IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

MICHAEL L. WINSTON,

Petitioner, ORDER

v. 04-C-59-C

PHIL KINGSTON, MIKE VANDENBROOK and JOHN DOES unlimited, sued in their official and individual capacities,

Respondents.

- -

This is a proposed civil action for declaratory and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Michael Winston, an inmate at the Columbia Correctional Institution in Portage, Wisconsin, requests leave to proceed in forma pauperis under 28 U.S.C. § 1915. He alleges that respondents Phil Kingston, Mike Vandenbrook and other unnamed officers subjected him to cruel and unusual punishment by placing him in a cell that was unsanitary and that did not provide adequate bedding or protection from the cold.

From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the 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.

I conclude that petitioner has stated a claim under the Eighth Amendment with respect to each of his claims. In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Michael Winston is an inmate at Columbia Correctional Institution in Portage, Wisconsin. He has a history of suicidal conduct. On December 19, 2003, petitioner was placed in an observation cell without any clothes after he reported feeling suicidal. The unit was not heated, even though the outside temperature was near or below zero degrees. Petitioner was given only a table cloth to keep warm.

There was no bed in the cell. Instead, petitioner had to sleep on a floor mat that was as hard as the floor and was covered with dried-up food and semen. The walls of the cell

were covered with feces and blood stains. Ants and "bugs" crawled on the walls and floor.

Petitioner complained to correctional officers about his conditions, but they did not respond. He next spoke to respondent Mike Vandenbrook, a psychologist at the prison, who told him that the conditions in the cell were uncomfortable but not inhumane.

While petitioner was in the cell, he was bitten by hundreds of bugs. He now has small scars all over his body from sleeping on the floor. He still has back pain and other pain "that could be felt all over." He suffers from severe emotional distress.

Respondent Phil Kingston is the warden of Columbia Correctional Institution.

OPINION

A. Excessive Cold

Prisoners have a right under the Eighth Amendment to be free from extreme hot and cold temperatures. Shelby County Jail Inmates v. Westlake, 798 F.2d 1085, 1087 (7th Cir. 1986). The same Eighth Amendment standard applies to cell temperatures as to other conditions of confinement: whether the temperatures subject the inmate to a substantial risk of serious harm and whether prison officials are deliberately indifferent to that risk. Murphy v. Walker, 51 F.3d 714 (7th Cir. 1995). In assessing whether this standard has been satisfied, a court should consider the temperature's severity, its duration, whether the inmate has alternative means to protect himself from the extreme temperatures, the adequacy of

these alternatives and whether the inmate must endure other uncomfortable conditions apart from the severe temperature. Dixon v. Godinez, 114 F.3d 640, 644 (7th Cir. 1997).

Petitioner alleges that he was put in an unheated cell at a time when the outside temperatures were near or below freezing, with no clothes and nothing but a table cloth to protect himself from the cold. It is not clear from petitioner's complaint how long he was subjected to these conditions, but it appears that it was at least several days. Although having to bundle up to stay warm does not violate the Eighth Amendment in itself, if petitioner was not given sufficient protection from the cold to avoid a substantial risk of harm to his health, his Eighth Amendment rights may have been violated. Id.; Del Raine v. Williford, 32 F.3d 1024, 1035 (7th Cir. 1994) (concluding that there was a genuine issue of material fact on cell temperatures claim even though plaintiff was given a blanket); Henderson v. DeRobertis, 940 F.2d 1055, 1060 (7th Cir. 1991) (no qualified immunity when defendants subjected prisoners to below freezing temperatures for four days). Further, the risk to petitioner's health may have been exacerbated by his already poor mental health.

The question on this claim is who the proper respondents are. It is reasonable to assume that as the warden of the prison, respondent Kingston is ultimately responsible for the temperatures of the inmate's cells and that he knew how cold petitioner's cell was. E.g., Dixon, 114 F.3d 640 (naming warden as defendant in cell temperatures case); Del Raine, 32 F.3d 1024 (same); Henderson, 940 F.2d 1055 (same); see also Sanders v. Sheahan, 198

F.3d 626, 629 (7th Cir. 1999) (high ranking officials "can realistically be expected to know about or participate in creating systematic jail conditions"). It is less likely that respondent Vandenbrook, the prison's psychologist, had any authority over the physical conditions of the cells. However, I will assume at this stage of the proceedings that Vandenbrook at least had the authority to recommend that petitioner be transferred to a safer location but refused to do so, even though he knew that petitioner's health was at risk. Fillmore v. Page, 358 F.3d 496 (7th Cir. 2004) (official may be liable for constitutional violation if he knew of violation and had ability to intervene but failed to do so).

Also, petitioner has listed "John Does Unlimited" as respondents. "[W]hen the substance of a pro se civil rights complaint indicates the existence of claims against individual officials not named in the caption of the complaint, the district court must provide the plaintiff with an opportunity to amend the complaint." Donald v. Cook County Sheriff's Department, 95 F.3d 548, 555 (7th Cir. 1996); see also Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981) (if prisoner does not know name of defendant, court may allow him to proceed against administrator for purpose of determining defendants' identity). In this case, petitioner may have a claim against the official or officials who chose to put him in the cell as well as the officers who ignored his complaints. Accordingly, petitioner will be granted leave to proceed against respondents Vandenbrook and Kingston, individually and for the purpose of discovering the names of the John Doe respondents allegedly responsible

for failing to protect him from the cold. Early on in this lawsuit, Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference. At the time of the conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed respondents and will set a deadline within which petitioner is to amend his complaint to include the unnamed respondents.

B. Unsanitary Conditions

It is well-established that the Eighth Amendment grants prisoners a right to the "minimal civilized measure of life's necessities," Rhodes v. Chapman, 452 U.S. 337, 347 (1981), which includes the right to sanitary conditions. DeMallory v. Cullen, 855 F.2d 442, 445 (7th Cir. 1988). However, courts have not drawn a clear line indicating when a cell's condition is so poor that it falls below what is consistent with contemporary standards of decency. Thomas v. Ramos, 130 F.3d 754 (7th Cir. 1997).

For instance, in Harris v. Fleming, 839 F.2d 1232, 1235 (7th Cir. 1988), the court held that ten days without toilet paper, a toothbrush or toothpaste in a "filthy, roach-infested cell" did not constitute cruel and unusual punishment. Accord Morissette v. Peters, 45 F.3d 1119, 1122-23, n.6 (7th Cir. 1995) (confinement in "filthy" cell for 10 days without adequate cleaning supplies did not violate Eighth Amendment). However, in Johnson v. Pelker, 891 F.2d 136 (7th Cir. 1989), the court held that a prisoner stated a claim under the

Eighth Amendment when he alleged that he had been kept for three days in a cell with feces smeared on the walls and with no running water.

Petitioner alleges that the walls of his cell were covered with blood and feces, that his floor mat had dried bodily fluids on it and that ants and "bugs" infested his cell to the extent that he was bitten "hundreds" of times. These allegations are sufficient at this stage to show that petitioner's health was threatened and thus that petitioner was subjected to conditions in violation of the Eighth Amendment. Again, petitioner will be allowed to proceed against respondents Kingston, Vandenbrook and the John Doe respondents who placed petitioner in the cell and did not respond to his complaints.

I note again, however, that petitioner does not allege *how long* he was kept in these conditions. In several cases involving challenges to unsanitary conditions in prisons, the court of appeals has relied heavily on the length of time that a prisoner was subjected to the deprivation. E.g, Sanders, 198 F.3d at 629 (providing one bar of soap, sample size of toothpaste and no means to launder clothes for eight months states claim under Eighth Amendment); Antonelli, 81 F.3d at 1431 (sixteen month infestation of cockroaches and mice sufficient to state a claim); Lunsford v. Bennett, 17 F.3d 1574 (7th Cir. 1994) (denial of hygiene items for 24 hours did not violate Eighth Amendment). If petitioner was in the cell for only a short time, he may be unable to prove an Eighth Amendment violation.

C. Bedding

Although the Eighth Amendment does not necessarily require prison officials to provide inmates with an elevated bed, e.g., Mann v. Smith, 796 F.2d 79, 85 (5th Cir. 1986); Robeson v. Squadrito, 57 F. Supp. 2d 642, 647 (N.D. Ind. 1999), courts generally agree that life's basic necessities include at least a mattress on the floor, Lyons v. Powell, 838 F.2d 28 (1st Cir. 1988); Lareau v. Manson, 651 F.2d 96 (2d Cir. 1981); Oladipupo v. Austin, 104 F. Supp. 2d 654 (W.D. La. 2000). However, even the deprivation of a mattress may not violate the Constitution if the deprivation is a short one. Antonelli, 81 F.3d at 1430 (no Eighth Amendment claim stated by allegation that inmate had to sleep on the floor for one night).

In this case petitioner alleges that he was given only a mat to sleep on for an unspecified period of time. In addition, he alleges that his sleeping conditions have caused him pain and scarring. If petitioner can prove that sleeping on the floor created a substantial risk to his health and that respondents knew about this risk, he may be able to show a violation of the Eighth Amendment. Petitioner will be allowed to proceed on this claim against respondents Kingston, Vandenbrook and the John Doe respondents who placed

petitioner in the cell and did not respond to his complaints.

ORDER

IT IS ORDERED that

1. Petitioner Michael Winston is GRANTED leave to proceed under 28 U.S.C. § 1915 on his claims that respondents Phil Kingston, Mike Vandenbrook and John Doe respondents who placed petitioner in the observation cell and ignored his complaints violated his Eighth Amendment right to be free from cruel and unusual punishment by (1) failing to protect him from excessive cold, (2) subjecting him to unsanitary conditions and (3) failing to provide him with adequate bedding.

2. The unpaid balance of petitioner's filing fee is $ 149.23; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2).

3. 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 learns the name of the lawyer that will be representing the respondents, he should serve the lawyer directly rather than respondents. The court will disregard documents petitioner submits that do not show on the court's copy that petitioner has sent a copy to respondents or to respondents' attorney.

4. Petitioner should keep a copy of all documents for his own files. If he is unable

to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 11th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge