IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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HARRISON FRANKLIN,

Petitioner, ORDER

v. 02-C-618-C

GARY R. McCAUGHTRY, GERALD BERGE, PAULINE BELGADO, SARGENT SIEDOSCHLAG, PETER HUIBREGTSE, LINDA HODDY-TRIPP, MS. BLACKBOURNE, JIM WEGNER, SARGENT LIND, CAPTAIN JOHN P. GRAHL, SARGENT DAN MEEHAN, CO II MIKE GLAMAN, and NURSE HOLLY MEIER,

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 Harrison Franklin is confined in Waupun Correctional Institution in Waupun, Wisconsin. He asserts claims that various respondents violated his constitutional rights by retaliating against him for filing a lawsuit, using excessive force against him, opening his legal mail outside his presence, providing him with unsanitary food, refusing him permission to speak with his attorney, denying him adequate medical care, refusing to provide him with medical privacy, interfering with his right of access to courts,

denying him adequate exercise and failing to protect him from assault. In an order dated December 11, 2002, I concluded that petitioner had no means with which to make an initial partial payment of the fee for filing his 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, on three or more previous occasions, the prisoner has 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. This court will not dismiss petitioner's case on its own for lack of administrative exhaustion, but if respondents believe 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).

As a preliminary matter, I note that a substantial number of the allegations that are contained in petitioner's complaint are not new. In Franklin v. McCaughtry, Case No. 00-C-157-C, petitioner alleged that respondents Gary R. McCaughtry, Pauline Belgado, Sgt.

Siedoschlag and Jim Wegner provided him with inadequate medical care for a finger that had to be partially amputated. In an order dated November 17, 2000, I granted petitioner leave to proceed on a claim that this conduct violated the Eighth Amendment. However, in an order dated January 26, 2001, I granted a motion to dismiss this claim because petitioner had not exhausted his administrative remedies as required by the Prison Litigation Reform Act. See 42 U.S.C. § 1997e(a).

Petitioner makes the same allegation in this case. In addition, he alleges that respondent Holly Meier was personally responsible for the mistreatment of his finger. Because I did not decide the merits of this claim in case no. 00-C-157-C, petitioner is not barred by the doctrine of claim preclusion from reasserting this claim. However, there is no reason to allow petitioner to proceed on this claim if it appears certain from the record that he has still failed to exhaust his administrative remedies. Although failure to exhaust administrative remedies is an affirmative defense, the Court of Appeals for the Seventh Circuit suggested recently that a court may raise an affirmative defense on its own when the complaint and other filed documents are clear that the affirmative defense applies or when it appears certain that defendants will file a motion to dismiss on the ground that respondent has failed to exhaust his administrative remedies. Gleash v. Yuswak, 308 F.3d 758, 760-61 (7th Cir. 2002).

In case no. 00-C-157-C, the record showed that petitioner had initially filed a

complaint about the treatment for his finger on June 16, 1999. The inmate complaint examiner directed petitioner to speak with the health services unit manager, but petitioner failed to do so. When petitioner filed another complaint regarding his finger on October 2, 2000, the inmate complaint examiner rejected the complaint because more than 14 days had passed since petitioner developed the problem with his finger and because health services had already addressed the problem. Under Wis. Admin. Code. § DOC 310.09(6), an inmate has 14 days to file a complaint after the alleged injury occurs. Although inmate complaint examiners *may* accept a late complaint for good cause, they are not required to do so. It is highly unlikely that the examiner would have accepted another complaint some time after October 2, 2000. None of the allegations in petitioner's complaint involving treatment for his finger in this case relate to events that occurred after 1999.

If petitioner failed to exhaust his administrative remedies on a claim because he missed deadlines imposed by the regulations, then he cannot proceed with that claim. "[A] prisoner who does not properly take each step within the administrative process has failed to exhaust state remedies, and thus is foreclosed by § 1997e(a) from litigating. Failure to do what the state requires bars, and does not just postpone, suit under § 1983." Pozo v. McCaughtry, 286 F.2d 1022, 1024 (7th Cir. 2002). However, because there is a chance, albeit a slim one, that petitioner may have exhausted his administrative remedies on this claim, I will stay a decision whether to grant petitioner leave to proceed on a claim that

respondents McCaughtry, Belgado, Siedoschlag, Wegner and Meier violated his Eighth Amendment rights when they failed to provide him adequate medical treatment for his finger. Petitioner may have until February 12, 2003, in which to submit proof to the court that he exhausted his administrative remedies on this claim.

I will address petitioner's remaining claims below.

In his complaint, petitioner makes the following allegations of fact. (I have not included petitioner's allegations of fact on his claim regarding the treatment of his finger.)

ALLEGATIONS OF FACT

A. Parties

Petitioner Harrison Franklin is an inmate at Waupun Correctional Institution in Waupun, Wisconsin. Gary McCaughtry is warden of the Waupun Correctional Institution. Respondent Pauline Belgado is a physician at Waupun Correctional Institution. Respondents John Grahal, Dan Meehan and Mike Glaman are correctional officers at Waupun Correctional Institution. Respondents Sargent Siedoschlag and Sargent Lind are correctional officers in the health segregation complex at Waupun Correctional Institution.

Gerald Berge is warden of the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Respondent Peter Huibregtse is security director of the Wisconsin Secure Program Facility. Respondent Linda Hoddy-Tripp is a unit manager at the Wisconsin

Secure Program Facility. Respondent Blackbourne is an employee of the Wisconsin Secure Program Facility.

B. Events after Filing Case No. 00-C-157-C

On June 23, 2000, respondents McCaughtry, Belgado and Siedoschlag were served with a summons and complaint for Franklin v. McCaughtry, Case No. 00-C-157-C. In retaliation for filing this lawsuit, respondents Grahl, Meehan and Glaman handcuffed petitioner to a door and stripped him. Respondent Grahl ordered petitioner to allow respondent Meehan to perform a body cavity search on petitioner. When petitioner refused consent, respondents Grahl, Meehan and Glaman beat petitioner's head repeatedly against the steel door until he could not stand. While an unknown officer restrained petitioner in a choke hold, Grahl, Meehan and Glaman performed a body cavity search on petitioner. Afterwards, petitioner was given no medical treatment and placed in a freezing cell with no clothes, no mattress and no sheets or blankets for several days. Petitioner was fed only "seg loaves" until he agreed to provide a urine sample.

In further retaliation for filing case no. 00-C-157-C, petitioner was sent to what is now known as the Wisconsin Secure Program Facility in Boscobel, Wisconsin on September 14, 2000. Respondents claimed that the transfer was the result of a "dirty" urine sample, but this was the first time petitioner had been accused of having a "dirty" urine sample.

Petitioner had never had a violent altercation with prison staff or other inmates.

C. Conditions at the Wisconsin Secure Program Facility

1. Food

On several occasions, petitioner had to pick hair out of his food in order to eat. Respondent Berge refused to make his employees wear hairnets when working with food. As a result, petitioner went into a deep depression, lost weight and became unable to concentrate on anything except his conditions of confinement.

2. Opened mail

On September 25, 2000, petitioner received a letter that was from a state representative and was clearly marked as such. The letter was already open when he received it. Prison staff told petitioner that they had opened his letter and made a copy of it for petitioner's file.

3. Access to attorney and medical records

In October 2000, petitioner received a letter from a lawyer who was representing him in a criminal case. In the letter, petitioner's attorney instructed him to call her immediately. to tell her whether he wanted to appeal his case to the Wisconsin Supreme Court and, if so,

what issues she should raise on his behalf. Respondents Hoddy-Tripp and Blackbourne read the letter and refused to allow petitioner to speak with his attorney. As a result, petitioner's attorney did not appeal his case.

While incarcerated at the Wisconsin Secure Program Facility, petitioner was denied access to copies of medical records from the University of Wisconsin Hospital, even though it was understood that petitioner needed these copies for 00-C-157-C, which was then pending before the court. In addition, petitioner was not allowed to write to doctors at the hospital, even though it was understood that petitioner was trying to obtain medical documents and expert witnesses for his case. Case no. 00-C-157-C was dismissed.

4. Access to medical file

Prison staff denied petitioner access to his own medical file. Petitioner was told that he could view his file only once every six months and could not hand copy any information contained in the file.

5. Medical privacy

Petitioner was provided no doctor-patient confidentiality while at the Wisconsin Secure Program Facility. He was required to speak with doctors about health problems in front of staff members or yell to doctors through a steel door so that other inmates could

hear.

6. Eyeglasses

Petitioner was denied eyeglasses for about three months because respondent Hoddy-Tripp said, untruthfully, that petitioner already had eyeglasses. Without glasses, petitioner could not see and the strain of trying to see made his eyesight worse.

Petitioner wrote letters to respondents Berge and Huibregtse about all of the problems he experienced at the Wisconsin Secure Program Facility and asked them for help. Respondents Berge and Huibregtse did not reply to his letters or come to his aid.

7. Diabetes

After being transferred back to Waupun Correctional Institution, petitioner was hospitalized for high blood sugar levels caused by diabetes. Even though the medical staff at the Wisconsin Secure Program Facility knew that petitioner's blood sugar had been rising at an alarming rate, they did not tell petitioner about his condition.

D. Prison Conditions at Waupun Correctional Institution

1. Diabetes

In March 2002, respondent Lind told petitioner that if he needed insulin for his

diabetes, she would make sure that he did not get any. Respondent Lind made this threat because she did not like conversations that petitioner had with other inmates. Because Lind is the officer in charge of the health services building, she is in a position to carry through with her threat.

Prison staff at Waupun Correctional Institution know that petitioner is diabetic but they have refused to provide him with a diabetic diet consistent with the one prescribed for him.

2. Attack by other inmates

On January 25, 2002, petitioner was locked in the prison cafeteria with approximately 50 other inmates. No officers were around. Petitioner was attacked by another inmate and beaten for several minutes.

3. Access to law books and photocopies

Staff at Waupun Correctional Institution refuse to give petitioner access to law books. They tell petitioner that he can use the computer instead. Petitioner has told prison staff that he does not know how to use a computer and they refuse to teach him.

Prison staff refuse to make copies of petitioner's exhibits for his habeas corpus petition because petitioner will not let them read his petition. After petitioner's family made

copies for him, prison staff refused to give petitioner his mail, telling him that he did not need copies of his exhibits. Although petitioner had a court deadline on August 6, 2002, he did not receive the copies until August 7, 2002.

4. Exercise

Petitioner is not receiving five hours of recreation a week. He is locked in a cage without enough room to walk around. There is no exercise equipment. Medical staff admit that petitioner needs extra recreation to control his diabetes.

5. Mattress

A doctor at the prison has given petitioner a prescription for an extra mattress to alleviate his back pain. However, petitioner is denied the mattress when he is housed in certain parts of the prison.

6. Shoes

Petitioner is denied athletic style shoes, even though he has a prescription for them. Medical staff admit that petitioner will be in pain without such shoes.

DISCUSSION

A. Retaliation, Use of Excessive of Force and Inadequate Medical Care

I understand petitioner to allege that respondents McCaughtry, Belgado and Siedoschlag directed respondents Grahl, Meehan and Glaman to retaliate against him for filing case no. 00-C-157-C by handcuffing him to a door, performing a body cavity search on him, placing him in a freezing cell with no mattress, sheets or blankets, feeding him "seg loaves" and transferring him to the Wisconsin Secure Program Facility. In addition, I understand petitioner to allege that respondents Grahl, Meehan and Glaman used excessive force against petitioner when he did not submit to a body cavity search.

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). Filing a lawsuit against a prison official is protected by the First Amendment. See Zorzi v. County of Putnam, 30 F.3d 885, 896 (7th Cir. 1994). To state a claim of retaliatory treatment for the exercise of a constitutionally protected right, petitioner need not present 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. Petitioner has done this. Accordingly, I will grant petitioner leave to proceed on a claim that respondents McCaughtry, Belgado, Siedoschlag, Grahl, Meehan and Glaman retaliated against him for filing a lawsuit in violation of the First Amendment. However, to succeed in later stages on this claim, petitioner will need more than an allegation. He must prove that repondents would not have beaten him or taken other actions against him had he not filed the lawsuit. 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 for his adverse treatment but also that none of the alleged retaliatory actions would have occurred if he had not filed the lawsuit.

With respect to petitioner's excessive force claim, the question is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson, 503 U.S. at 7. "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated . . . whether or not significant injury is evident." Id. at 9 (citations omitted). To determine whether force was used appropriately, a court considers the need for the application of force, the relationship between that need and the amount of force used and the extent of the injury inflicted. Whitley v. Albers, 475 U.S. 312, 321 (1986). Also relevant are factors such as the extent of the safety threat as reasonably perceived by the officers and the efforts made by the

officers to mitigate the severity of force. Id. Although it is not the case that "every malevolent touch by a prison guard gives rise to a federal cause of action," only a very minor use of physical force is excluded from the Eighth Amendment's prohibition of cruel and unusual punishment. Hudson, 503 U.S. at 9-10.

Petitioner alleges that respondents Grahl, Meehan and Glaman banged his head against the door repeatedly because he refused to allow an unlawful body cavity search. This is sufficient to a state a claim of excessive force. If petitioner can show that respondents Grahl, Meehan and Glaman had no legitimate reason to conduct the body cavity search or that it was unnecessary to bang petitioner's head against the door in order to insure compliance with the order, he may be able to show that respondent violated the Eighth Amendment. Accordingly, I will grant petitioner's request for leave to proceed against respondents Grahl, Meehan and Glaman on a claim for excessive force.

I also understand petitioner to allege that respondents Grahl, Meehan and Glaman violated his right to adequate medical care when they refused to seek medical treatment for him after they repeatedly banged his head against a steel door. Prisoners have a constitutional right to adequate medical care under the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 103 (1976); see also Walker v. Benjamin, 293 F.3d 1030, 1036-37 (7th Cir. 2002). To establish a violation of that right, petitioner must show both that he had a "serious medical need" and that the prison officials who denied him care were

"deliberately indifferent" to his health. Perkins v. Lawson, 312 F.3d 872, 875 (7th Cir. 2002) (citing Farmer v. Brennan, 511 U.S. 825 (1994)).

The Court of Appeals for the Seventh Circuit has held that "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. Gutierrez v. Peters, 111 F.3d 1364, 1371 (7th Cir. 1997). Deliberate indifference means more than inadvertent error, negligence or even gross negligence. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes v. Detella, 95 F.3d 586, 590-91 (7th Cir. 1996). Rather, the official must be aware that a prisoner faces a substantial risk of serious harm if he is not treated. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

Petitioner does not allege what the extent of his injuries were. However, it can be reasonably inferred from his complaint that he received a serious head injury that required medical attention and that respondents Grahl, Meehan and Glaman knew this but did nothing. Petitioner will be granted leave to proceed on a claim that respondents Grahl, Meehan and Glaman violated his right to adequate medical care under the Eighth Amendment when they failed to seek treatment for him after beating his head against the door.

B. Quality of Food

Petitioner alleges that he had to pick hair out of his food on several occasions and that respondent Berge failed to make prison staff wear hairnets. Prisoners are entitled to the "minimal civilized measure of life's necessities," which include sanitary conditions and nutritionally adequate food. Farmer, 511 U.S. at 832; Antonelli v. Sheehan, 81 F.3d 1422, 1432 (7th Cir. 1996). However, the existence of an occasional hair on a dinner plate may be unpleasant, but it does not violate the Eighth Amendment. The court of appeals has held that much more severe unsanitary conditions are constitutionally acceptable. See, e.g., Harris v. Fleming, 839 F.2d 1232, 1235 (7th Cir. 1988) (ten days without toilet paper, toothbrush or toothpaste in a "filthy, roach-infested cell" did not constitute cruel and unusual punishment). Prisoner's claim that his Eighth Amendment right to minimally adequate sanitary conditions will be denied as legally frivolous.

C. Opening Mail Outside Petitioner's Presence

Petitioner alleges that prison staff opened mail from a state representative outside his presence, read it, made a copy of it and put it in his file, even though the letter's source was clearly marked. It is well established that prison officials may open and inspect non-privileged mail because of the risk that it may contain contraband. Gaines v. Lane, 790 F.2d 1299, 1304 (7th Cir. 1986). However, the court of appeals has also held that an inmate has

a First Amendment right to *be present* when officials open his "legal mail." Bach v. People of the State of Illinois, 504 F.2d 1100 (7th Cir. 1974). Although in Bach the court considered only communications between an inmate and his attorney, later the court of appeals suggested that mail from "public officials," including a United States Senator, was also entitled to special protection. Martin v. Brewer, 830 F.2d 76, 78 (7th Cir. 1987); see also Castillo v. Cook County Mail Room Dept., 990 F.2d 304, 306-07 (7th Cir. 1993) (allegation that prisoner's letters from court and Department of Justice were opened outside his presence stated a claim upon which relief could be granted).

If petitioner can prove that his mail was clearly labeled as a letter from a public official, that a prison official opened, read and copied the letter *intentionally* outside petitioner's presence *and* that the letter was a "personal communication" to petitioner and not just "junk mail," this may be sufficient to show a violation of the First Amendment. See Kinkaid v. Vail, 969 F.2d 594, 602 (7th Cir. 1992) (holding that negligence does not rise to level of constitutional violation under 42 U.S.C. § 1983); Martin, 830 F.2d at 78 (distinguishing "personal communication" of public official from "junk mail" that does not contain "any materials intended for [the inmate's] eyes only."); see also Watson v. Caine, 846 F. Supp. 621, 631 (N.D. Ill. 1993) (denying prison official's motion for summary judgment on claim that inmate's First Amendment rights were violated when official opened letter to inmate from senator outside inmate's presence).

Petitioner does not identify the prison official who he believes opened and read his mail. Petitioner will be granted leave to proceed against respondent Berge (the warden of the Wisconsin Secure Program Facility) for the sole purpose of discovering the name of the prison official who is allegedly responsible. Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981). Once petitioner learns the name of the person directly responsible for denying him his treatment, he will have to amend his complaint to name that individual as a respondent in place of respondent Berge.

D. Denial of Access to Attorney

Petitioner alleges that respondents Hoddy-Tripp and Blackbourne refused to allow him to telephone his attorney and, as a result, his attorney did not appeal his case. The court of appeals has held that unreasonable restrictions on an inmate's access to the telephone for the purpose of speaking with his lawyer may violate the right of access to courts under the First and Fourteenth Amendment and the right to counsel under the Sixth Amendment. Murphy v. Walker, 51 F.3d 714, 718 (7th Cir. 1995); Tucker v. Randall, 948 F.2d 388, 390-91 (7th Cir. 1991). Although I question whether counsel for petitioner declined to appeal his case because of the absence of one call, I must accept all his allegations as true for the purpose of determining whether he has stated a claim. If respondents refused to permit petitioner to telephone his attorney for no other reason than to deny his access to

courts or right to counsel, this would be an unreasonable restriction on his telephone access. Petitioner will be granted leave to proceed on a claim that respondents Hoddy-Tripp and Blackbourne denied his rights under the First, Sixth and Fourteenth Amendments to speak with his lawyer over the telephone.

E. Access to Medical Records and Expert Witnesses

I understand petitioner to allege that prison officials refused to allow him to contact the University of Wisconsin Hospital in order to obtain medical documents and ask doctors at the hospital to be an expert witness in case no. 00-C-157-C. A prison official's intentional obstruction of an inmate's ability to present his claim can violate the inmate's right to access of courts. Johnson v. Avery, 393 U.S. 483, 485 (1969). However, in order to prevail on a claim of denial of access to the courts, an inmate must demonstrate that he was injured by the denial of access. Lewis v. Casey, 518 U.S. 343, 351 (1996). Although petitioner alleges that case no. 00-C-157-C was dismissed because he could not obtain medical documents and an expert witness, a review of the opinion granting summary judgment in that case reveals this allegation to be unfounded. (Although most of petitioner's claims were dismissed for failure to exhaust his administrative remedies, one claim of inadequate medical care remained until it was dismissed on summary judgment.)

I dismissed petitioner's claim of inadequate medical treatment in case no. 00-C-157-C

not because he lacked medical records or expert testimony but because he failed to present evidence that the defendant had been deliberately indifferent to his serious medical need. Petitioner had contended that defendant Pauline Belgado had violated his right to adequate medical care when she failed to give him pain medication. However, it was undisputed that defendant Belgado *had* given petitioner pain medication. To the extent that the medication was not sufficient to ease petitioner's pain, I concluded that the defendant acted reasonably because she believed that petitioner had a drug dependency problem and could become addicted to a stronger pain killer. See Franklin v. McCaughtry, No. 00-C-157-C (Order dated June 22, 2001, dkt. #65). Thus, medical records or an expert opinion suggesting that petitioner's medication should have been stronger would not have prevented his case from being dismissed. Because petitioner was not injured by respondents' alleged interference, I will deny his claim that respondents violated his right of access to courts for failure to state a claim upon which relief may be granted.

F. Failure to Provide Access to Medical File

Petitioner alleges that while he was incarcerated at the Wisconsin Secure Program Facility, he was permitted to review his medical file only once every six months. Although it is reasonable for any individual to desire access to his or her own medical files, I am not aware of any constitutional right of prisoners to review and copy these files, unless perhaps

it is necessary to pursue a legal claim. Petitioner does not allege that he needed his file for a lawsuit or that his inability to see his file more often hindered his ability to pursue a claim.

Further, although the Privacy Act, 5 U.S.C. § 552a(d), provides individuals with the right to gain access to government records that pertain to themselves, that law applies only to federal agencies. 5 U.S.C. § 552a(a)(1); Polchowski v. Gorris, 714 F.2d 749, 752 (7th Cir. 1983). Wisconsin law also provides that "any requester has a right to inspect any record." Wis. Stat. § 19.35(1). Although this right is limited when the requester is a prisoner, prisoners nonetheless have the right to inspect records that contain "specific references to that person." Wis. Stat. § 19.32(3). However, Wisconsin law requires prisoners to bring an action for mandamus to require production of the record no later than 90 days after the record request was denied. Wis. Stat. § 19.37(1m). Petitioner alleges that his ability to review his medical file was limited only at the Wisconsin Secure Program Facility and that he has been incarcerated at Waupun Correctional Institution since at least January 2002. Because more than 90 days has passed since petitioner made a request, I will deny him leave to proceed on a claim that prison officials violated his rights under the state open records law for failure to state a claim upon which relief may be granted.

G. Medical Privacy

Petitioner alleges that he was not permitted to speak with doctors in private while he

was incarcerated at the Wisconsin Secure Program Facility. "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 punishment 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. Therefore, I will deny petitioner leave to proceed on a claim that his right to medical privacy was violated when he was denied the opportunity speak to his doctor in confidence. He has failed to state a claim upon which relief can be granted.

H. Failure to Provide Adequate Treatment for Poor Vision

Petitioner alleges that for three months he was denied eyeglasses, without which he cannot see, because respondent Hoddy-Tripp said that he already had glasses. As a result,

his eyesight deteriorated. As noted above, the Eighth Amendment prohibits prison officials from acting with deliberate indifference toward a prisoner's serious medical needs. The Court of Appeals for the Seventh Circuit has not held in a published opinion whether the need for eyeglasses is a serious medical need, although the court has assumed that it was in several unpublished cases. Other circuits have held expressly that the need for prescription eyeglasses is a serious medical need, at least in some cases. See, e.g., Koehl v. Dalsheim, 85 F.3d 86, 88 (2d Cir. 1996) (need for eyeglasses is serious medical condition when inmate suffered headaches, his vision deteriorated and his daily activities were impaired). Therefore, I will grant petitioner leave to proceed on a claim that respondent Hoddy-Tripp violated his right to receive adequate medical care by refusing to provide him with eyeglasses. I will also grant petitioner leave to proceed against respondents Berge and Huibregtse on this claim because petitioner alleges that he complained to these officials but they did not intervene.

However, to prevail on his claim, petitioner will have to do more than show that he experienced inconvenience; rather, he will have to prove that not having eyeglasses caused him needless pain or suffering. Further, it will also be insufficient for petitioner to show that respondents disagreed with petitioner's perceived need for glasses or believed honestly but incorrectly that petitioner already had glasses. Rather, petitioner must prove that respondents knew that failing to provide him with glasses would expose him to a substantial risk of serious harm.

I. Failure to Provide Adequate Treatment for Diabetes

Petitioner alleges that prison medical staff at the Wisconsin Secure Program Facility knew that petitioner's blood sugar was rising at "an alarming rate" but did not tell him about his condition. Liberally construed, petitioner's complaint also contains an allegation that he was not given any treatment for his condition while at the Wisconsin Secure Program Facility. As a result, petitioner was hospitalized because of complications from diabetes after he was transferred to the Waupun Correctional Institution.

There is no question that diabetes is a serious medical need; failure to treat it can cause significant health problems or even death. If petitioner can prove that medical staff at the Wisconsin Secure Program Facility knew that he had diabetes or was at a substantial risk to develop the disease, but they did nothing to treat the condition, those staff members may have violated petitioner's Eighth Amendment right to receive adequate medical treatment. However, petitioner does not identify who he believes is personally responsible for the alleged violation. Petitioner will be granted leave to proceed against respondent Berge for the sole purpose of discovering the name of the prison official who is allegedly responsible. Duncan, 644 F.2d at 655-56. Once petitioner learns the name of the person directly responsible for denying him his treatment, he will have to amend his complaint to name that individual as a respondent in place of respondent Berge.

Petitioner also alleges that respondent Lind, the officer in charge of the health services building, has threatened to withhold his diabetes medication. Although petitioner does not allege that he has ever been denied his medication, the Supreme Court has held that " a remedy for unsafe conditions need not wait a tragic event." Helling, 509 U.S. at 33. If a prisoner is being exposed to "an unreasonable risk of serious damage to his future health," this may be enough to support an Eighth Amendment violation. Id. at 35. Thus, if petitioner can prove that respondent Lind did in fact make the statement he alleges she made and that she has the ability to prevent petitioner from receiving his medication, this may be sufficient to show that Lind violated petitioner's Eighth Amendment rights. Thus, petitioner will be granted leave to proceed on this claim against respondent Lind.

Finally, petitioner alleges that prison officials at the Waupun Correctional Institution have refused to provide him with a diabetic diet "consistent with the one prescribed for [him] by doctors at the UW-Hospital." The court of appeals has recognized that the failure to provide inmate diabetics with a special diet could be cruel and unusual punishment in some circumstances. See Sellers v. Henman, 41 F.3d 1100, 1102-03 (7th Cir. 1994). However, it is not clear from petitioner's complaint whether he is not receiving a special diet at all or whether he is receiving a special diet but one that is not identical to the one prescribed by doctors at the university hospital. It is well settled that mere disagreement with the course of treatment does not violate the Eighth Amendment "unless the medical

treatment is so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition." Snipes v. Detella, 95 F.3d 586, 592 (7th Cir. 1996). I will presume at this point that Waupun prison officials have refused to provide petitioner with any special diet, that the failure to provide this diet creates a substantial risk of serious harm to petitioner's health and that prison officials are aware of this risk.

Again, however, petitioner does not identify the prison officials allegedly responsible for refusing to provide him with a special diet. Petitioner will be granted leave to proceed against respondent McCaughtry (the warden of Waupun Correctional Institution) for the sole purpose of discovering the name of the prison official who is allegedly responsible. Duncan, 644 F.2d at 655-56. Once petitioner learns the name of the person directly responsible for denying him a special diet, he will have to amend his complaint to name that individual as a respondent in place of respondent McCaughtry.

J. Failure to Protect from Assault

Petitioner alleges that he was attacked in the prison cafeteria by another inmate when no officers were around. To hold prison officials liable under the Eighth Amendment for failing to stop the assault, petitioner would have to show that those officials were aware of a substantial risk that petitioner would be seriously harmed by the assault. Washington v. LaPorte County Sheriff's Department, 306 F.3d 515, 517-18 (7th Cir. 2002); Case v.

Ahitow, 301 F.3d 605, 605 (7th Cir. 2002). However, there is nothing in petitioner's complaint that would allow me to infer reasonably that any prison officials (and again, petitioner does not identify any officials by name) knew that petitioner was in danger. Even accepting as true petitioner's allegation that no officers were present in the cafeteria, this would not establish deliberate indifference. Instead, it suggests that prison officials were negligent in failing to adequately supervise the cafeteria. A showing of negligence is insufficient to prove a violation of the Eighth Amendment. Case, 301 F.3d at 605. Accordingly, I will deny petitioner's request for leave to proceed on a claim that his Eighth Amendment rights were violated when he was assaulted by an inmate in the cafeteria because he has failed to state a claim upon which relief may be granted.

K. Access to Courts: Law Books and Photocopies

Petitioner alleges that prison staff at Waupun Correctional Institution refuse to provide him access to law books. Instead, they tell him do legal research on the computer. Petitioner alleges that even though he has told prison staff that he does not know how to use a computer, they refuse either to instruct him on proper usage or allow him to use books. Prisoners have a right to a "reasonably adequate opportunity to file nonfrivolous legal claims challenging their convictions or conditions of confinement." Lewis, 518 U.S. at 356. In Lewis, the Court rejected the argument that prisoners have an absolute right to a law library

or legal assistance from someone trained in the law. Id. Rather, so long as the prison provides *some* method of insuring reasonably adequate access, prison officials have discretion to choose the particular method. Id. However, the court also suggested that the prison's duty may not be the same for all prisoners. For example, providing access to a law library may be sufficient to insure access for most prisoners, but additional assistance is required for prisoners who are non-English speakers or are illiterate. Id. at 356-57.

Petitioner's claim is analogous to the claims of the illiterate prisoners in Lewis. Although prison officials are not required to provide petitioner with access to law books, they must provide him with some means of doing legal research. If using a computer is the only means provided, then officials must arrange for instruction for inmates on the basics of computer usage if they do not already know them.

However, there remains a difficulty with petitioner's claim. He has not alleged that he has been injured by the limitations on his ability to do legal research. As noted earlier, in Lewis, the Supreme Court held that an inmate does not have standing to bring an access to courts claim unless he can show an "actual injury." Id. at 349. Specifically, the Court stated that the inmate must "demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." Id. at 351. Petitioner does not indicate in his complaint how the alleged inadequacies of the prison's legal assistance program hurt his ability to pursue a nonfrivolous claim. Therefore, the decision

whether to grant petitioner leave to proceed on this claim will be stayed so that petitioner can establish that he has standing to bring the claim. Petitioner may have until February 12, 2003, to provide information to the court identifying how the failure to provide him with books or computer training injured him. If petitioner does not respond by that date, his request for leave to proceed on that claim will be denied. If petitioner can make a proper allegation of injury, he must then amend his complaint to identify who is personally responsible for the alleged denial of his access to courts.

Petitioner also alleges that prison officials at Waupun Correctional Institution have refused to make copies of exhibits to his habeas corpus petition unless he allows them to read the petition. When petitioner's family made the copies for him, petitioner alleges that prison officials withheld these copies for several weeks until after he missed a court deadline by one day. Although petitioner has alleged that he missed a court deadline, he does not allege that the missed deadline resulted in his case being dismissed or otherwise prevented him from pursuing his claim. Therefore, the decision to grant petitioner leave to proceed will be stayed on this claim as well. Petitioner may have until February 12, 2003, to provide information to the court identifying the injury he received as the result of the delay in obtaining copies of his petition. Again, if petitioner can make a proper allegation of injury, he must then amend his complaint to identify who is personally responsible for the alleged denial of his access to courts.

L. Lack of Exercise

Petitioner alleges that he receives less than five hours of recreation a week, that he does not have enough room to exercise in his cell and that he does not have access to any exercise equipment. In addition, he alleges that he needs additional exercise to control his diabetes. The court of appeals has held that although severe short-term restrictions on prisoners' ability to exercise are constitutional, long-term deprivations may violate the Eighth Amendment, at least where there is no legitimate penological reason for the deprivation. Compare Harris, 839 F.2d at 1236; Caldwell v. Miller, 790 F.2d 589, 601 (7th Cir. 1986) (Eighth Amendment not violated when inmate was denied exercise for thirty days), with Delaney v. Detella, 256 F.3d 679, 686 (7th Cir. 2001) (inmate stated claim under Eighth Amendment when he was denied out-of-cell exercise for six months); Antonelli v. Sheehan, 81 F.3d 1422, 1432 (7th Cir. 1996) (holding that inmate who alleged that he was placed in environment the size of "small house trailer" with 37 other inmates for seven weeks stated claim under Eighth Amendment); see also Watts v. Ramos, 948 F. Supp. 739, 746 (N.D. Ill. 1996) (defendants not entitled to qualified immunity when they denied plaintiff out-of-cell recreation for one year).

"Lack of exercise may rise to a constitutional violation in extreme and prolonged situations where movement is denied to the point that the inmate's health is threatened."

Antonelli, 81 F.3d at 1432; see also Helling, 509 U.S. at 35 (holding that Eighth Amendment may be violated when a prisoner's "future health is unreasonably threatened"). I cannot say at this stage of the proceedings that the exercise facility was sufficient to maintain petitioner's health. Therefore, petitioner will be allowed to proceed against respondent McCaughtry for the sole purpose of discovering the name of the prison official who is allegedly responsible. Duncan, 644 F.2d at 655-56. Once petitioner learns the name of the person directly responsible for refusing to provide adequate exercise, he will have to amend his complaint to name that individual as a respondent in place of respondent McCaughtry.

M. Mattress and Shoes

Petitioner alleges that although he has prescriptions for an extra mattress to alleviate back pain and for athletic style shoes to alleviate pain in his feet, prison officials do not allow him to use an extra mattress when he is housed in certain parts of the prison and refuse to provide him with athletic style shoes. If petitioner can show that the denial of an extra mattress and special shoes causes him pain and that the reason officials have denied him these accommodations is that they are deliberately indifferent to his health, he may be able to prove that they have violated the Eighth Amendment. However, to prevail on this claim petitioner will have to show that he experienced more than just discomfort. See Rhodes v.

Chapman, 452 U.S. 337, 349 (1981) ("[T]he Constitution does not mandate comfortable prisons.") In addition, it will be insufficient to show that petitioner was denied an accommodation because officials disagreed with petitioner's perceived need for one. Again, petitioner must prove that officials were aware that of a substantial risk to petitioner's health or safety.

Petitioner will be granted leave to proceed on this claim against respondent McCaughtry for the sole purpose of discovering the name of the prison official who is allegedly responsible. Duncan, 644 F.2d at 655-56. Once petitioner learns the name of the person directly responsible for denying him an extra mattress and special shoes, he will have to amend his complaint to name that individual as a respondent in place of respondent McCaughtry.

ORDER

IT IS ORDERED that

1. Petitioner Harrison Franklin's request for leave to proceed in forma pauperis is STAYED with respect to his claims that (1) respondents Gary R. McCaughtry, Pauline Belgado, Sgt. Siedoschlag, Jim Wegner and Holly Meier violated his Eighth Amendment rights when they failed to provide adequate medical care for his finger and (2) prison officials violated his right of access to courts when they failed to allow him to use law books or

provide him with computer training and delayed his receipt of copies of his petition for a writ of habeas corpus. Petitioner may have until February 12, 2003, in which to submit proof to the court that he has exhausted his administrative remedies on his claim about his finger and to amend his complaint to allege how he was hindered in pursuing a legal claim. If petitioner fails to respond by that date, these claims will be dismissed from this case.

2. Petitioner's request for leave to proceed is GRANTED with respect to his claims that (1) respondents Gary McCaughtry, Pauline Belgado Sargent Siedoschlag, John Grahl, Dan Meehan and Mike Glaman retaliated against him for exercising his right to access the courts; (2) respondents Grahl, Meehan and Glaman used excessive force against him in violation of the Eighth Amendment; (3) respondents Grahl, Meehan and Glaman violated his Eighth Amendment right to receive adequate medical care when they did not seek treatment for him after repeatedly banging his head against a steel door; (4) a yet to be named respondent violated his First Amendment rights when he or she allowed his legal mail to be opened and read outside his presence and copied and kept after reading; (5) respondents Linda Hoddy-Tripp, Berge and Huibregtse violated his Eighth Amendment right to receive adequate medical care when they refused to provide him eyeglasses; (6) an unnamed respondent violated petitioner's Eighth Amendment right to receive adequate medical care when he or she failed to treat petitioner's diabetes; (7) respondent Lind violated petitioner's Eighth Amendment rights by threatening to withhold his medication; (8) an

unnamed respondent violated petitioner's Eighth Amendment rights by refusing to provide him with a special diet for his diabetes; (9) an unnamed respondent violated petitioner's Eighth Amendment rights by failing to provide him with adequate exercise; and (10) an unnamed respondent violated petitioner's Eighth Amendment rights by refusing to provide him with an extra mattress and special shoes.

3. Petitioner's request for leave to proceed is DENIED with respect to his claims that (1) respondent Berge violated petitioner's Eighth Amendment rights for failing to require prison staff to wear hairnets; (2) respondents Berge and Huibregtse violated his right of access to courts when they refused to allow petitioner to contact University of Wisconsin Hospital for the purpose of conducting discovery; (3) respondents Berge and Huibregtse violated petitioner's rights under federal and state law when they limited petitioner's ability to review and copy his medical files; (4) respondents Berge and Huibregtse violated petitioner's right of medical privacy when they would not allow him to consult privately with a physician; (5) prison officials violated his Eighth Amendment rights when they failed to protect petitioner from an assault by another inmate.

4. 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 lawyers who will be representing respondents, he should serve the lawyers directly rather than respondents. Petitioner should keep 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' lawyers.

5. The unpaid balance of petitioner's filing fee is $150.00; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2) when the funds become available.

Entered this 28th day of January, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge