IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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

MARK D. MARSHALL,

Petitioner,

v.

DOC Secretary MATTHEW J. FRANK, PHIL KINGSTON, Warden of Waupun, GARY ANKARLO, Chief Psychologist, JEFFREY GARBELMAN, Psychologist, DEBORAH FISCHER, Psychologist, MARY GORSKI, Nurse Practitioner, ICE JAMES MUENCHOW, ICE THERESA MURPHY, BELINDA SCHRUBBEE, HSU Manager, LIEUTENANT HOLM, KIM BAUER, Seg. Program Assistant and BRUCE SIEDSCHLAG, Seg. Unit Manager,

Respondents.

OPINION and ORDER

07-C-173-C

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

This is a proposed civil action for monetary and injunctive relief brought under 28 U.S.C. § 1983. Petitioner Mark D. Marshall, who is a prisoner at the Waupun Correctional Institution in Waupun, Wisconsin, alleges that respondents violated his rights under the First, Fourth and Eighth Amendment of the United States Constitution. Petitioner requests leave to proceed in forma pauperis under 28 U.S.C. § 1915 and has made the initial partial

payment required under that statute.

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. 28 U.S.C. § 1915(e)(2).

From petitioner's complaint and the attached materials, I draw the following factual allegations.

## ALLEGATIONS OF FACT

### A. Parties

Petitioner Mark Marshall is a prisoner who is housed at the Waupun Correctional Institution in Waupun, Wisconsin.

At all times relevant to this complaint, respondents were working in the following capacities at the Waupun Correctional Institution: Phil Kingston was the warden, Gary Ankarlo was the chief psychologist, Jeffrey Garbelman and Deborah Fischer were

psychologists, Mary Gorski was a nurse practitioner, Belinda Schrubbee was the manager of the Health Services Unit, Lieutenant Holm was a lieutenant in the segregation unit, Kim Bauer was a program assistant in the segregation unit, Bruce Siedschlag was the segregation unit manager and James Muenchow and Theresa Murphy were inmate complaint examiners.

Respondent Matthew Frank is the Secretary of the Department of Corrections.

B. Access to Legal Materials

Since his transfer to the Waupun Correctional Institution on October 12, 2006, petitioner has been housed in the segregation unit, where respondent Bauer is a program assistant. Respondent Bauer limits petitioner's access to legal library starter materials to one hour every few weeks. A policy at the Waupun Correctional Institution requires one hour of access every week. In the segregation unit, the only "access to courts" requires use of a computer. Petitioner lacks any computer skills. Respondent Bauer is aware of that petitioner is "totally computer illiterate" and refuses to teach him to use the computer.

C. Access to Christian Religious Study Materials

While petitioner has been in the segregation unit at the Waupun Correctional Institution, respondents Siedschlag and Holm have denied him "the right to study . . . religious Christian material," including "study courses, exams [and] Christian publications

of any kind except one Bible." This prohibition limits petitioner's ability to practice his religion and pursue "spiritual growth and awareness."

## D. Health Care

### 1. Lack of treatment for physical ailments

Petitioner suffers from high blood pressure, but was not treated or examined for this condition for six weeks following his transfer to the Waupun Correctional Institution. Respondent Mary Gorski was aware of his condition and need for treatment because petitioner sent repeated requests for treatment to her. By the time respondent Gorski treated petitioner, he had developed albumin in his urine. In addition, respondent Gorski "neglected to treat" petitioner for a hernia, which was indicated on his medical chart. Finally, respondent Belinda Schrubbee refuses to respond to petitioner's requests for medical care, has failed to ensure that he receives a weekly blood pressure check and cancelled petitioner's appointment at the University of Wisconsin hospital at which he was supposed to receive care for his chronic health problems. She reassigned this appointment to another prisoner.

### 2. Inadequate mental health care

Petitioner suffers from mental illness. After petitioner was transferred to the Waupun

Correctional Institution, respondent Deborah Fischer began offering petitioner additional clinical treatment, even though she was not assigned to care for him. Following an incident where respondent Fischer was required to drive to the prison after regular work hours to attend to petitioner while he was on "strap down placement," she refused to see him. She has "forced" other clinicians to treat petitioner in her place. Respondent Gary Ankarlo is the chief psychologist at the Waupun Correctional Institution and he refuses to transfer petitioner to a psychiatric facility, in spite of petitioner's "bizarre" behavior. Respondent Jeffrey Garbelman is the psychologist who is assigned to care for petitioner. He has lied to petitioner about issues related to his mental health care, in some cases "prolonging out of cell counseling sessions." Respondent Garbelman refuses to see petitioner when petitioner requests care. At times, his refusal to do so has led petitioner to engage in acts of self-harm in order to compel clinical intervention.

Petitioner filed inmate complaint number WCI-2006-30858 regarding his mental health treatment. Respondent James Muenchow included "false information" in his response to petitioner's complaint and recommended its dismissal. Petitioner appealed the decision to dismiss his complaint. Ultimately, the dismissal was affirmed by Rick Raemisch on behalf of respondent Frank's office.

E. Inadequate Nutrition

The food tray that petitioner receives is nutritionally inadequate to maintain his health and body weight. Petitioner experiences hunger pains, lack of energy and spells of dizziness as a result. Respondent Gorski responded to petitioner's concerns about lack of nutrition by stating that his weight was not abnormally low and that he did not need additional food. Petitioner is five feet nine inches tall and now weighs 135 pounds. Petitioner wrote to respondent Schrubbee in an attempt to "informally resolve" his concerns before he filed a formal complaint. Respondent Schrubbee did not respond to his note.

Petitioner then filed inmate complaint WCI-2007-2294 regarding the lack of adequate nutrition. Respondent Theresa Murphy included "false information" in her response to petitioner's complaint and recommended its dismissal. Petitioner appealed the decision to dismiss his complaint. Ultimately, the dismissal was affirmed by Rick Raemisch on behalf of respondent Frank's office.

## F. Conditions in the Segregation Unit

### 1. Constant illumination

The cells in the segregation unit at the Waupun Correctional Institution are illuminated 24 hours a day. As a result, petitioner experiences recurrent headaches and "constant levels of stress physically as well as psychologically" and sleeps inadequately.

2. Inadequate winter clothing

The clothing provided to prisoners in the segregation unit at the Waupun Correctional Institution is not warm enough for them to be comfortable in the "out of cell recreation sites" in cold weather. Petitioner is assigned recreation time in the late evenings, when it is typically colder than during the day. He is given a "flimsy spring jacket[]" that has a weak velcro closure to wear. He is not given a hat or gloves. Exposure to severe weather "mak[es] [petitioner] prone to sicknesses from induced exposedness to this weather such as colds, flus, frostbite[] on the digits such as fingers, toes, ears, nose, etc." Because he is concerned about having insufficient cold weather clothing, petitioner has refused recreation.

3. Wall

The hallway where petitioner is housed in the segregation unit at the Waupun Correctional Institution is divided in half by a wall. Therefore, petitioner cannot see prisoners in cells across from his. As a result of this "sensory deprivation," petitioner feels lonely and a sense of "undue separation." The wall serves no penological purpose.

4. Respondents' awareness of the conditions

Respondents Siedschlag and Phil Kingston are aware of the conditions in the segregation unit at the Waupun Correctional Institution. Prisoners have complained to

respondents about these conditions and respondents have given tours of the unit where they have described its physical lay-out and conditions. Respondents have had the opportunity to change the conditions in the segregation unit for many years and have not done so.

F. Use of "Incapacitative Agents"

On January 7, 2007, petitioner was on clinical observation status. Petitioner believed that he needed to talk to a clinician about "his abnormal thoughts that would probably lead to self harm." He pushed the emergency intercom button in his cell to summon staff to tell them. Respondent Holm, along with support staff, responded to petitioner's call. Upon arriving at petitioner's cell, respondent Holm asked petitioner whether he liked "being sprayed in the face" and told him to step away from the cell door so he could "spray [petitioner] in the face real good." Respondent Holm said that he couldn't spray petitioner because he was too close to the door. Petitioner thought respondent Holm was joking and stepped back from his cell door. Respondent Holm then sprayed petitioner in the face with an agent that caused petitioner to choke and become blinded. Respondent Holm told petitioner to move toward the door to be restrained. When petitioner turned toward the door, respondent Holm sprayed him again. The chemical with which respondent Holm sprayed petitioner has caused blurry vision and a burning discharge from petitioner's right eye. Respondent Holm did not videotape his use of the chemical agents, as is required by

institution policy.

Two weeks prior to this incident, petitioner had "verbally disrespected [and] degraded" respondent Holm for more than thirty minutes, causing respondent Holm to become visibly upset and to "subtly" threaten petitioner.

## OPINION

### A. Access to Legal Materials

Prisoners have a constitutional right of access to the courts to pursue postconviction remedies and to challenge the conditions of their confinement. Lehn v. Holmes, 364 F.3d 862, 865-66 (7th Cir. 2004). To state a denial of access claim, a prisoner is required to allege in his complaint not only that he has been denied access to the courts but also that he "has suffered an injury over and above" the denial of access to a court. Walters v. Edgar, 163 F.3d 430, 434 (7th Cir. 1998). The reason for this "heightened standard" is simple:

> [T]he mere denial of access to . . . legal materials is not itself a violation of a prisoner's rights; his right is to access the courts, and only if the defendants' conduct prejudices a potentially meritorious challenge to the prisoner's conviction, sentence, or conditions of confinement has this right been infringed.

Marshall v. Knight, 445 F.3d 965, 968 (7th Cir. 2006)

Petitioner alleges that respondent Bauer limits his access to legal library starter materials to one hour every few weeks and refuses to teach him to use the computer.

Although it is not clear how these allegations fit together, I will construe petitioner's complaint to allege that he has inadequate access to legal materials generally. (Prisoners do not have a right to "any specific resources such as a law library or a laptop with a CD-ROM drive or a particular type of assistance." Lehn, 364 F.3d at 868.) I am aware that, in addition to this action, petitioner is pursuing another multiclaim lawsuit before this court. However, in his complaint, petitioner has not alleged that his ability to pursue that lawsuit, the current action or any action pending elsewhere has been hampered by his limited access to legal materials. As discussed above, without such an allegation, petitioner's complaint cannot state a claim for denial of access to court. He will be denied leave to proceed on this claim.

B. Access to Christian Religious Materials

Inmates alleging that government officials have impeded their ability to practice their religious beliefs have two means of recourse: the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1, and the free exercise clause of the First Amendment.

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(a)(1)-(2), prohibits the government from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means." Cutter v. Wilkinson, 544 U.S. 709, 714-15 (2005). RLUIPA is designed to

"protect[] institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." Id. at 721.

The protections afforded by RLUIPA apply where:

> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. § 2000cc-1(b). Because the Wisconsin Department of Corrections receives and uses federal grant money for substance abuse treatment programs in its state prison facilities, the requirements of the Act apply to it.

Ultimately, to prove a RLUIPA claim, a petitioner bears the burden of establishing that respondents placed a substantial burden on the exercise of the petitioner's religious beliefs. 42 U.S.C. § 2000cc-2(b); Hernandez v. Commissioner, 490 U.S. 680, 699 (1989). Although RLUIPA does not define the term "substantial burden," the Court of Appeals for the Seventh Circuit has held that a substantial burden is "one that necessarily bears a direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003). Under the statute, a "religious exercise" is "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

Under RLUIPA, once a prisoner has shown that the actions of government officials have significantly burdened the exercise of his religious beliefs, the burden shifts to respondents to demonstrate that their decision was the least restrictive means of furthering a compelling government interest. See, e.g., Murphy v. Zoning Commission of the Town of Milford, 148 F. Supp. 2d 173, 187 (D. Conn. 2001). If they can do so, the RLUIPA claim fails.

The protections offered by the First Amendment are more limited than those extended under RLUIPA. Therefore, any claim that fails under RLUIPA will fail inevitably under the First Amendment's more stringent requirements. Although RLUIPA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," 42 U.S.C. § 2000cc-5(7), traditional First Amendment jurisprudence protects only "the observation of [] central religious belief[s] or practice[s]." Civil Liberties for Urban Believers, 342 F.3d at 760.

Because the free exercise clause allows states to enforce neutral laws of general applicability even when those laws significantly burden religious practices, Employment Division Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 887 (1990), the clause is violated only when the government intentionally targets a particular religion or religious practice, Sasnett v. Sullivan, 91 F.3d 1018, 1020 (7th Cir. 1996), vacated on other grounds, 521 U.S. 1114 (1997).

Petitioner alleges that he is prevented from possessing religious materials other than the Bible while housed in the segregation unit at the Waupun Correctional Institution. Such a restriction may well burden petitioner's ability to practice his religion and, therefore, the actions of prison officials may have violated his rights under the free exercise clause of the First Amendment and RLUIPA. Although prison officials may have a good reason for limiting access to reading materials by prisoners who are housed in the segregation unit, I will not speculate about those reasons here. At this stage in the proceedings, petitioner has done enough to state a claim. Therefore, I will grant him leave to proceed on his claims that respondents Siedschlag and Holm violated his right to practice his Christian beliefs by preventing him from possessing any religious materials other than the Bible in violation of the free exercise clause and RLUIPA.

C. Eighth Amendment

The Eighth Amendment's prohibition on "cruel and unusual punishment" establishes the minimum standard for the treatment of prisoners by prison officials. "Cruel and unusual punishment" is demonstrated by the "unnecessary and wanton inflictions of pain," including pain that is inflicted "totally without penological justification." Hope v. Pelzer, 536 U.S. 730, 737 (2001). Although this is the general standard that applies to all types of Eighth Amendment claims, it is applied differently depending on the claim involved. For claims

involving the adequacy of medical care and general conditions of confinement, the question is whether petitioner suffered from a serious medical need, to which prison officials were deliberately indifferent. Estelle v. Gamble, 429 U.S. 97 (1976). For claims involving conditions of confinement, the question is whether the petitioner has been denied the "minimal civilized measure of life's necessities" and that prison officials did so with a culpable state of mind. Rhodes v. Chapman, 452 U.S. 337, 347 (1981); Farmer v. Brennan, 511 U.S. 825, 847 (1994). Finally, for claims involving allegations of excessive force, the question is whether the prison officials inflicted at least a minimal injury "maliciously and sadistically for the very purpose of causing harm." Hudson v. McMillan, 503 U.S. 1, 6 (1992); Whitley v. Albers, 475 U.S. 312, 321 (1986).

1. Denial of health care

Under the Eighth Amendment, a prison official may violate a prisoner's right to medical care (including mental health care, E.g., Sanville v. McCaughtry, 266 F.3d 724, 734 (7th Cir. 2001); Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987)) if the official is "deliberately indifferent" to a "serious medical need." Estelle, 429 U.S. at 104-05. A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). The condition does not have to be life

threatening. Id. A medical need may be serious if it "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), if it causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir.1996), or if it otherwise subjects the detainee to a substantial risk of serious harm, Farmer, 511 U.S. 825. "Deliberate indifference" means that the officials were aware that the detainee needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, petitioner's claim has three elements:

(1) Did petitioner need medical treatment?

(2) Did respondents know that petitioner needed treatment?

(3) Despite their awareness of the need, did respondents fail to take reasonable measures to provide the necessary treatment?

a. Treatment for physical ailments

Petitioner has provided little information about his health conditions, but alleges that he suffers from high blood pressure and a hernia and requires treatment for both. It is possible to infer that either condition, in severe form, could result in a risk of serious harm or needless pain if left untreated. Therefore, at this early stage, petitioner has alleged enough to infer that his high blood pressure and a hernia constitute serious medical needs.

Next, I must consider whether it is possible to infer that respondents Gorksi and

Schrubbee were deliberately indifferent to petitioner's need for treatment for high blood pressure and a hernia. Petitioner alleges that Gorski was aware of his conditions and need for treatment because petitioner sent repeated requests to her and because his conditions were indicated in his medical chart. Petitioner alleges that respondent Gorski delayed her treatment of petitioner's high blood pressure until he had developed dangerous complications and refused to treat his hernia at all. This is sufficient to state an Eighth Amendment claim against respondent Gorski. Petitioner alleges that respondent Schrubbee refused to respond to his requests for medical care, failed to ensure that he receives a weekly blood pressure check and cancelled petitioner's appointment at the University of Wisconsin hospital at which petitioner was supposed to receive care for his chronic health problems. Because petitioner alleges facts from which an inference may be drawn that respondent Schrubbee was aware of petitioner's hernia and his high blood pressure, he will be permitted to proceed on his Eighth Amendment claim against her as well.

b. Treatment for mental illness___

If it is true, as petitioner alleges, that he is mentally ill to the point of engaging in self-harm, then it is possible to infer that his mental illness warrants treatment and constitutes a serious medical condition. More complicated is the question whether any of the named respondents were deliberately indifferent to petitioner's need for treatment for his condition.

First, petitioner alleges that respondent Fischer went out of her way to treat petitioner after he was transferred to the Waupun Correctional Institution and then stopped seeing him after she was called in to work after hours to treat him while he was in a "full bed strap-down." Petitioner alleges that she "forced" other clinicians to see him in her place. With this allegation, petitioner has pleaded facts that defeat his claim that respondent Fischer was deliberately indifferent to his mental health needs. Petitioner has a right to treatment for his serious mental health care needs, but he does not have a right to treatment from the health care professional of his choice. Respondent Fischer "forced" other clinicians to treat petitioner or insured that they did so. This suggests that she was not only concerned that petitioner receive care, but that she took steps to insure that he received it. These actions are incompatible with a finding that respondent Fischer was deliberately indifferent to petitioner mental health care needs.

Next, petitioner alleges that respondent Ankarlo exhibited deliberate indifference to his mental health needs when he refused to transfer petitioner from the Waupun Correctional Institution to a psychiatric facility. However, even if respondent Ankarlo knew about petitioner's mental illness, he was required by the Eighth Amendment to take reasonable measures to provide the necessary treatment, not to transfer petitioner within the prison system or to an outside treatment facility.

Petitioner asserts that respondent Garbelman has been assigned to care for him but

that he refuses to see petitioner when petitioner asks for care and that this refusal has led petitioner to engage in acts of self-harm. Because petitioner has alleged that respondent Garbelman knows about his need for treatment and refuses to provide it until after he harms himself, petitioner has stated an Eighth Amendment claim against respondent Garbelman. However, petitioner's other allegations against respondent Garbelman are more difficult to understand. Petitioner alleges that respondent Garbelman has lied to him about issues related to his mental health care, in some cases "prolonging out of cell counseling sessions." Nothing in this allegation forms the basis for an Eighth Amendment claim.

Finally, petitioner alleges that respondent Muenchow reviewed and recommended dismissal of petitioner's complaints and falsified the facts in his response to petitioner's complaints. An official is involved sufficiently to establish liability for a constitutional violation "if she acts or fails to act with a deliberate or reckless disregard of petitioner'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). Thus, if respondent Muenchow investigated petitioner's complaint, learned that he was receiving no treatment for his mental illness and then falsified the facts in order to dismiss the complaint, it would be possible to infer deliberate indifference on the part of respondent Muenchow. That said, petitioner should be aware that it is appropriate for complaint examiners to rely on information from the medical staff in their evaluation of his

complaint. E.g., Johnson v. Doughty, 433 F.3d 1001, 1012 (7th Cir. 2006) (non-medical prison official cannot be held "deliberately indifferent simply because [he] failed to respond directly to the medical complaints of a prisoner who was already being treated by the prison doctor"). However, at this stage, petitioner will be granted leave to proceed against respondent Muenchow.

Petitioner alleges that respondent Frank is liable because his office reviewed and ultimately dismissed petitioner's complaint. However, petitioner will not be granted leave to proceed against respondent Frank for two reasons. First, respondent Frank did not personally review or make a decision regarding petitioner's appeal. Instead, Rick Raemisch reviewed the appeal and upheld the dismissal of petitioner's complaint. Under § 1983, there is no liability on the theory of respondeat superior, under which a superior may be held liable for the acts of his subordinates. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690-695 (1978); Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995).

Second, assuming as petitioner alleges that Muenchow misrepresented the facts in his report recommending dismissal, it is not likely that the information received by the secretary's office would not likely be sufficient to put respondent Frank or anyone else on notice that petitioner's constitutional rights were being violated and petitioner has not alleged facts to the contrary. Therefore, the approval of the secretary's office of a dismissal of the complaint would not be enough to implicate the secretary in a violation of petitioner's rights.

2. Insufficient nutrition

Prisoners must be given sufficient food that is nutritionally adequate. Gilles v. Litscher, 468 F.3d 488, 491 (7th Cir. 2006); Antonelli v. Sheahan, 81 F.3d 1422, 1432 (7th Cir. 1995) (citations omitted). Petitioner alleges that he has reached an unhealthy weight, feels lethargic and experiences dizziness as a result of the inadequate nutritional content of his meals. These allegations are sufficient to suggest that the meals served to petitioner are not nutritionally adequate. Further, petitioner alleges facts from which it may be inferred that respondents Gorski and Schrubbee are aware of this situation and refuse to remedy it, in spite of petitioner's repeated pleas for additional food. Petitioner will be granted leave to proceed against respondent Gorski and Schrubbee on his claims that their failure to provide him with nutritionally adequate meals violates his Eighth Amendment protections against cruel and unusual punishment.

Petitioner alleges that respondent Murphy reviewed his complaint regarding inadequate nutrition, falsified her response and recommended wrongly that the complaint be dismissed. Assuming respondent Murphy was aware that petitioner was receiving inadequate nutrition and refused to take action to stop this, she may be liable for violating petitioner's Eighth Amendment rights; at this early stage, petitioner will be granted leave to proceed against her.

Again, however, petitioner's allegations that respondent Frank should be liable with

respect to this claim because his office reviewed and ultimately dismissed his complaint must fail. Petitioner does not allege that respondent Frank reviewed this appeal and he does not allege that anything in respondent Murphy's recommendation for dismissal was sufficient to put respondent Frank on notice that petitioner's constitutional rights were being violated. Therefore, petitioner will not be granted leave to proceed against him.

3. Conditions in segregation unit

a. Constant illumination

To prevail ultimately on a claim of cruel and unusual punishment, a plaintiff must show both that the conditions to which he or she is subjected are "sufficiently serious" and that defendants are deliberately indifferent to the inmate's health or safety. Farmer, 511 U.S. at 835. Generally, the inquiry whether the conditions are "sufficiently serious" focuses on the question whether the conditions are contrary to "the evolving standards of decency that mark the progress of a maturing society." Farmer, 511 U.S. at 833-34 (internal quotations omitted). This question has been described alternatively as a question whether the inmate has been denied "the minimal civilized measure of life's necessities." Rhodes, 452 U.S. at 347. To satisfy this test, the deprivation must be "extreme"; mere discomfort is not sufficient. Hudson, 503 U.S. at 8-9.

Petitioner alleges that he was subject to 24-hour illumination and that this caused him

to experience headaches and trouble sleeping. This court ruled in King v. Frank, 371 F. Supp. 2d 977 (W.D. Wis. 2005), that a 9-watt fluorescent light, burning 24 hours a day at the Waupun Correctional Institution was not bright enough to violate the inmate's Eighth Amendment rights. However, petitioner was not a party to that action. There is a very slight possibility that petitioner will be able to prove facts at some later stage of this lawsuit that the wattage and effects of the lighting in his cell had such a serious effect on his health that the conditions violated the Eighth Amendment. Blonder-Tongue Laboratory. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971) (explaining that due process prohibits barring litigant who was not party to prior action from litigating identical issue despite existing decisions on issue contrary to litigant's position).

The next question is whether petitioner has alleged that any of the named respondents were deliberately indifferent to these conditions. In the context of a conditions of confinement claim, deliberate indifference is the equivalent of intentional or reckless conduct. Jackson v. Illinois Medi-Car, Inc., 300 F.3d 760, 765 (7th Cir. 2002). To state a claim, a prisoner must allege, at a minimum, "actual knowledge of impending harm easily preventable." Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992) (quoting Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985)). "A failure of prison officials to act in such circumstances suggests that the officials actually want the prisoner to suffer the harm." Id. Petitioner alleges that respondents Kingston and Siedschlag were aware that prisoners in the

segregation unit at the Waupun Correctional Institution were exposed to constant illumination and that they had the authority to change the conditions but refused to do so. It is possible that petitioner may be able to prove that respondents were aware that the constant illumination could have harmful effects on petitioner and ignored a serious risk of harm. This is sufficient to state a claim of deliberate indifference. At a later stage respondents may be able to demonstrate that there were legitimate penological reasons for justifying the constant illumination of petitioner's cell. E.g., Delaney v. DeTella, 256 F.3d 679, 684 (7th Cir. 2001). However, at this point, petitioner will be granted leave to proceed on his claim that respondents Kingston and Siedschlag violated his Eighth Amendment rights by housing him in a cell that is illuminated 24 hours a day.

b. Lack of adequate clothing

Petitioner alleges that the winter clothing provided to him when he goes to an unheated recreation area is insufficiently warm. "Prisoners have a right to protection from extreme cold." Antonelli v. Sheahan, 81 F.3d 1422, 1433 (7th Cir. 1996); Murphy v. Walker, 51 F.3d 714, 720-21 (7th Cir. 1995). Although it is doubtful the conditions petitioner experienced in the unheated recreational area were so extreme and his clothing so flimsy that he suffered a serious risk of frostbite, he has alleged enough to warrant his invocation of the Eighth Amendment. Petitioner also alleges that Kingston and Siedschlag

were aware of these conditions and did nothing to improve them. At this stage of the proceedings he has done enough to state a claim against respondents Kingston and Siedschlag.

c. Sensory deprivation

Finally, petitioner contends that his Eighth Amendment rights have been violated because the segregation hallway is divided in half by a wall. Because of the placement of the wall, petitioner cannot see the cells of the prisoners who are housed across from him. The wall serves no penological purpose. The "sensory deprivation" that results from the placement of the wall causes petitioner to feel lonely and experience "undue separation."

In some instances, extreme social isolation and sensory deprivation may give rise to an Eighth Amendment claim regarding conditions of confinement. See, e.g., Scarver v. Litscher, 371 F. Supp. 2d 986, 1000-01 (W.D. Wis. 2005). However, in those cases, the prisoner was deprived of all interaction with others. In this case, petitioner states that the bare fact that he is unable to see other inmates in cells across from his violates the Eighth Amendment. Unfortunately for petitioner, however, substantial separation from other individuals is just one of the hallmarks of incarceration. Even if the placement of the wall serves no penological purpose, petitioner's inability to see prisoners in other cells is simply not "sufficiently serious" or extreme to form the basis for an Eighth Amendment claim.

Therefore, petitioner will be denied leave to proceed on this claim.

4. Excessive force

The Eighth Amendment prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain." Rhodes, 452 U.S. at 347. Because prison officials must sometimes use force to maintain order, the central inquiry for a court faced with an excessive force claim is whether the force "was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson, 503 U.S. at 6-7. To determine whether force was used appropriately, a court considers factual allegations revealing the safety threat perceived by the officers, the need for the application of force, the relationship between that need and the amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity of the force. Whitley, 475 U.S. at 321; Outlaw v. Newkirk, 259 F. 3d 833, 837 (7th Cir. 2001).

Petitioner alleges that respondent Holm and other prison staff members went to petitioner's cell when petitioner pressed his emergency call button. From the facts alleged by petitioner, there was no need for respondent Holm to subdue petitioner when he sprayed petitioner in the face with a stinging gas. Petitioner asserts that he was not resisting orders or doing anything that merited such a response and that the motive behind respondent Holm's action was an attempt to harm petitioner for yelling at respondent Holm two weeks

before. Assuming petitioner's allegations are true, as I must at this early stage, petitioner has stated a claim that respondent Holm's use of force was excessive.

ORDER

IT IS ORDERED that

1. Petitioner Mark D. Marshall is GRANTED leave to proceed in forma pauperis on his claims that:

a. Respondents Bruce Siedchlag and Lt. Holm violated petitioner's rights under the free exercise clause of the First Amendment and RLUIPA by denying him access to Christian religious materials while he was confined in the segregation unit at the Waupun Correctional Institution;

b. Respondents Mary Gorski and Belinda Schrubbee violated petitioner's Eighth Amendment rights when they denied him adequate medical care for his high blood pressure and hernia;

c. Respondent Jeffrey Garbelman violated petitioner's Eighth Amendment rights when he failed to adequately treat petitioner's mental health needs;

d. Respondent James Muenchow violated petitioner's Eighth Amendment rights when he falsified facts in his recommendation to dismiss petitioner's complaint that petitioner was receiving inadequate mental health care;

e. Respondents Gorski and Schrubbee violated petitioner's Eighth Amendment rights when they refused to provide him with meals that provided adequate nutrition;

f. Respondent Theresa Murphy violated petitioner's Eighth Amendment rights when she falsified facts in her recommendation to dismiss petitioner's complaint that he was receiving inadequate nutrition;

g. Respondents Phil Kingston and Siedschlag violated petitioner's Eighth Amendment rights when they exposed him to unconstitutional conditions of confinement including constant illumination of his cell and dangerously cold conditions in the recreation areas;

h. Respondent Holm violated petitioner's Eighth Amendment rights when he used excessive force against petitioner by spraying petitioner in the face with an "incapacitative agent" on January 7, 2007.

2. Petitioner is DENIED leave to proceed in forma pauperis on his claims that

a. Respondent Kim Bauer violated petitioner's First Amendment right of access to courts;

b. Respondents Deborah Fischer and Gary Ankarlo violated petitioner's Eighth Amendment right to adequate medical care;

c. Respondents Phil Kingston and Siedschlag violated petitioner's Eighth Amendment rights when they exposed him to sensory deprivation as a result of the placement of a wall in the segregation unit at the Waupun Correctional Institution; and

d. Respondent Matthew Frank violated his Eighth Amendment rights when his office approved dismissal of petitioner's complaints.

3. Respondents Kim Bauer, Deborah Fischer, Gary Ankarlo and Matthew Frank are DISMISSED from this action.

4. 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 respondents or to respondents' attorney.

5. 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.

6. The unpaid balance of petitioner's filing fee is $348.67; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

7. Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's complaint, attached materials and this order are being sent today to the Attorney General for service on the state respondents.

Entered this 24th day of May, 2007.

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

---