

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

SHONDELL KILLEBREW,

Plaintiff,

v.

JUDY P. SMITH, J. ZANON, S. MUSHA,
HANS KUSTER, E. NORMAN,
and T. IKERT,

Defendants.

OPINION & ORDER

15-cv-52-jdp

Plaintiff Shondell Killebrew, a prisoner in the custody of the Wisconsin Department of Corrections at the Oshkosh Correctional Institution, has filed a complaint alleging that he was forced to spend a month in a cold segregation cell. He seeks leave to proceed with his case *in forma pauperis*, and he has already made an initial partial payment of the filing fee previously determined by the court.

The next step is for the court to screen the complaint and dismiss any portions that are legally frivolous, malicious, fail to state a claim upon which relief may be granted, or ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A. In screening 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).

After considering plaintiff's allegations, I will allow plaintiff to proceed on Eighth Amendment and state law negligence claims against two of the named defendants, but I will deny him leave to proceed against the remainder of the defendants.

ALLEGATIONS OF FACT

Plaintiff Shondell Killebrew is an inmate at the Oshkosh Correctional Institution. On October 10, 2014, plaintiff was placed in segregation after having an argument with a prison official. The segregation cell was very cold. Plaintiff told segregation Captain Hans Kuster about the cold cell while Kuster was making his rounds. Kuster told plaintiff that “he will see what he could do.” Plaintiff’s allegations are somewhat difficult to follow, but I understand him to be saying that he later talked to Kuster at a disciplinary hearing, but Kuster ignored him. Plaintiff then filled out an “interview request” form to defendant Tim Ikert, the maintenance superintendent, but received no response.

After several weeks of plaintiff and other inmates complaining about the cold cells, Sergeant Menzel (who is not named as a defendant) checked the temperature with a hand-held thermometer. Menzel said it was 78 degrees. Plaintiff and other inmates told Menzel that the hall was much warmer than the cells. Menzel then placed the thermometer in a cell “no longer than five minutes” and got a reading of 64 degrees. Plaintiff says that the outside temperature at this point was “near or below 0.” (From these allegations it is difficult to tell whether plaintiff is saying the cell temperature was 64 degrees, or that the thermometer reading would have continued to drop had it been left in the cell.)

The prison heating system was repaired on November 14, 2014, but plaintiff had to endure frigid temperatures for about a month. The cold caused plaintiff “aching pain in [his] hands, feet, and back” and exacerbated other problems plaintiff states are caused by his disability. (Plaintiff does not explain the nature of his disability or attendant problems). Plaintiff’s inmate grievance about the problem was affirmed; the complaint examiner noted that the cell temperature had already been investigated and heating system repaired because

of several complaints from prisoners. Defendant Warden Judy Smith's decision affirming the grievance was "carbon copied" to defendants Kuster, Ikert, S. Musha (a segregation sergeant), E. Norman (a segregation lieutenant), and J. Zanon (the security director).

ANALYSIS

I understand plaintiff to be bringing federal claims under the Eighth Amendment as well as state law negligence claims for being kept in cold conditions for a month while in the segregation unit. The Eighth Amendment requires the government to "provide humane conditions of confinement; prison 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 v. Chapman*, 452 U.S. 337, 347 (1981).

To demonstrate that prison conditions violated the Eighth Amendment, a plaintiff must allege facts that satisfy a test involving both an objective and subjective component. *Farmer*, 511 U.S. at 834. The objective analysis focuses on whether prison conditions 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," *id.*, or "exceeded contemporary bounds of decency of a mature, civilized society." *Lunsford v. Bennett*, 17 F.3d 1574, 1579 (7th Cir. 1994). The subjective component requires an allegation that prison officials acted wantonly and with deliberate indifference to a risk of serious harm to plaintiff. *Id.* "Deliberate indifference" means that the defendant knew that the plaintiff faced a substantial risk of

serious harm and yet disregarded that risk by failing to take reasonable measures to address it. *Farmer*, 511 U.S. at 847. Thus, it is not enough for plaintiff to prove that a defendant acted negligently or should have known of the risk. *Pierson v. Hartley*, 391 F.3d 898 (7th Cir. 2004). He must show that the official received information from which an inference could be drawn that a substantial risk existed and that the official actually drew the inference. *Id.* at 902.

Prisoners have a right to “protection from extreme cold.” *Dixon v. Godinez*, 114 F.3d 640, 642 (7th Cir. 1997). For Eighth Amendment claims based on low cell temperature, courts examine 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.

Given the generous interpretation pro se pleadings are afforded, plaintiff’s allegations just barely satisfy the pleading requirements for an Eighth Amendment claim. It is difficult to tell exactly how cold plaintiff thought his cell was. It seems unlikely that a prisoner could prevail on a claim that his cell was 64 degrees, but his allegations about the pain he felt as a result of the cold seems incompatible with a cell temperature in the 60s. Plaintiff’s allegations regarding the cold conditions causing him pain and exacerbating his disability is sufficient to establish the severity of the cold at this point in the case.

As for the requirement that defendants acted with deliberate indifference to the risk posed by the cold, plaintiff’s allegations about alerting defendants Kuster and Ikert weeks before the problem was solved is sufficient to meet this element, so I will allow him to proceed on claims against these defendants. His allegations about the other defendants are not sufficient to support Eighth Amendment claims. Plaintiff seems to say that he alerted “all

the defendants,” Dkt. 1, at 5, but he does not explain how any of the defendants other than Kuster and Ikert were aware of the problem before it was solved. Plaintiff names Warden Judy Smith as a defendant, but she appears to have become aware of the problem only through the grievance process, after the heating system was fixed. Defendants Musha, Norman, and Zanon appear by name only as recipients of Smith’s grievance decision, which does not show that these defendants knew of the problem yet failed to stop it. Accordingly, I will not allow plaintiff to proceed on Eighth Amendment claims against Smith, Musha, Norman, or Zanon.

Plaintiff also alleges that the acts of defendants were negligent, and includes a “notice of claim,” which is generally required to sustain Wisconsin law claims against government officials. Thus I understand plaintiff to be bringing a state law negligence claim as well. A negligence claim under Wisconsin law includes the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) harm to the plaintiff. *Paul v. Skemp*, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 625 N.W.2d 860. The reasoning stated above regarding plaintiff’s Eighth Amendment claims holds true for his negligence claims. I will allow plaintiff to proceed on negligence claims against Kuster and Ikert but not the other defendants.

ORDER

IT IS ORDERED that:

1. Plaintiff Shondell Killebrew is GRANTED leave to proceed on Eighth Amendment and state law negligence claims against defendants Hans Kuster and Tim Ikert.
2. Plaintiff is DENIED leave to proceed on claims against defendants Judy Smith, S. Musha, E. Norman, and J. Zanon. These defendants are DISMISSED from the case.

3. Under 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 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 on behalf of defendants.
4. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve defendants' lawyer directly rather than defendants themselves. The court will disregard any documents submitted by plaintiff unless he shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.
5. 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.

Entered July 6, 2015.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge