IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GARY B. CAMPBELL,

Petitioner, OPINION AND ORDER

v. 01-C-524-C

Waupun Correctional Officials CO II MIRZEJEWSKI, LT. THOMPSON, SGT. LIND; SGT. TONEY; SGT. JOHN DOE; C/O JOHN & JANE DOE; C/O JOHN & JANE B. DOE; C/O JOHN & JANE C. DOE; C/O JOHN & JANE D. DOE; UNIT MANAGER CURT JANESSE; SECURITY DIRECTOR; ASSISTANT WARDEN; and GARY R. McCAUGHTRY, WARDEN,

Respondents.

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This is a proposed civil action for declaratory, injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Waupun Correctional Institution in Waupun, Wisconsin, contends that respondents (1) refused to allow him to mail legal documents in violation of the First Amendment; (2) refused to give him his medication in violation of the Eighth Amendment; (3) kept no record of a "minor" disciplinary hearing in violation of the Fourteenth Amendment; (4) denied him his personal toiletries and provided limited showers while in segregation in violation of the Eighth Amendment; and (5) confined him in segregation for three weeks with no outside recreation

in violation of the Eighth Amendment. Petitioner has submitted some but not all of the initial partial payment he was ordered to pay under § 1915(b)(1). However, from the updated trust fund account statement petitioner submitted with the payment, I conclude that petitioner has no more money in his prison account and no means to pay any more than he already has paid. Therefore, I will consider his request for leave to proceed in forma pauperis with this action

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See 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 on three or more previous occasions had a suit 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 seeks money damages from a respondent who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioner will be allowed leave to proceed on his Eighth Amendment claim that he was denied prescribed medication. Petitioner will be denied leave to proceed on his First Amendment claim of interference with his legal mail, Fourteenth Amendment claim that no record was kept of a minor hearing, Eighth Amendment claim that he was denied personal toiletries and was limited to two showers a week and Eighth Amendment claim that he was confined in segregation for three weeks with no outside recreation.

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

Petitioner Gary B. Campbell is an inmate at Waupun Correctional Institution, Waupun, Wisconsin. Respondents COII Mirzejewski, Lieutenant Thompson, Sargent Lind and Sargent Toney are correctional officers at the Institution. Respondents Sargent John/Jane Doe are any other correctional officers at Waupun Correctional Institution involved in the alleged events. Respondent Curt Janesse is unit manager of the segregation unit, respondent Security Director is the security director and respondent Assistant Warden is the assistant warden of the Waupun Correctional Institution. Respondent Gary R. McCaughtry is warden of the Waupun Correctional Institution.

On June 27, 2001, respondent Mirzejewski did not allow petitioner to mail a package containing court documents. Although petitioner informed respondent Mirzejewski that the

package contained legal documents, Mirzejewski refused to allow petitioner to proceed to a mailbox located approximately 25 feet away. Instead, petitioner was ordered back to his cell. A conversation ensued between petitioner and respondent Mirzejewski and Mirzejewski informed petitioner that he should have mailed his package earlier. Shortly thereafter, respondents Thompson and Lind restrained petitioner and took him to temporary lock-up and then to segregation. Respondent Thompson refused to mail petitioner's package for him. Petitioner had his cellmate mail his package. As a result of being placed in segregation, petitioner was put back on a four-month waiting list for the Domestic Violence Group, in which he was to have begun participation on July 10, 2001.

While in segregation, petitioner requested repeatedly from "Sargent John Doe" that he receive his medication for dysthymic and general anxiety disorders. Petitioner never received his medication and as a result he suffered an anxiety attack. The attack caused him to become fearful of falling asleep.

On June 28, 2001, respondent Curt Janesse conducted a "minor" hearing and no record was kept of this hearing.

Petitioner was confined in segregation for three weeks during which time he was denied his personal hygiene products and permitted only two showers a week. Petitioner was unable "to use lotion like any human being would do" after getting out of the shower. Petitioner accidently flushed a prison-issued bar of soap down the toilet and was refused

another bar of soap until the next shower day, which was three days later. As a result of petitioner's poor hygiene and lack of fresh air in segregation he suffered a panic attack on July 6, 2001. Petitioner filed a request to see a health services "physiologist" for the emotional and mental suffering caused from being in a "stuffy cell." Petitioner did not receive a reply or a visit from a health services worker. Petitioner was held in segregation for three weeks and did not receive any outside recreation.

OPINION

A. Interference with Legal Mail

Prisoners have a limited liberty interest in their mail under the First Amendment. Thornburgh v. Abbott, 490 U.S. 401, 407 (1989); Martin v. Brewer, 830 F.2d 76, 77 (7th Cir. 1987). Prison officials may regulate or restrict an inmate's access to mail if the regulations are reasonably related to a legitimate penological interest. Thornburgh, 490 U.S. at 404 (citing Turner v. Safley, 482 U.S. 78, 89 (1987)). Just as with other access to the courts claims, an inmate must make some showing that the interference with his legal mail has damaged his legal position in some way. See Alston v. DeBruyn, 13 F.3d 1036, 1041 (7th Cir. 1994) (access to the courts claim requires a showing of "'some quantum of detriment caused by the challenged conduct of state officials resulting in the interruption and/or delay of the plaintiff's pending or contemplated litigation'") (quoting Shango v.

Jurich, 965 F.2d 289, 291 (7th Cir. 1992)); see also Lewis v. Casey, 518 U.S. 343, 348-49 (1996) (prisoner must show that he has suffered actual injury in order to bring claim alleging denial of access to courts); DeMallory v. Cullen, 855 F.2d 442 (7th Cir. 1988); Richardson v. McDonnell, 841 F.2d 120 (5th Cir. 1988) (delay in processing two pieces of inmate's mail does not offend Constitution where no prejudice shown). The standard of prejudice that petitioner must show before he has alleged a cognizable access to the courts claims is high. The Supreme Court has clarified the elements necessary to state a claim of denial of access to the courts: a plaintiff must allege facts from which an inference can be drawn of "actual injury." Lewis, 518 U.S. at 348-49. This principle derives ultimately from the doctrine of standing, and requires that petitioner demonstrate that a non-frivolous legal claim has been or is being frustrated or impeded. Id. at 353 n.3-4. In light of Lewis, a petitioner must plead at least general factual allegations of injury resulting from respondents' conduct or suffer dismissal of his complaint for failure to state a claim upon which relief may be granted.

Petitioner alleges that respondent Mirzejewski did not allow him to mail a package containing legal documents. But petitioner does not allege any actual injury or facts from which an inference of injury can be drawn that respondents' actions caused an injury. In fact, petitioner states that his cellmate was allowed to mail his package. Because petitioner's claim is legally frivolous, I will deny his request for leave to proceed on this claim.

B. Denial of Prescribed Medication

I understand petitioner to be alleging that Sargent John Doe violated his Eighth Amendment rights by denying him his prescribed medication. The Eighth Amendment prohibits infliction of cruel and unusual punishment upon incarcerated persons. Wilson v. Seiter, 501 U.S. 294 (1991). To succeed on an Eighth Amendment claim that the denial of medical care amounts to cruel and unusual punishment, a prisoner must show that prison officials acted with "deliberate indifference to [his] serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). This standard implies at a minimum actual knowledge of impending harm easily preventable, so that conscious, culpable refusal to prevent the harm can be inferred from the respondents' failure to prevent it. Duckworth v. Franzen, 780 F.2d 845, 852-53 (7th Cir. 1985). In Farmer v. Brennan, 511 U.S. 825, 839 (1994), the United States Supreme Court defined deliberate indifference as recklessness in the criminal law sense. Similarly, the Court of Appeals for the Seventh Circuit has held that deliberate indifference under the Eighth Amendment is the "functional equivalent of intent." McGill v. Duckworth, 944 F.2d 344, 347 (7th Cir. 1991). Petitioner alleges that he suffers from dysthymic and general anxiety disorder, that he had been prescribed medication to treat this condition and that respondent Doe denied him the medication. As a result of not taking his medication, petitioner alleges, he suffered an anxiety attack. Although petitioner failed to name as a respondent the individual who was responsible for the alleged constitutional

violation, this is not a bar to proceeding on this claim at this stage of the proceeding. Rather, petitioner will be allowed to proceed against the current warden, respondent Gary R. McCaughtry, so that he can conduct formal discovery to ascertain the name of the person directly responsible for allegedly violating his constitutional rights. See Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981) (pro se complaint should not suffer dismissal of a defendant high official for lack of personal involvement when claim involves conditions or practices which, if they existed, would likely be known to higher officials or if petitioner is unlikely to know the person or persons directly responsible absent formal discovery). Because petitioner's allegations are sufficient to support an inference that a prison official was deliberately indifferent to his medical needs in violation of the Eighth Amendment, I will allow him to proceed on this claim against respondent Warden Gary R. McCaughtry for the sole purpose of discovering the name of the correctional officer who is allegedly responsible. Once petitioner learns the name of the person directly responsible for denying him prescribed medication, he will have to amend his complaint to name that individual as a respondent in place of respondent McCaughtry.

C. Due Process: Record of Hearing

I understand petitioner to be alleging that respondents denied him procedural due process in connection with a disciplinary hearing for a minor infraction in violation of the

Fourteenth Amendment. A procedural due process claim against government officials requires proof of inadequate procedures and interference with a liberty or property interest. See Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). In Sandin v. Conner, 515 U.S. 472, 483-84 (1995), the Supreme Court held that liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." After Sandin, in the prison context, protected liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. See Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, Sandin does not allow suit complaining about deprivation of liberty). According to DOC § 303.68(1)(b) a minor penalty could be a reprimand, loss of recreation privileges, building confinement, loss of a specific privilege, extra duty, assignment to secure work crews and restitution, none of which would trigger a due process violation. In any event, petitioner does not allege any facts about what punishment he received as a result of this minor hearing. His placement in segregation or loss of privileges would be insufficient to trigger a liberty interest. Because petitioner does not allege that he lost good time credits as a result of this hearing, he has failed to allege facts from which an inference may be drawn that he suffered "atypical, significant deprivations." Therefore, petitioner's request for leave

to proceed on his due process claim will be denied because it is legally frivolous.

D. Conditions of Confinement

I understand petitioner to be alleging that respondents violated his Eighth Amendment rights by denying him his personal toiletries and providing no more than two showers a week while he was housed in segregation for three weeks. The Eighth Amendment's prohibition against cruel and unusual punishment imposes upon jail officials the duty to "provide humane conditions of confinement" for prisoners. Farmer v. Brennan, 511 U.S. 825, 832 (1994). The Eighth Amendment imposes a duty on prison officials to provide adequate shelter, although conditions may be harsh and uncomfortable. See Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997). Prisoners are entitled to "the minimal civilized measure of life's necessities." Id. (citing Farmer, 511 U.S. at 833-34). Petitioner concedes that he was given prison-issued soap and permitted two showers a week. Nevertheless, petitioner alleges that not allowing him to use his own personal toiletries or providing him with more than two showers a week while in segregation is cruel and unusual punishment. Such treatment does not suggest petitioner is being denied life's necessities; inconvenience and discomfort fall outside the Eighth Amendment. See Caldwell v. Miller, 790 F.2d 589, 600-01 (7th Cir.1986). Because I find that this claim is legally frivolous, petition will be denied leave to proceed on this claim.

E. Denial of Outside Recreation

Petitioner alleges he was confined to his segregation cell for three weeks and was not allowed any outside recreation. The Seventh Circuit has recognized that in some circumstances the failure to provide prisoners incarcerated in segregation "with the opportunity for at least five hours a week of exercise outside the cell raises serious constitutional questions." Davenport v. DeRobertis, 844 F.2d 1310, 1315 (7th Cir.); see also Jamison-Bey v. Thieret, 867 F.2d 1046, 1048 (7th Cir. 1989) (although 101 consecutive days of segregation does not alone violate Constitution, severe restrictions on exercise may constitute Eighth Amendment violation). However, in Harris v. Fleming, 839 F.2d 1232, 1236 (7th Cir. 1988) the Court of Appeals for the Seventh Circuit found no Eighth Amendment violation when an inmate spent four weeks in segregation and was not permitted outside recreation but was allowed to move about his segregation cell and could have exercised by jogging in place, engaging in aerobics or doing push-ups in his cell. Although petitioner alleges confinement of three weeks, he does not allege that he was not allowed to exercise or move about in his segregation cell. Because petitioner's allegation of three weeks of confinement with no outside recreation does not suggest an Eighth Amendment violation, I will deny petitioner leave to proceed on this claim because it is legally frivolous.

ORDER

IT IS ORDERED that

1. Petitioner Gary B. Campbell's request for leave to proceed in forma pauperis against respondents COII Mirzejewski, Lieutenant Thompson, Sargent Lind, Sargent Toney, Sargent John/Jane Doe, Curt Janesse, Security Director, Assistant Warden and Gary R. McCaughtry on his First Amendment claim of interference with his legal mail, Fourteenth Amendment due process claim that no record was kept of a minor hearing, Eighth Amendment claim that he was denied personal toiletries and was limited to two showers a week and Eighth Amendment claim that he was confined in segregation for three weeks with no outside recreation, are DENIED as legally frivolous;

2. Petitioner's request for leave to proceed in forma pauperis on his Eighth Amendment claim of denying prescribed medication against respondent Warden Gary R. McCaughtry is GRANTED for the sole purpose of discovering the name of the correctional officer who is allegedly responsible. Once petitioner learns the name of the person directly responsible for denying him prescribed medication, he will have to amend his complaint to name that individual as a respondent in place of respondent McCaughtry; and

3. In addition, petitioner should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyer who will be representing respondents, he should serve

the lawyer directly rather than respondents. Petitioner should retain 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. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondents or to respondents' attorney.

Entered this 12th day of October, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge