IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES KURALLE,

Petitioner,

v.

DENNIS HILLSTEAD,
KAREN HUMPHRIES,
KRISTEN ANDERSON
and DEPUTY SCHAFFER,

Respondents.

ORDER

04-C-515-C

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This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Redgranite Correctional Institution in Redgranite, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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 has had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion 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). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner James Kuralle is an inmate and is currently confined at the Redgranite Correctional Institution in Redgranite, Wisconsin. At all relevant times, he was a pretrial detainee at the St. Croix County jail in Hudson, Wisconsin. Respondent Dennis Hillstead is the sheriff of St. Croix County, respondent Karen Humphries is a captain, respondent Kristen Anderson is a sergeant and respondent Schaffer is a deputy.

On April 5, 2003, petitioner was placed in the St. Croix County jail. At some time that month, he asked respondent Schaffer for a razor. Respondent Schaffer responded that inmates were not allowed to have razors but that petitioner could have Nair, a depilatory lotion. Initially, petitioner declined but after a few weeks, his facial hair began to bother him and he used Nair on his face. When the chemicals in the lotion caused an intense burning sensation, petitioner read the package, which stated that the product should not be used on the face or head.

Petitioner called respondent Schaffer and asked him why the jail would provide a product that stated specifically that it was not to be used on the face. Respondent Schaffer indicated that Nair was the only hair removal product available at the jail and petitioner was free to take it or leave it. After petitioner pointed out the blistering that the lotion had caused on his face, respondent Schaffer called a nurse, who provided petitioner with ointment and an ice pack. Petitioner couldn't sleep that night because of the pain of having his face touch the pillow. The next day his face was discolored, swollen and blistered. The nurse gave him pain killers, ice and ointment but refused his request to take pictures of his face. Petitioner was unable to wash his face for another two days and his scabbing did not subside for another two weeks. Over a year later, petitioner still has some scars and he is no longer able to wear a mustache because he has a large patch where his hair follicles have been burned.

In May 2003, respondent Humphries held a meeting with the inmates in unit A of the jail at which petitioner asked whether inmates could have razors and respondent Humphries said no. Petitioner then asked if inmates could shave for visitors or court appearances and suggested that unkempt facial hair might make a person look more guilty to a judge. Respondent Humphries responded that if that were true, her husband has looked guilty for the last twenty years.

DISCUSSION

A. Eighth Amendment

Petitioner alleges that respondents violated his Eighth Amendment right to be free from cruel and unusual punishment by providing him with a depilatory cream with which to shave that should not be used on the face. In a similar case challenging this same policy, I noted that there is no arguable Eighth Amendment violation if a jail official simply "refuse[s] inmates razors and make[s] Nair available at the prison canteen or in bottles clearly marked with the manufacturer's directions for use and cautions against use." Bonner v. St. Croix County Jail, 03-C-662-C, December 11, 2003. As I explained in that opinion, an inmate has no constitutional right to a razor and he is free to decline to use the hair removal product offered at the jail. Id.

In Bonner, I allowed the petitioner to proceed with his claim because he had provided

almost no detail about the incident and therefore, it was possible that the respondent had provided the petitioner with an unmarked container of a Nair product that was not appropriate for use of the face and was forcing the petitioner to use it. In this case, however, petitioner's allegations make it clear that the bottles were labeled with a warning and his use of the product was discretionary. Accordingly, petitioner will not be allowed to proceed on a theory that respondents' actions violated the Eighth Amendment.

B. Substantive Due Process

Although petitioner does not suggest that he may have a claim for the violation of his substantive due process rights, pro se litigants are not required to articulate legal theories. In addition to the Eighth Amendment's protection against cruel and unusual punishment, pretrial detainees have a substantive due process right to be free from any form of punishment. Youngberg v. Romeo, 457 U.S. 307, 320 (1982); Bell v. Wolfish, 441 U.S. 520, 535 (1978). Because petitioner was a pretrial detainee at all relevant times, he had a right to be free from any form of punishment, not just punishment that qualifies as cruel and unusual. Although the scope of petitioner's right to be free from punishment is arguably more expansive under the due process clause than under the Eighth Amendment, the distinction is immaterial in the present case; the jail punishment does not amount to punishment of any kind.

"[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" Bell, 441 U.S. at 539. Maintaining institutional security, order and discipline are legitimate administrative goals that may require limitations on the rights of pretrial detainees. Id. at 546; Rapier v. Harris, 172 F.2d 999, 1003 (7th Cir. 1999). Certainly, a policy prohibiting inmates from having razor blades is reasonably related to the administrative objective of maintaining safety and security within the prison, cf. Bell, 441 U.S. at 553 (prison policy prohibiting pretrial detainees from receiving packages justified by security concerns such as the "traditional file in the cake kind of situation"), and none of petitioner's allegations suggest that respondents banned razors as a means of punishing detainees. Nor can it be said that respondents were "punishing" petitioner by making Nair available to him. According to petitioner's allegations, the product was clearly marked with a warning that it should not be used on the face and respondents did not require him to use it; in fact, respondent Schaffer told petitioner expressly that his use of the product was entirely discretionary.

Petitioner's injuries were caused when he applied Nair to his face of his own free will from a bottle that clearly warned against such use. Because petitioner's allegations do not suggest that he was "punished" in any way, he will be denied leave to proceed on his claim. Although the ban on shaving razors might be considered overly cautious, courts are not to

substitute their own judgements for those of expert prison administrators who have a far better understanding of the administrative and safety needs of the institutions that they oversee. Caldwell v. Miller, 790 F.2d 589, 596 (7th Cir. 1986).

ORDER

IT IS ORDERED that

1. Petitioner James Kuralle is DENIED leave to proceed on his claim that respondents Dennis Hillstead, Kristen Anderson, Karen Humphries and deputy Schaffer violated his due process and Eighth Amendment rights when they prohibited him from having a razor and made available a depilatory lotion that was marked with a warning against application to the face;

2. This action is DISMISSED pursuant to 28 U.S.C. § 1915A because the allegations in the complaint fail to state a claim on which relief can be granted;

2. The unpaid balance of petitioner's filing fee is $147.24; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

3. The clerk of court is directed to enter judgment for defendants and close this case;

4. A strike will be recorded against petitioner in accordance with 28 U.S.C. § 1915(g).

Entered this 3rd day of September, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge