IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BERRELL FREEMAN,

Petitioner, ORDER

v. 02-C-0365-C

WISCONSIN DEPARTMENT OF CORRECTIONS, JON E. LITSCHER, and GERALD BERGE,

Respondents.

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This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Berrell Freeman, who is presently confined at Supermax Correctional Institution in Boscobel, Wisconsin, alleges that respondents violated his Fourteenth Amendment right to due process, his First Amendment right to free expression, his Fourth Amendment right to privacy, his Eighth Amendment right to be free from cruel and unusual conditions of confinement and his Fourth Amendment right to be free from unreasonable searches.

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. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

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).

Earlier this year, petitioner filed a lawsuit against respondents Litscher and Berge, among others, making the same claims that he raises in this lawsuit, with one exception. See Freeman v. Litscher, case no. 02-C-24-C. In that case, I dismissed his claims relating to due process and privacy because they were legally frivolous. I dismissed his freedom of expression claim for failure to state a claim upon which relief can be granted. I allowed

petitioner leave to proceed on his claims that respondents subjected him to (1) cruel and unusual conditions of confinement under the Eighth Amendment by exposing him to extreme cell temperatures and to a number of other conditions that when combined together allegedly caused him sensory deprivation and social isolation; and (2) unreasonable searches. The sensory deprivation and social isolation claim included the following conditions: confinement to a cell all but three hours a week; constant illumination; limited use of the telephone; no contact visits; and constant video monitoring. Petitioner was not allowed to proceed on his other Eighth Amendment claims that were not part of the sensory deprivation and social isolation claim (escort by two guards, limited food items and limited use of the canteen). Later in case no. 02-C-24-C, defendants moved to dismiss petitioner's sensory deprivation and social isolation claim, the extreme cell temperatures claim and the claim that petitioner had been subjected to unreasonable searches on the ground that he had failed to exhaust his administrative remedies and that motion was granted.

I will dismiss all of the claims presented in this case that were raised in case no. 02-C-24-C and were dismissed on their merits. These include claims that respondents violated his rights to (1) due process under the Fourteenth Amendment by incarcerating him at Supermax, by paying him less than inmates incarcerated elsewhere and by subjecting him to a level system; (2) freedom of expression under the First Amendment by limiting the publications he may possess and by monitoring his outgoing mail other than legal mail; (3)

privacy under the Fourth Amendment by monitoring him constantly; and (4) freedom from cruel and unusual punishment under the Eighth Amendment by subjecting him to 24-hour lighting and escort by two guards, denying access to the outdoors and limiting his use of canteen. Once a claim has been dismissed on the merits (with prejudice), a plaintiff may not bring another claim against the same parties for the same conduct. Okoro v. Bohman, 164 F.3d 1059, 1063 (7th Cir. 1999) ("[A] judgment on the merits precludes relitigation of any ground within the compass of the suit.") I have rejected these claims before and I decline to consider them again.

Petitioner has raised one new claim in this lawsuit: he was denied food as punishment in violation of his Eighth Amendment rights. Also, petitioner has added a new respondent: the Wisconsin Department of Corrections. The Wisconsin Department of Corrections will be dismissed from the case because petitioner has not alleged that this respondent has a policy of violating inmates' constitutional rights. Petitioner will be granted leave to proceed on his claim that he was denied food as punishment.

Also, now that it appears that petitioner has exhausted his administrative remedies, he will be granted leave to proceed in forma pauperis on his claims that respondents violated his Fourth Amendment right to be free of unreasonable searches and his claims under the Eighth Amendment that it is cruel and unusual punishment to subject him to extreme cell temperatures and to sensory deprivation and social isolation by keeping him in a cell that

is constantly illuminated and where he is under constant video surveillance and depriving him of access to the outdoors. Because petitioner's claims based on state law are not related to the constitutional claims that will be allowed to go forward, I will decline to exercise supplemental jurisdiction over them.

Also before the court are two motions filed by petitioner. I will deny petitioner's motion for appointment of counsel as premature. Petitioner has filed a "motion for notification" or, alternatively, for an extension of time in which to submit his initial partial payment, in which he seeks confirmation that his initial partial payment has been received by the court. Petitioner's motion for notification will be granted because the court has received petitioner's initial partial payment.

In his complaint, petitioner makes the following allegations of fact that relate to claims that were not dismissed on their merits in 02-C-24-C.

ALLEGATIONS OF FACT

A. Parties

Petitioner Berrell Freeman is an inmate at Supermax Correctional Institution. The Wisconsin Department of Corrections is an agency of the state of Wisconsin. Respondent Jon E. Litscher is Secretary of the Department of Corrections. Respondent Gerald Berge is the warden at Supermax.

B. Conditions of Confinement

Petitioner has been confined at Supermax for over 910 days. The conditions at Supermax are considerably more harsh and restrictive than those of the typical prison. Petitioner has been subjected to constant sensory deprivation and almost total isolation. He has been exposed to 24-hour a day illumination for his entire stay, excessive cold in the winter and excessive heat in the winter. He has seen the outdoors only on outside medical visits. All other Wisconsin prisons allow prisoners regular access to the outdoors. Petitioner has been subjected to 24-hour monitoring by audio, video and staff. No other Wisconsin prison does this.

The conditions have caused petitioner physical, psychological and mental torture. They have caused petitioner to suffer from constant headaches, depression, sleep deprivation, breathing complications and decreased vision. The conditions have caused petitioner illusions, forgetfulness, confusion and bi-polar traits. They have caused petitioner to be placed on a medical diet. He had a medical restriction to sleep with his mattress on the floor in front of the vent. Petitioner has suffered from chronic colds and flus that dehydrated petitioner, resulting in pain and discomfort and from a build-up of fluid in his nipples and lumps and rashes all over his body that caused him pain and physical discomfort.

Petitioner has been denied regular meals because he turned his light off or was not wearing his pants. Food is used as punishment. Each time that petitioner is punished with

the denial of food, staff say that he "refused" his meal. Petitioner has never verbally refused food.

C. Unreasonable Searches

Petitioner has been subjected to undocumented monthly cell and strip searches without cause.

D. Administrative Code Violations

The Wisconsin Administrative Code allows inmates to retain legal property that they purchase. Respondents prohibit petitioner from having Prison Legal News.

The Wisconsin Administrative Code allows inmates to keep religious materials. Respondents prohibit petitioner from having "Awaken."

DISCUSSION

A. Respondent Wisconsin Department of Corrections

Petitioner has 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. Dept. 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). Petitioner has not alleged that the Department of Corrections has any such policy. Therefore, he may not proceed against respondent Wisconsin Department of Corrections.

B. Eighth Amendment Conditions of Confinement

Petitioner contends that he is subjected to conditions of confinement at Supermax that violate his Eighth Amendment right to be free from cruel and unusual punishment.

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. 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).

Petitioner alleges that he is exposed to extreme cold in the winter and extreme heat

in the summer. He has received a medical restriction allowing him to place his mattress on the floor near the air vent. The extreme temperatures have caused petitioner chronic colds and flus that dehydrated him, resulting in pain and discomfort. In addition, petitioner suffered from a build-up of fluid in his nipples and lumps and rashes all over his body that caused him pain and physical discomfort.

Prisoners are entitled to "the minimal civilized measure of life's necessities." 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 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. Although at this early stage I cannot say that petitioner could not prove any set of facts entitling him to relief on this claim, 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 cells during the time in question 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. Petitioner's request for leave to proceed in forma pauperis on this claim will be granted against respondents Litscher and Berge.

Petitioner alleges also that he has been denied regular meals because he turned off his light or was not wearing pants. Prison officials are not constitutionally barred from using food to discipline inmates for misconduct. See, e.g., Lemaire v. Maass, 12 F.3d 1444, 1455-56 (9th Cir. 1993). However, even recalcitrant prisoners are entitled to "the minimal civilized measure of life's necessities." Farmer v. Brennan, 511 U.S. 825, 833-34 (1994). These include "adequate food, clothing, shelter and medical care." Id. at 832. Thus, failure to provide an inmate with "nutritionally adequate food" may constitute a violation of the Eighth Amendment. Antonelli v. Sheehan, 81 F.3d 1422, 1432 (7th Cir. 1996).

It is not possible to tell from petitioner's scant allegations whether he was deprived of food over several days or whether the sanction was only sporadic. Because the facts are unclear on this point, I cannot say that petitioner's claim that he was deprived of food is not sufficiently serious to state a claim under the Eighth Amendment. Petitioner's allegations may present a situation similar to that in Cooper v. Sheriff, Lubbock County, Texas, 929 F.2d 1078, 1081 (5th Cir. 1991), in which a prisoner alleged that he had been denied food for several days in a row because he was not fully dressed at mealtime. The Court of Appeals for the Fifth Circuit held that although withholding food for failing to dress may be "a

facially permissible form of punishment," being deprived of food for several days could constitute cruel and unusual punishment. Id. at 1083. See also Dearmann v. Woodson, 429 F.2d 1288, 1289 (10th Cir. 1970) (prisoner stated a claim under § 1983 when he alleged that prison officials deprived him of food for 50½ hours); Williams v. Coughlin, 875 F. Supp. 1004, 1013 (W.D.N.Y. 1995) (officials may have violated Eighth Amendment when they withheld food for two days for prisoner's failure to return food tray). Although petitioner will be granted leave to proceed on this claim, if he is to succeed in the end, he will have to prove that the amount of food he received was not "adequate to maintain [his] health." LeMaire, 12 F.3d at 1456.

In Jones 'El v. Berge, case no. 00-C-421-C, in which petitioner is a class member, I granted the plaintiff class leave to proceed on a claim that certain conditions that were constitutionally permissible by themselves might violate the Eighth Amendment if, in combination, they deprived an inmate of a single identifiable basic human need.

The conditions making up the "totality" claim in Jones 'El were as follows:

(1) 24-hour lock down, except that some inmates are able to leave their cells for up to four hours a week to use an unheated or cooled indoor recreation cell;

(2) cells with a sliver of a window and a boxcar door that prevents inmates from seeing outside their cell;

(3) extremely limited use of the telephone, family or personal visits by video screen

only and visiting regulations so burdensome as to prevent many inmates from receiving visitors;

(4) chronic sleep deprivation caused by 24-hour cell illumination and, for inmates choosing to block the light by covering their heads, being awakened hourly throughout the night by security staff;

(5) use of a video camera rather than human interaction to monitor all inmate movement; and

(6) extreme cell temperatures.

In Jones'El, I understood the plaintiffs to contend that these conditions combined to deprive them of the clearly identifiable and basic human needs of social interaction and sensory stimulation. In this case, petitioner alleges that he was subjected to the following conditions also found among the conditions listed in Jones 'El:

(1) no access to the outdoors;

(2) constant cell illumination;

(3) constant video monitoring; and

(4) extreme cell temperatures.

I have concluded that petitioner states an independent claim for relief under the Eighth Amendment with respect to the extreme temperatures in his cell. I concluded in case no. 02-C-24-C that the lack of access to the outdoors, constant illumination and constant

video monitoring failed to state viable independent Eighth Amendment claims. For that reason, I have not repeated the analysis in this opinion. However, petitioner alleges that the lack of access to the outdoors, constant illumination and constant monitoring cause him to take anti-depressants and sleep medications. From this allegation, it is possible to infer that these conditions are alleged to have a mutually enforcing effect that deprives petitioner of separate identifiable basic human needs, that is, sensory stimulation and social interaction. Accordingly, I conclude that petitioner's allegations make out a claim that he is being subjected to social isolation and sensory deprivation by respondents' policies of denying him access to the outdoors and subjecting him to constant illumination and video surveillance. Petitioner's request for leave to proceed in forma pauperis will be granted on this claim against respondents Litscher and Berge. I note, however, that because the settlement in Jones 'El did not resolve the issue of liability on the conditions of confinement claim, it will be necessary for petitioner to establish respondents' liability as well as his damages in order to prevail ultimately on this claim.

C. Unreasonable Searches

Petitioner alleges that he is subjected to cell searches and strip searches on a monthly basis 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. 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 petitioner has been searched following visits with visitors or visits to the law library or recreation area. However, from the allegations in his complaint, I cannot say that the cell and strip searches are reasonable. Petitioner's request for leave to proceed on this claim against respondents Berge and Litscher on this claim will be granted.

D. State Law Claims

Petitioner alleges that certain aspects of respondents' conduct violate the Wisconsin Administrative Code, such as the limitations on legal and religious publications. These state law claims are based on facts that are entirely separate from petitioner's viable federal law claims. Accordingly, I decline to exercise supplemental jurisdiction over petitioner's state law claims pursuant to 28 U.S.C. § 1367(a). 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. Motion for Appointment of Counsel

In determining whether counsel should be appointed, I must first find that petitioner 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 in Freeman v. Litscher, case no. 02-C-24-C, petitioner provided the court with the names and addresses of several lawyers whom he asked to represent him and who declined to take the case because they do not handle civil rights cases. At least two lawyers agreed to take petitioner's case if he posts a retaining fee. On the basis of those submissions, it seems that plaintiff has made reasonable efforts to secure counsel as to the claims at issue in this case.

Second, I must determine whether petitioner is competent to represent himself 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)). It is simply too early in this case to make this determination. Petitioner has demonstrated the ability to draft a complaint and explain the claims he is asserting.

Accordingly, petitioner's motion for appointment of counsel will be denied without prejudice to his renewing the motion at a later stage in the case.

ORDER

IT IS ORDERED that

1. Petitioner Berrell Freeman's request for leave to proceed in forma pauperis is GRANTED on his claims that respondents Jon E. Litscher and Gerald Berge violated his rights (1) to be free from unreasonable searches under the Fourth Amendment; and (2) to be free from cruel and unusual conditions of confinement under the Eighth Amendment relating to extreme cell temperatures, food deprivation, and sensory deprivation and social isolation stemming from lack of access to the outdoors, constant illumination in his cell and constant video monitoring.

2. Petitioner's request for leave to proceed in forma pauperis is DENIED on all of his other Eighth Amendment claims and on his claims that respondents violated his rights to due process under the Fourteenth Amendment, to free expression under the First Amendment and to privacy under the Fourth Amendment because those claims are duplicative of claims that were dismissed on the merits in Freeman v. Litscher, case no. 02-C-24-C;

3. Respondent Wisconsin Department of Corrections is DISMISSED from this case;

4. Petitioner's motion for appointment of counsel is DENIED without prejudice;

5. Petitioner's motion "for notification and or extension of time" is GRANTED; petitioner is notified that this court has received his initial partial payment in this case;

6. 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

8. The unpaid balance of petitioner's filing fee is $145.35; 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 10th day of September, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge