IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

BERRELL FREEMAN,

ORDER

Plaintiff,

02-C-024-C

v.

JON E. LITSCHER, GERALD BERGE,
ELLEN RAY, PETER HUIBREGTSE,
JOHN RAY, CINDY O'DONNELL,
PERCY PITZER and DONALD JACKSON,

Defendants.

- -

This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff Berrell Freeman, who is presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, alleges that defendants violated his Fourteenth Amendment right to due process, his First Amendment right to free expression, his Fourth Amendment right to privacy, his First Amendment right to the free exercise of religion, his Fourteenth Amendment right to access to the courts, his Eighth Amendment right to be free from cruel and unusual conditions of confinement, his Eighth Amendment right to adequate medical care, his Fourth Amendment right to reasonable searches and his rights under the

Religious Land Use and Institutionalized Persons Act.

Plaintiff filed this suit in the Circuit Court for Dane County, Wisconsin. Defendants removed it to this court. Although the full filing fee was paid at the time of removal, because plaintiff is a prisoner and defendants are government officers or employees of a governmental entity, this court is required to screen the complaint, identify the claims and dismiss any claim that is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(a), (b).

Having screened plaintiff's complaint, I conclude that his due process, right to privacy, freedom of religion, Religious Land Use and Institutionalized Persons Act, denial of access to the courts and inadequate medical care claims must be dismissed because they are legally frivolous. His freedom of expression claim must be dismissed for failure to state a claim upon which relief can be granted. Plaintiff will be allowed to proceed on his claim that the policy of unreasonable searches violates his Fourth Amendment rights. In addition, the proceedings relating to plaintiff's conditions of confinement claim will be stayed. Plaintiff may have until March 29, 2002, in which to notify the court about the type and extent of injury, if any, that he has suffered as a result of the conditions of confinement at Supermax.

In addition to his complaint, plaintiff has filed several additional motions, all of which

will be denied: a motion to oppose and strike defendants' petition for removal, which I construe as a motion to remand; a motion for default judgment; a motion for a preliminary injunction; and a motion for appointment of counsel.

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 on three or more previous occasions the prisoner has had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or 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 plaintiff's case sua sponte for lack of administrative exhaustion, if defendants can prove that plaintiff 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).

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

ALLEGATIONS OF FACT

A. Parties

Plaintiff Berrell Freeman is an inmate at Supermax Correctional Institution. Defendant Jon E. Litscher is Secretary of the Department of Corrections. Defendant Gerald Berge is Warden of Supermax. Defendant Ellen Ray is an institution complaint examiner at Supermax. Defendant Peter Huibregtse is a security director at Supermax. Defendant John Ray is the corrections complaint examiner. Defendant Cindy O'Donnell is deputy secretary of the Department of Corrections. Defendants Percy Pitzer and Donald Jackson are employed as hearing officers at the Whiteville Correctional Institution in Whiteville, Tennessee.

B. Fourteenth Amendment: Due Process

On December 9, 1999, defendant Jackson denied plaintiff the right to call witnesses and the right to an impartial decision maker at a disciplinary hearing. Defendant Jackson found plaintiff guilty of certain conduct on the basis of a statement in a disciplinary report. Defendant Pitzer affirmed defendant Jackson's decision.

On the same day, after the disciplinary hearing, plaintiff was transferred to Supermax. Defendants Litscher and Berge failed to determine that the transfer and placement was based on credible and reliable evidence. After plaintiff had been at Supermax for 20 months, defendants acknowledged that plaintiff's rights had been violated during the disciplinary

hearing and expunged the disciplinary record.

On August 20, 2001, plaintiff filed an inmate complaint asking for all backpay and continued pay. (Plaintiff had had a job as a kitchen worker before his transfer to Supermax.) On August 25, 2001, defendant inmate complaint examiner Ellen Ray recommended that the complaint be dismissed. On August 31, 2001, defendant Huibregtse dismissed the complaint. On September 7, 2001, plaintiff appealed the dismissal, again asking for backpay and continued pay. On September 25, 2001, defendant complaint examiner John Ray recommended that the appeal be dismissed. On September 30, 2001, defendants Deputy Secretary O'Donnell and Secretary Litscher accepted the decision of defendant Ray and dismissed the appeal.

As an inmate at Supermax, plaintiff is forced to participate in a behavior modification "level system." Under this system, he is subjected to demotions and non-promotion without any due process protections.

C. First Amendment: Freedom of Expression

At Supermax, plaintiff has not been allowed to order local newspapers or watch local news. He has not been allowed more than 3 books and 2 magazines in his cell at any time. All of plaintiff's mail, other than his legal materials from lawyers, has been monitored.

D. Right to Privacy, First Amendment Freedom of Religion and Religious Land Use and Institutionalized Persons Act

Defendants subject plaintiff to constant surveillance, including surveillance by female officers, while plaintiff is undressing, showering and using the toilet.

E. Denial of Access to the Courts

Plaintiff has not been allowed access to the law library for more than 80 minutes a week. Plaintiff's access to legal materials has been almost non-existent.

F. Eighth Amendment: Conditions of Confinement

For 23 months, plaintiff has suffered harsh conditions of confinement that surpass those of the typical supermaximum security facility. The following conditions make up the conditions of confinement imposed on plaintiff: constant lighting; extreme temperatures; confinement to cell 24 hours a day all but 3 hours a week; no view of or access to outdoors; no opportunity to work or obtain out-of-cell schooling; use of telephone limited to 24 minutes a month; escort by two guards in handcuffs and leg shackles; limitation of seven food items, including candy, in his cell at any time; use of canteen not consistent with other Wisconsin prisons; 24 hour monitoring by audio, video and security staff; and no contact visits.

G. Eighth Amendment: Inadequate Medical Care

The conditions of confinement at Supermax result in gratuitous pain and suffering and pose an imminent danger of serious illness, injury or death to plaintiff. By imposing these conditions, defendants have acted with deliberate indifference to plaintiff's serious medical and safety needs. These conditions are not reasonably related to legitimate penological interests.

H. Fourth Amendment: Unreasonable Searches

Plaintiff is subjected to monthly cell searches even though he never has human contact without officers present. Plaintiff is strip searched every time his cell is searched. These searches are unrelated to prison security and are calculated to harass plaintiff.

DISCUSSION

I. MOTION TO OPPOSE AND STRIKE PETITION FOR REMOVAL

Plaintiff has filed a motion and an amended motion in opposition to defendant's removal of this case, which I construe as a motion to remand this cause to circuit court. A remand is proper only when a case has been removed improperly. There is no showing that defendants lacked any basis for removing this case. A defendant may remove to federal court any action brought in state court over which the federal court has original jurisdiction. 28

U.S.C. § 1441(a). Federal courts have original jurisdiction over cases raising questions of federal constitutional law, such as those that plaintiff in his complaint. This court has jurisdiction under 18 U.S.C. § 1331. Plaintiff's motion to remand will be denied.

II. MOTION FOR DEFAULT JUDGMENT

Plaintiff has filed a motion for default judgment against defendants Jon E. Litscher, Cindy O'Donnell and John Ray. Plaintiff asserts that he served the summons and complaint on these defendants on January 2, 2002, and that as of February 19, 2002, he had not received an answer from these defendants. Plaintiff points out that under Wisconsin Statutes, defendants have 45 days in which to answer a summons and complaint.

If this case had not been removed to federal court, plaintiff might have had a valid argument. However, on January 14, 2002, defendants filed a petition and notice of removal, which had the effect of transferring jurisdiction over this case to this court. Under this court's procedure, defendants need not answer a prisoner complaint until after this court has completed an initial screening as required by § 1915. Until this court has issued its screening order, no action is required of either party. After this order has been issued to defendants, they will have 20 days in which to file an answer or other responsive pleading, as set out in Rule 12 of the Federal Rules of Civil Procedure. For this reason, plaintiff's motion for a default judgment will be denied.

III. MERITS OF THE CLAIMS

A. Fourteenth Amendment: Due Process

The Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Before plaintiff is entitled to Fourteenth Amendment due process protections, he must first have a protected liberty or property interest at stake. Averhart v. Tutsie, 618 F.2d 479, 480 (7th Cir. 1980). 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).

1. Disciplinary hearing at Whiteville

Petitioner alleges that defendants Jackson and Pitzer violated his right to due process by not allowing him to call witnesses, not affording him an impartial decision maker and relying solely on a statement in a disciplinary report.

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). 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).

Plaintiff's allegations do not suggest that he has a protected liberty interest in the outcome of the disciplinary hearing. He does not allege that he is being held at Supermax beyond the term of his incarceration or that he has lost good time credits because of the disciplinary hearing. Id. Plaintiff has not alleged facts sufficient to establish that remaining at Supermax implicates a liberty interest under Sandin. Therefore, he will not be allowed to proceed on this claim because it is legally frivolous.

2. Transfer to Supermax

Plaintiff alleges that he was not provided any due process in connection with his transfer to Supermax, where the conditions are severe. Specifically, he alleges that defendants Litscher and Berge failed to determine that the transfer was based on reliable evidence. However, the placement decision about which plaintiff complains does not implicate a liberty interest. Prisoners do not have a liberty interest in not being transferred from one institution to another. Meachum v. Fano, 427 U.S. 215 (1976) (due process

clause does not limit interprison transfer even when the new institution is much more disagreeable). Because plaintiff has not alleged facts sufficient to establish that remaining out of Supermax implicates a liberty interest under Sandin, his claim will be dismissed as legally frivolous.

3. Backpay and continued pay

I understand plaintiff to contend that defendants are violating his rights under the due process clause by depriving him of his protected liberty interest in receiving his paycheck while he has been incarcerated at Supermax. In Higgason v. Farley, 83 F.3d 807, 809 (7th Cir. 1996), the Court of Appeals for the Seventh Circuit held that the loss of "social and rehabilitative activities" are not "atypical and significant hardships" that are constitutionally actionable rights under Sandin, 515 U.S. 472. In Vanskike v. Peters, 974 F.2d 806, 809 (7th Cir. 1992), the court of appeals held expressly that a prisoner has no protected liberty interest in a prison job. Plaintiff's contention that defendants violated his constitutional rights when they revoked his prison job at the time of his transfer to Supermax is legally frivolous.

4. Level system

Plaintiff alleges that the level system at Supermax violates his right to due process.

Plaintiff argues that although the level system is punitive in nature, inmates are not allowed a hearing before being demoted to a lower level.

The level system and the related demotions and non-promotions at Supermax do not implicate a liberty interest. Under Sandin, these alleged losses do not impose atypical and significant hardships on plaintiffs; they do not create a loss in good time credits or otherwise lengthen an inmate's sentence. Plaintiff will not be allowed to proceed on his due process claim relating to the level system because the claim is legally frivolous.

B. First Amendment: Freedom of Expression

Plaintiff alleges that defendants have not allowed him to order local newspapers or watch local television news. Defendants have not allowed him to have more than 3 books and 2 magazines in his cell at any time. Finally, defendants monitor all of plaintiff's mail, other than his legal mail.

1. News and publications

I understand plaintiff to contend that defendants are violating his First Amendment rights by denying him access to certain newspapers and news programs and possession of more than a limited number of publications in his cell at a time. Prison actions that affect an inmate's constitutional rights must be "reasonably related to legitimate penological

interests." Turner v. Safley, 482 U.S. 78, 89-90 (1987). From other complaints filed by Supermax inmates, I take judicial notice of the fact that the restriction on periodicals and publications at Supermax is part of the institution's level system, an incentive program. See, e.g., Tiggs v. Berge, No. 00-C-317-C, Opin. and Order entered Aug. 31, 2000, at 23. Plaintiff has not alleged that he receives fewer books and periodicals than other inmates at the same level. Because restricting reading materials and televisions as part of an incentive program furthers a legitimate penological interest, plaintiff will not be allowed to proceed in this claim.

2. Mail

Prisoners have a limited liberty interest in their mail under the First Amendment. Thornburgh v. Abbott, 490 U.S. 401, 407 (1989); Martin v. Brewer, 830 F.2d 76, 77 (7th Cir. 1987). As a general rule, inmate mail can be opened and read outside the inmate's presence, Martin, 830 F.2d at 77, but legal mail may be subject to somewhat greater protection. Plaintiff alleges only that defendants monitor his non-legal mail, but there is no prohibition against prison officials screening inmates' non-legal mail for contraband. Plaintiff will not be allowed to proceed on this claim because it is legally frivolous.

C. Fourth Amendment: Right to Privacy

I understand plaintiff to contend that defendants are violating his right to privacy under the Fourth Amendment by monitoring him constantly and by assigning female guards to his unit where they were likely to see male inmates such as plaintiff undressing, showering and using their cell toilets. The Fourth Amendment is not triggered unless the state intrudes into an area "in which there is a 'constitutionally protected reasonable expectation of privacy.'" New York v. Class, 475 U.S. 106, 112 (1986) (citing Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). Although prisoners do not forfeit all of their rights to privacy, these rights are severely curtailed. Hudson v. Palmer, 468 U.S. 517 (1984) (prisoner had no reasonable expectation of privacy in his prison cell); Lanza v. New York, 370 U.S. 139 (1962) (prisoner had no reasonable expectation of privacy in jail visiting rooms). Pretrial detainees are subject to the same diminished expectations of privacy. Bell v. Wolfish, 441 U.S. 520, 546 (1979)

In Johnson v. Phelan, 69 F.3d 144, 145 (7th Cir. 1995), the Court of Appeals for the Seventh Circuit held that the Cook County jail did not violate the Fourth Amendment by assigning female guards to monitor a male pretrial detainee, even though such monitoring meant that these guards would observe the inmate naked in his cell, the shower and the toilet. The court explained that inmates "do not retain any right of seclusion or secrecy against their captors, who are entitled to watch and regulate every detail of daily life." Id. at 146. In light of Johnson, it is clear that any female guards who observe plaintiff

undressing, showering or using his cell toilet are not violating his right to privacy. Plaintiff will not be allowed to proceed on this claim because it is legally frivolous.

D. First Amendment: Freedom of Religion

In addition to contending that surveillance violates his Fourth Amendment rights, plaintiff contends that it violates his right to practice his religion. "[T]he Free Exercise Clause does not require states to make exceptions to neutral and generally applicable laws even when those laws significantly burden religious practices." Goshtasby v. Board of Trustees of Univ. of Ill., 141 F.3d 761, 769 (7th Cir. 1998) (citing Employment Division Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 887 (1990)); see also City of Boerne v. Flores, 521 U.S. 507 (1997) (Scalia, J., concurring) ("Religious exercise shall be permitted so long as it does not violate general laws governing conduct."); Sasnett v. Sullivan, 91 F.3d 1018, 1020 (7th Cir. 1996), vacated on other grounds, 521 U.S. 1114 (1997) ("After Smith the only way to prove a violation of the free-exercise clause is by showing that government discriminated against religion, or a particular religion, by actually targeting a religious practice, rather than accidentally hit it while aiming at something else . . . only intentional discrimination . . . is actionable under Smith."). In other words, the restrictions about which plaintiff complains must target those of his religion alone or amount to intentional discrimination against those of his religion. So long as the restrictions

promote a legitimate goal such as safety, they do not run afoul of the Constitution. Plaintiff does not allege that the constant surveillance targets his religion alone or that only those of his religion observe religious prohibitions on constant surveillance. Even assuming that plaintiff had made such allegations, constant surveillance promotes the legitimate goal of safety in the prison. Plaintiff will not be allowed to proceed on his First Amendment claim for failure to state a claim upon which relief can be granted.

E. Religious Land Use and Institutionalized Persons Act

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, holds the government to a higher standard than the free exercise clause of the First Amendment. The act states that

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person -
>
> (1) is in furtherance of a compelling state interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a). Plaintiff has not alleged that constant surveillance, by male or female security officers, constitutes a substantial burden on his religious practice. Because defendant's policy is not a substantial burden on plaintiff, defendants need not demonstrate that the imposition furthers a compelling state interest or that it represents the least

restrictive means of furthering that compelling interest. However, as noted above, prison officials have a legitimate, and even a compelling, interest in the safety of their institution. Plaintiff will not be allowed to proceed on his claim under the Religious Land Use and Institutionalized Persons Act for failure to state a claim.

F. Fourteenth Amendment: Denial of Access to the Courts

It is well established that prisoners have a constitutional right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement. Campbell v. Miller, 787 F.2d 217, 225 (7th Cir. 1986) (citing Bounds v. Smith, 430 U.S. 817 (1977)); Wolff v. McDonnell, 418 U.S. at 539, 578-80 (1974); Procunier v. Martinez , 416 U.S. 396, 419 (1974). The right of access is grounded in the due process and equal protection clauses of the Fourteenth Amendment. Murray v. Giarratano, 492 U.S. 1, 6 (1989). To insure meaningful access, states have the affirmative obligation to provide inmates with "adequate law libraries or adequate assistance from persons trained in the law." Bounds, 430 U.S. at 828.

To have standing to bring a claim of denial of access to the courts, a plaintiff must allege facts from which an inference can be drawn of "actual injury." Lewis v. Casey, 518 U.S. 343, 349 (1996). The plaintiff must have suffered injury "over and above the denial." Walters v. Edgar, 163 F. 3d 430, 433-34 (7th Cir. 1998) (citing Lewis , 518 U.S. 343). At

a minimum, the plaintiff must allege facts showing that the "blockage prevented him from litigating a nonfrivolous case." Id. at 434; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (plaintiff may sustain burden of establishing standing through factual allegations of complaint).

Plaintiff alleges that defendants have impeded his constitutional right of access to the courts by not allowing him more than eighty minutes of law library time a week, resulting in severely limited access to legal materials. However, plaintiff does not allege injury over and above the inconvenience caused by this policy. Specifically, he does not allege that because of the policy, a nonfrivolous legal action of his was dismissed or the time for filing such an action ran out. Thus, plaintiff's claim for denial of access to the courts will be dismissed for failure to state a claim upon which relief may be granted.

G. Eighth Amendment: Conditions of Confinement

Plaintiff alleges that several of the conditions at Supermax violate his right to be free from cruel and unusual punishment: constant illumination; extreme temperatures; confinement to cell all but three hours a week; no view of outdoors; limited use of telephone; escort by two guards in handcuffs and shackles; limited food items; limited use of canteen; constant monitoring; and no contact visits. In order to state a claim under the Eighth Amendment, plaintiff's allegations about prison conditions must satisfy a test that involves

both a subjective and objective component. Farmer v. Brennan, 511 U.S. 825, 834 (1994). The objective component focuses on whether the conditions "exceeded contemporary bounds of decency of a mature, civilized society." Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994) (citing Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992)). The subjective component focuses on intent: "whether the prison officials acted wantonly and with a sufficiently culpable state of mind." Lunsford, 17 F.3d at 1579. It is possible for physical conditions of confinement to violate the Eighth Amendment when viewed in their totality. See Jones 'El v. Berge, 00-C-421-C, slip op. at 37 (order entered August 14, 2001).

In this case, the allegations fail to describe the injury that plaintiff has allegedly suffered as a result of the conditions of confinement at Supermax. Without this information, it is not possible to determine whether plaintiff's allegations state a claim. The proceedings relating to this claim will be stayed until plaintiff informs the court about the injuries, if any, that he has suffered as a result of the conditions of confinement. Plaintiff may have until March 29, 2002, in which to notify the court about the type and extent of injury, if any, that he has suffered as a result of the conditions of confinement at Supermax.

H. Eighth Amendment: Inadequate Medical Care

I understand plaintiff to allege that defendants' subjecting him to the totality of the circumstances at Supermax violates his Eighth Amendment right to adequate medical care

by causing him "gratuitous" pain and suffering. Under the Prison Litigation Reform Act, 42 1997e(e), "no Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." Plaintiff's claim that the conditions at a prison cause an inmate pain and suffering is not actionable in federal court without an allegation of physical injury. Plaintiff will not be allowed to proceed on this claim because it is legally frivolous.

I. Fourth Amendment: Unreasonable Searches

Plaintiff alleges that he is subjected to cell searches and strip searches on a monthly basis and often for no legitimate reason. In Bell v. Wolfish, 441 U.S. 520 (1979), pretrial detainees at a New York City facility alleged that the policy of conducting body cavity searches following visits from outsiders violated their Fourth Amendment rights. On the merits, the Supreme Court found that the searches were reasonable in light of the circumstances. Id. at 558-60. The Court held that reasonableness must be determined by balancing the need for the search against the invasion of personal rights, as revealed by four factors: "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Id. at 559. The court held that the danger of contraband entering the facility was so significant that it outweighed the intrusive nature of the search. Id. at 560. It may be that plaintiff has been searched

following visits with visitors or visits to the law library or recreation area. However, from the allegations in plaintiff's complaint, I cannot determine whether the cell and strip searches are reasonable. Plaintiff will be allowed to proceed on this claim against defendants Berge and Litscher.

III. MOTION FOR A PRELIMINARY INJUNCTION

Plaintiff has filed a motion for a preliminary injunction, asserting that this court should order his transfer out of Supermax because the disciplinary infraction for which he was transferred to Supermax has since been expunged. In order to obtain emergency injunctive relief, plaintiff must show that (1) he has no adequate remedy at law and will suffer irreparable harm if the relief is not granted; (2) the irreparable harm he would suffer outweighs the irreparable harm defendants would suffer from an injunction; (3) he has some likelihood of success on the merits; and (4) the injunction would not frustrate the public interest. Palmer v. City of Chicago, 755 F.2d 560, 576 (7th Cir. 1985). At the threshold, plaintiff must show some likelihood of success on the merits and that irreparable harm will result if the requested relief is denied. If plaintiff makes both showings, the court then moves on to balance the relative harms and public interest, considering all four factors under a "sliding scale" approach. In re Forty-Eight Insulations, Inc., 115 F. 3d 1294, 1300 (7th Cir. 1997). I have already determined that plaintiff's transfer to Supermax is not a

constitutional violation, even if the underlying disciplinary infraction was expunged. Because plaintiff cannot demonstrate a likelihood of success on the merits of his claim, I will deny his motion for a preliminary injunction.

IV. MOTION FOR APPOINTMENT OF COUNSEL

In determining whether counsel should be appointed, I must first find that plaintiff made reasonable efforts to retain counsel and was unsuccessful or that he was precluded effectively from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). I note that plaintiff provided the court with the names and addresses of several lawyers whom he has asked to represent him in this case and who have declined to take the case because they do not handle civil rights cases. At least two lawyers agreed to take plaintiff's case if he posts a retaining fee. On the basis of these submissions, it seems that plaintiff has made reasonable efforts to secure counsel.

Second, I must determine whether a pro se plaintiff is competent to represent him or herself given the complexity of the case, and if he is not, whether the presence of counsel would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)).

Plaintiff states that he is unskilled in the law and has no understanding of court proceedings. However, most pro se litigants are similarly disadvantaged. In this court,

persons representing themselves are not penalized for failing to know the rules applying to their cases. In most instances, if proper procedure is not followed, the pro se litigant is directed to the relevant rule and given a second opportunity to comply.

Plaintiff's case is not complex. He contends that defendants performed unreasonable searches of his cell and his person in violation of his Fourth Amendment rights. The law governing this kind of Fourth Amendment claim is well settled. The question to be resolved is whether defendants' search of plaintiff's cell and person was reasonable in light of the circumstances, as determined by four factors: "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Bell, 441 U.S. at 559. Plaintiff does not need to pore over law books to obtain additional precedent. His ability to succeed on his claim will rest entirely upon the facts presented on a motion for summary judgment or at trial. With respect to the facts, plaintiff need undertake little discovery, if any. He should have personal knowledge of the incident giving rise to his claim.

I am convinced that plaintiff has the ability to prosecute a case of minor complexity such as this. I will deny his motion to appoint counsel.

ORDER

IT IS ORDERED that

1. Plaintiff's motion to remand is DENIED.

2. Plaintiff's motion for a default judgment is DENIED.

3. Plaintiff is allowed to proceed on his Fourth Amendment unreasonable searches claim against defendants Berge and Litscher.

4. The proceedings relating to plaintiff's conditions of confinement claim is STAYED. Plaintiff may have until March 29, 2002, in which to notify the court about the type and extent of injury, if any, that he has suffered as a result of the conditions of confinement at Supermax. If by March 29, 2002, plaintiff has not informed the court about his alleged injury, his conditions of confinement claim will be dismissed for failure to state a claim.

5. Plaintiff's claims for due process, the right to the free exercise of religion and denial of access to the courts, right to privacy and inadequate medical care as well as his claim under the Religious Land Use and Institutionalized Persons Act are DISMISSED because they are legally frivolous.

6. Plaintiff's claim for the right to the freedom of expression is DISMISSED for failure to state a claim upon which relief may be granted.

7. Defendants Ellen Ray, Peter Huibregtse, John Ray, Cindy O'Donnell, Donald Jackson and Percy Pitzer are DISMISSED from this case.

8. Plaintiff's motion for a preliminary injunction is DENIED.

9. Plaintiff's motion for appointment of counsel is DENIED.

10. Plaintiff should be aware of the requirement that he send the lawyers who are representing defendants a copy of every paper or document that he files with the court. Plaintiff should serve the lawyers directly rather than defendants. Plaintiff should retain 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. The court will disregard any papers or documents submitted by plaintiff unless the court's copy shows that a copy has gone to defendants' lawyers.

Entered this 12th day of March, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge