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

HAROLD JOHNSON,

Plaintiff,

v.

OPINION AND ORDER
11-cv-091-wmc

Lt. KEVIN BOODRY and OFFICER BIGNELL,

Defendants.

Plaintiff Harold Johnson alleges that defendants violated his First Amendment rights by retaliating against him for calling prison staff incompetent and unprofessional and violated his Eighth Amendment rights by subjecting him to conditions of confinement that amounted to cruel and unusual punishment. Plaintiff asks for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915. From the financial affidavit plaintiff has given the court, the court concludes that he is unable to prepay the full fee for filing this lawsuit. Plaintiff has made the initial partial payment of $1.09 required of him under § 1915(b)(1).

The next step is determining whether Johnson's proposed action is (1) frivolous or malicious, (2) fails to state a claim on which relief may be granted or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). Plaintiff has met this burden only with respect to his Eighth Amendment conditions of confinement claim. Plaintiff will not be allowed to proceed on his First Amendment retaliation claim because he can not show that his criticisms of prison staff were constitutionally-protected speech.

ALLEGATIONS OF FACT

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). For purposes of this screening order, the court assumes the following facts from his complaint:

Plaintiff Harold Johnson is incarcerated at the Columbia Correctional Institution ("CCI"), located in Portage, Wisconsin. Defendant Kevin Boodry is CCI's security supervisor and defendant Officer Bignell is one of its correctional officers.

At approximately 10:00 p.m. on December 15, 2010, several inmates in CCI's DS-1 unit, where Johnson was housed, were complaining because the second-shift officers had not exchanged the linens before going off-duty. Another inmate, Carlos Santos, located directly across the hall from Johnson, had covered the window to his cell so that the correctional officers could not observe him. Bignell was on duty in the unit and called Boodry as the shift supervisor.

While Boodry was talking with Santos, Johnson began calling the prison staff incompetent and unprofessional. Boodry approached Johnson's cell and asked him "what shit are you talking?" Johnson responded that he felt the DS-1 staff was incompetent and that Boodry was incompetent for not properly training his subordinates. Boodry spoke loudly to plaintiff, stating "you don't know what the fuck you are talking about." Boodry then ordered him to "shut up."

Johnson called Boodry a "grumpy old man." Boodry told him that he could not speak to him that way and that he would learn not to mess with his shift. Plaintiff told Boodry

that he could speak to him in any manner he chose. Boodry then informed Johnson that he would be placing him in "controlled status" (or segregation).

In the past, supervisors have placed naked inmates in segregation rooms that they know are extremely cold. Johnson told Boodry that his decision was arbitrary and an abuse of power, confirming that Boodry was a grumpy old man and unprofessional. Boodry again told him to shut up and again informed him that he would be placed in segregation. When plaintiff stated "that's okay, I've been there before," Boodry told plaintiff that he was going to be nude and then smiled sadistically.

Officer Bignell then took plaintiff to the "strip cage" where he was strip searched. When Johnson was nude, Bignell escorted him back to his cell during which time the other inmates were able to observe plaintiff's nakedness. Johnson was embarrassed and humiliated. Other inmates made sexual comments. For ten hours, Johnson was left naked in an empty, cold cell in the segregation unit with no clothing, linen, bedding or other property. He was extremely cold and shook uncontrollably at times. After 10 hours, he was given a smock but remained extremely cold.

Johnson was released from controlled segregation at noon the next day. Boodry and Bignell issued him an allegedly baseless report for disruptive conduct in further retaliation for plaintiff's speech. As a result, he was placed in disciplinary segregation on the DS-1 unit. Prisoners in the DS-1 unit must stay in a cell with a "box car" door for 24 hours a day, except for a few hours of recreation per week in an empty cage. Mentally ill prisoners on the unit yell, scream and throw or smear bodily fluids. Prisoners must eat from the floor and

sleep on the floor on very thin mattresses. They are allowed only a few hours of no-contact visitation and one 10-minute phone call per month.

Plaintiff has not received any mental health treatment and has "decompensated mentally" on the DS-1 unit. He also has experienced sleeplessness, lethargy, depression, suicidal ideation, back and joint pain, a loss of appetite, anxiety, migraines and constipation.

OPINION

I. First Amendment Retaliation

"An act taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." *DeWalt v. Carter,* 224 F.3d 607, 618 (7th Cir. 2000). While alleging that defendants retaliated against him for voicing his opinions about the competency of the correctional staff and calling Boodry a "grumpy old man," to state a claim for retaliation under the First Amendment, Johnson must allege that: (1) he was engaged in a constitutionally protected activity; (2) he suffered a deprivation that would likely deter a person from engaging in the protected activity in the future; and (3) the protected activity was a motivating factor in defendants' decision to take retaliatory action. *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009) (citing *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008)). A prisoner's right to use available grievance procedures has been recognized as a constitutionally protected activity. *Hoskins v. Lenear*, 395 F.3d 372, 375 (7th Cir. 2005). Unfortunately for Johnson, a prisoner's verbal complaints are not considered protected speech unless the prisoner engaged in speech "in a manner consistent with legitimate

penological interests," *Watkins v. Kasper*, 599 F.3d 791, 794-95 (7th Cir. 2010) (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987) (prison regulation restricting speech is valid if "reasonably related to legitimate penological interests")).

In *Watkins*, the court of appeals concluded that the confrontational, disorderly manner in which the prisoner complained about the treatment of his personal property was inconsistent with the legitimate penological interest of prison discipline and order and removed his grievance from First Amendment protection. *Id.* at 798. The court noted that "Watkins did not confine himself to a formal, written grievance or a courteous, oral conversation with Kasper about the placement of his legal materials. Instead, he confronted Kasper face-to-face in the library, presumably within earshot of other prisoners, using a loud voice and active hand gestures, prompting Kasper to file a conduct report for intimidation." *Id.* at 798-99. In sum, the court determined that Watkins could not rely on an act of speech that violated legitimate prison rules as the basis for a free speech retaliation claim. *Id*. at 799.

Based on plaintiff's own allegation, he voiced personal opinions about Broody and other prison staff in an insulting and disruptive manner. He did not file any formal complaint or even raise specific objections to actions of the prison staff. Instead he acknowledges raising any arguably legitimate issue with prison personnel in a manner that was likely to aggravate, if not potentially escalate, an existing dispute between other inmates and supervisor Boodry and other security officers. This "speech" was neither in a manner nor time that would subject it to even arguable protection under the First Amendment.

Indeed, courts have upheld punishments for the use of similar speech. *Lockett v. Suardini*, 526 F.3d 866, 874 (6th Cir. 2008) (prisoner's foul comment to prison official that was "insulting, derogatory, and questioned her authority" was unprotected speech); *Freeman v. Texas Dept. of Criminal Justice*, 369 F.3d 854, 864 (5th Cir. 2004) (public rebuke of prison chaplain that incited fifty prisoners to walk out of church service was inconsistent with prison discipline); *Ustrak v. Fairman*, 781 F.2d 573, 580 (7th Cir. 1986) (punishing an inmate for calling prison officers "stupid lazy assholes" did not violate the First Amendment).

Accordingly, the court finds that Johnson has failed to state a claim for First Amendment retaliation against defendants.

II. Eighth Amendment

On the other hand, the Eighth Amendment's prohibition on "cruel and unusual punishment" establishes the minimum standard for the treatment of prisoners by prison officials. Conditions in prison "must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). "[P]rison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of inmates.'" *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)). Conditions of

confinement that expose a prisoner to a substantial risk of serious harm are unconstitutional. *Rhodes*, 452 U.S. at 347.

To state a conditions of confinement claim under the Eighth Amendment, a plaintiff must satisfy a test that involves both a subjective and objective component. *Farmer*, 511 U.S. at 834. The objective component focuses on "whether the conditions at issue were sufficiently serious so that a prison official's act or omission results in the denial of the minimal civilized measure of life's necessities." *Townsend v. Fuchs*, 522 F.3d 765, 773 (7th Cir. 2008) (internal quotations omitted). The subjective component focuses on "whether the prison officials acted wantonly and with a sufficiently culpable state of mind." *Lunsford v. Bennett*, 17 F.3d 1574,1579 (7th Cir. 1994). In prison conditions cases, the requisite "state of mind is one of 'deliberate indifference' to inmate health or safety." *Farmer*, 511 U.S. at 834.

Deliberate indifference "implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." *Dixon v. Godinez*, 114 F.3d 640, 645 (7th Cir. 1997) (quoting *Duckworth v. Franzen*, 780 F.2d 645,653 (7th Cir. 1985)). To meet this component, "it is not enough for the inmate to show that the official acted negligently or that he or she should have known about the risk." *Townsend*, 522 F.3d at 773. Rather, "the inmate must show that the official received information from which the inference could be drawn that a substantial risk existed, and that the official actually drew the inference." *Id.*

Plaintiff alleges that defendants Boodry and Bignell subjected him to cruel and unusual punishment when they stripped him naked, marched him before other prisoners and placed him in a cold cell for 10 hours. Because prisoners have the right to life's necessity of adequate shelter, they also have a right to "protection from extreme cold." *Dixon*, 114 F.3d at 642. For Eighth Amendment claims based on low cell temperature, courts should examine several factors, such as "the severity of the cold; its duration; whether the prisoner has alternative means to protect himself from the cold; the adequacy of such alternatives; as well as whether he must endure other uncomfortable conditions as well as cold." *Id.* at 644. "Cold temperatures need not imminently threaten inmates' health to violate the Eighth Amendment." *Id.* Taken in combination, the conditions of low cell temperature, lack of clothing and bedding may establish an Eighth Amendment violation because they have "a mutually enforcing effect that produces the deprivation of a single, identifiable human need" such as warmth. *Wilson v. Seiter*, 501 U.S. 294, 304 (1991).

At this early stage, plaintiff has alleged sufficient facts to support an inference that defendants deprived plaintiff of "minimal civilized measure of life's necessities" when they forced him to remain in an extremely cold cell without any clothing or other means of protection. To prevail on this claim at summary judgment or trial, plaintiff will have to prove that defendants actually exposed him to a substantial risk of serious harm with deliberate indifference to his health and safety. Although plaintiff's allegations at least implicitly assert that defendants imposed a harsh punishment for a seemingly minor offense, plaintiff should be aware that it is only in the "exceedingly rare" and "extreme" case that a

non-capital sentence will be so disproportionate to the offense for which it is imposed that it violates the Constitution. *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quotations omitted). The disproportionality principle generally is applicable to sentences for terms of years and may no longer be available for institution of other harsh conditions of confinement. *Id.*

I note that although plaintiff also complains about the conditions that he was housed under in the DS-1 unit, he does not appear to be raising an Eighth Amendment condition of confinement claim with respect to those allegations. Nor would the allegations state such a claim. *See Delaney v. DeTella*, 256 F.3d 679, 683-84 (7th Cir. 2001) (although denial of all exercise for period of 6 months rises to level of constitutional violation, denial of exercise for shorter periods or where prisoner given limited exercise does not); *Mann v. Smith*, 796 F.2d 79, 85 (5th Cir. 1986) (Constitution does not require elevated beds for prisoners); *Franklin v. Beth*, 2007 WL 1062429, *3 (E.D. Wis. Apr. 3, 2007) (allegation that inmates forced to eat food off dirty floor does not raise constitutional claim).

Finally, plaintiff briefly mentions that he has not received any mental health treatment, has decompensated mentally and has had suicidal thoughts while in segregation. Prisoners have a right to receive adequate medical care, *Estelle v. Gamble*, 429 U.S.97 (1976), which includes a right to appropriate mental health treatment. *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987); *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983). However, that right is not without limits. *See Lewis v. Sullivan*, 279 F.3d 526, 529 (7th Cir. 2002) (stating in dicta that "suicidally depressed are entitled, at most, to precautions that

will stop them from carrying through; they do not have a fundamental right to psychiatric care at public expense"). Further, adequate care extends not just to things like medication and therapy but also to the conditions of confinement. When these "are so severe and restrictive that they exacerbate the symptoms that mentally ill inmates exhibit," this may result in cruel and unusual punishment. *Jones 'El v. Berge*, 164F. Supp. 2d 1096, 1116 (W.D. Wis. 2001). It is unclear whether plaintiff is attempting to raise a claim with respect to a lack of mental health treatment, but the allegations in his complaint fail to state such a claim.

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." This means that "the complaint must describe the claim in sufficient detail to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *EEOC v. Concentra Health Services, Inc.*, 496 F.3d 773, 776(7th Cir. 2007). In his proposed complaint, plaintiff merely refers to a lack of treatment and suicidal thoughts. He does not state that he has been diagnosed with a mental illness for which he requires treatment, identify any instances of attempted suicide to which defendants have shown deliberate indifference, explain what treatment has been denied or describe specifically how the conditions of his confinement have made his condition worse.

If plaintiff wishes to attempt to bring additional Eighth Amendment claims, he is free to file an amended complaint. A proposed amended complaint should repeat all of plaintiff's previous allegations on which he has been granted leave to proceed, as well as any new

allegations explaining what happened to plaintiff to make him believe his rights were violated with respect to his mental health, including the specific actions taken by each defendant. He also should take care to identify how each defendant knew about any mental health problems that he had and how each acted with deliberate indifference to them.

ORDER

IT IS ORDERED that:

(1) Plaintiff Harold Johnson is GRANTED leave to proceed on his claim that defendants Kevin Boodry and Officer Bignell violated his rights under the Eighth Amendment by subjecting him to conditions of confinement that amounted to cruel and unusual punishment.

(2) Plaintiff is DENIED leave to proceed on his claim that defendants violated the First Amendment by retaliating against him for complaining about correctional staff.

(3) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

(4) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

(5) Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at his institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

(6) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the

defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

Entered this 2d day of November, 2012.

BY THE COURT:
/s/
WILLIAM M. CONLEY
District Judge