IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

EDWARD J. PISCITELLO,

Petitioner, ORDER

v. 02-C-0252-C

GERALD BERGE,

Respondent.

- -

This is a proposed civil action for declaratory, injunctive and monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner Edward J. Piscitello, who is an inmate at the Waupun Correctional Institution in Waupun, Wisconsin, alleges that (1) he was transferred to Supermax in violation of due process under the Fourteenth Amendment; (2) he was denied biblical counseling courses at Supermax in violation of the First Amendment; (3) he was denied medical and dental care at Supermax in violation of the Eighth Amendment; and (4) the totality of his conditions of confinement at Supermax violated the Eighth Amendment. In addition, petitioner has filed a motion for appointment of counsel.

Petitioner has submitted some but not all of the initial partial payment he was ordered to pay under § 1915(b)(1). Because it appears petitioner is destitute and his inmate

account shows he has a zero balance, I will consider his request for leave to proceed in forma pauperis without first requiring him to pay the remainder of the initial partial payment earlier assessed.

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.

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

ALLEGATIONS OF FACT

Petitioner Edward J. Piscitello is an inmate at the Waupun Correctional Institution. Respondent Gerald Berge is warden at the Supermax Correctional Institution.

In March 2000, petitioner was transferred to the Wisconsin prison system (Columbia Correctional Institution) at his request for court hearings. Before petitioner was transferred, he had been held in protective management for five years in the Florida Department of Corrections at an undisclosed location. In Columbia, petitioner was placed in "DS-2" and

under administrative confinement.

On May 2, 2000, petitioner was transferred to Supermax Correctional Institution with no procedural due process. Columbia could have sent petitioner under protective confinement to Waupun Correctional Institution. Petitioner was held at Supermax under cruel conditions by false statements on Department of Corrections forms that listed him as having a violent behavior. Petitioner wrote the warden many times to correct these false statements but they were not corrected until petitioner filed a civil suit. Petitioner's inmate records show that he has been a model inmate since his incarceration in 1991. Petitioner was subjected to cruel and unusual punishment for political reasons.

The entire time petitioner was at Supermax, he was punished for his religious educational values held by his faith. All of his degree courses in biblical counseling had been denied on the basis of Supermax policy. This was the best form of rehabilitation. Petitioner is a non-punitive status prisoner.

Petitioner was denied both dental and medical needs.

The cruel treatment went on for years. The totality of the conditions at Supermax constitute cruel and unusual punishment, these conditions include: constant illumination, hourly bed checks throughout the night, extreme temperatures, 24-hour cell confinement, lack of a cell windows, limited use of the telephone, visits by video screen, constant monitoring, insufficient time in recreational facilities and inadequate facilities.

DISCUSSION

A. Transfer to Supermax

I understand petitioner to allege that his Fourteenth Amendment right to due process was violated when he was transferred to Supermax. Before petitioner is entitled to Fourteenth Amendment due process protections, he must first have a protected liberty or property interest at stake. Averhart v. Tutsie, 618 F.2d 479, 480 (7th Cir. 1980). Liberty interests are "generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484 (1995) (citations omitted). However, prisoners do not have a liberty interest in not being transferred from one institution to another. See Meachum v. Fano, 427 U.S. 215 (1976) (due process clause does not limit interprison transfer even when the new institution is much more disagreeable). Therefore, petitioner will be denied leave to proceed on this claim because it is legally frivolous.

B. Biblical Counseling Courses

I understand petitioner to allege that his First Amendment rights to exercise his religion were violated because all of his degree courses in biblical counseling had been denied

because of prison policy. Because this allegation puts respondent on notice as to the claim so that respondent can file an answer, petitioner will be granted leave to proceed on this claim. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002) ("All that need be specified is the bare minimum facts necessary to put the defendant on notice of the claim so that he can file an answer.").

C. Dental and Medical Needs

Petitioner has not alleged an injury or any specific medical or dental incidents that would put respondent on notice as to petitioner's claim so that respondent can file an answer. See id. Therefore, petitioner will be denied leave to proceed as to this claim for failure to state a claim upon which relief can be granted.

D. Conditions of Confinement

In Jones 'El v. Berge, case no. 00-C-0421-C, in which petitioner 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. Id.

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 plaintiff class 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-0421-C, Aug. 14, 2001, dkt. #90, at 25.

In this case, petitioner alleges that he was subjected to the following conditions also found among the conditions listed in Jones 'El: constant illumination, hourly bed checks throughout the night, extreme temperatures, 24-hour cell confinement, lack of a cell windows, limited use of the telephone, visits by video screen, constant monitoring, insufficient time in recreational facilities and inadequate facilities. 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. Accordingly, I conclude that petitioner'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. Thus, petitioner will be allowed to proceed on this claim. 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 petitioner to establish respondent's liability as well as his damages in order to prevail on this claim.

E. Motion for Appointment of Counsel

In considering whether counsel should be appointed, I must determine first whether petitioner made reasonable efforts to retain counsel and was unsuccessful or whether he was precluded effectively from making such efforts. See Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Ordinarily, before the court will find that the petitioner has made reasonable efforts to secure counsel it requires petitioner to provide the names and addresses of at least three lawyers that he has asked to represent him and who have declined to take the case. In this case, petitioner has submitted letters from three law firms that have declined to take his case. Thus, petitioner has made a reasonable effort to obtain counsel.

Second, I must determine whether a pro se plaintiff is competent to represent himself given the complexity of the case, and if he is not, whether the presence of counsel would make a difference in the outcome of his lawsuit. See Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). At this point in the proceedings, it is too early to determine the complexity of the case or petitioner's ability to proceed without counsel. Accordingly, petitioner's motion for appointment of counsel will be denied without prejudice.

ORDER

IT IS ORDERED that

1. Petitioner Edward J. Piscitello's request for leave to proceed in forma pauperis against respondent Gerald Berge is DENIED in part and GRANTED in part as follows: (a) DENIED as to his Fourteenth Amendment due process claim as to his transfer to Supermax as legally frivolous and his Eighth Amendment claim of inadequate medical and dental care for failure to state a claim upon which relief can be granted; and (b) GRANTED as to his First Amendment claim as to the denial of biblical counseling courses and his Eighth Amendment claim as to the totality of the conditions of his confinement at Supermax;

2. Petitioner's motion for appointment of counsel is DENIED without prejudice;

3. The unpaid balance of petitioner's filing fee is $147.40; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2) when the funds become available;

4. In addition, petitioner should be aware of the requirement that he send respondent 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 respondent, he should serve the lawyer directly rather than respondent. 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 respondent or to respondent's lawyer.

Entered this 13th day of June, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge