

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

DARRIN GRUENBERG,

Plaintiff,

v.

LT. TETZLAFF, CAPT. MORGAN, JANEL NICKEL,
TIM DOUMA, CATHY JESS, MELISSA ROBERTS,
CHARLES COLE, and GARY HAMBLIN,

Defendants.

OPINION AND ORDER

13-cv-095-wmc

In this action under 42 U.S.C. § 1983, plaintiff Darrin Gruenberg is suing prison staff at the Columbia Correctional Institution (CCI) and administrators at the Wisconsin Department of Corrections for violating his Eighth and Fourteenth Amendment rights. The claims arise out of an incident in which Gruenberg created a disturbance and was subsequently strip searched and placed into controlled segregation for nine hours without a mat to sit on or clothing to keep him warm. Because he is a prisoner seeking “redress from a governmental entity or officer or employee of a governmental entity,” the court must now determine whether his proposed action (1) is frivolous or malicious; (2) fails to state a claim upon which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. After examining the complaint, the court concludes that Gruenberg may proceed on his Eighth Amendment claims.

ALLEGATIONS OF FACT

In addressing any pro se litigant's complaint, the court must read the allegations generously, and hold the complaint "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). Gruenberg alleges, and the court assumes for purposes of this screening order, the following facts.

A. Parties

Plaintiff Darrin Gruenberg is an inmate at the Wisconsin Secure Program Facility, but at the time of the incidents in question was incarcerated at the Columbia Correctional Institution ("CCI"). Plaintiff admits that he regularly attempts to disrupt prison operations and "constantly and incessantly argues with and disrespects . . . officers and line staff." (Compl., dkt. #1, ¶ 56.)

Defendants Lieutenant Tetzlaff, Captain Morgan, Janel Nickel and Tim Douma are prison staff at CCI. Defendants Cathy Jess, Melissa Roberts, Charles Cole and Gary Hamblin are (or were at the time of the relevant events) administrators in the Wisconsin Department of Corrections.

B. Key Events

On February 24, 2011, Gruenberg was being housed in the DS-1 unit at CCI and given an unusually small portion of food. In protest, Gruenberg briefly refused to return his food tray and began arguing with and shouting at prison staff and other prisoners. Eventually, he relinquished the tray to unit staff and stopped shouting. Lieutenant

Tetzlaff then ordered Gruenberg to exit his cell and transferred him to an observation area, where he was strip-searched and forced to spread his buttocks for an unreasonably and painfully long period of time.

After the search, Gruenberg was placed into controlled segregation pursuant to Wisconsin Administrative Code DOC 303.71, which provides in relevant part:

Controlled Segregation.

(1) Use. A security supervisor may order into controlled segregation any inmate in segregated status who exhibits disruptive or destructive behavior. Staff shall not place an inmate in controlled segregation unless a conduct report is written for the conduct giving rise to the use of controlled segregation.

...

(b) The security director shall review extensions every 24 hours. When the inmate's behavior is brought under control, the person who authorized the extension shall remove the inmate from controlled segregation.

(2) Conditions. The institution shall provide inmates in controlled segregation the following: clean mattress

(3) Necessities. The institution shall provide the following for each inmate in controlled segregation: adequate clothing, While an inmate is acting in a disruptive manner, the institution shall maintain close control of all property.

Gruenberg requested a black mat and a security smock, but Lieutenant Tetzlaff refused to provide these items, even though Tetzlaff knew that it was extremely cold in the cell. Gruenberg was not destroying or misusing any prison property, and alleges that he was denied basic clothing and a mattress simply because Tetzlaff intended to inflict as much pain and suffering upon Gruenberg as possible. Gruenberg was kept naked in the

cold cell for nine hours, while unit staff visually inspected his body and ignored his requests for clothing and a mat to protect his “frozen” feet and buttocks.

Although a conduct report was generated describing the incident in which Gruenberg was placed into controlled segregation, he was not given a hearing or opportunity to explain himself before being placed in the cell.

Gruenberg alleges that he attempted to exhaust his prison remedies to address all of these issues, but that some of his ICE grievance forms were not acknowledged.

OPINION

I. Conditions of Confinement Claim

Gruenberg alleges that the conditions in his controlled segregation cell were so bad that intentionally keeping him there for 9 hours was itself cruel and unusual punishment. Cruel and unusual conditions are those that “deprive inmates of the minimal civilized measure of life’s necessities.” *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). The Eighth Amendment does not “mandate comfortable prisons.” *Id.* Conditions that make confinement unpleasant are not enough to state an Eighth Amendment claim because regular discomforts are “part of the penalty that criminal offenders pay for their offenses against society.” *Id.* at 348-49.

Notwithstanding this, Gruenberg’s allegations of extreme cold and lack of any sort of mat to protect him from the floor or clothing to cover his body -- and Lieutenant Tetzlaff’s alleged deliberate indifference to Gruenberg’s suffering -- suffice at the pleading

stage to state a conditions of confinement claim against Tetzlaff.¹ See *Lewis v. Lane*, 816 F.2d 1165 (7th Cir. 1987) (an allegation of inadequate heating may state an Eighth Amendment violation). Accord *Gillis v. Litscher*, 468 F.3d 488, 493 (7th Cir. 2006).

II. Due Process Claim

Gruenberg attempts to assert a procedural due process claim arising out of his nine-hour placement in controlled segregation without a prior hearing. He cannot succeed on this claim because he was not deprived of a liberty interest.

A prisoner challenging the process he was afforded in a prison disciplinary proceeding must show that: (1) he has a life, liberty or property interest that the state has interfered with; and (2) the procedures he was afforded in that deprivation were constitutionally deficient. *Scruggs v. Jordan*, 485 F.3d 934, 939 (7th Cir. 2007). Typically, a placement in segregation must extend for several months before a liberty interest is found, and even then only when conditions in segregation are quite harsh. *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 697 (7th Cir. 2009). Here, the alleged conditions were harsh, but the period of confinement was also very short. Under this court's reading of Seventh Circuit precedent, Gruenberg has not come close to alleging a liberty interest, and the alleged severity of the conditions in his cell must be addressed under the rubric of his conditions of confinement claim.

¹ At various points in his rambling complaint, Gruenberg baldly alleges that all of the named defendants were "aware that his rights were being violated." Absent any more detailed explanation for how high-level supervisors and administrators approved of or directed individual Eighth Amendment violations as they happened on the ground, the court will allow Gruenberg to proceed only against Lieutenant Tetzlaff, who was directly responsible for the alleged conduct.

III. Strip Search Claim

Although Gruenberg's complaint centers on the decision to keep him in controlled segregation, he also mentions that before entering the cell Lieutenant Tetzlaff (1) ordered him strip searched; (2) forced him to spread his buttocks for an unreasonably and painfully long time; and (3) did so for no purpose other than to humiliate Gruenberg. From this allegation, the court infers a viable Eighth Amendment claim against Tetzlaff, for body searches that are "for harassment purposes or any purposes that could reasonably be said to be punishment" may constitute cruel and unusual punishment. *Peckham v. Wis. Dep't. of Corr.*, 141 F.3d 694, 697 (7th Cir. 1998). See also *Calhoun v. DeTella*, 319 F.3d 936, 939 (7th Cir. 2003) (noting that "a search conducted in a harassing manner intended to humiliate and inflict psychological pain" would be an Eighth Amendment violation).

IV. Challenge to Constitutionality of DOC Policy

Finally, Gruenberg challenges Wisconsin Administrative Code DOC 303.71 as facially unconstitutional. This administrative rule allows a security supervisor to order a prisoner into controlled segregation on the basis of "disruptive or destructive behavior," and instructs the supervisor to remove the prisoner once his or her "behavior is brought under control." Wis. Admin. Code DOC 303.71(1). The rule also instructs institutions to provide a mattress and adequate clothing to prisoners, but allows them to keep "close control" on property when an inmate continues to act in a disruptive manner. Wis. Admin. Code DOC 303.71(2) & (3).

Gruenberg makes two claims. *First*, he claims that controlled segregation in a bare cell with the option to keep “close control” on items such as mattresses and clothing is unconstitutional because “it is not at all instrumental in advancing any meaningful or appropriate penological and medical objective.” (Compl., dkt #1, at ¶92.) Gruenberg does not state what part of the Constitution this challenge means to invoke -- perhaps the Fourteenth Amendment substantive due process on grounds that the rule fails rational basis, or perhaps the Eighth Amendment on grounds that it is cruel and unusual punishment. Either way, the language employed by Gruenberg seems specifically calculated to overcome the principle articulated in *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254 (1987), which holds that a prison regulation “is valid if it is reasonably related to legitimate penological interests.”

The court will, therefore, reject this claim as frivolous. The type of controlled segregation envisioned by DOC 303.71 is valid, because segregation of disruptive prisoners plainly serves the goal of an orderly prison, and the ability to deny prisoners clothing and other items in the cell that they are likely to misuse or destroy serves the goal of conservation of state property. So, the rule is facially constitutional. Whether the rule was *applied* in a vindictive or unreasonable manner is a different question, which Gruenberg can pursue in his conditions of confinement claim.

Second, Gruenberg claims that DOC 303.71 is unconstitutionally vague in that it gives prison officials too much leeway in determining what constitutes “disruptive behavior,” and thus gives too much leeway for officials to place prisoners into the harsh conditions of segregation. (See Compl., dkt. #1, at ¶¶73-74, 79, 82, 84, 88.) The void-

for-vagueness doctrine states that a rule “which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The court assumes that the void-for-vagueness doctrine applies to prison administrative regulations, but notes that in the prison context the doctrine is tempered by the *Turner v. Safley* rule. See *Bahrampour v. Lampert*, 356 F.3d 969, 975 (9th Cir. 2004) (applying *Turner v. Safley*, 482 U.S. 78 (1987), to vagueness challenge to prison regulation prohibiting receipt of certain types of mail).

Even at this early stage, however, the court can find no good faith basis for Gruenberg’s contention that the phrase “disruptive conduct” is unconstitutionally vague. Even outside prison walls, laws barring disorderly conduct have been upheld as constitutional against vagueness challenges. See *City of Oak Creek v. King*, 148 Wis.2d 532, 545-48, 436 N.W.2d 285, 290-91 (Wis. 1989) (upholding Wis. Stat. § 947.01); *Soglin v. Kauffman*, 286 F. Supp. 851, 853-55 (W.D. Wis. 1968). Within prison, where administrative discretion surely deserves more deference under *Turner v. Safley*, a rule allowing prison officials the flexibility to identify and control what they consider “disruptive behavior” is not too vague and serves strong penological interests. Again, discriminatory or vindictive use of this power can be corrected via other theories without alleging a facial challenge like the one found in Gruenberg’s complaint.

ORDER

IT IS ORDERED that:

- (1) Plaintiff Darrin Gruenberg's motion for leave to proceed against Lieutenant Tetzlaff is GRANTED IN PART consistent with the opinion above, and DENIED with respect to all other defendants.
- (2) 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.
- (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.

Entered this 7th day of April, 2014.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge