IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KENNETH W. JAWORSKI,

ORDER

Petitioner,

02-C-251-C

v.

WARDEN JUDY P. SMITH;
DR. ALEXANDER STOLARSKI;
ASST. FRED NELSON; LT. KEN
KELLER; STAFF SGT. G. NEAU;
STAFF SGT. VAN DEN BERG,

Respondents.

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This is a proposed civil action for monetary and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Kenneth W. Jaworski, who is presently confined at the Columbia Correctional Institution in Portage, Wisconsin, seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

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 defendant who is immune from such relief.

Because petitioner has no protected liberty interest in remaining free from segregated confinement, his Fourteenth Amendment due process claim will be dismissed as legally frivolous. Because the facts alleged in petitioner's complaint make clear that respondents did not subject him to cruel and unusual conditions of confinement, his Eighth Amendment claim will be dismissed as legally frivolous as well.

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

## ALLEGATIONS OF FACT

Petitioner Jaworski is an inmate at the Columbia Correctional Institution in Portage, Wisconsin. During the events described in petitioner's complaint, he was incarcerated at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. Respondent Smith is Warden of the Oshkosh Correctional Institution, where respondent Nelson is Assistant Warden. I

understand petitioner to allege that respondents Stolarski, Keller, Neau and Van den Berg are all employees of the Wisconsin Department of Corrections assigned to the Oshkosh prison.

On May 25, 2001, petitioner was told by a corrections officer that he had to cut his hair braid, even though he had worn the braid for 18 years and had never been told it was a problem during the first five months he was at the Oshkosh prison. Petitioner refused, telling the officer that he had been ordered to cut the braid while at Jackson Correctional Institution in 1998 as well, but that he had successfully resisted the order because the administrative code did not require him to cut his hair. Because petitioner refused to cut his hair, he was taken to the prison's segregation unit and placed in cell 35. At this time, petitioner stopped eating to protest his placement in segregation as a result of his failure to cut his hair. On May 29, 2001, plaintiff was issued conduct report #1220878 by respondent Neau, who was ordered to issue the report by respondent Nelson.

On May 31, 2001, petitioner was moved to a two-man cell in W Unit temporary lock up. On June 4, 2001, petitioner had an adjustment committee hearing on his conduct report, was given 60 days' program segregation and was taken back to W Unit. Petitioner did not get 24-hour advance written notice of the hearing or an opportunity to call witnesses and was not allowed to present evidence because respondent Van den Berg, his staff advocate, did not meet with him before the hearing. That same day petitioner appealed the

hearing's outcome. Respondent Nelson affirmed the committee's decision. Plaintiff's inmate complaints on the matter were dismissed. Respondent Keller told petitioner that he would send an officer to ask petitioner again to cut his hair after 30 days in program segregation and that if plaintiff refused again he would get another conduct report.

On June 8, 2001, a Dr. Weller talked to petitioner about his refusal to eat. This was the first time prison staff asked him about his protest, even though petitioner had not eaten for 15 days. Dr. Weller told petitioner he was talking to him to see if he needed to be transferred to the Wisconsin Resource Center. On Dr. Weller's orders, petitioner was moved to the segregation observation cell. Petitioner was allowed to take all his segregation property with him, along with state-issued clothing, sheets, pillows, blankets and a mattress.

On June 12, 2001, petitioner was moved out of the observation cell because it was needed for another prisoner who said he was going to kill himself. On June 16, 2001, petitioner was examined by a nurse who said he did not like what he saw and ordered petitioner transferred to an outside hospital. Prison officials hoped a doctor at the hospital would deem petitioner crazy, but the doctor refused because he was not qualified to make such a determination. Only a psychiatrist or psychologist can make such a determination and none were available at the hospital on the weekend. However, the doctor did call the prison to urge them to put petitioner in the prison hospital. Instead, petitioner was put back in the segregation observation cell, along with his property.

On June 18, 2001, respondents Keller and Stolarski ordered all of petitioner's property removed from his cell, including his clothing, mattress, pillows, blankets and sheets. Petitioner was given only a "diaper" to wear as clothing. The diaper was dehumanizing and humiliating, as prison officials knew that other inmates would come by the observation cell on their way to recreation and could see petitioner. By making him wear the diaper, respondents Smith, Nelson, Keller and Stolarski intended to punish petitioner for his protest. They knew it was the only way they could get him to cut his hair. Respondent Stolarksi is not a medical doctor and no one from health services staff spoke to petitioner or reviewed Stolarski's decision.

By now petitioner was very sick, weak, anxious and depressed. Respondent Keller told petitioner his protest would not succeed and that he would remain on his current status until he relented. Petitioner was also told he would be awakened every hour to see whether he wanted water or a special drink mix and that the cell's light would be left on permanently. The observation cell was very cold. By the afternoon, petitioner went into shock, was hypothermic and had a temperature of 104 degrees. A nurse told corrections staff that petitioner had no way of fighting off the cold with no food in his body. At this point, petitioner was taken to an outside hospital where he was given two IV fluid bags and 2 cans of a drink mix. Petitioner was then returned to the prison, placed in the observation cell and given one blanket. This made no sense because earlier respondent Stolarski had said

petitioner was on suicide watch to justify the removal of petitioner's property, clothing and bedding. That petitioner was given a blanket at this point shows the suicide watch was a sham designed to end his protest.

At this point petitioner ended his protest because he feared respondents might try to kill him by inducing shock and hypothermia again. Petitioner was already very anxious and depressed and did not want to go through the pain his protest entailed again. Petitioner started to eat and allowed his hair to be cut. Petitioner was removed from observation status on June 20, 2001.

## OPINION

I understand petitioner to allege that his First Amendment rights were violated when he was forced to cut his hair, that his Fourteenth Amendment procedural due process rights were violated at his hearing on the conduct report he received for refusing to cut his hair and that the conditions he endured while in observation status amounted to cruel and unusual punishment in violation of the Eighth Amendment.

### A. First Amendment

It is unclear from petitioner's complaint whether he contends that the prison regulation requiring him to cut his hair is unconstitutional or only that the cutting of his

braid set in motion events (his disciplinary hearing and subsequent confinement in an observation cell) during which his rights were violated. The First Amendment's free exercise clause is not helpful to petitioner because he does not allege that his religious beliefs require him to wear a hair braid. To the extent petitioner seeks to state a First Amendment free expression claim, his challenge must fail. Prison regulations on hair length are "plausibly supported by considerations of safety and security." Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988); see also Pollock v. Marshall, 845 F.2d 656, 659 (6th Cir. 1988). Such regulations have routinely survived legal challenges unscathed, even when strictly scrutinized under the compelling interest/least restrictive means standard contained in the now-invalidated Religious Freedom Restoration Act. See, e.g., Diaz v. Collins, 114 F.3d 69, 73 (5th Cir. 1997); Harris v. Chapman, 97 F.3d 499, 504 (11th Cir. 1996); Hamilton v. Schriro, 74 F.3d 1545, 1555 (8th Cir. 1996). Accordingly, petitioner's First Amendment challenge will be denied as legally frivolous.

B. Fourteenth Amendment

Citing Wolff v. McDonnell, 418 U.S. 539 (1974), petitioner alleges that he was denied procedural due process when he was not given advance notice of his disciplinary hearing and was denied the opportunity to call witnesses and present evidence. As a result of the hearing, petitioner was sentenced to 60 days' program segregation. Petitioner's claim

is legally frivolous because his allegations do not establish that he was deprived of any protected liberty interest. A procedural due process claim against government officials requires proof of inadequate procedures *and* interference with a liberty or property interest. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). The due process clause itself can create liberty interests of its own force, but "changes in the conditions of confinement having a substantial adverse impact on the prisoner are not alone sufficient to invoke the protections of the Due Process Clause '[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him.'" Vitek v. Jones, 445 U.S. 480, 493 (1980) (quoting Montanye v. Haymes, 427 U.S. 236, 242 (1976)). A prisoner has no liberty interest in not being kept in segregated confinement because such confinement is "well within the terms of confinement ordinarily contemplated by a prison sentence." Hewitt v. Helms, 459 U.S. 460, 468 (1983). See also Smith v. Shettle, 946 F.2d 1250, 1252 (7th Cir.1991) ("a prisoner has no natural liberty to mingle with the general prison population"). Petitioner has identified no liberty interest created by the due process clause itself under which he may seek procedural protections.

Protected liberty interests may also be created by states through the enactment of certain statutes and regulations. Hewitt, 459 U.S. at 469. However, in Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that although "States may under certain circumstances create liberty interests which are protected by the Due Process Clause,"

those 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." In so holding, the Court sought to focus the liberty interest inquiry on the nature of the deprivation rather than the language of a particular regulation in order to discourage "prisoners [from] comb[ing] regulations in search of mandatory language on which to base entitlements to various state-conferred privileges." Id. at 481. After Sandin, in the prison context, state-created protected liberty interests are limited essentially 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). Petitioner has not alleged that his 60 days of program segregation kept him confined beyond the term of his incarceration. Therefore, petitioner has failed to allege that the result of his disciplinary hearing imposed on him an atypical and significant hardship in relation to the ordinary incidents of prison life. Accordingly, as was true of the prisoner in Sandin, neither "prison regulation[s] . . . nor the Due Process Clause itself afford[s] [petitioner] a protected liberty interest that would entitle him to the procedural protections set forth in Wolff." Sandin, 515 U.S. at 487. Petitioner's Fourteenth Amendment procedural due process claim will be dismissed as legally frivolous.

C. Eighth Amendment

Petitioner alleges that he was subjected to cruel and unusual conditions of confinement in violation of the Eighth Amendment when he was placed in the segregation unit's observation cell. 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.

In order to state a claim under the Eighth Amendment, petitioner's allegations about prison conditions must satisfy a test that involves both an objective and subjective component. Farmer v. Brennan, 511 U.S. 825, 834 (1994). He must show that the conditions to which he was subjected were "sufficiently serious" (objective component) and that defendants were deliberately indifferent to his health or safety (subjective component). Id. Under some circumstances, it is possible for a combination of physical conditions of confinement to violate the Eighth Amendment when viewed in their totality, even if each condition alone would not. See Wilson v. Seiter, 501 U.S. 294, 304 (1991). Conditions of confinement that deprive prisoners of the "minimal civilized measure of life's necessities" satisfy the objective component of the Eighth Amendment inquiry. Farmer, 511 U.S. at 834

(citations omitted). However, "[c]onditions, alone or in combination, that do not . . . fall below the contemporary standards of decency are not unconstitutional, and 'to the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.'" Caldwell v. Miller, 790 F.2d 589, 601 (7th Cir. 1986) (quoting Rhodes, 452 U.S. at 347).

As for the subjective component of the Eighth Amendment test, the Supreme Court has held that deliberate indifference requires that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer, 511 U.S. at 837. If the circumstances suggest that the prison officials were exposed to information about the risk and thus must have known about it, that evidence could be sufficient to allow a trier of fact to find actual knowledge. Id. at 842-43. The officials can still show that they were unaware of the risk or that they were aware of the risk and took reasonable steps to prevent the risk of harm. Id. at 844-45.

Petitioner alleges that his placement in the segregation unit's observation cell with nothing but a "diaper" violated his Eighth Amendment rights. Petitioner was humiliated because other prisoners could occasionally see him in the diaper as they passed the observation cell on their way to recreation. Petitioner also alleges that the cell was cold, that for a time he was awakened every hour by guards checking to see if he wanted water and that

the cell light remained on constantly. Even if these conditions, alone or in combination, would be objectively serious enough to state an Eighth Amendment claim under normal circumstances, the facts alleged in petitioner's complaint regarding his hunger strike make clear that respondents did not subject petitioner to cruel and unusual conditions of confinement.

"[P]rison officials are responsible for taking reasonable steps to guarantee the safety of inmates in their charge." Estate of Novack ex rel. Turbin v. County of Wood, 226 F.3d 525, 529 (7th Cir. 2000). Prison officials confronted with an inmate who presents a suicide risk and who fail to avert the suicide face the possibility that they will be accused of being deliberately indifferent to the risk of the inmate's suicide, thereby depriving him of his life without due process of law. See, e.g., Id.; Boncher ex rel. Boncher v. Brown County, 272 F.3d 484 (7th Cir. 2001); Sanville v. McCaughtry, 266 F.3d 724 (7th Cir. 2001). Petitioner stopped eating on May 25, 2001. On June 8, 2001, after 15 days of refusing to eat, petitioner was moved to the observation cell along with his possessions. He was moved out for a few days to make room for another prisoner who was threatening suicide, but returned on June 16, 2001. On June 18, 2001, after petitioner had not eaten for 25 days and following an examination by respondent Stolarski (who petitioner alleges is a doctor, but not a medical doctor), all of petitioner's property, clothing and bedding was removed from the cell and he was forced to wear a "diaper." According to petitioner, at this time he had not

eaten for more than three weeks and was depressed and anxious. Given these facts, respondents can hardly be blamed for placing petitioner on suicide watch. Indeed, failing to do so might have exposed respondents to an Eighth Amendment claim that they were deliberately indifferent to the risk of petitioner's suicide.

Also on June 18, petitioner was told that he would be awakened hourly to check whether he wanted water or a nutritional drink mix, that he was required to respond to these queries and that the light in his cell would remain on constantly. Again, given that petitioner had not eaten for 25 days, these precautions were sensible rather than cruel and unusual. See Estate of Novack, 226 F.3d at 529 ("Suicide is a 'serious harm' and prison officials must take reasonable preventative steps when they are aware that there is a substantial risk that an inmate may attempt to take his own life."). Petitioner alleges also that his cell was cold when he was stripped of his clothing on the morning of June 18, but his complaint makes clear that his shock and "hypothermia" stemmed from his refusal to eat and his 104 degree temperature. In addition, petitioner alleges that he was taken to the hospital by prison officials in the afternoon of that same day for intravenous fluids, a reasonable response to plaintiff's "hypothermia" that precludes liability under the Eighth Amendment. Farmer, 511 U.S. at 844-45. In short, petitioner's factual allegations undermine his Eighth Amendment claim. Petitioner chose to protest his disciplinary segregation by engaging in a sustained hunger strike that seriously jeopardized his health and

well being. Against this backdrop, there is no merit to petitioner's claim that respondents violated his Eighth Amendment rights when they put him in a cold cell, placed him on suicide watch, deprived him of his property, clothing and bedding and woke him hourly to check whether he wanted water.

C. Motion for Appointment of Counsel

Because petitioner will be denied leave to proceed on each of his claims, his motion for appointment of counsel will be denied as moot.

ORDER

IT IS ORDERED that

1. Petitioner Kenneth W. Jaworski's request for leave to proceed in forma pauperis on his First Amendment, Fourteenth Amendment and Eighth Amendment claims is DENIED as legally frivolous;

2. Petitioner's motion for appointment of counsel is denied as moot;

3. The unpaid balance of petitioner's filing fee is $140.91; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

4. A strike will be recorded against petitioner in accordance with 28 U.S.C. § 1915(g).; and

5. The clerk of court is directed to close the file.

Entered this 18th day of June, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge