

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EUGENE L . CHERRY,

Petitioner,

v.

GERALD BERGE, PETER HUIBREGTSE,
JOHN SHARPE and BRIAN KOOL,

Respondents.

ORDER

05-C-38-C

This is a proposed civil action for declaratory, injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner Eugene Cherry, who is presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, alleges that respondents violated his rights under the Eighth Amendment. In addition to his proposed complaint, petitioner has filed a motion for the appointment of counsel.

Petitioner 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. 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 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. After examining petitioner's proposed complaint, I conclude that none of his allegations state a claim under the Eighth Amendment. Thus, petitioner will not be allowed to proceed on any of the claims presented in this lawsuit and his motion for appointment of counsel will be denied as moot.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Eugene Cherry is an inmate at the Wisconsin Secure Program Facility. Respondent Gerald Berge is the warden at the facility and respondent Peter Huibregtse is a deputy warden. At the time of the relevant events in this case, respondent John Sharpe was a unit manager at the facility; he is now a captain. Petitioner has not identified the

position of respondent Brian Kool. I will assume that he is employed at the facility.

B. Behavior Management Plan

On July 3, 2002, respondent Sharpe placed petitioner on a “behavior management plan” that he had created. On that date, petitioner received a memorandum stating that

due to your inappropriate behavior, specifically exposing your genitals and inappropriate behavior to include vulgar comments, you will be placed on this behavior management plan. This plan will be reactivated each time you display the above mentioned inappropriate behavior.

Petitioner was on the plan for fourteen days. During that time, he was placed in “ice cold” cells without any clothing or a mattress and forced to sleep naked on a cold concrete floor. He was not allowed personal hygiene items such as showers, a toothbrush or toothpaste and toilet paper. He had to use his hand to clean himself after defecating. Before being placed on the plan, petitioner had been prescribed Acyclovair to alleviate symptoms associated with herpes and Tylenol to alleviate his back pain stemming from a car accident. On numerous occasions while petitioner was on the plan, respondents allowed nurses to refuse him these medications because he did not comply with the terms of the plan, which required him to come out of his cell naked and barefoot to receive medication. As a result of being forced to sleep naked on a concrete floor and being denied his medications, petitioner suffered excruciating pain in his chest, back, leg and hip, migraine headaches and painful lesions and

blisters on his genitals. He continues to experience pain in his chest, back, leg and hip. In addition, petitioner suffers from emotional distress, severe depression and anxiety because of his treatment while on the plan.

On numerous occasions, petitioner complained to respondents Berge and Huibregtse about being placed on the behavior management plan. They ignored his pleas and allowed respondent Sharpe to keep petitioner on the plan despite having discussed the appropriateness and punitive nature of the plans in a July 15, 2002 “special needs inmate meeting.” On July 17, 2002, unit manager Brad Hompe removed petitioner from the plan and gave him all of his property and bedding.

C. Denial of Meals

From July to October 2004, respondent Kool allowed his staff to withhold petitioner’s meals on numerous occasions because he was not dressed or had not turned on the light in his cell. As a result, petitioner suffered excruciating stomach pains, fainting spells and weight loss. He complained to respondents Berge and Huibregtse on numerous occasions but they ignored him and allowed respondent Kool to let his staff withhold his meals.

DISCUSSION

Petitioner claims that respondents Berge, Huibregtse and Sharpe violated his rights

under the Eighth Amendment by (1) placing him in a cold cell without clothes or a mattress from July 3-17, 2002; (2) denying him personal hygiene items and showers from July 3-17, 2002; and (3) denying him prescribed medications on numerous occasions from July 3-17, 2002. In addition, he claims that respondents Berge, Huibregtse and Kool violated his rights under the Eighth Amendment by denying him meals on numerous occasions from July to October 2004.

A. Failure to Follow Prison Rules

Two of petitioner's claims in this lawsuit stem from his failure to follow certain rules at the Wisconsin Secure Program Facility. He alleges that certain respondents (he does not provide specific names) allowed prison nurses to withhold his medications because he did not comply with the terms of the behavior management plan, which required him to come out of his cell naked and barefoot to receive his medications. In addition, he alleges that he was denied meals "on numerous occasions" during July, August, September and October 2004 because he was not dressed or did not have his cell light on. I understand petitioner to be challenging the Wisconsin Secure Program Facility's policy that requires inmates to put on pants, turn on the light in their cells and stand in the middle of their cells in full view of corrections officers before receiving meals.

Although the Eighth Amendment requires the government "to provide medical care

for those whom it is punishing by incarceration,” Snipes v. Detella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)) and to insure that inmates receive basic necessities including adequate food, Sanville v. McCaughtry, 266 F.3d 724, 733 (7th Cir. 2001) (citing Farmer v. Brennan, 511 U.S. 825, 832 (1994)), in a recent decision, the Court of Appeals for the Seventh Circuit has held that an inmate who is deprived of the food solely because he deliberately refuses to comply with a valid prison rule is not being punished for the purpose of the Eighth Amendment. Rodriguez v. Briley, 403 F.3d 952 (7th Cir. 2005). Rodriguez involved an inmate who was denied between 300 and 350 meals over the course of 18 months because he refused to comply with a rule requiring him to store his belongings in a storage box before leaving his cell. The court rejected the inmate’s Eighth Amendment claim, stating that “deliberate noncompliance with a valid rule does not convert the consequences that flow automatically from that noncompliance into punishment . . . by failing to comply with a reasonable condition on being allowed to leave his cell, and as a result missing out on meals, Rodriguez punished himself.” Id. at 952-53. The court concluded its opinion by noting that prison officials would have a duty under the Eighth Amendment to intervene if an inmate’s refusal to eat became suicidal or was the product of insanity. Id. at 953.

Rodriguez forecloses petitioner’s food deprivation claim directly. Petitioner concedes that the reason he was denied meals was his refusal to comply with the facility’s

requirements for meal delivery. Although he experienced excruciating stomach pains, fainting spells and weight loss, petitioner does not allege that his recalcitrance was the product of insanity or a desire to starve himself to death or that his physical condition deteriorated to the point that he was at a substantial risk of serious harm. Thus, petitioner will be denied leave to proceed on his food deprivation claim.

By analogy, Rodriguez forecloses petitioner's claim regarding the denial of his medications while on the behavior management plan. Petitioner states that prison nurses denied his medications solely because he failed to follow the plan's requirement that he come out of his cell naked and barefoot to receive them. He has not alleged that he was physically unable to comply with this requirement or that the denial of medications put him at substantial risk of serious harm. Therefore, he will be denied leave to proceed on this claim as well.

Petitioner asserts two other violations of the Eighth Amendment related to the conditions of his confinement while on the behavior management plan. I will address each in turn.

B. Placement in Cold Cell

I understand petitioner to allege that respondents Berge, Huibregtse and Sharpe violated his Eighth Amendment rights by subjecting him to extremely cold temperatures

while on the behavior management plan without affording him the means to warm himself. The Eighth Amendment's prohibition against cruel and unusual punishment imposes upon jail officials the duty to “provide humane conditions of confinement” for prisoners. Farmer v. Brennan, 511 U.S. 825, 832 (1994). The Eighth Amendment imposes a duty on prison officials to provide adequate shelter, although conditions may be harsh and uncomfortable. Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997). Prisoners are entitled to “the minimal civilized measure of life's necessities.” Id. (citing Farmer, 511 U.S. at 833-34). This includes a right to protection from extreme cold. Id. (holding that cell so cold that ice formed on walls and stayed throughout winter every winter might violate Eighth Amendment). “[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.” Id. at 644. “Cold temperatures need not imminently threaten inmates' health to violate the Eighth Amendment.” Id. Petitioner alleges that he was placed in an “ice cold” cell for two weeks without any clothes and that he was forced to sleep on the concrete floor because he was not given a mattress. Petitioner’s allegations of freezing cold cell temperatures in his cell are not credible for two reasons. First, he was placed on the behavior management plan during July 2002, the middle of summer. Second, at that time, cells at the Wisconsin Secure Program

Facility were not artificially cooled by air conditioning or other means. Petitioner's cell temperature may have caused him discomfort, but the fact that he was in an institution without air conditioning in the middle of summer indicates that his cell could not have been cold enough to violate the Eighth Amendment. He will denied leave to proceed on this claim.

C. Denial of Personal Hygiene Items

A denial of personal hygiene items will violate the Eighth Amendment only where the denial deprives an inmate of the “minimal civilized measure of life’s necessities.” Rhodes v. Chapman, 452 U.S. 337, 347 (1981). 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, 109 (7th Cir. 1971). 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 allegedly unsanitary conditions. Compare Sanders v. Sheahan, 198 F.3d 626, 629 (7th Cir. 1999) (providing one bar of soap, sample size of toothpaste and no means to launder clothes for eight months states claim under Eighth Amendment) and Antonelli v. Sheahan, 81 F.3d 1422, 1431 (7th Cir. 1996) (sixteen month infestation of cockroaches and mice sufficient to state a claim) with Harris v. Fleming, 839 F.2d 1232, 1235 (7th Cir.

1988) (allegations that inmate was kept in filthy, roach-infested cell without toilet paper for five days and without soap, tooth paste or a tooth brush for ten days did not “reach unconstitutional proportions”); see also Lee v. Washington, No. 97 C 4710, 1999 WL 759609 (N.D. Ill. 1999) (denial of personal hygiene items such as soap, toothpaste and deodorant for two weeks did not rise to level of constitutional violation). Petitioner alleges that he was not allowed to take a shower during the two weeks he was on the behavior management plan and that he was denied soap, toothpaste, toilet paper and a toothbrush during this time. The decisions in Harris and Lee indicate that plaintiff’s allegations are insufficient to state a claim under the Eighth Amendment. He will be denied leave to proceed on this claim.

ORDER

IT IS ORDERED that

1. Petitioner Eugene Cherry’s request for leave to proceed in forma pauperis is DENIED on his claim that respondents Gerald Berge, Peter Huibregtse and John Sharpe violated his rights under the Eighth Amendment by placing him in a cold cell without clothes or a mattress from July 3-17, 2002;

2. Petitioner’s request for leave to proceed in forma pauperis is DENIED on his claim that respondents Berge, Huibregtse and Sharpe violated his rights under the Eighth

Amendment by denying him prescribed medications on numerous occasions from July 3-17, 2002;

3. Petitioner's request for leave to proceed in forma pauperis is DENIED on his claim that respondents Berge, Huibregtse and Sharpe violated his rights under the Eighth Amendment by denying him personal hygiene items and showers from July 3-17, 2002;

4. Petitioner's request for leave to proceed in forma pauperis is DENIED on his claim that respondents Berge and Huibregtse violated his rights under the Eighth Amendment by denying him meals on numerous occasions from July to October 2004;

5. This case is DISMISSED with prejudice for petitioner's failure to state a claim upon which relief may be granted;

6. Petitioner's motion for appointment of counsel is DENIED as moot;

7. The unpaid balance of petitioner's filing fee is \$247.00; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

8. A strike will be recorded against petitioner pursuant to § 1915(g); and

9. The clerk of court is directed to close the file.

Entered this 17th day of May, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge