IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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REGGIE TOWNSEND,

ORDER

Petitioner,

05-C-204-C

v.

(Warden) CATHERINE FERREY;
(Deputy Warden) LIZZIE TEGELS;
(Security Director) LARRY FUCHS;
(Adm. Capt.) JEFF JAEGAR;
LT. DAHNKE;
(HSU Manager) C. WARNER; and
(Doctor) HEINZL, Physician,

Respondents.

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This is a proposed civil action for injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner Reggie Townsend, who is presently confined at the New Lisbon Correctional Institution in New Lisbon, 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). Petitioner has filed a motion for appointment of counsel with his complaint.

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); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Reggie Townsend is an inmate at the New Lisbon Correctional Institution in New Lisbon, Wisconsin. The seven respondents work at the institution in the following

capacities: Catherine Ferry, warden; Lizzie Tegels, deputy warden; Larry Fuchs, security director; Jeff Jaegar, administration captain; Lt. Dahnke, lieutenant; C. Warner, manager of the health services unit; and Dr. Heinzl, physician.

B. Placement in Temporary Lock-Up

On November 15, 2004, respondent Dahnke came to petitioner's cell and told him that he was going to be placed in temporary lock-up for making threats and committing a battery on a staff member. Petitioner never threatened or harmed anyone, nor did he receive a conduct report for threatening or harming anyone. Respondent Fuchs did not authorize petitioner's placement in temporary lock-up because he did not sign petitioner's notice of temporary lock-up. Petitioner's placement in temporary lock-up was part of an effort by respondents to target black inmates and retaliate against them for a fight that occurred between white staff members and black inmates two days earlier. The fight occurred in a unit other than petitioner's unit. Each unit in the institution is segregated from the other units. No white inmates were placed in temporary lock-up after the fight. Respondent Fuchs was responsible for the adverse actions taken against the black inmates including petitioner.

At no time before or during his confinement in temporary lock-up did petitioner receive a hearing or a conduct report. Also, he did not receive notice that his confinement

would be extended beyond twenty-one days. An advocate did not speak with him and he was not presented with any evidence that he hit or threatened staff. Petitioner remained in segregation for sixty-three days. Respondents conspired to cover up the violations of petitioner's due process rights. When he was let out of temporary lock-up, petitioner asked respondent Fuchs why he was held in temporary lock-up. Respondent Fuchs said, "we do make mistakes. This is why we're letting you out."

C. Conditions in Temporary Lock-up

Petitioner was placed in a cell in with another inmate. He had to sleep on the floor. The floor was wet and the cell smelled unpleasant. Petitioner was not allowed to exercise, walk, loosen his body or breathe fresh air. As a result, petitioner's chest began to hurt. He made repeated requests for medical attention but was told to lie down and did not see a nurse until eight days after his requests. By the time he saw a nurse, petitioner had developed respiratory problems.

D. Medical Treatment

After being released from temporary lock-up, petitioner was seen by a nurse, although he was not examined. He was given medication that caused problems with his heart, liver and kidneys. Petitioner was not given instructions or other warnings that the medication

could cause him to experience pain in these organs. Respondent Heinzl knew that petitioner was bleeding internally and experiencing stomach, liver and kidney problems but negligently prescribed medication for petitioner that caused further stomach pains and internal bleeding.

Petitioner requested medical attention a second time as his internal bleeding continued. Six days after his request, petitioner was called and health services unit staff told him he would have to pay a co-payment because of his pre-existing stomach and respiratory problems. Petitioner refused to pay the co-payment and did not receive treatment. Some time later, petitioner submitted another request to the health services unit and paid the co-payment. He was seen two days after paying the co-payment, at which time blood was still in his stomach. Petitioner informed respondents Heinzl and Warner that he continued to bleed internally. Respondent Heinzl prescribed more medication, telling petitioner that it would not cause bleeding although he knew otherwise. Respondent Heinzl prescribed the medication to cause petitioner pain. Petitioner began bleeding again and experiencing pain in his stomach and liver. Respondent Warner failed to prevent petitioner from receiving the medications that caused these injuries.

D. Confiscation of Legal Work

After petitioner was released from temporary lock-up, an officer named Kabowski came to his cell and demanded that petitioner turn over his copy of the temporary lock-up

document and other legal papers. Respondents Fuchs and Jaegar gave this order. Kabowski told petitioner that they needed to make copies of petitioner's documents because the prison did not have copies of the documents on file. Kabowski informed petitioner that if he did not turn over the documents voluntarily, Kabowski would have to search petitioner's cell, and confiscate the documents and put petitioner in segregated confinement. Petitioner gave the documents to Kabowski. He has not received them back, despite speaking with respondent Fuchs and filing an inmate complaint.

DISCUSSION

A. Due Process

I understand petitioner to allege that respondents Dahnke and Fuchs violated his due process rights by placing him in temporary lock-up, a form of administrative confinement, without cause for sixty-three days. I understand petitioner to allege also that his due process rights were violated because he did not receive a conduct report or a hearing, was not allowed to speak with an advocate, was not notified that he would remain in temporary lock-up for more than twenty-one days and was never confronted with any evidence that he had assaulted or threatened institution staff.

The Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Before petitioner

is entitled to Fourteenth Amendment due process protections, he must first have a protected liberty or property interest at stake. DeWalt v. Carter, 224 F.3d 607, 613 (7th Cir. 2000). Russ v. Young, 895 F.2d 1149, 1154 (7th Cir. 1989) holds that being placed in temporary lock-up does not implicate a liberty interest. Because petitioner has no liberty interest in remaining free from temporary lock-up, he will be denied leave to proceed on his due process claim.

B. Equal Protection

Petitioner alleges that no white inmates were placed in temporary lock-up at the time he was so confined. More broadly, he states that his confinement was part of a broader course of retaliation by prison officials against black inmates because of a fight that broke out between white staff members and black inmates two days before petitioner was placed in temporary lock-up. He alleges that respondent Fuchs, the security director, is responsible for this course of retaliation. To the extent petitioner is arguing that respondent Fuchs discriminated against him because of his race in violation of the equal protection clause, his allegations fail to state a claim.

The equal protection clause of the Fourteenth Amendment guarantees that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Petitioner concedes that respondent Dahnke told him

that he was being placed in temporary lock-up for making threats and committing a battery on a staff member. His allegation that no white inmates were placed in temporary lock-up will not support a claim under the equal protection clause because petitioner does not allege that any white inmates were similarly situated to him. That is, he has not alleged that any white inmates were suspected of threatening or battering institution staff. Moreover, despite petitioner's use of the word retaliation, his complaint makes clear that respondent Dahnke had a valid reason for transferring petitioner to temporary lock-up. Petitioner will be denied leave to proceed on this claim.

C. Retaliation

As noted above, petitioner alleges that his placement in temporary lock-up was part of a broader course of retaliation against black inmates that officials at New Lisbon engaged in after a fight broke out between black inmates and white staff members. A prison official who takes action against an inmate to retaliate against him for exercising a constitutional right may be liable to the inmate for damages. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). Unfortunately for petitioner, his allegation fails to state a claim for retaliation because he has not alleged that he was placed in temporary lock-up for exercising a constitutional right. Thus, he will be denied leave to proceed on this claim.

D. Eighth Amendment

I understand petitioner to allege several violations of his Eighth Amendment protection against cruel and unusual punishment. Specifically, I understand him to allege the following claims: (1) petitioner was housed in a cell with another inmate during his time in temporary lock-up; (2) petitioner was not allowed out of his cell to exercise while in temporary lock-up; (3) petitioner experienced respiratory problems because he was was forced to sleep on a wet floor while in temporary lock-up; (4) respondent Heinzl prescribed medication for petitioner that caused him to bleed internally and experience pain in his stomach, liver and kidneys; and (5) petitioner was denied medical care because he refused to pay a co-payment.

1. Double celling

Petitioner alleges that he was forced to share a cell with another inmate while in temporary lock-up. "[T]he mere practice of double celling is not per se unconstitutional," French v. Owens, 777 F.2d 1250, 1252 (7th Cir. 1985) (citing Rhodes, 452 U.S. 337), and petitioner has not alleged facts suggesting that his double celling resulted in a serious deprivation of basic human needs. Therefore, he will be denied leave to proceed on this claim.

2. Lack of exercise

Petitioner alleges that he was not allowed out of his cell to exercise during his time in temporary lock-up. Petitioner has no constitutional right to daylight, fresh air or outdoor exercise. Harris v. Fleming, 839 F.2d 1232, 1236 (7th Cir. 1988). Denial of exercise may present an Eighth Amendment violation if lack of movement causes muscle atrophy, threatening the health of the prisoner. Thomas v. Ramos, 130 F.3d 754, 763 (7th Cir. 1997). "Unless extreme and prolonged, lack of exercise is not equivalent to a medically threatening situation." Harris, 839 F.2d at 1236. See also Caldwell v. Miller, 790 F.2d 589, 600 (7th Cir. 1986) (no Eighth Amendment violation even though inmates confined to cells twenty-four hours a day for a one-month period after a lockdown). Petitioner does not have a constitutional right to choose the type of exercise in which he participates. He has not suggested that his muscles have atrophied or that his health has been threatened, nor has he alleged that he was prevented from exercising in his cell. Thus, he will be denied leave to proceed on this claim.

3. Wet floor and foul odor

Petitioner alleges that he was forced to sleep on the floor of his cell while in temporary lock-up. He does not say whether he was given a mattress or anything with which to warm himself. He alleges further that the floor was wet and that his cell had a foul smell. He

suggests that he suffered respiratory problems as a result of these conditions.

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. The Court of Appeals for the Seventh Circuit has found Eighth Amendment violations when, for example, an inmate was tied to a bed for nine days, had to use a urinal pitcher which was then left full by his bed for two days, had no change of linen or clothes for that period, had no silverware and had to eat with his hands, and had no opportunity to exercise. Wells v. Franzen, 777 F.2d 1258 (7th Cir. 1985). 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).

Petitioner does not indicate whether the floor of his cell was wet constantly or only for isolated periods of time. It is likely that petitioner's Eighth Amendment rights would not be violated if he was forced to sleep on a wet floor only for several days. However, at this stage of the litigation, I must construe petitioner's allegations liberally and draw all reasonable inferences in his favor. Wynn v. Southward, 251 F.3d 588, 591-92 (7th Cir.

2001). From his allegations, it is reasonable to infer that petitioner was forced to sleep on a floor that was wet for most of the sixty-three days he spent in temporary lock-up. In addition, it is possible that petitioner could prove additional facts consistent with his allegations that would entitle him to relief under the Eighth Amendment. Therefore, I will allow petitioner to proceed on this claim. He will be allowed to proceed against respondent Fuchs because petitioner identified respondent Fuchs as the official responsible for placing him in temporary lock-up.

2. Prescribed medications

The Supreme Court held in Estelle v. Gamble, 429 U.S. 97, 104-05 (1976), that deliberate indifference to prisoners' serious medial needs constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment. To state a claim under the Eighth Amendment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Id. at 106. In other words, petitioner must allege facts from which it can be inferred that he had a serious medical need and that prison officials were deliberately indifferent to this need. Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

Petitioner alleges that respondent Heinzl prescribed medication for him on two occasions that caused him to bleed internally and experience pain in his stomach, liver and

kidneys. He contends respondent Heinzl knew that the medication would exacerbate petitioner's bleeding and pain when he prescribed them and that respondent Heinzl prescribed the medication with intent to cause petitioner pain. Also, he alleges that respondent Warner, the head of the prison's health services unit, knew about petitioner's conditions and did not stop respondent Heinzl from prescribing the medications. I will assume that the combination of internal bleeding and the pain in petitioner's stomach, liver and kidneys constituted a serious medical need and proceed to the deliberate indifference prong.

Petitioner characterizes the conduct of respondents Heinzl and Warner as ranging from negligent to deliberately indifferent. At one point in his complaint, petitioner states that respondent Heinzl's actions were negligent; at another, he contends that respondent Heinzl knew that petitioner was experiencing internal bleeding and knew that the medications he prescribed for petitioner would cause additional bleeding and pain. Inadvertent error, negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes v. DeTella, 95 F.3d 586, 590-91 (7th Cir. 1996). Deliberate indifference requires a showing of intent or recklessness. Foelker v. Outgamie County, 394 F.3d 510, 513 (7th Cir. 2005). At a minimum, petitioner must allege that respondents knew of a substantial risk of harm and acted or failed to act in disregard of that risk. Gil v. Reed, 381

F.3d 649, 661 (7th Cir. 2004).

At this stage of the litigation, I must give petitioner the benefit of the doubt and accept as true his allegations that respondent Heinzl knew that the medications he gave to petitioner would exacerbate petitioner's conditions and that he prescribed the medication for the very purpose of causing petitioner pain. Construing petitioner's allegations liberally, I conclude that they are sufficient to state a claim of deliberate indifference to a serious medical need. White v. Napoleon, 897 F.2d 103, 109 (3d Cir. 1990) (allegation that prison doctor intended to inflict pain on inmates without medical justification sufficient to state claim of deliberate indifference). Petitioner will be allowed to proceed on this claim against respondents Heinzl.

Petitioner will not be allowed to proceed against respondent Warner because he has not alleged that respondent Warner was personally involved in the decision to prescribe medications to petitioner. It is well established that liability under § 1983 must be based on an officials's personal involvement in the constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). "A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary." Wolf-Lillie, 699 F.2d at 869. It is not necessary that a defendant participate directly in the deprivation; the official

is sufficiently involved "if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985). Respondent Warner's involvement appears to be limited to learning that petitioner was bleeding internally and failing to prevent respondent Heinzl from issuing the second prescription that failed to stop petitioner's internal bleeding. Petitioner does not allege that respondent Warner knew that the medication prescribed by respondent Heinzl would not stop petitioner's internal bleeding or that respondent Warner ordered respondent Heinzl to prescribe the medication. Therefore, he has not alleged sufficient personal involvement of respondent Warner, who will be dismissed from this case.

3. Co-payment

Petitioner alleges that he began bleeding internally soon after respondent Heinzl prescribed medication for him. He alleges that he requested medical attention and that he was called to the health services unit after six days, at which time some member of the health services unit staff told petitioner that he would have to pay a co-payment. Initially, petitioner refused to pay, but later he paid the co-payment and received medical attention. Petitioner does not allege that he could not afford the co-payment and his allegations suggest that he had the financial resources to do so. By refusing to pay the co-payment initially,

petitioner punished himself. That is, the denial of medical care was not the result of any act of a prison official. Rodriguez v. Briley, 403 F.3d 952, 952-53 (7th Cir. 2005) ("deliberate noncompliance with a valid rule does not convert the consequences that flow automatically from that noncompliance into punishment"). Because petitioner's allegations regarding the co-payment do not indicate that he was punished for the purpose of the Eighth Amendment, he will be denied leave to proceed on this claim.

E. Conspiracy

Finally, I understand petitioner to allege that respondents Fuchs and Jaegar conspired to cover up the fact that he was placed in temporary lock-up without cause and held in that status for sixty-three days in violation of the due process clause. He alleges that respondents Fuchs and Jaegar sent an official named Kabowski to collect petitioner's copy of his temporary lock-up slip and other legal work and that respondents have not returned the documents. I have already concluded that petitioner's placement in temporary lock-up did not violate his due process rights. Because petitioner's confinement in temporary lock-up did not violate due process, petitioner's claim that respondents Fuchs and Jaegar conspired to cover up the violation of his due process rights cannot stand. Petitioner will be denied leave to proceed on this claim.

F. Motion for Appointment of Counsel

Petitioner asks that counsel be appointed to represent him in this case. Before the court can appoint counsel in a civil action such as this, it must find first that the petitioner made a reasonable effort to retain counsel and was unsuccessful or that he was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). In this court, a petitioner must list the names and addresses of at least three lawyers who declined to represent him before the court will find that he made reasonable efforts to secure counsel on his own. Petitioner has attached to his motion letters from two lawyers who have declined to represent him in this case. A third letter petitioner appears to have sent to another lawyer was returned as undeliverable. Because petitioner has not submitted the names and addresses of three lawyers who declined to represent him, he has not shown that he has made reasonable efforts to secure counsel on his own.

Second, the court must consider whether the petitioner is competent to represent himself given the complexity of the case, and if he is not, whether the presence of counsel would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285, 288 (7th Cir. 1995) (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). This case is too new to allow me to assess petitioner's abilities. Although he states that he is unskilled in the law and has no understanding of court proceedings, most pro se litigants are similarly disadvantaged. In this court, persons representing themselves are not penalized for failing

to know the rules applying to their cases. In most instances, if proper procedure is not followed, the pro se litigant is directed to the relevant rule and given a second opportunity to comply. Therefore, petitioner's motion will be denied without prejudice to his renewing it at some later stage of the proceedings.

ORDER

IT IS ORDERED that

1. Petitioner Reggie Townsend's request for leave to proceed in forma pauperis is GRANTED on his claims that (1) respondent Fuchs violated his Eighth Amendment rights by forcing him to sleep on a wet concrete floor for sixty-three days and (2) respondent Heinzl violated his Eighth Amendment rights by deliberately giving petitioner medication that caused him to continue to bleed internally and experience pain in his stomach, liver and kidneys;

2. Petitioner's request for leave to proceed in forma pauperis is DENIED on his claims that (1) respondents Dahnke and Larry Fuchs violated his rights under the due process clause of the Fourteenth Amendment by placing him in temporary lock-up for sixty-three days without cause; (2) his placement in temporary lock-up constituted race discrimination in violation of the equal protection clause; (3) respondent Fuchs retaliated against him by placing him in temporary lock-up; (4) his Eighth Amendment protection

against cruel and unusual punishment was violated because he was forced to share a cell with another inmate while in temporary lock-up; (5) he was not allowed any out-of-cell exercise while in temporary lock up in violation of the Eighth Amendment; (6) his Eighth Amendment rights were violated because he was required to pay a co-payment in order to receive medical services; and (7) respondents Fuchs and Jaegar conspired to cover up the fact that petitioner's placement in temporary lock-up violated his due process rights;

3. Respondents Catherine Ferrey, Lizzie Tegels, Jeff Jaegar, Lt. Dahnke and C. Warner are DISMISSED from this case;

4. Petitioner's motion for appointment of counsel is DENIED without prejudice to his renewing it at some later stage of the proceedings.

5. 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.

6. 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.

7. The unpaid balance of petitioner's filing fee is $242.34; petitioner is obligated to

pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

8. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants.

9. 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 18th day of May, 2005.

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