IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

EUGENE L. CHERRY,

ORDER

Petitioner,

02-C-394-C

v.

JON LITSCHER, GERALD BERGE,
JIM PARISI, SGT. MASON,
PAM BARTELS, DR. KIM, RON REIMER,
KATHRYN McQUILLAN, VICKI SHARPE,
KAREN SOLOMON, JOHN SHARPE,

Respondents.

- -

This is a proposed civil action for monetary, declaratory and injunctive relief brought pursuant to 42 U.S.C. §1983. Petitioner Eugene Cherry, who is presently confined at Supermax Correctional Institute in Boscobel, Wisconsin, contends that respondents (1) violated his rights under the First, Eighth and Fourteenth Amendments when they took basic needs and privileges from him for sexually inappropriate behavior; and (2) violated his right to be free from cruel and unusual punishment and his right of privacy when they refused to treat his serious medical needs. In addition, petitioner has filed motions for a preliminary injunction, for appointment of counsel, for a protective order or an in camera inspection and

a motion to "dispense with the requirement of security."

In an order dated July 12, 2002, I concluded that petitioner had no means with which to make an initial partial payment of the fee for filing his case. Nonetheless, petitioner has since obtained $40 and submitted it to this court as part of the filing fee for this case.

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. 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).

I conclude that petitioner has stated a claim upon which relief may be granted on his claims that he was retaliated against for exercising a constitutional right, that he was denied

the minimal civilized measure of life's necessities and that respondents were deliberately indifferent to his serious medical needs. Petitioner will be granted leave to proceed on those claims. Petitioner will be denied leave to proceed his claims that he was denied due process and equal protection and that his right to privacy was violated. All of petitioner's motions will be denied.

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

ALLEGATIONS OF FACT

A. Parties

Petitioner Eugene Cherry is a prisoner at Supermax Correctional Institution, in Boscobel, Wisconsin. Respondent Jon Litscher is Secretary of the Department of Corrections. Respondent Gerald Berge is the warden of Supermax. Respondent Jim Parisi is Supermax's security director. Respondent Pam Bartels is the health unit supervisor at Supermax. Respondent Dr. Kim is a physician. Respondent Ron Reimer is a physician assistant. Respondent Kathryn McQuillan is a nurse. Respondents Kim, Reimer and McQuillan are all employed at Supermax. Petitioner has not identified the positions of respondents Sgt. Mason, Karen Solomon, Vicki Sharpe and John Sharpe. I will assume that they also are employed at Supermax.

B. Denial of Notary Services

In November 2001, respondent Vicki Sharpe sent petitioner a memorandum stating that because of the repeated incidents in which petitioner had exposed himself to female staff members, effective immediately petitioner would be allowed to receive notary services only from Mr. Ferrell and only when it is Ferrell's week for notary duty.

During 2001, petitioner did not receive any conduct reports for exposing himself to female notary staff. Respondent Sharpe singled out plaintiff because of accusations made by staff who are not notaries. In all important respects, petitioner's history of exposing himself is the same as other prisoners at Supermax who were not restricted from using the services of female notaries.

C. Computer Training

In April 2002, respondent Karen Solomon sent petitioner a memorandum informing him that she would not provide computer training to petitioner because he had masturbated in front of her while she was training another inmate and that if he wanted to receive training, it would be provided through a video. Petitioner received no conduct reports in April 2002 for exposing himself from respondent Solomon or any other law library staff. Solomon singled plaintiff out because of accusations made by staff who do not work in the law library. In all important respects, petitioner's history of exposing himself is the same as

other prisoners at Supermax who were not prohibited from training with respondent Solomon.

D. Behavioral Management Plan

In July 2002, respondent John Sharpe sent petitioner a memorandum, which stated: "Due to plaintiff's inappropriate behavior, specifically exposing his genitals, and using vulgar language, that plaintiff is being placed on a behavioral management plan, which allows staff to take plaintiff's property and clothing out of his cell and from him." Petitioner did not receive a conduct report in 2002 for exposing himself to staff on respondent John Sharpe's unit. Sharpe singled out petitioner because petitioner is suing Sharpe's wife and because petitioner has a history of exposing himself to staff. In all important respects, petitioner's history of exposing himself is the same as other prisoners at Supermax who were not placed on a behavioral management program.

E. Denial of Basic Needs and Refusal To Treat

In May 2000, respondent Mason placed a sign outside petitioner's cell that read, "Due to inmate Cherry's ongoing behavior, if he exposes himself to any staff, such behavior is to be regarded as non-compliance and will result in denial of any items being offered at that time, (meals, medication, shower rolls, phone, supplies, etc.)." Respondent Mason

never wrote petitioner a conduct report for sexual misconduct. The sign was placed outside petitioner's cell to humiliate and degrade him.

After the sign was displayed, prison staff denied petitioner meals and medication for exposing himself. As a result, petitioner suffered excruciating back, neck and stomach pain, weight loss and fainting spells, which threatened petitioner's health.

Petitioner wrote to respondents Parisi and Berge, requesting that they order the sign to be taken down, but they refused. The sign remained posted for sixteen months.

In September 2000, petitioner contracted herpes. He contacted a nurse, who ordered blood work. Soon after, the nurse resigned and no further work was done. Petitioner wrote to respondent Bartels, asking to speak with her about his symptoms. Although Bartels knew of petitioner's illness, she refused to respond to his requests for over a year. As a result of not being treated for herpes, petitioner suffered from excruciating pain from blisters and lesions on his body, which threatened his health.

In 2000 petitioner was diagnosed as having h. pylori bacteria in his stomach, which can cause ulcers. Stedman's Medical Dictionary 793 (27th ed. 2000). (Although petitioner refers to his condition as a stomach "virus," Stedman's identifies h. pylori as a bacterial species.) He was given antibiotics to treat the condition. In early 2002, after the prescription expired, petitioner was still experiencing stomach problems, so he requested that the antibiotic prescription be renewed or that he take another blood test to determine

whether the bacteria was gone. A nurse told petitioner that he had been cured and no blood test or antibiotics were needed. Petitioner sent numerous requests to respondent Bartels, complaining about severe stomach pain. Bartels did not respond, so petitioner went untreated for months, during which time petitioner suffered from excruciating abdominal pain. Failure to treat petitioner's stomach condition could have caused him to die. Eventually respondent Reimer began treating petitioner.

On numerous occasions in 2001 and 2002, respondent McQuillan refused to give petitioner his prescribed medication for both his back injury and stomach condition, even though she was aware of an inmate complaint that told health service staff not to refuse petitioner's medication. As a result of McQuillan's refusal to treat petitioner, he suffered from excruciating back and stomach pains, which threatened his health. Petitioner wrote to respondent Bartels about McQuillan's refusal but she did not respond.

On two occasions, petitioner asked to speak with respondent Reimer in private because he did not want other prison staff to know his confidential medical information. Reimer knew that petitioner suffered from both herpes and a stomach condition, but refused both times to meet with petitioner in private even though the settlement agreement in Jones El v. Berge, No. 00-C-421-C, provides: "Consistent with security policy, inmates shall be permitted to request that any discussions involving confidential medical information be conducted in a private setting." As a result, petitioner did not receive treatment and suffered

from excruciating stomach pain and pain from his blisters and lesions, which could have led to death.

Petitioner also asked respondent Kim to examine him privately because petitioner had had problems with staff discussing his confidential medical information. Respondent Kim refused, and as a result did not treat petitioner, who continued to suffer from pain.

Petitioner wrote to respondents Litscher and Berge on numerous occasions complaining about the mistreatment, but they refused to do anything. Petitioner continues to suffer from stomach pain as well as painful blisters and lesions. In addition, petitioner experiences emotional distress, severe depression, anxiety and humiliation.

DISCUSSION

A. Due Process

Petitioner's claims can be grouped factually into those arising from respondents' reaction to petitioner's exposing himself and masturbating publicly, those arising from respondents' refusal to treat petitioner's medical conditions and those that involve a refusal to treat petitioner *because* he exposed himself to staff. With regard to the accusations of sexual misconduct, petitioner alleges that he did not receive a conduct report for exposing himself and therefore his adverse treatment was not the result of a violation of a prison rule. (However, I note that he is extremely specific in his allegations, stating, for example, that "in

April 2002," he did not receive a conduct report from "law library staff.") To the extent that petitioner means to contend that the due process clause under the Fourteenth Amendment prohibits respondents from disciplining him for inappropriate sexual behavior unless he has received a conduct report, this claim fails.

When due process applies, it generally requires notice and an opportunity to be heard before adverse action may be taken. However, due process protections do not attach to every state action taken for a punitive reason. Sandin v. Connor, 515 U.S. 472, 484 (1995). Rather, they apply only when there is 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, 515 U.S. at 472, 484 (1995) (citations omitted).

None of the disciplinary actions taken by respondents increased petitioner's sentence and denying access to female notaries or limiting computer training to videos cannot be characterized as atypical or significant hardships. Although the behavioral management plan involves taking petitioner's property out of his cell, petitioner has not alleged that anything has been permanently confiscated from him, so no property interest has been implicated. Even if he had, neither intentional nor negligent deprivation of property gives rise to a

constitutional violation so long as state remedies are available for the loss of property. See Daniels v. Williams, 474 U. S. 327 (1986); Hudson v. Palmer, 468 U.S. 517 (1984). Sections 810 and 893 of the Wisconsin Statutes provide plaintiff with replevin and tort remedies. Section 810.01 provides a remedy for the retrieval of wrongfully taken or detained property. Section 893 contains provisions concerning tort actions to recover damages for wrongfully taken or detained personal property and for the recovery of the property. The existence of state remedies defeats any claim petitioner might have that respondents deprived him of his property without due process of law. Because petitioner has failed to allege facts that would allow me to reasonably infer that any of the respondents have interfered with a protected liberty or property interest, he will be denied leave to proceed on a claim that due process required that he receive a conduct report before being disciplined. If petitioner believes that respondents have not complied with the requirements of the Department of Corrections regulations by failing to issue a conduct report, he may seek a remedy in state court after he has exhausted his administrative remedies.

B. Equal Protection and Retaliation

I also understand petitioner to allege that respondents Vicki Sharpe, John Sharpe and Solomon violated his right to equal protection under the Fourteenth Amendment when they denied him access to female notaries and in-person computer training and placed him on a

behavioral management plan. He alleges that other similarly situated inmates who were accused of exposing themselves did not lose the privileges that he did.

The equal protection clause of the Fourteenth Amendment provides that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Courts generally apply a rational basis analysis to differential treatment unless it involves a suspect classification or a fundamental right. Pryor v. Brennan, 914 F.2d 921, 923 (7th Cir. 1990). It cannot be plausibly argued that petitioner has a fundamental right to expose himself or masturbate in front of others and petitioner alleges no facts from which I could infer that he was discriminated against for being a member of a suspect class. He does not allege that he was treated differently for being in *any* class. Rather, petitioner is presumably proceeding under a "class of one" theory as recognized by the Supreme Court in Village of Willowbrook v. Olech, 528 U.S. 562 (2000). To prevail under a "class of one" theory, petitioner must show either that there is no rational basis for respondents intentional discriminatory treatment or that "totally illegitimate animus" is the "sole cause" of the complained of action. Nevel v. Village of Schaumburg, 297 F.3d 673, 681 (7th Cir. 2002).

Initially, I note that petitioner's allegations are almost identical to those he made in another lawsuit, Cherry v. Litscher, 02-C-71-C. I denied petitioner leave to proceed on an equal protection claim in that action because he had failed to allege that he was similarly

situated to other inmates. Petitioner has now alleged the "magic words," but he still has given respondents no notice of how his history is similar to other inmates or even who those other inmates might be and therefore he has not given respondents the "bare minimum facts necessary to put [them] on notice of the claim so that [they] can file an answer." Higgs v. Carver, 286 F.3d 437, 438 (7th Cir. 2002).

Even assuming that petitioner's bald assertion is sufficient, I would nonetheless deny petitioner leave to proceed on an equal protection claim because he has not alleged that the sole cause of his differential treatment was animus. There are a number of rational bases for not providing the same discipline to inmates who engage in sexually inappropriate behavior. Petitioner acknowledges that respondents Solomon and Vicki Sharpe singled him out "because of accusations made by staff" and that respondent John Sharpe singled him out partly because petitioner "has a history of exposing himself to others." Further, petitioner does not allege that other inmates were not disciplined; he alleges only that they were not disciplined in the same way. Respondents may have disciplined petitioner differently from other inmates who engaged in similar behavior because they believed that petitioner was less amenable to other types of discipline or his instances of misconduct were more closely related to the privileges that were taken away from him. Therefore, petitioner's request for leave to proceed on his claim that his equal protection rights were violated will be denied as legally frivolous.

_____However, plaintiff also alleges that respondent John Sharpe placed him on a behavior management program because petitioner was suing respondent John Sharpe's wife. From this, I understand petitioner to allege that respondent John Sharpe retaliated against him for exercising his right of access to courts.

_____Prison officials may not retaliate against inmates for the exercise of a constitutional right. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). To state a claim of retaliatory treatment for the exercise of a constitutionally protected right, petitioner need not present direct evidence in the complaint. Moreover, the Court of Appeals for the Seventh Circuit recently decided that it was unnecessary for inmates to allege a chronology of events from which retaliation may be inferred. Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002). However, it is insufficient simply to allege the ultimate fact of retaliation. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002).

Under Higgs, all that is required to state a claim that officials retaliated against an inmate for filing a suit is to identify the act of retaliation and the suit filed that sparked the retaliatory act. Id. Petitioner alleges that respondent John Sharpe placed him on a behavioral management program after he filed a suit against Sharpe's wife; this is sufficient to put respondent Sharpe on notice, so petitioner will be granted leave to proceed on this claim. However, to succeed in later stages on this action, petitioner will need more than an allegation. The "ultimate question is whether events would have transpired differently

absent the retaliatory motive." Babcock, 102 F.3d at 275. Therefore, petitioner will need to come forward with evidence not only that his protected conduct was a motivating factor in his placement on the behavioral program but also that he would not have been placed on the program if he had not filed the lawsuit.

C. Eighth Amendment – Refusal to Treat and Denial of Basic Needs

Petitioner alleges that respondent Mason posted a sign outside his door that instructed staff not to pass anything to petitioner while he was exposing himself. Petitioner wrote to respondents Parisi and Berge, but they refused to order that the sign be taken down.

With regard to withholding food, prison officials are not constitutionally barred from using food to discipline inmates for misconduct. E.g., Lemaire v. Maass, 12 F.3d 1444, 1455-56 (9th Cir. 1993). However, even recalcitrant prisoners are entitled to "the minimal civilized measure of life's necessities." Farmer v. Brennan, 511 U.S. 825, 833-34 (1994). These include "adequate food, clothing, shelter and medical care." Id. at 832. Thus, failure to provide an inmate with "nutritionally adequate food" may constitute a violation of the Eighth Amendment. Antonelli v. Sheehan, 81 F.3d 1422, 1432 (7th Cir. 1996).

Withholding medicine is governed by a similar standard. The Eighth Amendment requires the government "'to provide medical care for those whom it is punishing by incarceration.'" Snipes v. Detella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Estelle v.

Gamble, 429 U.S. 97, 103 (1976)). To state a claim of cruel and unusual punishment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106. "Serious medical needs" encompass not only conditions that are life-threatening or that carry risks of permanent, serious impairment if left untreated, but also those in which the deliberately indifferent withholding of medical care results in needless pain and suffering. See Gutierrez, 111 F.3d at 1371. See also id. at 1373 (a "serious medical need is one that has been diagnosed by a physician as mandating treatment").

Petitioner does not say whether the deprivation of food and medicine for exposing himself was continuous or only sporadic. However, he alleges that he suffered from weight loss resulting from lack of food and pain from lack of medicine. If left untreated, h. pylori can lead to ulcers and other serious stomach conditions. Petitioner alleges that he suffered from severe pain from both his stomach condition and from herpes. I conclude that petitioner has alleged facts sufficient to suggest that he has a serious medical need. Westlake v. Lucas, 537 F.2d 837 (6th Cir. 1976) (holding that stomach pain and abdominal distress constituted a serious medical need) (cited in Gutierrez, 111 F.3d at 1372 n.6). If respondents' refusal to give petitioner his medication caused him needless pain and suffering, they may have violated the Eighth Amendment.

Also, I cannot say at this stage of the proceedings that petitioner's deprivation of food

was insufficiently serious to state a claim under the Eighth Amendment. Petitioner's allegations present a situation similar to that in Cooper v. Sheriff, Lubbock County, Texas, 929 F.2d 1078, 1081 (5th Cir. 1991), in which a prisoner alleged that he had been denied food for several days in a row because he was not fully dressed at mealtime. The Court of Appeals for the Fifth Circuit held that although withholding food for failing to dress may be "a facially permissible form of punishment," being continually deprived of food for several days could constitute cruel and unusual punishment. Id. at 1083. See also Dearmann v. Woodson, 429 F.2d 1288, 1289 (10th Cir. 1970) (prisoner stated a claim under § 1983 when he alleged that prison officials deprived him of food for 50½ hours); Williams v. Coughlin, 875 F. Supp. 1004, 1013 (W.D.N.Y. 1995) (officials may have violated Eighth Amendment when they withheld food for two days for prisoner's failure to return food tray). However, to succeed in later stages of the litigation, petitioner will have to demonstrate that the food he did receive was not "adequate to maintain [his] health." LeMaire, 12 F.3d at 1456.

Petitioner also must demonstrate that respondents were deliberately indifferent to his health in order to succeed on an Eighth Amendment claim. 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 v. Brennan, 511 U.S. 825, 837 (1994). Deliberate indifference

may be evidenced by a denial of access to necessary medical care, or by excessive delay of access to such care. Estelle, 429 U.S. at 104-05. Inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. See Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes, 95 F.3d at 590-91. Petitioner's allegations include nothing about what respondents Mason, Parisi and Berge knew. However, at this point, I will assume that each was aware of an excessive risk to petitioner's health and did nothing.

Petitioner also alleges that respondents Bartels and McQuillan have been deliberately indifferent with respect his serious medical needs in violation of the Eighth Amendment. Again, petitioner must allege facts from which it can be inferred that he had a serious medical need (objective component) and that prison officials were deliberately indifferent to this need (subjective component). See Estelle, 429 U.S. at 104; see also Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

With regard to the objective component, I have concluded that both petitioner's stomach condition and his sexually transmitted disease may constitute a serious medical need. With regard to the subjective component, petitioner alleges that he has complained to respondent Bartels about his herpes for over a year and about his stomach condition since early 2002, but she has done nothing. If respondent Bartels refused to treat petitioner or have him examined without knowing whether treatment was needed, even though he

continued to complain of pain, respondent Bartels may have been deliberately indifferent to petitioner's serious medical need. Petitioner will be allowed to proceed on his claims that he was denied food and medicine in violation of the Eighth Amendment.

With respect to respondent McQuillan, petitioner alleges that she refused to give him medication for his back and stomach pain "on numerous occasions." Petitioner does not make clear why respondent McQuillan would not give him medication and it may have been related to petitioner's inappropriate sexual behavior. Regardless of the reason, if respondent McQuillan's refusal to give petitioner created an excessive risk to his health and McQuillan knew of that risk, she may have acted with deliberate indifference.

D. Medical Privacy

Petitioner alleges that respondents Reimer and Kim refused to treat him or consult with him in a private setting. "Whether prisoners have any privacy rights in their prison medical records and treatment appears to be an open question." Massey v. Helman, 196 F.3d 727, 742 n. 8 (7th Cir. 1999) (citing Anderson v. Romero, 72 F.3d 518, 522-23 (7th Cir.1995)). In Anderson, 72 F.3d at 523, the Court of Appeals for the Seventh Circuit could not "find any appellate holding that prisoners have a constitutional right to the confidentiality of their medical records," but noted in dictum that the cruel and unusual punishments clause of the Eighth Amendment might protect against a state's dissemination of "humiliating but penologically irrelevant details of a prisoner's medical history."

Thus, to the extent that petitioner has a constitutional right to medical privacy, it would prohibit the doctor or any observers from disseminating information, but it would not grant him a right to consult with the doctor in private. Although petitioner alleges that in the past prison staff had discussed his confidential medical information with others, he does not identify who those staff members were or with whom they discussed his information. Therefore, I will deny petitioner leave to proceed on a claim that his right to medical privacy was violated for failure to state a claim upon which relief can be granted.

Petitioner alleges in his complaint that the settlement agreement in Jones 'El v. Berge, No. 00-C-421-C, states that inmates shall be permitted to request that their discussions involving confidential medical information be conducted in a private setting if it is consistent with security policy. First, I note that the agreement does not guarantee private medical consultations; it provides only that inmates may ask for one if it would be consistent with security policy. However, even assuming that respondents Reimer and Kim violated the settlement agreement when they would not see petitioner privately, this is not an issue that can be addressed in an action brought under § 1983.

A consent decree does not create or enlarge constitutional rights. DeGigidio v. Pung, 920 F.2d 525, 534 (8th Cir. 1990); Green v. McKaskle, 788 F.2d 1116, 1123 (5th Cir. 1986). Thus, in a § 1983 action, a prisoner may seek relief for violations of a consent decree only to the extent that those violations also infringe upon the prisoner's constitutional rights.

I have concluded that respondents Reimer and Kim did not violate petitioner's constitutional rights by refusing to see him in private. If petitioner believes that respondents are not complying with the consent decree, the appropriate response is to communicate his concerns to the monitor of the settlement agreement, who is empowered to investigate violations of the agreement and facilitate a resolution.

Finally, petitioner alleges that he wrote complaints to respondents Berge and Litscher "about the mistreatment by SMCI officials and of the harsh conditions at SMCI" but they did nothing. Petitioner is not specific regarding the mistreatment or harsh conditions that he complained of. However, I will assume at this stage that petitioner complained to respondents Berge and Litscher about each of the claims for which he is being granted leave to proceed, and that "the conduct causing the constitutional deprivation occur[red] at [their] direction or with [their] knowledge or consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985). Therefore, petitioner may proceed against respondents Berge and Litscher as well.

E. Preliminary Injunction

Petitioner requests that this court issue a preliminary injunction ordering his transfer out of Supermax and to another institution because he is not receiving adequate treatment for his herpes or stomach condition. A preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant carries the burden of persuasion by a

clear showing. Boucher v. School Board of Greenfield, 134 F.3d 821 (7th Cir. 1998). In order to succeed on a motion for a preliminary injunction, the moving party must show that "it has more than a negligible chance of success on the merits, and no adequate legal remedy. Once this is established, the district court must then consider the balance of hardships between the plaintiffs and the defendants, adjusting the hardships for the probability of success on the merits." Planned Parenthood of Wisconsin v. Doyle, 162 F.3d 463, 473 (7th Cir. 1998). In addition, the Prison Litigation Reform Act limits the scope of preliminary injunctive relief available in challenges to prison conditions and treatment. The act provides that

> Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief . . . .

18 U.S.C. § 3626(a)(2).

Although petitioner alleges that he has a "deadly" stomach condition, he has presented no evidence that he is in any immediate danger or that a transfer out of Supermax is "the least intrusive means necessary to correct the harm." Because petitioner has not shown even a negligible chance of succeeding on the merits, his motion for a preliminary injunction will be denied.

F. Motion for Appointment of Counsel

Petitioner has requested that counsel be appointed to assist him. He has complied with the preliminary requirements of Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992), by providing the court with the names and addresses of four lawyers who he asked to represent him. However, before counsel can be appointed, the court must evaluate the abilities and skills of petitioner in light of the complexity of the legal issues and evidence in the case. Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993). "The simpler the case, the less intelligent or experienced the petitioner need be to handle it without assistance of counsel." Id. at 321.

The claims on which petitioner is being granted leave to proceed are not particularly complex. The law governing Eighth Amendment claims involving conditions of confinement and medical care is well settled. See, e.g., Farmer v. Brennan, 511 U.S. 824, 827 (1994); Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). Specifically, petitioner will have to show that the parties were deliberately indifferent to his serious need for food and medical care. In other words, petitioner will have to prove that these individuals deliberately withheld food and pain medication from him or deliberately thwarted his efforts to see a doctor. On his retaliation claim, petitioner must show that he would not have been placed on a behavioral management program if he had not filed a lawsuit against respondent John Sharpe's wife. Babcock, 102 F.3d at 275. Petitioner does not need to obtain additional legal

precedent. His ability to succeed on his claim will rest entirely on the facts presented on a motion for summary judgment or at trial.

At this early stage of the proceedings, I am convinced that petitioner has the ability to prosecute a case such as this. Accordingly, I will deny his motion to appoint counsel without prejudice.

G. Motion for Protective Order or In Camera Inspection

Petitioner anticipates the respondents will seek to discover confidential medical records that are unrelated to this action and asks that the court issue a protective order barring discovery of those records. Alternatively, petitioner requests an in camera inspection of the records so that the court can determine which records are discoverable. This motion is premature as discovery has not yet begun. Petitioner's motion will be denied without prejudice. If respondents later seek to discover records for which petitioner believes there is good cause to protect from discovery, petitioner may renew his motion then.

H. Motion to Dispense with Requirement of Security

Finally, petitioner has filed a motion to dispense with the requirement to post security. The motion will be denied as unnecessary because petitioner is not required to post security in this case.

ORDER

IT IS ORDERED that

1. Petitioner Eugene Cherry's request for leave to proceed in forma pauperis is GRANTED with respect to his claims that (1) respondents John Sharpe, Gerald Berge and Jon Litscher retaliated against him for exercising his constitutional right of access to courts; (2) respondents Sgt. Mason, Jim Parisi, Berge and Litscher denied him the minimal civilized measures of life's necessities in violation of the Eighth Amendment when they refused to provide him with food and medicine; and (3) respondents Pam Bartels, Kathryn McQuillan, Berge and Litscher were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment.

2. Petitioner's request for leave to proceed in forma pauperis is DENIED with respect to his claims that (1) respondents Vicki Sharpe, John Sharpe and Karen Solomon violated his due process and equal protection rights and (2) respondents Ron Reimer and Dr. Kim violated his right to privacy; respondents Vicki Sharpe, Karen Solomon, Ron Reimer and Dr. Kim are DISMISSED from this action.

3. Petitioner's motion for a preliminary injunction is DENIED.

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

5. Petitioner's motion for a protective order or in camera inspection is DENIED

without prejudice.

6. Petitioner's motion to dispense with the requirement of security is DENIED as unnecessary.

7. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

8. 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.

9. The unpaid balance of petitioner's filing fee is $110; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2) when funds

become available.

Entered this 10th day of September, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge