IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BERRELL FREEMAN,

Petitioner, ORDER

v. 03-C-0021-C

GERALD BERGE and
JON E. LITSCHER,

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 Berrell Freeman is presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. He alleges that respondents Jon Litscher and Gerald Berge violated his Eighth Amendment right to be free from cruel and unusual conditions of confinement, his Fourth Amendment right to be free from unreasonable searches and his Fourteenth Amendment right to due process. In addition, he has filed a motion for appointment of counsel.

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, 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. This court will not dismiss petitioner's case on its own for lack of administrative exhaustion, but if respondents believe 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 has filed two previous lawsuits against respondents, in which he asserted most of the same claims he raises in this lawsuit. See Freeman v. Wisconsin Department of Corrections, Case No. 02-C-365-C; Freeman v. Litscher, Case No. 02-C-24-C. In both cases,

I dismissed each of the claims on the ground that petitioner had failed to exhaust his administrative remedies. However, because I did not decide the merits of these claims, petitioner is not barred by the doctrine of claim preclusion from reasserting them. Now that it appears that petitioner has exhausted his administrative remedies, I will grant him leave to proceed on his claim that respondents violated the Fourth Amendment by subjecting him to unreasonable strip searches and that they violated the Eighth Amendment by using excessive force against him. In addition, I will allow him to proceed on his claims that respondents violated his Eighth Amendment right to be free from cruel and unusual punishment when they (1) denied him food; (2) subjected him to extreme cell temperatures; and (3) subjected him to sensory deprivation and social isolation by keeping him in a cell that is constantly illuminated and under 24-hour video surveillance and by depriving him of access to the outdoors.

Petitioner has added one new claim in this lawsuit: that respondents deprived him of due process of law in violation of the Fourteenth Amendment when they placed him on "paper restriction" status. Petitioner's request for leave to proceed on this claim will be denied because it is legally frivolous.

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

ALLEGATIONS OF FACT

Petitioner Berrell Freeman is a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Respondent Gerald Berge is the prison's warden. Respondent Jon Litscher is Secretary of the Wisconsin Department of Corrections.

Petitioner has been confined at the Secure Program Facility for almost three years. During this entire period, petitioner has been subjected to 24-hour lighting, 24-hour monitoring by audio, video and staff, excessive heat in the summer and excessive cold in the winter. Petitioner has no access to the outdoors except for medical appointments.

Petitioner has been subjected to undocumented monthly cell and strip searches. These are conducted to harass and intimidate petitioner.

Petitioner has been denied food when he turned his light off or was not wearing his pants. Each time that petitioner is punished with the denial of food, staff say that he "refused" his meal. Petitioner has never refused food.

Petitioner was placed on "paper restriction" status. This means that petitioner was allowed only 12 sheets of tissue paper each shift, one sheet of writing paper on first and second shift and use of hygiene products twice a day. Plaintiff was placed on "paper restriction" for 14 days without cause.

These conditions of confinement have caused petitioner to be so severely depressed that he must take anti-depressants. Petitioner has tried to commit suicide. He cannot sleep without medication, has difficulty breathing in the summer and is plagued with colds and

the flu in the winter. Because of the extreme temperatures, petitioner must sleep with a mattress on the floor next to the vent. In addition, petitioner suffers from a build-up of fluid in his nipples and lumps and rashes all over his body that cause him pain and physical discomfort. He experiences distortions, illusions, forgetfulness and confusion. The constant illumination had led to impaired vision, headaches and eye pain.

DISCUSSION

A. Due Process: Paper Restriction Status

I understand petitioner to allege that respondents have violated his due process rights under the Fourteenth Amendment by restricting the paper products he receives. When due process applies, it generally requires notice and an opportunity to be heard before adverse action may be taken. However, due process protections do not attach to every state action taken for a punitive reason. Sandin v. Connor, 515 U.S. 472, 484 (1995). Rather, they apply only when there is a protected liberty or property interest at stake. Averhart v. Tutsie, 618 F.2d 479, 480 (7th Cir. 1980). Liberty interests can be created by state law or by the due process clause itself. Thielman v. Leean, 282 F.3d 478, 480 (7th Cir. 2002). Petitioner does not identify a state-created liberty interest, so the question is whether his freedom from restraint has been restricted so greatly that it "exceed[s] the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force." Sandin,

515 U.S. at 484; see also Vitek v. Jones, 445 U.S. 480, 493 (1980) (finding liberty interest when punishment was "qualitatively different" from the punishment characteristically suffered by a person convicted of a crime)

Thus far, the Supreme Court has identified two instances in which the due process clause creates a liberty interest in the context of a prison sentence: a transfer from a prison to a mental hospital, Vitek, 445 U.S. 480 (1980), and the involuntary administration of psychotropic drugs, Washington v. Harper, 494 U.S. 210 (1990). Petitioner cannot argue successfully that limiting the amounts of paper he is entitled to receive because of misconduct is comparable to the conditions discussed in Vitek or Harper. Accordingly, I will deny petitioner leave to proceed on his claim that respondents violated his right to due process when they put him on paper restriction. The claim is legally frivolous.

B. Unreasonable Searches

I understand petitioner to allege that respondents condone subjecting him to monthly cell and strip searches for the sole purpose of harassment and intimidation. With respect to the cell searches, the Supreme Court has held that prison officials may search an inmate's cell at random without violating the Fourth Amendment because prisoners have no reasonable expectation of privacy in their cells. Hudson v. Palmer, 468 U.S. 517, 519-20 (1984). Therefore, this portion of petitioner's Fourth Amendment claim will be denied as

legally frivolous. However, the Court of Appeals for the Seventh Circuit has recognized that prisoners retain some protection under the Fourth Amendment against unreasonable searches of their person. Peckham v. Wisconsin Department of Corrections, 141 F.3d 694, 697 (7th Cir. 1998). Reasonableness is determined by balancing "the scope of the particular intrusion, the manner in which it was conducted, the justification for initiating it, and the place in which it is conducted." Bell v. Wolfish, 441 U.S. 520, 559 (1979). In addition to the protections under the Fourth Amendment, the Eighth Amendment's prohibition on the use of excessive force may apply when the purpose of the search is solely for harassment rather than legitimate institutional concerns. Peckham, 141 F.3d at 697; see Hudson v. McMillan, 503 U.S. 1, 9 (1992) (standard for excessive force is whether "prison officials maliciously and sadistically use force to cause harm"). It may be that petitioner has been searched for legitimate security concerns. However, from the scant allegations in the complaint, I cannot say that the strip searches are reasonable. I will assume at this stage that the monthly strip searches are conducted either pursuant to a policy or at the direction or consent of respondents. See Sheik-Abdi v. McClellan, 37 F.3d 1240, 1248 (7th Cir. 1994) (Under § 1983, "liability does not attach unless the individual defendant caused or participated in a constitutional deprivation.") Petitioner's request for leave to proceed on this claim will be granted.

C. Eighth Amendment: Conditions of Confinement

Petitioner contends that he is subjected to conditions of confinement at the Wisconsin Secure Program Facility 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 from the time of his arrival at the Wisconsin Secure Program Facility until the present he has been 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 has suffered from a build-up of fluid in his nipples and lumps and rashes all over his body that have 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 [the inmate] 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 obtain 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 adverse health effects beyond mere discomfort. Petitioner's request for leave to proceed in forma pauperis on this claim will be granted.

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, 511 U.S. at 833-34. 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 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 together deprive him of sensory stimulation and social interaction and require him to take anti-depressants and sleep medications. Accordingly, I conclude that petitioner's allegations

make out a claim that the combination of conditions deprive him of his human need for sensory stimulation and social interaction in violation of the Eighth Amendment. Petitioner's request for leave to proceed in forma pauperis will be granted on this claim.

Petitioner should be aware that he faces an uphill battle on this claim. Not only will he have to show that he is deprived of any meaningful amount of social interaction and sensory stimulation, he will also have to show that this deprivation creates a substantial risk of serious harm for him. The allegations in petitioner's complaint provide almost no details regarding this claim. Although the Federal Rules of Civil Procedure permit plaintiffs to allege in a complaint the bare minimum of facts that are sufficient to give the defendant notice of the plaintiff's claim, the procedure is much different on a motion for summary judgment. If respondents later move for summary judgment and petitioner does nothing more than restate his allegations in affidavit form, I will have to dismiss petitioner's case. Fed. R. Civ. P. 56 requires parties to "set forth specific facts which show that there is a genuine issue for trial." See also Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990) ("The object of [summary judgment] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.") Petitioner will have to present sufficient evidence to permit a reasonable jury to find in his favor.

In addition, I note 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. Further, petitioner is limited in the relief that he can obtain with respect to any of the conditions certified for class treatment and addressed by the settlement agreement in Jones 'El. These include the conditions regarding cell temperatures, constant monitoring and illumination and lack of access to the outdoors. In approving the agreement, I concluded that it was fair, reasonable and lawful. See Jones El' v. Litscher, 00-C-421-C, Order dated March 28, 2002, dkt. #207, at 8. Therefore, petitioner cannot obtain injunctive relief on these claims and can obtain monetary damages only for conduct occurring before March 28, 2002, the date I approved the settlement agreement. This also means that in acquiring evidence to prove these claims, petitioner should focus solely on evidence showing his conditions as they existed before March 28, 2002. To the extent that petitioner believes that respondents have not been complying with the settlement agreement since it was approved, he should direct his concerns to the monitor.

Because I did not certify for class treatment the issue of using food as punishment and because the settlement agreement did not address the reasonableness of inmate strip searches, petitioner is not limited in the relief he may seek on those two claims.

D. 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). Petitioner must provide the court with the names and addresses of at least three lawyers that he has asked to represent him in this case and who have declined to take the case before I can find that he has made reasonable efforts to secure counsel. Petitioner suggests that this requirement should not apply to him because "[t]he court is well aware that the plaintiff has contacted numerous attorneys concerning representation." However, petitioner is not excused from the requirements under Jackson simply because he has been unsuccessful in finding counsel in previous cases. The court of appeals did not indicate in Jackson that the only time pro se parties must look for representation is the first time they file a claim.

Even if petitioner had made reasonable efforts to obtain counsel, I still could not appoint counsel for him at this early stage. Appointment of counsel is not appropriate unless the pro se plaintiff is unable to represent him or herself given the complexity and 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 the lawsuit to make these determinations. Petitioner has shown in this case and in previous actions that he is capable of drafting motions and making legal arguments. I am convinced that petitioner is capable of representing himself at least

in the earliest stages of litigation.

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 Litscher and Gerald Berge violated his rights (1) to be free from unreasonable strip searches under the Fourth Amendment and from excessive force under the Eighth 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 is DENIED with respect to his claim that respondents violated his right to due process under the Fourteenth Amendment by restricting the paper he receives and on his claim that respondents violated his Fourth Amendment rights by searching his cell. These claims are DISMISSED as legally frivolous.

3. Petitioner's motion for appointment of counsel is DENIED.

4. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will

be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

5. Petitioner should keep 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.

5. The unpaid balance of petitioner's filing fee is $147.79; 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 12th day of February, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge