IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHN D. TIGGS, JR.; a.k.a. A'KINBO
JIHAD-SURU HASHIM,

Plaintiff,

v.

GERALD A. BERGE,

Defendant.

OPINION AND ORDER

01-C-171-C

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This is a civil action for monetary, injunctive and declaratory relief brought pursuant to 42 U.S.C. § 1983. Plaintiff John Tiggs, a prisoner at Supermax Correctional Institution in Boscobel, Wisconsin (now known as the Wisconsin Secure Program Facility) alleges that defendant Gerald Berge violated his rights under the Eighth Amendment. Defendant has filed a motion for summary judgment. The sole issue to be decided is whether plaintiff has demonstrated that there is a genuine issue of material fact with respect to his claim that defendant violated his right to be free from cruel and unusual punishment by depriving him of social interaction and sensory stimulation.

I conclude that plaintiff has not met his burden. He has neither explained how defendant deprived him of his basic human need for social interaction or sensory stimulation nor provided evidence that his conditions of confinement caused him harm. Defendant's motion for summary judgment will be granted.

Before I set forth the undisputed facts, a word is required regarding their source. Both parties have submitted proposed findings of fact. Although plaintiff filed responses to defendant's proposed findings of fact, defendant has not filed responses to plaintiff's proposed findings. Instead, defendant sent a letter to the court stating: "There is no federal rule, nor is there a local rule, that would indicate that the defendant would need to respond. Proposed findings of fact are appropriate when filed by a moving party, not a party simply opposing a motion for summary judgment."

Defendant is incorrect. This court's "Procedure to be Followed on Motions for Summary Judgment," a copy of which was provided to both parties as part of the preliminary pretrial conference order, allows non-moving parties to file their own proposed findings of fact. See Procedure II.B. ("In addition to responding to the movant's proposed facts, a non-movant may propose its own findings of fact following the procedure in section I.B and C. above."). Certainly, the non-moving party must be allowed to tell its side of the story as well. It cannot be expected to be bound by only those facts that the moving party deems to be important. If that were the case, the moving party could insure its success simply by proposing only those facts that supported its position while leaving out relevant facts that would favor the non-moving party. This would be contrary to this court's procedures, to Fed. R. Civ. P. 56 and to basic notions of fairness.

Defendant is also incorrect that responses to plaintiff's proposed findings of fact are unnecessary because he addressed them in his reply brief. The court's procedures make it clear that this court will not consider facts contained only in a brief. Because defendant has failed to oppose plaintiff's proposed findings of fact, I will treat those facts as undisputed. See Waldridge v. American Hoescht Corp., 24

F.3d 918, 922 (7th Cir. 1994); Stewart v. McGinnis, 5 F.3d 1031, 1034 (7th Cir. 1993).

From the parties' proposed findings of fact, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

Plaintiff John Tiggs is an inmate at Supermax Correctional Institution in Boscobel, Wisconsin (now known as the Wisconsin Secure Program Facility). Defendant Gerald Berge is the warden. Defendant is responsible for the overall administration and operation of the prison. He implements all Wisconsin Department of Corrections policies and directives and legislative and judicial mandates.

Plaintiff was transferred to Supermax from Columbia Correctional Institution on December 7, 1999. There are five housing units in Supermax: Alpha, Charlie, Delta, Echo and Foxtrot. Until mid-2002, all inmates on Level 1 were housed in the Alpha unit. Plaintiff spent 552 days on Level 1, 418 days on Level 2 and approximately 80 days on Level 3. Plaintiff has never reached Level 4 or 5. Plaintiff has been demoted to Level 1 on seven separate occasions. During the time that plaintiff was on Level 1 status, the window shutter remained closed.

The size of plaintiff's cell is approximately 6' by 12' by 10'. The walls and ceiling are white; the floor is gray. Each cell contains a sink, a toilet and a bed. The bed is a concrete fixture with a padded mattress. A near-opaque narrow skylight runs across the top of the back wall of the cell. Little natural light comes through the skylight. Plaintiff's cell is monitored with a video camera. Because of this, plaintiff must shower while wearing his undershorts and cover himself with a blanket while using the

bathroom.

Plaintiff experiences frequent headaches, anxiety, irritability and problems sleeping. He believes these symptoms are caused by the prison's level system.

OPINION

A. Scope of Relief

As a preliminary matter, I note that plaintiff's claim is limited to challenging conditions that existed before March 28, 2002. On that date, I approved a settlement agreement in Jones 'El v. Litscher, 00-C-421-C (W.D. Wis. 2002), which modified the conditions of confinement at the Supermax Correctional Institution that plaintiff is challenging in this action. In approving the agreement, I concluded that it was fair, reasonable and lawful. See Jones El' v. Litscher, 00-C-421-C, Order dated March 28, 2002, dkt. #207, at 8.

Because plaintiff is an inmate at Supermax, he is a member of the class in Jones 'El. See id. Order dated February 15, 2001, dkt. #37, slip op. at 13) (defining class members as "all persons who are now, or will in the future be, confined in the Supermax Correctional Institution in Boscobel, Wisconsin"). Therefore, he is bound by that agreement and cannot obtain injunctive or declaratory relief for those issues covered by the settlement agreement or recover money damages for conditions addressed by the agreement that occurred after the settlement agreement was approved. See United States v. Fisher, 864 F.2d 434, 439 (7th Cir. 1988) (internal citations omitted) ("A consent decree is res judicata and thus bars either party from reopening the dispute by filing a fresh lawsuit. Alternatively, it is a contract in which

the parties deal away their right to litigate over the subject matter.") Therefore, I did not consider facts proposed by the parties that referred to conditions in the prison as they existed after March 28, 2002.

B. Eighth Amendment Claim

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." It applies to the states by virtue of the Fourteenth Amendment. Robinson v. California, 370 U.S. 660 (1962). Confinement in a prison is a form of punishment subject to scrutiny under Eighth Amendment standards. Helling v. McKinney, 509 U.S. 25, 31-32 (1993); Hutto v. Finney, 437 U.S. 678, 685 (1978). Like most other claims under the Eighth Amendment, a claim asserting cruel and unusual conditions of confinement must satisfy a two-part test, with a subjective and an objective component. Farmer v. Brennan, 511 U.S. 825, 835 (1994). A plaintiff must show both that the conditions to which he or she is subjected are "sufficiently serious" (objective component) and that defendants are deliberately indifferent to the inmate's health or safety (subjective component). Id.

1. Sufficiently serious conditions

The standard for determining whether prison conditions satisfy the objective component of the Eighth Amendment is understandably imprecise. Generally, the inquiry focuses on 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). The question has been described alternatively as whether the inmate has been denied "the minimal civilized measure of life's necessities."

Rhodes v. Chapman, 452 U.S. 337, 347 (1981). To satisfy this test, the deprivation must be "extreme"; mere discomfort is not sufficient. Hudson v. McMillan, 503 U.S. 1, 8-9 (1993). However, " a remedy for unsafe conditions need not wait a tragic event." Helling, 509 U.S. at 33. If a prisoner is being exposed to "an unreasonable risk of serious damage to his future health," this may satisfy the Eighth Amendment's objective component. Id. at 35.

In this case, plaintiff contends that the totality of his conditions of confinement at Supermax violates the Eighth Amendment. The Supreme Court has rejected the view that "'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." Wilson v. Seiter, 501 U.S. 294, 305 (1991). Rather, the Court has stated: "*Some* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise–for example a low cell temperature at night combined with a failure to issue blankets." Id. In accordance with Wilson, I granted plaintiff leave to proceed solely on a claim against defendant Berge that the conditions of confinement at the Supermax Correctional Institution deprive him of the basic human needs of social interaction and sensory stimulation.

Before addressing the evidence plaintiff has adduced to show that a reasonable jury could find in his favor, I note that defendant has proposed more than 600 facts and focused a significant portion of his brief on plaintiff's behavior both at Supermax and at other correctional institutions. Specifically, defendant details plaintiff's "long history of assaultive, disruptive and non-compliant conduct in the

prison setting," Dft.'s Br., dkt. #128, at 21, and argues that because plaintiff is "dangerous and recalcitrant," the conditions under which he is confined cannot be considered cruel and unusual. Id. at 32.

I agree with defendant to the extent he means to argue that whether the Eighth Amendment has been violated is a contextual inquiry and that the reason prison officials imposed a particular condition may be a relevant consideration. Although an inmate's conduct would not be important in determining whether a condition was "sufficiently serious" (the deprivation would not be more or less extreme depending on the reason it was imposed), it could be relevant in determining whether a defendant was "deliberately indifferent." See Lunsford v. Bennett, 17 F.3d 1574, 1581-82 (7th Cir. 1994). For example, a prison official might be deliberately indifferent if he or she housed an inmate in segregation out of malice or caprice but might not be deliberately indifferent if he or she imposed the same condition because every time the inmate was placed in the general population he became assaultive. Also, if the condition was imposed as punishment for misconduct, the egregiousness of the behavior would be relevant in determining whether the punishment was proportional to the wrong committed. Pearson v. Ramos, 237 F.3d 881 (7th Cir. 2001).

Although an inmate's behavior may be relevant, it is not enough to cite a prisoner's history of misconduct and then conclude that, because of his misconduct, the Constitution does not apply to him. Even recalcitrant prisoners are entitled to the minimal civilized measure of life's necessities. Defendant cites Pearson to support his proposition that the conditions imposed on plaintiff cannot be unconstitutional because plaintiff has behaved so badly, but Pearson does not sweep as broadly as

defendant suggests. In Pearson, the plaintiff was a prisoner who was placed in disciplinary segregation and denied yard privileges for a year because of a series of infractions including arson and beating a guard to the point that he required hospitalization. The court concluded that there was no Eighth Amendment violation because prison officials had no alternative and the plaintiff had presented no credible evidence that he had been harmed. Id. at 885-86.

Although the court viewed the inmate's conduct as a relevant consideration, it did not hold that it was the only one. Rather, the court acknowledged that the ultimate question was whether, even in spite of the misconduct, the deprivation "does so much harm to a prisoner that it is intolerable to the sensibilities of a civilized society no matter what the circumstances." Id. at 885. In Pearson, the deprivation alleged was the denial of yard privileges. Had the conditions of confinement been more extreme, the conclusion might have been different. In addition, in Pearson the court addressed only the constitutionality of conditions that were imposed because of the misconduct and considered whether the conditions bore a close relation to the misconduct. Although confining a prisoner in isolation and denying him yard privileges may be an appropriate response to violent behavior, it does not follow that *any* condition of confinement, even one that is unnecessary to further a legitimate penological interest, is insulated from the requirements of the Eighth Amendment because the prisoner has a history of bad behavior.

Regardless of defendant's overemphasis on defendant's misconduct, I cannot conclude from the record that a reasonable jury could find that defendant has violated plaintiff's Eighth Amendment right to be free from cruel and unusual punishment. Plaintiff was allowed to proceed on a claim that he was

denied his basic human needs of sensory stimulation and social interaction. To prevail on this claim, plaintiff would have to show initially that he was in fact subjected to social isolation and sensory deprivation. However, plaintiff has proposed only nineteen findings of fact, consisting primarily of vague or general allegations from his own affidavit. For example, plaintiff's proposed finding of fact #10 states: "The plf's use of 'non-visual stimuli that fluctuates at staff's discretion' begins with Def. Berge's intentional and experimental imposition of various forms of sensory deprivation to force behavior modification." Plt.'s Prop. Find. of Fact, dkt. #220, at 3, ¶10. Even if accepted as true, this fact does not begin to explain *how* defendant subjected him to sensory deprivation.

I cannot conclude from the record that a reasonable jury could find that defendant has violated plaintiff's Eighth Amendment right to be free from cruel and unusual punishment. Plaintiff was allowed to proceed on a claim that he was denied his basic human needs of sensory stimulation and social interaction. To prevail on this claim, plaintiff would have to show initially that he was in fact subjected to social isolation and sensory deprivation. However, plaintiff has proposed only nineteen findings of fact, consisting primarily of vague or general allegations from his own affidavit. very small cell in which there is little natural light and that plaintiff is monitored by a video camera. These facts are simply not enough to permit a reasonable jury to find that plaintiff's conditions of confinement deprive him of a basic human need for social interaction and sensory stimulation. Although plaintiff cannot be expected to know the legal complexities of Eighth Amendment jurisprudence, he must provide the court with facts from which a reasonable jury could find in his favor. Plaintiff has failed to do this.

In his brief, plaintiff asks the court to consider the facts in Jones 'El in examining his claim.

However, I have already explained to plaintiff that he has the responsibility to prove his own case. In an order in this case dated July 5, 2002, I wrote:

> [A]lthough many facts that plaintiff would have to prove at trial overlap with those at issue in Jones 'El, plaintiff cannot rely on "facts" surrounding the conditions of confinement in Jones 'El because those facts were not final findings of fact that support a judgment. Instead, they were facts found only for the purpose of the particular rulings at hand. To prove his claims, plaintiff must show that defendant was liable for the socially isolating conditions that caused plaintiff harm. Plaintiff cannot rely on facts found for a limited purpose in Jones 'El.

Order dated July 5, 2002, dkt. #100, at 3. These statements still apply. I cannot consider any facts beyond those that have been proposed in this case. Although defendant has proposed a number of general facts regarding the level system at Supermax, many of these facts are unrelated to plaintiff's claim of social isolation and sensory deprivation and none is specific to the conditions of confinement imposed on plaintiff.

In addition, plaintiff has failed to propose any facts that would allow a reasonable jury to conclude that his conditions of confinement have caused him serious harm or created a substantial risk of serious harm. Although I view as undisputed the proposed facts that plaintiff has headaches and sleeping problems and is irritable, anxious and confused, plaintiff has provided no evidence that any of these problems are caused by the denial of human interaction or sensory stimulation. In sum, even drawing all reasonable inferences in plaintiff's favor, I cannot conclude that he has demonstrated that there is a genuine issue of material fact that his conditions of confinement are sufficiently serious to violate the Eighth Amendment. Because plaintiff has not met his burden regarding the objective component of the Eighth Amendment test, it is unnecessary to consider whether defendant acted with deliberate indifference to plaintiff's health or safety.

In addition to contending that his conditions of confinement violate the Eighth Amendment, plaintiff argues that his due process rights were violated when he was transferred to Supermax. However, as I noted in the order dated July 5, 2002, plaintiff's case was re-opened on April 29, 2002, only as to his Eighth Amendment cruel and unusual punishment claim. Therefore, plaintiff's due process arguments will not be considered.

ORDER

IT IS ORDERED that defendant Gerald Berge's motion for summary judgment is GRANTED. The clerk of court is directed to enter judgment in favor or defendant and close this case.

Entered this 14th day of November, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge