IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

LUIS VASQUEZ,

ORDER

Petitioner,

05-C-528-C

v.

MATHEW FRANK, Secretary,
PHIL KINGSTON, Warden,
GARY McCAUGHTRY, Former Warden,
MARC CLEMENTS, Security Director,
MIKE THURMER, Deputy Warden,
CYNTHIA THORPE, ARA,
CURTIS JANSSEN, HSCUM,
STEVEN SCHUELER, HSCSS,
BELINDA SCHRUBBE, HSUM,
GARY ANKARLO, PSUS,
RICHARD RAEMISCH, OOS,
SANDRA HAUTAMAKI, CCE,
JAMES MUENCHOW, ICE,
CAPT. O'DONOVAN,
JOHN McDONALD, Social Worker/Advocate,
and STANLEY TONN, ICE,

Respondents.

- -

This is a proposed civil action for injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Waupun Correctional

Institution in Waupun, 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). Along with his complaint, petitioner has filed a motion for the appointment of counsel.

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).

With his complaint, petitioner submitted a number of documents. Because I have

considered them in analyzing his claims, they have become part of his complaint. Fed. R. Civ. P. 10(c). From the complaint and attached documents, I understand petitioner to be alleging the following.

ALLEGATIONS OF FACT

A. Parties

Petitioner Luis Vasquez is an inmate at the Waupun Correctional Institution. He has been incarcerated since 1999 and is serving a term of life in prison. Respondent Matthew Frank is Secretary of the Wisconsin Department of Corrections. Respondent Richard Raemisch is employed by the Office of the Secretary of the Department of Corrections. Respondent Sandra Hautamaki is employed by the department as a corrections complaint examiner.

The following respondents are employed currently at the Waupun Correctional Institution in the following capacities: Phil Kingston, Warden; Mike Thurmer, Deputy Warden; Marc Clements, Security Director; Curtis Janssen, Unit Manager of the Health Segregation Complex; Steven Schueler, captain and Security Supervisor of the Health Segregation Complex; Belinda Schrubbe, Manager of the Health Services Unit; Gary Ankarlo, Supervisor of the Psychological Services Unit; James Muenchow and Stanley Tonn, inmate complaint examiners; Capt. O'Donovan, captain; and John McDonald, Social

Worker/Advocate. Respondent Cynthia Thorpe is employed at the institution in an unspecified capacity. Respondent Gary McCaughtry was Warden at the institution before respondent Kingston.

B. Eighth Amendment

1. Canteen privileges

Petitioner has been confined in the institution's Health Segregation Complex since December 2002. He cannot order full canteen or purchase his own personal hygiene items. Although he is provided soap, toothpaste and a toothbrush, the brands of these items offered by the prison canteen are of better quality. The soap issued to petitioner is small, unscented and often dries his skin, which causes irritation. Petitioner is allowed only two showers and two bars of soap each week, whereas inmates in the general population are allowed to shower four to six times each week. The toothpaste issued to petitioner is of poor quality; although it helps reduce the risk of cavities, it does not whiten his teeth or prevent yellow stains. The toothbrush issued to petitioner is approximately three inches long and is difficult to use. Occasionally, petitioner gets toothpaste on his fingers or his toothbrush falls onto the floor or into the toilet, which is next to the sink. The deodorant petitioner is allowed to purchase from the canteen contains no alcohol and is unscented. It does not prevent odor or sweat. Most inmates refuse to purchase it. In addition, petitioner is allowed to possess little

personal property and has few privileges.

On April 18, 2004, petitioner tried unsuccessfully to resolve his complaints with respondent Schueler. The next day, he filed an inmate complaint listing his grievances. Respondent Muenchow recommended dismissal of the complaint and respondent McCaughtry accepted that recommendation. Petitioner filed an appeal on June 3, 2004. John Ray, a corrections complaint examiner, recommended dismissal of the complaint on June 15, 2004 and respondent Raemisch accepted this recommendation on June 18, 2004.

2. Constant illumination

Cells in the Health Segregation Complex are illuminated 24 hours a day. Petitioner can dim the lighting but cannot turn it off completely. Because of the constant illumination, petitioner has suffered migraine headaches, blurred vision, pain in his eyes and has had trouble sleeping. Also, petitioner's emotional distress and depression have worsened. Petitioner began taking Trazodone but this medication causes petitioner to suffer side effects such as nausea, dizziness and dry mouth. Petitioner has refused to take the medication numerous times because of the side effects. He has told Kaemmerer repeatedly that he has trouble sleeping because of the constant lighting.

Petitioner requested medical treatment for his migraine headaches on June 17 and 20, 2004 and on July 8, 2004. On June 17 and 24, 2004, petitioner tried to resolve this issue

with respondents Janssen and Schueler, but they failed to act. Petitioner filed an inmate complaint on June 29, 2004. On July 9, 2004, petitioner was given excedrine for his headaches; he received the medication for two months, at which point Dr. Larson discontinued it. Respondent Muenchow recommended dismissal of petitioner's inmate complaint on August 3, 2004, stating that he had

> reviewed Capt. Schueler's response and concur with his explanation of the situation. The security lights in the cells in the Health Segregation Complex (HSC) must remain on at all times so staff can visibly observe inmates in their cells. The lights in the cells have been measured with a foot-candle meter, and the reading was one foot-candle. A foot-candle is the light given by a standard candle. This reading was taken from the bed in the cell. The complainant is reminded that he is housed in segregation of a maximum security prison. Staff must be able to see in the cells to observe the inmates.

Respondent McCaughtry dismissed the complaint on August 11, 2004. Petitioner appealed the dismissal. Respondent Hautamaki recommended dismissal of petitioner's appeal on August 23, 2004 and respondent Raemisch accepted this recommendation and dismissed the appeal on August 27, 2004.

3. Inadequate fire protection

The cells in the Health Segregation Complex do not contain sprinklers or "fire detectors." Petitioner became concerned that the cells do not contain proper fire precautions. He raised this issue with respondents Janssen and Schueler but they did not

take any action. On July 8, 2004, petitioner filed an inmate complaint regarding this issue. Respondent Muenchow recommended dismissal of the complaint on August 4, 2004 and respondent McCaughtry accepted this recommendation August 11, 2004. Petitioner appealed the dismissal of his complaint. On August 23, 2004, respondent Hautamaki recommended dismissal of his appeal. Respondent Raemisch accepted this recommendation and dismissed the appeal on August 27, 2004.

4. Inadequate ventilation & cell temperatures

The cells in the Health Segregation Complex are poorly ventilated. The air is dry and stale and contains dust. The cells are not cool enough in the summer or warm enough in the winter. In the summer, the heat in petitioner's cell causes him to sweat constantly. Sweat soaks his t-shirt and bed sheets. Also, he has difficulty breathing. His nose becomes congested and he has coughed up blood and had nose bleeds occasionally. In addition, the poor ventilation has caused petitioner to suffer heat exhaustion, dizziness, insomnia and discomfort. It increases the side effects of petitioner's medications. On several occasions, petitioner has refused to take his medication because of the extreme heat.

On July 5, 2004, petitioner tried unsuccessfully to resolve this issue with respondents Janssen and Schueler. In addition, he relayed his health concerns to "clinical service" and health services staff, but they failed to act or even address the matter in petitioner's clinical

and medical files. Petitioner filed an inmate complaint on July 12, 2004. On August 5, 2004, respondent Muenchow recommended dismissal, stating that

> The HSC cooling and ventilation system was operating and the cells in the HSC normally range between 10 and 20 degrees cooler than the temperatures outside. The air exchange system has not malfunctioned. Inmate Vasquez has relayed his health related concerns to HSU staff, and that is the proper action to take. Though the high heat and humidity may create a less than desirable environment, the conditions were in no way life threatening. As stated by Capt. Schueler, the temperature and humidity is monitored on the ranges. There is no evidence that inmate Vasquez is being subject to adverse conditions as the result of negligence or malicious intent.

Respondent McCaughtry accepted respondent Muenchow's recommendation and dismissed petitioner's complaint on August 11, 2004. Petitioner appeal the dismissal but respondent Hautamaki recommended dismissal of the appeal and respondent Raemisch accepted this recommendation and dismissed the appeal on August 27, 2004.

5. Mental health treatment

Petitioner has been mentally ill since he was 12 years old. At present, he is on clinical monitoring "due to suffering from emotional distress, depression, anxiety, and [] other psychological problems." He is taking Fluoxetine and Trazodone for his psychological problems but his mental illness has worsened because of the length of his sentence, his placement in administrative confinement, the death of his mother, the conditions of his confinement and the lack of psychological counseling. He is not receiving any psychological

counseling or a "monthly psychological evaluation."

Petitioner has complained about his mental disorders and physical ailments repeatedly to respondent Ankarlo and George Kaemmerer, a crisis intervention worker. Kaemmerer is aware of petitioner's mental illness and his treatment needs but has neglected to note them or comment on them in petitioner's "Psychological Services Client Contacts." Kaemmerer denied that petitioner is mentally ill after petitioner revealed all of the details concerning his emotional and psychological problems. Kaemmerer does not have the professional expertise to recognize that petitioner is mentally ill. Kaemmerer promised petitioner that he would visit him monthly but then broke that promise.

Petitioner has told Kaemmerer repeatedly that he has trouble sleeping because of the constant illumination in his cell and the constant flashbacks and nightmares about the victim in his case. Also, he told Kaemmerer that he has been hearing voices telling him to hurt himself and other people and that he has been having cold sweats. Kaemmerer did not record any of the information disclosed by petitioner in his reports. On July 30, 2004, Kaemmerer was making rounds in the Health Segregation Complex. Petitioner called him to his cell and asked him why he did not fully acknowledge petitioner's physical ailments and psychological problems in his reports. Kaemmerer replied that he only commented on the problems he considered serious.

On May 31, 2004, petitioner tried unsuccessfully to resolve his grievance informally

with respondent Ankarlo. Petitioner filed an inmate complaint on June 2, 2004. Respondent Tonn recommended dismissal of the complaint, stating the following:

> G. Kaemmerer was contacted and he stated that Vasquez was seen on 7/03/03 and at that time G. Kaemmerer's notes reflected that Vasquez was going to be only loosely monitored and did not promise a monthly visit. HSM, B. Schrubbe stated that Vasquez is seen weekly in HSC by HSU staff during rounds. Her records indicated that Vasquez has not been on the psychotropic meds since 1999, largely due to the fact he was refusing them. If Vasquez' condition has changed or if he has not fully revealed the details regarding his physical or clinical needs he is encouraged to contact either of the two staff listed above or Dr. G. Ankarlo, Clinical supervisor as soon as possible. Vasquez will then be re-evaluated and the best course of treatment will be decided by the professionals.
>
> Vasquez should note that an inmate's housing unit is an administrative decision and the ICE has no authority to override that decision.

Respondent Thorpe accepted respondent Tonn's recommendation and dismissed the complaint. Petitioner's appeal was dismissed by respondents Hautamaki and Raemisch.

Petitioner filed another inmate complaint on August 16, 2004 in which he stated that he was dissatisfied with his psychological treatment in light of all that he had revealed to Kaemmerer. Respondent Muenchow recommended dismissal of the complaint on October 15, 2004. Respondent McCaughtry accepted this recommendation and dismissed the complaint on October 18, 2004. Petitioner filed an appeal on October 27, 2004. On October 29, 2004, respondent Hautamaki recommended dismissal of his appeal. Respondent Raemisch accepted this recommendation and dismissed the appeal on

November 4, 2004.

6. Finger injury caused by pen insert

Inmates in the Health Segregation Complex are not allowed to possess pens. Instead, they are provided only the insert of a pen without the outer casing. Petitioner has had to write with a pen insert, which is extremely thin and hard. As a result, he has developed a lump or bulge, also known as a "writer's callus," on his right middle finger. At times, Vasquez has no sensation on the part of his middle finger where the bulge is located.

Petitioner tried unsuccessfully to resolve this problem informally with respondents Janssen and Schueler on June 16, 2004. On June 17 and 20, 2004, petitioner's request for medical care for his finger were denied. On June 28, 2004, petitioner filed an inmate complaint; on August 3, 2004, respondent Muenchow rejected the complaint because it failed to raise a significant issue. Muenchow wrote that

> The condition described by inmate Vasquez in not specifically causally related to the use of a pen insert. It is not arguable that many individuals can develop "writers bumps" on their hands from using any normal writing instrument.

Respondent McCaughtry affirmed rejection of the complaint on August 17, 2004.

A nurse examined petitioner's middle finger and said that it appeared to be infected. She scheduled an appointment for him with Dr. Larson that took place on July 22, 2004. Dr. Larson examined petitioner's finger and determined that it was not infected. He told

petitioner that he could not provide any treatment or give him anything for the pain.

Petitioner filed an informal grievance with respondent Schrubbe, who told him that no medical treatment could be given to him. Petitioner filed another inmate complaint in which he alleged that he was being denied medical treatment for his finger. On September 3, 2004, respondent Muenchow recommended dismissal of the complaint, writing the following:

> HSM Schrubbe was contacted regarding this issue and records were reviewed. She stated that on 7/22/04, inmate Vasquez was seen by Dr. Larson. There were no signs of infection. The diagnosis was that Vasquez has a pressure pad, or more commonly referred to as a writer's bump. There is no medical intervention needed in light of the diagnosis.
>
> The quality of care, though it may not be professionally evaluated by the ICE, appears to be appropriate and consistent with the demonstrated need. This does not mean inmate Vasquez has to agree or be satisfied with the answers he receives from health care professionals, it merely serves as an indication that his concerns have been addressed and that there has been no negligence on the part of staff.

Respondent Thorpe accepted respondent Muenchow's recommendation and dismissed petitioner's complaint on September 22, 2004. Petitioner appealed the dismissal on September 28, 2004. On October 1, 2004, John Ray recommended dismissal of the appeal and respondent Raemisch dismissed the appeal.

C. First Amendment

1. Personal photographs

Petitioner may not possess his personal photographs although inmates in segregation at other maximum security prisons such as Green Bay Correctional Institution, Dodge Correctional Institution, Columbia Correctional Institution and the Wisconsin Secure Program Facility may possess their personal photographs. Petitioner has suffered depression and emotional distress because of this deprivation.

On July 13, 2004, petitioner tried to resolve his complaint informally with respondents Janssen and Schueler. On July 16, 2004, respondent Schueler told him that photographs "have not been on the approved property list for the health segregation complex building as they add to the allowable proper [sic] making the necessary searches and shakedowns more difficult to maintain the safety and security for the staffs as well as inmates." Petitioner filed an inmate complaint regarding this issue on July 23, 2004. On August 19, 2004, respondent Muenchow recommended dismissal of the complaint and on August 23, 2004, respondent McCaughtry dismissed the complaint. Petitioner filed an appeal. On September 3, 2004, respondent Hautamaki recommended dismissal of the appeal and respondent Raemisch dismissed the appeal.

2. Access to pornographic materials

Prisoners are allowed to possess photographs and magazines that depict women

wearing swimming suits and lingerie. However, petitioner cannot possess photographs and magazines that depict full nudity and sexual activity.

On April 19, 2005, petitioner tried unsuccessfully to resolve this issue with respondent Kingston. On May 4, 2005, petitioner filed an inmate complaint in which he stated, "I am challenging the IMP rule and regulations that contains in various sections of the Wis. Administrative Code found at Wisc. Admin. Code DOC 309 rule that's in effect." Respondent Muenchow rejected the complaint on May 9, 2005, stating,

> Inmate Vasquez complains of the provisions of DOC 309 IMP 50. This IMP has been effective in its current form since 4/23/02. That is the occurrence giving rise to this complaint. It is well beyond the 14-day time limit to file a complaint with respect to a rule that has been in effect since 2002. Vasquez makes no claim for acceptance of this untimely complaint for good cause, nor is there any other proof that would show how inmate Vasquez was denied the use of or inhibited in any way from using the ICRS since the date of the occurrence.

Petitioner filed an appeal of the rejection on June 6, 2005. Respondent Thurmer affirmed rejection of the complaint on June 7, 2005.

3. Visitation privileges

Inmates in the Health Segregation Complex are not allowed to have contact visits or face-to-face visits. Instead, they are allowed only visits through a video monitoring system. The visual and audio quality are poor. Often, the inmate and visitor cannot hear, see or

understand each other. During a visit, an inmate must wear handcuffs and waist restraints and must be tethered to a concrete block that has no back support. The Health Segregation Complex has an area designed for face-to-face visits that inmates may use for attorney visits. Petitioner's family refuses to visit him because he is not allowed face-to-face visits with them.

Petitioner tried unsuccessfully to resolve his grievance informally with respondent Kingston on June 16, 2005. On July 25, 2005, petitioner received a memorandum from respondent Clements that stated that the use of video equipment for visits for inmates in the Health and Segregation Complex met the requirements of Wis. Admin. Code § DOC 309.09 and assures the safety of visitors.

Petitioner filed an inmate complaint on June 23, 2005 concerning the lack of face-to-face visits. Respondent Muenchow rejected the complaint as untimely on July 19, 2005. He wrote,

> Inmate Vasquez has been subject to either no-contact or video monitor visiting since 12/20/02. That is the occurrence giving rise to this complaint. It is well beyond the 14-day time limit to file a complaint with respect to conditions of his confinement that took effect on 12/20/02. Vasquez makes no plea for good cause acceptance of his untimely filed complaint, nor is there any other proof that would show how inmate was denied the use of or inhibited in any way from using the ICRS since the date of occurrence.

Petitioner appealed rejection of the complaint on July 20, 2005. Respondent Thurmer affirmed rejection of the complaint on July 22, 2005.

D. Due Process

Petitioner received a document entitled "Notice of Review of Administrative Confinement" indicating that a hearing was scheduled for August 25, 2004. The notice indicated also that respondent McDonald had been assigned to represent petitioner at the hearing. Respondent McCaughtry chose respondent McDonald to represent petitioner.

Respondent McDonald came to petitioner's cell. Petitioner told respondent McDonald that he did not want him to serve as his advocate because respondent McDonald has a history of providing ineffective assistance to petitioner and other inmates.

When petitioner saw respondent O'Donovan, he asked him if he had received petitioner's request for a different advocate. Respondent O'Donovan said he had received petitioner's request but that he had no authority to appoint a different advocate. Petitioner asked respondent O'Donovan to postpone the hearing until petitioner could obtain a new advocate but respondent O'Donovan denied this request.

On August 25, 2004, petitioner sent respondent McCaughtry a request for a new advocate but respondent McCaughtry failed to respond or provide a new advocate. On September 6, 2004, petitioner filed an inmate complaint in which he stated that he told respondent McDonald that he did not want him to represent him at his hearing. He stated further that he asked the hearing officer to have respondent McDonald removed from the hearing because he ineffective but that the hearing officer stated that he had no authority

to remove respondent McDonald and continued the hearing with respondent McDonald present. On November 4, 2004, respondent Muenchow recommended dismissal of the complaint. He wrote that

> considering that advocates are appointed by the Warden in accordance with DOC 303.78, it is only reasonable that the only way to obtain a change of advocate is by contacting the Warden and requesting the change. The ICE has no supervisory authority over the appointment of advocates, and the ICRS will not review ACRC actions until the completion of the appeal process.

On November 7, 2004, respondent Thurmer accepted this recommendation and dismissed petitioner's complaint. Petitioner filed an appeal on November 12, 2004. Respondent Ray recommended dismissal of the appeal on November 16, 2004 and respondent Raemisch accepted this recommendation on November 17, 2004. In a memorandum to petitioner dated November 19, 2004, respondent Kingston stated that he had reviewed his request for a change of advocate but that no change would be made because petitioner had not shown that respondent McDonald had a known and demonstrated conflict of interest in representing petitioner.

DISCUSSION

A. Eighth Amendment

I understand petitioner to allege that a number of the conditions of his confinement in the Health Segregation Complex violated his Eighth Amendment protection against cruel

and unusual punishment. "The Constitution 'does not mandate comfortable prisons,' Rhodes v. Chapman, 452 U.S. 337, 349 (1981), but neither does it permit inhumane ones, and it is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment,' Helling [v. McKinney, 509 U.S. 25 (1993)]." Farmer v. Brennan, 511 U.S. 825, 832 (1994). "Inhumane conditions" are those that exceed the "contemporary bounds of decency of a mature, civilized society." Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994). Deprivations must be "unquestioned and serious" and contrary to "the minimal civilized measure of life's necessities." Rhodes, 452 U.S. at 347.

To state a claim against prison officials for inhuman conditions, an inmate must allege not only that the conditions are unconstitutional but that the prison officials "acted wantonly and with a sufficiently culpable state of mind." Lunsford, 17 F.3d at 1579. That state of mind is one of "deliberate indifference to inmate health or safety." Farmer, 511 U.S. at 834. To prove deliberate indifference, a plaintiff must show that the defendant official knew of an excessive risk to inmate health or safety and disregarded that risk. Id. at 837. The official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id.

1. Hygiene items

Petitioner alleges that he is unable to purchase personal hygiene items from the prison canteen. Instead, he is issued soap, toothpaste and a toothbrush. He alleges further that the soap causes dry skin, the toothpaste does not whiten his teeth although it does help prevent cavities and the toothbrush is difficult to use. Finally, petitioner alleges that the deodorant he is given does not prevent odor or sweat.

It is clear that petitioner is dissatisfied with the hygiene items he is given. However, allegations of mere dissatisfaction with an aspect of prison life do not state a claim under the Eighth Amendment. Prison officials have a duty under the Eighth Amendment to meet the basic human needs of inmates by providing adequate food, shelter, clothing, sanitation and medical care, Oliver v. Deen, 77 F.3d 156, 159 (7th Cir. 1996), but the Eighth Amendment does not regulate the property and privileges to which inmates are entitled. Petitioner has not alleged facts from which an inference may be drawn that the personal hygiene items he is issued are so defective as to pose a substantial threat to his health. Because his allegations are legally meritless, he will be denied leave to proceed on this claim.

2. Constant illumination

Petitioner alleges that his cell is illuminated 24 hours a day and, as a result, he has experienced migraine headaches, blurred vision, pain in his eyes and trouble sleeping. Constant illumination may violate the Eighth Amendment if it causes sleep deprivation or

leads to other serious physical or mental health problems. Keenan v. Hall, 83 F.3d 1083, 1089 (9th Cir. 1996).

In King v. Frank, 371 F. Supp. 2d 977 (W.D. Wis. 2005), I was presented with and resolved the constitutionality of an identical claim by another inmate who was housed in the Health Segregation Complex at the Waupun Correctional Institution. In that case, I found that the light in the cells that inmates do not have the power to turn off are 9-watt fluorescent lights that remain lit at all times to allow prison officials to observe inmates at night. (To emphasize the minimal amount of light a 9-watt bulb generates, respondent Muenchow noted that the light given off by the fluorescent light is the same as that given off by one candle.) I found as well that inmates are allowed to cover their eyes with a towel, washcloth, or t-shirt while sleeping to block out this minimal amount of light. In the other case, I concluded that a 9-watt fluorescent light was not bright enough to constitute an Eighth Amendment violation. King v. Frank, 371 F. Supp. 2d at 984-85. Because I have already found that the lighting in the Health Segregation Complex at the Waupun Correctional Institution does not violate the Eighth Amendment, petitioner will be denied leave to proceed on this claim.

3. Fire Sprinklers

Petitioner alleges that his cell does not contain a sprinkler or "fire detector."

However, this allegation standing alone is insufficient to state a claim under the Eighth Amendment. Nothing in petitioner's allegations suggest that respondents have no plan to protect his health or safety in the event of a fire. In the absence of such allegations, petitioner's claim is legally meritless. Therefore, he will be denied leave to proceed on this claim.

4. Inadequate ventilation

Petitioner alleges that the air in his cell is dry, stale and contains dust which causes his nose to become congested and occasionally to bleed. Petitioner alleges also that he has occasionally "coughed up blood." This suggests that petitioner may have a serious medical issues, but it is too far a stretch from common sense to assume that this condition is caused by poor ventilation. Therefore, his allegations are insufficient to state a claim under the Eighth Amendment. Adams v. Pate, 445 F.2d 105, 108-09 (7th Cir. 1971) (no constitutional violation where inmate's cell was filthy and stunk, water faucet was inches above the toilet and ventilation was inadequate).

Petitioner alleges further that his cell is not cool enough in the summer or warm enough in the winter. He does not allege that the temperatures exceeded the outdoor temperatures or that he had no ability to cool himself with water from his sell. He alleges only that he sweats constantly during the summer and that the heat caused dizziness,

insomnia and "heat exhaustion" and exacerbated the side effects of his medications. According to the website of the Centers for Disease Control and Prevention, heat exhaustion is "a milder form of heat-related illness that can develop after several days of exposure to high temperatures and inadequate or unbalanced replacement of fluids." Http://www.bt.cdc.gov/disasters/extremeheat/elderlyheat.asp.

The Eighth Amendment protects an inmate from exposure to extreme heat and cold. Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997); Shelby County Jail Inmates v. Westlake, 798 F.2d 1085, 1087 (7th Cir. 1986). Petitioner's allegations suggest at most that the temperatures in his cell were uncomfortable and may have caused the same minor health effects he would have suffered from the heat if he were not incarcerated. He does not allege that the temperatures were so excessive that they posed a serious risk to his health. In the absence of allegations that petitioner was deprived of measures to cool himself and that the temperatures in his cell were so severe that he suffered serious risks to his health, petitioner fails to state a claim of a violation of his Eighth Amendment rights. Therefore, he will be denied leave to proceed on this claim.

5. Pen insert

Petitioner alleges that he has developed a lump on his right middle finger because he is allowed to write only with the insert of a pen. This allegation is insufficient to state a

claim under the Eighth Amendment because a "writer's callus" does not constitute a serious medical need. Petitioner concedes that a doctor examined his finger, determined the finger was not infected and told him that no medical treatment was available to correct the lump. Although petitioner may disagree with Dr. Larson's assessment of his condition, he has failed to allege facts suggesting the assessment was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate" his condition. Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir. 1996) (internal quotations omitted). Thus, petitioner will be denied leave to proceed on this claim.

6. Mental health treatment

Petitioner alleges that he is receiving inadequate mental health treatment. It is well settled that the Eighth Amendment protects the mental health of prisoners no less than their physical health. See, e.g., Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987); Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983). However, an inmate must still allege that his mental health problems constitute a serious medical need and that prison officials have met that need with deliberate indifference. Sanville v. McCaughtry, 266 F.3d 724.

Petitioner alleges that he has depression, anxiety and other psychological problems. He alleges that his mental illnesses have become worse because of the conditions of his

confinement and because he is not receiving psychological counseling. In addition, he alleges that he has told Kaemmerer that he has been having nightmares and hearing voices telling him to hurt himself and others. At this stage of the proceedings, these allegations are sufficient to constitute a serious medical need.

The next question is whether petitioner has alleged that any of the prison officials named in his complaint have acted with deliberate indifference. Petitioner's allegations center around his contacts with Kaemmerer, a crisis intervention worker. However, petitioner has not named Kaemmerer as a respondent in this case. Instead, he is suing Gary Ankarlo, the supervisor of the Psychological Services Unit. Petitioner's allegations against Ankarlo are that he has told Ankarlo about his mental health problems on multiple occasions and that he is not receiving any psychological counseling or a monthly psychological evaluation. However, petitioner concedes that he is being monitored and that he has been prescribed Fluoxetine and Trazodone for his mental illnesses. Petitioner's allegation that he is receiving medication rather than counseling for his mental health problems is not enough to suggest that Ankarlo is ignoring petitioner or turning a blind eye to his situation. Farmer v. Brennan, 511 U.S. 825, 837 (1994) (prison official acts with deliberate indifference when he "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.). Rather, petitioner's allegations

suggest that he disagrees with the treatment he is being given. That, however, is insufficient to support an Eighth Amendment claim.

Likewise, petitioner's allegations do not permit an inference that any of the prison officials that handled his inmate complaints concerning his mental health treatment acted with deliberate indifference. Respondent Tonn recommended dismissal of petitioner's inmate complaint about his mental health treatment after contacting Kaemmerer and respondent Schrubbe, manager of the Health Services Unit, and learning that petitioner was being seen on a weekly basis by Health Services Unit staff and that he had been refusing his medication. Faced with these facts, respondent Tonn's decision to recommend dismissal of petitioner's complaint does not amount to deliberate indifference. Greeno v. Daley, 414 F.3d 645, 655-56 (7th Cir. 2005). Similarly, because respondents Thorpe, Hautamaki and Raemisch reviewed respondent Tonn's decision and had the same information as respondent Tonn, their failure to rule in petitioner's favor did not constitute deliberate indifference. Because he has failed to allege that any prison official has acted with deliberate indifference towards his mental illness, petitioner will be denied leave to proceed on this claim.

B. Equal Protection

Petitioner alleges that he is not allowed to possess photographs in his cell at the Waupun Correctional Institution but that inmates in segregation units at other Wisconsin

prisons are allowed to possess photographs in their cells. I understand petitioner to allege that this violates his rights under the equal protection clause of the Fourteenth Amendment.

The equal protection clause provides that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Although lawful imprisonment deprives prisoners of many rights, they retain limited constitutional protection, including the right to equal protection of the laws. Williams v. Lane, 851 F.2d 867, 871 (7th Cir. 1990). Petitioner's allegations, however, fail to state an equal protection claim because he has failed to allege that he is being treated differently from other inmates in his unit. He alleges that he is not able to possess property that inmates at other institutions are able to possess. However, inmates at other institutions and in other units are not similarly situated to petitioner. Thus, petitioner will be denied leave to proceed on his equal protection claim.

C. First Amendment

1. Personal photographs

In addition to his equal protection claim, I understand petitioner to allege that his inability to possess personal photographs in the Health Segregation Complex violates his rights under the First Amendment. Prison inmates have a First Amendment right to receive and possess written and materials that originate outside the prison such as mail and

photographs. Thornburgh v. Abbott, 490 U.S. 401 (1989). However, this right may be restricted by prison rules and regulations that are reasonably related to legitimate penological interests. Turner v. Safley, 482 U.S. 78, 89 (1987). In Ramirez v. McCaughtry, No. 04-C-335-C, 2005 WL 2010173 (W.D. Wis. Aug. 22, 2005), an inmate detained in segregated confinement at the Waupun Correctional Institution brought a claim against various prison officials contending that his restricted access to photographs and reading materials violated his rights under the First Amendment. In that case, I concluded that restrictions on a inmate's receipt of mail and photographs as part of an incentive program were reasonably related to the prison's legitimate interest in promoting good behavior. Because I have already concluded that the restriction petitioner complains of in this case is constitutional, he will be denied leave to proceed on this First Amendment claim.

2. Access to pornographic materials

I understand petitioner to allege that officials at the Waupun Correctional Institution are violating his rights under the First Amendment by implementing DOC 309 IMP 50 which prohibits inmates from possessing photographs or magazines that depict nude women or sexual activity. Petitioner will be denied leave to proceed on this claim because it is barred by the settlement agreement reached in Aiello v. Litscher, No. 98-C-791. In Kaufman v. McCaughtry, No. 03-C-27-C, 2003 WL 23218305 (W.D. Wis. Apr. 24, 2003), I

considered whether it was proper for this court to review claims brought in independent lawsuits by individual members of the class in Aiello, in which the members challenged post-settlement characterizations of mail as pornography. (Petitioner is a member of the class defined in Aiello because he is an adult inmate in the custody of the Wisconsin Department of Corrections). I concluded that such claims could not be decided without affecting the Aiello class as a whole and that in any event, the settlement agreement precludes lawsuits based solely on isolated misinterpretations of the rules regarding sexually explicit material or its successor regulations by line staff. Therefore, petitioner will be denied leave to proceed on this claim.

3. Visitation privileges

Petitioner alleges that inmates in the Health Segregation Complex are not allowed to have contact visits or face-to-face visits. He alleges further that the visual and audio quality of the video monitoring system used for visitations are poor and that during a visit, an inmate must wear handcuffs and waist restraints and be tethered to a concrete block. These allegations were presented in King v. Frank, 371 F. Supp. 2d 977 (W.D. Wis. 2005). In that case, I concluded that the restrictions on visitations imposed on inmates in the Health Segregation Complex at the Waupun Correctional Institution were constitutional because they are reasonably related to "the institution's interests in maintaining security and

rehabilitating inmates by awarding increasing levels of privileges for good behavior." Id. at 984. In light of this conclusion, petitioner will be denied leave to proceed on this claim.

Even if petitioner's claim had not been foreclosed by the decision in King, he would be denied leave to proceed on this claim because he failed to exhaust his administrative remedies with respect to this claim. His inmate complaint concerning visitations was rejected as untimely by respondent Muenchow and this decision was affirmed by respondent Thurmer. Because petitioner's complaint was untimely, he failed to exhaust his administrative remedies.

D. Due Process

I understand petitioner to allege that his due process rights were violated when respondent McDonald was not removed as his advocate at a hearing on petitioner's administrative confinement status on August 25, 2004.

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). Petitioner's placement in administrative confinement does not implicate a liberty interest. Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in

disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, Sandin does not allow suit complaining about deprivation of liberty). In Sandin v. Conner, 515 U.S. 472, 486 (1995), the Supreme Court held that an inmate's "discipline in segregated confinement did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Petitioner does not have a liberty interest in avoiding administrative confinement because such confinement does not impose an atypical and significant hardship on him in light of "the ordinary incidents of prison life." Id. at 484. Therefore, petitioner was not entitled to any procedural protections in connection with his administrative confinement review hearing. Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001) (in absence of liberty interest, "the state is free to use any procedures it chooses, or no procedures at all."). Because he has not alleged the existence of a protected liberty interest, petitioner will be denied leave to proceed on this claim.

ORDER

IT IS ORDERED that

1. Petitioner Luis Vasquez's request for leave to proceed in forma pauperis is DENIED with respect to all claims raised in this case;

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

3. The unpaid balance of petitioner's filing fee is $115.28; this amount is to be paid

in monthly payments according to 28 U.S.C. § 1915(b)(2);

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

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

Entered this 21st day of October, 2005.

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