's safety. Id. at 208. In failure to protect cases, "[a] prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety." McGill v. Duckworth, 944 F.3d 344, 349 (7th Cir. 1991).

In this case, petitioner alleges only that solitary cells lack water sprinklers and that there is an electrical outlet in close proximity to the shower. Even assuming that respondents knew that petitioner's cell did not have water sprinklers and that it had an electrical outlet near the shower, I cannot find that petitioner has alleged facts supporting the conclusion that respondents were deliberately indifferent to his safety. First, according to petitioner's own allegations, none of the solitary cells have water sprinklers. Nothing in petitioner's allegations suggests that respondents do not have a plan to protect him from harm a fire. Moreover, petitioner does not allege that he has ever been harmed by the placement of the electrical outlet. Petitioner's anxieties about fire or electric shock are not

enough to raise a viable Eighth Amendment claim. Petitioner's request to proceed in forma pauperis on this claim will be denied because the claim is legally frivolous.

D. Eighth Amendment Inadequate Medical Care

To state an Eighth Amendment claim of cruel and unusual punishment arising from improper medical treatment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). A condition is serious if "the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain." Gutierrez, 111 F.3d at 1373. Deliberate indifference requires that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer, 511 U.S. at 837. Inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes v. Detella, 95 F.3d 586, 590-9 1 (7th Cir. 1996).

As an initial matter, petitioner's allegations do not suggest that he has a serious medical need. He complains of aches, pains and dizziness that, at least on occasion, have caused him to suffer when he does not receive his "noncontrol" medication. Nonetheless, even assuming that he has a serious mental health need, petitioner has failed to allege facts

sufficient to establish that respondents were deliberately indifferent to that need when they failed to staff the emergency medical alert system with trained medical personnel or to provide him medical care when requested through the emergency medical alert system. Petitioner has not alleged any facts suggesting that he was ultimately denied medical care, only that he has never received medical care when he used the medical alert system. I will deny petitioner's request for leave to proceed on his claim as to respondents' use of the emergency medical alert system because he has failed to state a claim upon which relief may be granted.

Petitioner also alleges that officers distributing medication on the 6 a.m. medical round sometimes give him a single dose of his "noncontrol" medication rather than the day's worth of doses. When petitioner has aches and pains on those days, he suffers for the remainder of the day. These facts are insufficient to suggest that respondents (who are not alleged to be involved in the 6 a.m. medical cart responsibilities) were aware of facts from which they could infer that petitioner was at substantial risk of serious harm if he did not receive treatment or that they drew that inference. Farmer, 511 U.S. at 837. Although it may not demonstrate conscientious effort for the officers not to distribute petitioner his doses for the whole day, at best this claim is one for negligence that does not rise to the level of an Eighth Amendment violation. Accordingly, petitioner's request for leave to proceed as to his claim of inadequate medical care will be denied because he fails to state a claim

upon which relief can be granted.

Petitioner alleges further that he has been placed in segregation while not "under the care and advice of a physician" in violation of Wis. Admin. Code § DOC 302.10. These allegations may state a claim of a violation of state law, but absent allegations that petitioner had serious medical needs while he was in segregation that were ignored, it does not state a claim of a violation of federal law. Because petitioner has not stated a claim under federal law, I decline to exercise supplemental jurisdiction over petitioner's state law claim. See 28 U.S.C. § 1367(c)(3); see also Groce v. Eli Lilly & Co. , 193 F.3d 496, 500 (7th Cir. 1999) (recognizing that "a district court has the discretion to retain or to refuse jurisdiction over state law claims").

E. First Amendment Denial of Publications

1. Denial of publications in segregation

Petitioner alleges that respondents violated his right to free speech by denying him access to publications for which he has subscriptions and other personal materials while in segregation. Prison actions that affect an inmate's receipt of non-legal mail must be "reasonably related to legitimate penological interests." Thornburgh v. Abbott, 490 U.S. 401, 409 (1989); see also Turner v. Safley, 482 U.S. 78, 89-90 (1987) (setting forth four factor test); Bell, 441 U.S. 520. In his allegations, petitioner pleads himself out of court.

By alleging that his magazine subscriptions are withheld from him only when he is in segregation, he implies that inmates in general population, including himself when he is not in segregation, are not restricted in the same manner. When added to the allegation that magazine issues to which inmates in segregation subscribe are kept in lockers in the segregation unit, this allegation allows only one inference to be drawn: restricting the periodicals and other reading materials of inmates in segregation is part of an incentive program that furthers a legitimate penological interest. Therefore, petitioner's request for leave to proceed will be denied as to his claim that respondents denied him access to publications in segregation because the claim is legally frivolous.

2. Contraband

Petitioner also alleges that respondents censored his incoming mail and confiscated certain catalogs, flyers and magazine issues because they contained nudity, sexual conduct, gang-related material and samples of skin care products. Prisoners have a limited liberty interest in their mail under the First and Fourteenth Amendments. Procunier v. Martinez, 416 U.S. 396, 413, 414 (1974). The inspection of personal mail for contraband is a legitimate prison practice, justified by the important governmental interest in prison security. Gaines v. Laine, 790 F.2d 1299, 1304 (7th Cir. 1986). Further interference with an inmate's personal mail must be reasonably related to legitimate prison interests in security

and order. Turner v. Safley, 482 U.S. 78, 89 (1987).

In this case, petitioner alleges that respondents Lardinois, Brant and Jauquet confiscated certain items of his mail for allegedly containing contraband, such as nudity, sexual conduct and gang-related materials, and that respondents Bertrand approved those confiscations. It could very well be that respondents were not rejecting his mail for no reason at all on a regular basis but instead were pursuing the legitimate penological interest of prison security. Nevertheless, I am unprepared to conclude that petitioner could not prove any set of facts entitling him to relief on this claim and will grant him leave to proceed on this claim against respondents Lardinois, Brant and Jauquet.

F. Fourteenth Amendment Equal Protection

I understand petitioner to contend that respondents Bertrand, Hallet and Natzke violated his right to equal protection of the laws by not providing water sprinklers in solitary cells and by denying inmates in segregation access to publications to which they subscribe and to other personal reading material. Petitioner alleges that inmates in general population are not subjected to these restrictions.

The equal protection clause of the Fourteenth Amendment guarantees that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Petitioner's allegations fall far short of suggesting that

while in segregation, he is similarly situated to other inmates at Green Bay in general population. By the very nature of the disciplinary segregation unit, inmates who are housed there are taken out of the general population and subjected to different, more restrictive conditions. Although petitioner may receive fewer reading materials or be more concerned about fire while in segregation, this does not mean that his right to equal protection of the laws are being violated. Inmates in segregation are simply not similarly situated to those in general population. Because petitioner's allegations do not imply that he is being treated differently from other inmates with whom he is similarly situated, he cannot succeed on his claim that respondent is depriving him of his right to equal protection. Petitioner's request for leave to proceed on his equal protection claim will be denied as legally frivolous.

ORDER

IT IS ORDERED that

1. Petitioner Tony Walker's request for leave to proceed in forma pauperis is GRANTED on (1) his Eighth Amendment conditions of confinement claim as it relates to the extreme cell temperatures against respondents Daniel R. Bertrand, Lora Hallet, Duwayne Natzke, Glen Ripley and Wendy Bruns, as it relates to constant illumination against respondents Bertrand, Hallet, Natzke, Ripley and Bruns; and as it relates to inadequate food against respondents Jon E. Litscher, Bertrand, Hallet, Natzke, Ripley and Bruns; and (2) his

First Amendment free speech claim relating to contraband against respondents Francis Lardinois, Patrick Brant and Richard Jauquet.

2. Petitioner's request for leave to proceed is DENIED on his (1) Fourteenth Amendment due process claim as it relates to his disciplinary hearings and the deprivation of personal clothing; (2) Eighth Amendment conditions of confinement claim as it relates to the lack of recreation; and (3) Eighth Amendment inadequate medical care claim for failure to state a claim upon which relief can be granted;

3. Petitioner's request for leave to proceed is DENIED on his (1) Fourteenth Amendment due process claim as it relates to the inmate complaint review system; (2) Eighth Amendment conditions of confinement claim as it relates to the lack of sprinklers; (3) First Amendment free speech claim as it relates to publications in segregation; and (4) Fourteenth Amendment equal protection claim because the claims are legally frivolous;

4. Respondents Department of Corrections, Cindy O'Donnell, Steven Casperson, Sandy Hautamaki, John Ray, Peter Ericksen and Jennifer Voelkel are DISMISSED from this case;

5. Petitioner should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyers who will be representing respondents, he should serve the lawyers directly rather than respondents. Petitioner should retain a copy of all documents for his

own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondents or to respondents' lawyers; and

6. The unpaid balance of petitioner's filing fee is $150.00; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2) when the funds become available.

Entered this 19th day of June, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge