IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BERRELL FREEMAN,

ORDER

Plaintiff,

02-C-024-C

v.

JON E. LITSCHER and GERALD BERGE,

Defendants.

- -

In this civil action brought pursuant to 42 U.S.C. § 1983, plaintiff Berrell Freeman alleges that defendants violated several of his constitutional and federal rights. In an order dated March 12, 2002, I (1) allowed plaintiff to proceed on his Fourth Amendment unreasonable searches claim; (2) dismissed his claims based on right to privacy, freedom of religion, Religious Land Use and Institutionalized Persons Act, denial of access to the courts and inadequate medical care and freedom of expression; and (3) stayed his conditions of confinement claim in order to allow him to provide the court with additional information. After the March 12, 2002 order issued, plaintiff submitted "supplemental" pleadings, on which I took no action, awaiting notification from plaintiff whether he wished to rely upon his original complaint (entitled "first amended complaint") or the newly submitted

"supplemental" pleadings. In a letter dated April 24, 2002, dkt. #22, plaintiff notified the court that he wishes to withdraw his supplemental pleadings and instead rely upon the "first amended complaint" on which this court based its March 12, 2002 order.

Currently before the court are several motions and documents recently filed by plaintiff. I will deny plaintiff's multiple motions to reconsider. I will lift the stay imposed as to plaintiff's Eighth Amendment claims. Plaintiff will be allowed to proceed on his Eighth Amendment claims relating to extreme cell temperatures and to the totality of the conditions, both against defendants Litscher and Berge. The totality claim includes the following conditions: confinement to cell all but three hours a week; constant illumination; limited use of the telephone; no contact visits; and constant monitoring. Plaintiff will not be allowed to proceed on his other Eighth Amendment claims that are not part of the totality claim (escort by two guards, limited food items and limited use of canteen). Finally, I will deny plaintiff's second motion for appointment of counsel without prejudice.

A. Motions to Reconsider

Plaintiff has filed a motion for reconsideration, dkt. #12, an "amended motion for reconsideration," dkt. #18, and a motion entitled "re: court order dated March 12, 2002, and motion for reconsideration pursuant to Fourteenth Amendment Due Process," dkt. #21. In the first motion, plaintiff argues that he should have been allowed to proceed on a

procedural due process claim concerning his transfer to Supermax because the conditions there impose a significant and atypical hardship. He also asserts that he is entitled to back pay that he would have earned if he had not been transferred to Supermax. In the second and third motions to reconsider, plaintiff reasserts his due process argument and further asserts that all defendants should be reinstated. Plaintiff's motions raise no issues that I did not carefully consider in the March 12, 2002 order. Accordingly, plaintiff's motions for reconsideration will be denied.

B. Clarification of Injury and Damages

In the March 12, 2002 order, I stayed a decision whether to grant plaintiff leave to proceed on an Eighth Amendment conditions of confinement claim in order to allow him to submit additional information regarding the claim. Plaintiff has now filed a document entitled "clarification of injury and damages caused by confinement at Supermax," dkt. #12. In the document, plaintiff alleges that because of the extreme heat in the cells during the summer months, he experienced weight loss and breathing complications that required him to obtain a medical restriction to sleep on the floor. In addition, plaintiff visited the University Hospital because he was suffering a build-up of fluid in his nipples and lumps and rashes all over his body that caused him pain and physical discomfort. The extreme cold temperatures in plaintiff's cell during the winter cause plaintiff to experience chronic

episodes of flu and colds. The constant lighting has caused plaintiff's vision to deteriorate and gives him chronic headaches. The lighting is also responsible for plaintiff's bi-polar traits. Plaintiff receives anti-depression medication and sleep medication because he is plagued with despair, depression and sleep disorder as a result of his continued incarceration at Supermax.

Having received plaintiff's additional submissions, I must now consider whether the specific conditions about which plaintiff complains are sufficient to state a claim under the Eighth Amendment standing alone and, if not, whether the totality of the conditions may give rise to an Eighth Amendment claim.

1. Individual conditions

The Eighth Amendment prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain" or that are "grossly disproportionate to the severity of the crime warranting imprisonment." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Because the Eighth Amendment draws its meaning from evolving standards of decency in a maturing society, there is no fixed standard to determine when conditions are cruel and unusual. Id. at 346. The Court of Appeals for the Seventh Circuit has found Eighth Amendment violations when, for example, an inmate was tied to a bed for nine days, had to use a urinal pitcher which was then left full by his bed for two days, had no change

of linen or clothes for that period, had no silverware and had to eat with his hands, and had no opportunity to exercise. See Wells v. Franzen, 777 F.2d 1258 (7th Cir. 1985). However, conditions that create "temporary inconveniences and discomforts" or that make "confinement in such quarters unpleasant" are insufficient to state an Eighth Amendment claim. Adams v. Pate, 445 F.2d 105, 108-09 (7th Cir. 1971). In Adams, the court of appeals did not find a constitutional violation when an inmate alleged that his cell was filthy and stunk, that the water faucet from which he drank was only inches above the toilet and that the ventilation was inadequate. Id.

a. Extreme cell temperatures

Plaintiff alleges that during the winter months, the cold temperatures in plaintiff's cell cause him chronic illnesses. Conversely, in the summer months, plaintiff alleges, he experiences weight loss and breathing complications that require him to sleep on the floor. In addition, plaintiff visited the University Hospital because he was suffering from a build-up of fluid in his nipples and lumps and rashes all over his body that caused him pain and physical discomfort.

Prisoners are entitled to "the minimal civilized measure of life's necessities." Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997) (citing Farmer v. Brennan, 511 U.S. 825, 833-34 (1994)). This includes a right to protection from extreme cold, see id. (holding that

cell so cold that ice formed on walls and stayed throughout winter every winter might violate Eighth Amendment), and extreme heat, see Shelby County Jail Inmates v. Westlake, 798 F.2d 1085, 1087 (7th Cir. 1986). "[C]ourts should examine several factors in assessing claims based on low cell temperature, 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." Dixon, 114 F.3d at 644. In certain circumstances extreme hot or cold cell temperature may constitute violations of the Eighth Amendment. Although at this early stage I cannot say that plaintiff could not prove any set of facts entitling him to relief on this claim, I note that he faces an uphill battle. To succeed on this claim, plaintiff will have to garner evidence of the actual temperature in his cell during the time in question and be prepared to prove that as a result of the extreme heat or cold he suffered deleterious effects on his health beyond mere discomfort.

b. 24-hour illumination

Plaintiff alleges that because of the 24-hour illumination in his cell, his vision has deteriorated and he experiences chronic headaches. The constant lighting is also responsible for plaintiff's bi-polar traits. In and of themselves, plaintiff's allegations regarding the 24-hour illumination do not rise to the level of an Eighth Amendment violation. These

allegations do not suggest "the wanton and unnecessary infliction of pain" or conditions that are "grossly disproportionate to the severity of the crime warranting imprisonment." Rhodes, 452 U.S. at 347. Plaintiff will not be allowed to proceed on his claim that defendants violated his Eighth Amendment rights by subjecting him to constant illumination.

c. Escort by two guards in handcuffs and shackles

Plaintiff alleges that his being escorted by two guards while handcuffed and shackled violates his rights under the Eighth Amendment. However, plaintiff is incarcerated at Supermax, a maximum security facility. Although plaintiff may find the fact of being escorted by two guards and also being handcuffed and shackled excessive, I do not find that such procedures suggest "the wanton and unnecessary infliction of pain" or that such conditions are "grossly disproportionate to the severity of the crime warranting imprisonment." Rhodes, 452 U.S. at 347. Plaintiff will not be allowed to proceed on his claim that defendants are violating his Eighth Amendment rights by escorting him with two guards while he is handcuffed and shackled.

d. Limited food items and limited use of canteen

According to plaintiff, defendant restrict the food items that he can keep in his cell

and his use of the canteen in violation of the Eighth Amendment's prohibition on cruel and unusual punishment. Although plaintiff may not care for these restrictions, they represent only conditions that make "confinement in such quarters unpleasant," Adams, 445 F.2d at 108-09, rather than the "wanton and unnecessary infliction of pain," Rhodes, 452 U.S. at 347. Plaintiff will not be allowed to proceed on his claim that defendants violate his Eighth Amendment rights by limiting his food items and his use of the canteen.

e. 24-hour confinement, no view of outdoors, limited use of telephone, constant monitoring and no contact visits

In his original complaint, plaintiff alleges that several additional conditions violate his right to be free from cruel and unusual punishment: confinement to his cell all but three hours a week; no view of the outdoors; limited use of telephone; constant monitoring; and no contact visits. Standing alone, none of these conditions rises to the level of an Eighth Amendment violation, with the possible exception of confinement all but three hours a week. Although each one taken individually may make "confinement in such quarters unpleasant," they are insufficient to state individual Eighth Amendment claims. Adams, 445 F.2d at 108-09. Moreover, in his clarification of injury and damages, plaintiff does not establish a link between these individual conditions and any injury that he has sustained. Plaintiff does not state independent claims that each of these conditions violates his Eighth Amendment rights.

Accordingly, plaintiff will not be allowed to proceed as to these individual conditions of confinement claims.

2. Totality of conditions

In Jones 'El v. Berge, case no. 00-C-421-C, in which plaintiff is a class member, I granted the plaintiff class leave to proceed on a claim that the total combination of the conditions of confinement at the Supermax Correctional Institution made out a possible claim of violation of the Eighth Amendment. In doing so, I relied on Wilson v. Seiter, 501 U.S. 294, 304 (1991), in which the Supreme Court recognized that although certain conditions standing alone might not raise a claim of a constitutional violation, a combination of conditions having 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," might state a claim under the Eighth Amendment.

The objectionable physical conditions at Supermax at issue on the totality claim in Jones 'El were as follows:

(1) 24-hour lock down, except that some inmates are able to leave their cells for up to four hours a week to use an unheated or cooled indoor recreation cell;

(2) cells with a sliver of a window and a boxcar door that prevents inmates from

seeing outside their cell;

(3) extremely limited use of the telephone, family or personal visits by video screen only and visiting regulations so burdensome as to prevent many inmates from receiving visitors;

(4) chronic sleep deprivation caused by 24-hour cell illumination and, for inmates choosing to block the light by covering their heads, being awakened hourly throughout the night by security staff;

(5) use of a video camera rather than human interaction to monitor all inmate movement; and

(6) extreme cell temperatures.

Rather than analyzing these conditions separately to determine whether each made out an independent claim for a violation of the Eighth Amendment, I accepted the premise that even if one or more of the conditions did not make out a separate Eighth Amendment claim, the plaintiffs had alleged sufficient facts to suggest that the conditions combined to deprive them of the clearly identifiable and basic human needs of social interaction and sensory stimulation. I reiterated this thinking in a later order in Jones 'El, when the plaintiff class attempted to amend the complaint to add to their totality claim a challenge to the ability of female guards to monitor male inmates while allegedly making rude remarks about the inmates' genitals. I denied plaintiffs' motion to include this allegation in their totality

claim because it did not relate to "the over-arching concern behind the totality claim, the sensory deprivation and social isolation imposed on inmates." Jones 'El, 00-C-421-C, Aug. 14, 2001, dkt. #90, at 25.

In this case, plaintiff alleges that he was subjected to the following conditions also found among the conditions listed in Jones 'El:

(1) confinement to cell all but three hours a week;

(2) cells with no view to the outside;

(3) limited use of the telephone and no contact visits;

(4) constant cell illumination;

(5) constant monitoring; and

(6) extreme cell temperatures.

I have concluded that plaintiff states independent claims for relief under the Eighth Amendment with respect to the conditions that cause him to suffer from extreme hot and cold cell temperatures and that plaintiff fails to state independent Eighth Amendment claims as to the other alleged conditions of confinement. However, combining the claims of confinement to cell all but three hours a week, constant illumination, limited use of the telephone, no contact visits and constant monitoring with plaintiff's allegation that he is taking anti-depressant and sleep medications because of the conditions, it is possible to draw the inference that these conditions have a mutually enforcing effect that produces the

deprivation of a separate identifiable human need, such as the need for human contact and sensory stimulation that was lacking in the total conditions at stake in Jones 'El. Indeed, the conditions central to the totality claim in Jones 'El (cells with only a sliver of a window and a boxcar door that prevents inmates from seeing outside the cell; extremely limited use of phone; family and personal visits by video and visiting regulations so burdensome as to discourage visitors; and the use of a video camera rather than human interaction to monitor inmate movement) overlap significantly with those conditions that plaintiff challenges in his complaint in this case. Accordingly, I conclude that plaintiff's allegations make out a claim that the totality of the conditions of confinement about which he complains deprives him of his Eighth Amendment rights. Plaintiff will be allowed to proceed on this claim against defendants Litscher and Berge. I note, however, that because the settlement in Jones 'El did not resolve the issue of liability on the conditions of confinement claim, it will be necessary for plaintiff to establish defendants' liability as well as his damages in order to prevail ultimately on this claim.

C. Motion for Appointment of Counsel

Also before the court is plaintiff's second motion for appointment of counsel. In the motion, plaintiff asserts that he is experiencing difficulties litigating this case because prison policies make it difficult for inmates to obtain legal materials from the law library, to spend

sufficient time in the law library and to get help from other inmates with legal matters. In addition, plaintiff asserts that documents relating to this case are "coming up missing."

In the order dated March 12, 2002, this court denied plaintiff's first motion for appointment of counsel. In that order, I noted that plaintiff appears to have made reasonable efforts to secure counsel and that he seems to be competent to represent himself given the complexity of the case. Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). Nonetheless, I must also determine whether the presence of counsel would make a difference in the outcome of his lawsuit. Zarnes, 64 F.3d at 285. This case is simply too new to permit the assessment of the potential outcome of the lawsuit. Therefore, the motion will be denied without prejudice to plaintiff's renewing it at some later stage of the proceedings.

ORDER

IT IS ORDERED that

1. Plaintiff Berrell Freeman's motions to reconsider are DENIED;

2. The stay imposed as to plaintiff's Eighth Amendment claims is LIFTED;

3. Plaintiff will be allowed to proceed on his Eighth Amendment conditions of confinement claim relating to extreme cell temperatures against defendants Litscher and Berge and relating to the totality of the conditions against defendants Litscher and Berge;

4. Plaintiff will not be allowed to proceed on his independent Eighth Amendment claims that are not part of the totality of the conditions (escort by two guards; limited food items; and limited use of canteen); and

5. Plaintiff's second motion for appointment of counsel is DENIED without prejudice.

Entered this 10th day of May, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge