IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

SHAROME ANDRE POWELL,

Petitioner,

ORDER

05-C-112-C

v.

PHIL KINGSTON and
TIM DOUMA,

Respondents.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Columbia Correctional Institution in Portage, 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 Sharome Andre Powell is an inmate currently incarcerated at the Columbia Correctional Institution in Portage, Wisconsin. At all relevant times, respondent Phil Kingston was the warden of the Columbia facility and respondent Tim Douma was the institution's security director.

On October 14, 2004, petitioner was transferred to the Columbia facility from the Wisconsin Resource Center. When he arrived, he was placed in a punitive segregation

housing unit pursuant to facility policy. According to this policy, all inmates transferred from the Wisconsin Resource Center are to be placed in the segregation unit upon arrival for at least thirty days as a safety precaution. Petitioner was placed on "bag meal restriction," "sharps restriction" and "low trap precaution." As a result of these restrictions, he was served meals in bags and not provided utensils. The bag meals do not provide 2,000 calories each day and are not nutritionally adequate; at times, they included rotten apples and moldy oranges. Because petitioner was not provided utensils, he was forced to "drink" his cereal and spread peanut butter and jelly with his finger. Petitioner was kept on the bag lunch restriction for his first 46 days at the Columbia facility and at some later point, for another 31-day period. As a result, he suffered weight loss and malnourishment.

Petitioner discovered a provision in the segregation unit rule book that provides:

> When an inmate abuses or misuses food items or his meal tray/utensils, a conduct report and/or incident report must be written. The security supervisor on duty may impose a temporary bag meal restriction. The temporary restriction will remain in place for no longer than 3 days (9 meals) until the incident can be reviewed by the security director. The security director will review the reports and determine if additional monitoring is warranted. The period of monitoring will not exceed 5 days total . . . . If there is no reoccurrence of abuse, normal meal procedure will resume no later than 5 days (15 meals) from the time the restriction was imposed. If the inmate was previously on a low trap precaution or sharps restriction, the bag meal restriction may remain in place until the precaution restriction is removed.

Petitioner believes that the duration of time he was kept on the bag meal restriction violated this rule.

DISCUSSION

A. Eighth Amendment

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 "identifiable human need[s] such as food," Wilson v. Seiter, 501 U.S. 294, 304 (1991). This conclusion derives from the well-settled principle that when government "so restrains an individual's liberty that it renders him unable to care for himself," a failure to provide for his basic human needs would constitute cruel and unusual punishment. Reed v. McBride, 178 F.3d 849, 852 (7th Cir. 1999) (quoting Helling v. McKinney, 509 U.S. 25, 32 (1993)).

The Court of Appeals for the Seventh Circuit has recognized that denying inmates sufficient food for extended periods of time may violate the Eighth Amendment. Reed, 178 F.3d 849, 853 (7th Cir. 1999); see also Hutto v. Finney, 437 U.S. 678, 683, 686-87 (1978) (diet consisting of fewer than 1,000 calories each day could violate Eighth Amendment if maintained for substantial time period). In addition, a violation may exist where the food that is provided is not "nutritionally adequate." Antonelli v. Sheahan, 81 F.3d 1422, 1432 (7th Cir. 1996) (citations omitted). However, the right to a nutritionally adequate diet does not mean that the food provided must be appetizing. Lunsford v. Bennett, 17 F.3d 1574, 1578 (7th Cir. 1994).

Petitioner alleges that he was given his meals in bags; that he was forced to eat without utensils; that on occasion, the bag meals would contain rotten fruit; and that for 46 and 31 day periods, he was given fewer than 2,000 calories each day. The question in any food deprivation case is "whether the defendants were deliberately indifferent to a substantial risk of serious harm to the inmate's health or safety." Freeman v. Berge, 03-C-21-C , 2003 WL 23272395, at *5 (W.D. Wis. Dec. 17, 2003) (citing Reed, 178 F.3d at 853 and Sanville v. McCaughtry, 266 F.3d 724, 733 (7th Cir. 2001)).

The first three of petitioner's complaints do not implicate the Eighth Amendment. That petitioner was served meals in bags that on occasion included rotten fruit or made to eat without the assistance of utensils does not suggest that he faced a substantial risk of serious harm to his health. To the contrary, petitioner's allegations reveal that he was able to consume his food without utensils, though less neatly than might be desired; he does not allege that he ever ate or became sick from eating the rotten fruit; and I can think of no reason why being served food in a bag would threaten his health. Such treatment does not suggest petitioner is being denied one of life's necessities but instead suggests mere inconvenience or discomfort. "[T]he Constitution does not mandate comfortable prisons" and conditions that are restrictive and even harsh "are part of the penalty that criminal offenders pay for their offenses against society." Rhodes v. Chapman, 452 U.S. 337, 347, 349 (1981); see also Hudson v. McMillan, 503 U.S. 1, 8-9 (1993); Adams v. Pate, 445 F.2d

105, 108-09 (7th Cir. 1971).

Petitioner's allegations about not being provided with at least 2,000 calories each day for 46 and 31-day periods present a closer case. In determining whether food deprivation poses a substantial risk of serious harm to an inmate's health, "a court must assess the amount and duration of the deprivation." Reed, 178 F.3d at 853. Although petitioner has not provided a rough estimate of the number of calories that are provided in the bag meals, he has alleged that there were fewer than 2,000 calories each day and that he suffered from malnutrition; these allegations suggest a sufficiently serious threat to his health. Hutto, 437 U.S. at 683 n.7 and 686-87 (average mature man in punitive isolation spending 12 hours each day lying down and 12 hours sitting or standing consumes approximately 2,000 calories daily); Phelps v. Kapnolas, 308 F.3d 180, 186 (2d Cir. 2002) (allegation of denial of nutritionally adequate diet for fourteen straight days "is not as a matter of law insufficiently serious" to state Eighth Amendment claim); Antonelli, 81 F.3d at 1432 (allegation of "nutritionally deficient" diet sufficient to state claim); Johnson v. Lewis, 217 F.3d 726, 732 (9th Cir. 2000) (no "edible" food and "adequate" water for four days).

In addition to alleging a serious risk to his health, petitioner's allegations must give some suggestion that each named respondent acted with deliberate indifference to that risk. Reed, 178 F.3d at 854. The deliberate indifference standard may be satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that

harm will result. Haley v. Gross, 86 F.3d 630, 641 (7th Cir. 1996). If respondents actually knew of a substantial risk of harm to the inmate and acted or failed to act in disregard of that risk, the standard is met. Id. "[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Farmer v. Brennan, 511 U.S. 825, 842 (1994).

As warden, respondent Kingston can be assumed to have responsibility over all internal facility policies. Liberally construing petitioner's complaint, I understand him to allege that the bag meals provided fewer than 2,000 calories each day pursuant to some prison policy. In addition, I will assume that respondent Douma, as the facility security director, was responsible for the policy of placing inmates transferred from the Wisconsin Resource Center on bag meal restriction for thirty days. Again applying the rule of liberal construction, I read petitioner's complaint to allege that respondent Douma knew that the bag meal diet would not provide at least 2,000 calories each day. Thus construed, petitioner's allegations are sufficient to suggest deliberate indifference. (Finally, I note that even if petitioner's allegations regarding the inclusion of rotten fruit in the bag meals could be construed to suggest a serious risk to petitioner's health, his claim would fail because he does not suggest that any policy required the provision of rotten fruit or that respondent Douma knew that rotten fruit was being placed in the bags.)

### B. State Law Claim

Petitioner argues that defendants violated the segregation rule quoted above by placing him on bag meal restriction for periods exceeding five days. Although it is doubtful that a violation of this rule could be the basis for a civil suit, it is unnecessary to make this determination. Petitioner's allegations give no indication that his placement on bag meal restriction violates the rule he quotes. First, the rule provides a limit on the length of time an inmate can be kept on bag meal restriction when the limitation is imposed for abuse or misuse of food items; petitioner does not suggest that he was placed on bag meal restriction for such an infraction. Second, the five-day limitation period does not apply when an inmate was previously on a low trap precaution or sharps restriction; petitioner alleges specifically that he was subject to both of these restrictions. It is not clear why petitioner believes that this provision applies to him. Thus, I will deny him leave to proceed on a claim for violation of the rule.

## ORDER

IT IS ORDERED that petitioner Sharome Andre Powell's request for leave to proceed in forma pauperis is GRANTED on his claim that respondents Phil Kingston and Tim Douma violated his Eighth Amendment rights by subjecting him to a diet of fewer than 2,000 calories daily for 46 and 31-day periods. FURTHER, IT IS ORDERED that petitioner

is DENIED leave to proceed on his claims that his rights were violated because he was served meals in bags that on occasion included rotten fruit and was denied eating utensils and his claim that defendants violated a segregation unit rule limiting the number of days an inmate can be placed on bag meal restriction for abuse or misuse of food items.

- 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.
- 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.
- The unpaid balance of petitioner's filing fee is $249.07; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).
- Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's complaint and this order are being sent today to the Attorney General for service on the state respondents.
- Petitioner submitted documentation of exhaustion of administrative remedies with

his complaint. Those papers are not considered to be a part of petitioner's complaint. However, they are being held in the file of this case in the event respondents wish to examine them.

Entered this 29th day of March, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge