IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROGER LEE WARREN,

Plaintiff,

v.

JON LITSCHER, GERALD BERGE, JANET WALSH, TWILA HAGAN and COLLETTE CULLEN,

Defendants.

OPINION AND ORDER

02-C-0093-C

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This is a civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Roger Lee Warren contends that defendants violated his constitutional rights while he was incarcerated at the Wisconsin Secure Program Facility (formerly the Supermax Correctional Institution) in Boscobel, Wisconsin. In an order dated April 22, 2002, I allowed plaintiff to proceed on his Eighth Amendment claims of cruel and unusual punishment related to the following prison conditions: sensory deprivation, social isolation, inadequate health care, 24-hour illumination and extreme temperatures.

This case is now before the court on defendants' motion to dismiss.

As an initial matter, I note that after the parties submitted briefs on defendants' motion to dismiss, plaintiff asked to dismiss his claims against defendant Janet Walsh voluntarily. Defendants do not object to Walsh's dismissal. Accordingly, plaintiff's claims against defendant Walsh will be dismissed without prejudice and she will no longer be a defendant in this case.

The remaining defendants have moved to dismiss plaintiff's claims for plaintiff's failure to exhaust his administrative remedies or for his failure to state a claim upon which relief may be granted or, alternatively, on the ground that they are entitled to qualified immunity. Because the record shows that plaintiff did not exhaust his claims of sensory deprivation and social isolation and inadequate mental health care, defendants' motion to dismiss for failure to exhaust will be granted as to those claims. Defendants' motion to dismiss plaintiff's claims that he was subjected to 24-hour illumination and extreme temperatures will be granted as to defendants Hagan and Litscher because plaintiff does not oppose the motion as to these defendants and as to defendant Cullen because he is a prison psychologist without control over the lighting and temperatures at the prison. Defendants' motion to dismiss will be granted with respect to defendant Berge on plaintiff's claim that he was subjected to 24-hour illumination because the constitutional right not to be subjected to 24-hour illumination was not clearly established when plaintiff was subjected to this condition of confinement and defendant Berge is qualifiedly immune for his actions in this

respect. Defendants' motion to dismiss will be granted as to defendant Berge on plaintiff's claim that he was subjected to extreme cell temperatures, because the record reveals that plaintiff has exhausted his administrative remedies as to this claim, that the claims should not be dismissed for failure to state a claim and that the right not to be subjected to dangerously extreme temperatures was clearly established during the period plaintiff was at the Wisconsin Secure Program Facility.

Also before the court is plaintiff's motion for appointment of counsel, which will be denied because plaintiff has shown himself to be capable of prosecuting his claims on his own behalf.

In support of their motion to dismiss for failure to exhaust administrative remedies, defendants have submitted documents relating to plaintiff's exhaustion efforts within the inmate complaint review system. Plaintiff has submitted additional documents in opposition to the motion. I can consider this documentation without converting the motion to dismiss into a motion for summary judgment because documentation of a prisoner's use of the inmate complaint review system is a matter of public record. See General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997). Also, for the purpose of deciding defendants' motion to dismiss, I accept as true the allegations in plaintiff's complaint.

ALLEGATIONS OF FACT

A. Parties

Plaintiff Roger Lee Warren is a Wisconsin prisoner presently confined at the Columbia Correctional Institution in Portage, Wisconsin. Defendant Litscher is Secretary of the Department of Corrections. Defendant Berge is the warden at Supermax Correctional Institution, where defendants Cullen and Hagan are psychologists.

B. Facts Relevant to Eighth Amendment Claims

On December 14, 1999, plaintiff was transferred from Columbia Correctional Institution to the Supermax Correctional Institution. Before his transfer, plaintiff was neither examined by a psychiatrist nor evaluated using the Supermax mental health screening tool although his clinical file contained evidence that he suffered from a mental illness. At the time of his transfer, plaintiff's clinical file contained a range of diagnoses, including major depression, bipolar disorder, borderline personality disorder and severe mood swings. These diagnoses had been part of plaintiff's clinical file since the beginning of his incarceration and were also included in his presentence report and in various psychiatric hospital files. All of these reports indicate that plaintiff suffered from mental illness as a child and an adult.

On March 7, 2000, defendant Hagan filed a Supermax clinical services brief diagnostic summary of plaintiff's condition. In this summary, Hagan stated that on Axis II diagnoses, plaintiff had a diagnosis of antisocial personality with borderline features. In addition, she wrote that plaintiff had no recorded history of placement in observation status and no history of transfer to the Wisconsin Resource Center or the special management unit. This was not true. Hagan falsified the report to make it look as though plaintiff had not had any problems in the past. Hagan had in her possession plaintiff's clinical file, which states that plaintiff was placed in the observation and special management units at the Dodge Correctional Institution. Even though Hagan knew about all of this and about plaintiff's borderline personality disorder diagnosis, she still kept plaintiff at Supermax and provided him clinical counseling only rarely.

After plaintiff had been at Supermax for ten months and two days, a psychologist evaluated plaintiff using the mental health screening tool. The psychologist answered "yes" to the question whether plaintiff had a documented history of chronic or severe mental illness and listed the following diagnoses: ADHD, bipolar NOS, depression and personality disorder with antisocial and borderline features. The psychologist answered "no" to the question whether plaintiff had been hospitalized because of his mental illness. The psychologist was not truthful in answering all of the screening tool's questions, including question five, in answer to which the psychologist asserted that all treatment options had

been exhausted for plaintiff, including inpatient treatment at the Wisconsin Resource Center and involuntary treatment with medication. Even though the psychologist knew at this point that it was improper for plaintiff to be housed at Supermax, she did not remove him, thereby risking the exacerbation of his mental disorders.

In 2001, defendant Cullen diagnosed plaintiff again as having borderline personality disorder. Although in Cullen's opinion, plaintiff did not belong at Supermax, for several months after making the diagnosis, she failed to have plaintiff transferred.

While plaintiff was confined at Supermax, he was subjected to 24-hour illumination, sensory deprivation and social isolation and to extreme temperatures. This caused plaintiff a great deal of stress that in turn resulted in his receiving frequent demotions within the prison's level system during the 23 months and seven days he was incarcerated there. Plaintiff wrote several letters asking that his mental illness be treated, but because he had limited contact with defendant Cullen he did not receive proper treatment. Two biweekly half hour therapy sessions with Cullen were not sufficient to treat plaintiff's emotional disorders. Plaintiff suffered frequently from severe headaches because of the lighting at Supermax . A lack of medical care intensified plaintiff's mental disorders and resulted in his being placed on observation status on several occasions. Plaintiff frequently received little or no psychological or psychiatric counseling and when he did it was for only minutes at a

time. Because plaintiff experienced almost constant isolation, he lost touch with reality at times and always had a sense of hopelessness that intensified his mental disorders.

In June 2001, plaintiff was placed on observation status. When defendant Cullen came to see plaintiff, she repeatedly asked him to trust her and to let her help him. Approximately one day later, Cullen returned to the observation cell and told plaintiff she would not see him until he reached level two. Cullen refused to provide plaintiff psychological treatment while he was on level one.

All defendants knew that plaintiff suffered from a borderline personality disorder and a bipolar disorder. Even though it was determined on October 17, 2000, that plaintiff did not fit the criteria for transfer to Supermax because of his mental condition, he was kept at Supermax for another 13 months.

Defendant Litscher did not properly train the other defendants in filling out the Supermax mental illness screening tool and in recognizing that plaintiff suffered from a serious mental illness.

C. Facts Relevant to Administrative Exhaustion

On September 11, 2000, plaintiff filed an inmate complaint (#SMCI-2000-25919), alleging that Janet Linscheid had denied him access to clinical services. On September 13, 2000, the inmate complaint examiner recommended dismissing the complaint. On

September 14, 2000, the reviewer dismissed the complaint. Plaintiff did not appeal the dismissal to the corrections complaint examiner.

On October 17, 2000, plaintiff filed an inmate complaint (#SMCI-2000-29684), alleging a variety of grievances, including inadequate ventilation, sensory deprivation and social isolation, inadequate dental and medical services and 24-hour illumination. On October 18, 2000, the complaint was rejected by an inmate complaint examiner because it included more than one issue. On October 24, 2000, plaintiff filed a request for a corrections complaint examiner review. On October 30, 2000, the examiner dismissed the complaint because it included more than one issue. On November 11, 2000, defendant Litscher accepted the decision of the examiner.

Plaintiff did not file a subsequent complaint for sensory deprivation, inadequate dental services or inadequate medical services.

On October 18, 2000, plaintiff filed an inmate complaint (#SMCI-2000-29767), alleging that Dr. Apple had denied him access to clinical services. On November 9, 2000, the inmate complaint examiner recommended dismissal of the complaint. On the same date, November 9, 2000, the reviewer dismissed the complaint. Plaintiff did not appeal the dismissal to the corrections complaint examiner.

On November 15, 2000, plaintiff filed an inmate complaint (#SMCI-2000-33026), alleging that extreme temperatures in his cell were causing him problems. On November,

19, 2000, the inmate complaint examiner recommended dismissal of the complaint. On December 12, 2000, the reviewer dismissed the complaint. On December 21, 2000, plaintiff filed a request for review by a corrections complaint examiner. On January 12, 2001, the examiner dismissed the complaint because "[t]he devices in use to measure cell temperatures at SMCI are deemed more reliable than the complainant." On February 10, 2001, defendant Litscher accepted the decision of the examiner.

On November 27, 2000, plaintiff filed an inmate complaint (#SMCI-2000-34121), alleging that 24-hour illumination in his cell caused him physical and mental problems. On November, 30, 2000, the inmate complaint examiner recommended dismissal of the complaint because the lights in question were on for security purposes. On January 5, 2001, the reviewer dismissed the complaint. On January 17, 2001, plaintiff filed a request for a corrections complaint examiner review. On February 1, 2001, the examiner dismissed the complaint. On February 10, 2001, defendant Litscher accepted the decision of the examiner.

On February 14, 2001, plaintiff filed an inmate complaint (#SMCI-2001-5159), alleging that he was denied access to a crisis worker. On March 8, 2001, the inmate complaint examiner recommended dismissing the complaint. Also on March 8, 2001, the reviewer dismissed the complaint. Plaintiff did not appeal the dismissal to the corrections complaint examiner.

On July 10, 2001, plaintiff filed an inmate complaint (#SMCI-2001-20172), alleging that defendant Cullen had denied him access to clinical services. On July 19, 2001, the inmate complaint examiner recommended dismissal of the complaint. On July 30, 2001, the reviewer dismissed the complaint. Plaintiff did not appeal the dismissal to the corrections complaint examiner.

On September 4, 2001, plaintiff filed an inmate complaint (#SMCI-2001-26079), alleging that defendant Cullen had denied him participation in treatment programs. On September 24, 2001, the inmate complaint examiner recommended dismissal of the complaint. On October 5, 2001, the reviewer dismissed the complaint. Plaintiff did not appeal the dismissal to the corrections complaint examiner.

On September 10, 2001, plaintiff filed an inmate complaint (#SMCI-2001-27064), alleging that defendant Cullen had denied him a copy of his clinical file. On October 11, 2001, the inmate complaint examiner recommended dismissal of the complaint. On October 15, 2001, the reviewer dismissed the complaint. Plaintiff did not appeal the dismissal to the corrections complaint examiner.

On October 17, 2001, plaintiff filed an inmate complaint, alleging that he had not been screened for mental illness and that he was not receiving proper treatment for his mental disorders. On October 17, 2001, the complaint was returned to him because it included more than one issue. On October 19, 2001, plaintiff re-filed the October 17, 2001

complaint. On October 22, 2001, the complaint was returned to him because it included more than one issue. Plaintiff did not file a subsequent complaint that included only one issue. Plaintiff did not appeal the dismissal to the corrections complaint examiner.

OPINION

A. Administrative Exhaustion

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), states that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." The term "prison conditions" is defined in 18 U.S.C. § 3626(g)(2), which provides that "the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." The Court of Appeals for the Seventh Circuit has held that "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits." Perez v. Wisconsin Dept. of Corrections., 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v. Helman, 196 F.3d 727 (7th Cir. 1999). Moreover, the Court of Appeals held that

"if a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim. The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures." Massey, 196 F.3d at 733.

Wis. Admin. Code § DOC 310.04 details the exhaustion requirement for claims involving prison conditions: "[B]efore an inmate may commence a civil action . . . the inmate shall file a complaint under s. DOC 310.09 or 310.10, receive a decision on the complaint under s. DOC 310.12, have an adverse decision reviewed under s. DOC 310.13, and be advised of the secretary's decision under s. DOC 310.14."

1. Exhaustion of sensory deprivation and social isolation claims

Plaintiff filed an inmate complaint (#SMCI-2000-29684) under § DOC 310.09, alleging a variety of grievances, including sensory deprivation. The complaint was rejected by the inmate complaint examiner under § DOC 310.12. The complaint was also rejected by the corrections complaint examiner and by defendant Litscher and plaintiff was advised of the secretary's decision under § DOC 310.14. However, plaintiff's claim of sensory deprivation was never examined on the merits because his inmate complaint was dismissed for violating the filing requirements set forth in § 310.09(1). Specifically, plaintiff failed to

comply with that section's requirement that an "inmate shall only include one issue in each complaint." See Wis. Admin. Code § DOC 310.09(1). This constitutes a failure to exhaust administrative remedies. Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002)(finding that "[t]o exhaust administrative remedies, a person must follow the rules governing filing and prosecution of a claim"). Plaintiff never filed an inmate complaint relating to isolation. Therefore, plaintiff's claims relating to sensory deprivation and social isolation will be dismissed as to all defendants.

2. Exhaustion of inadequate mental health care claim

Plaintiff alleged inadequate mental health care in seven complaints filed under § DOC 310.09: (1) #SMCI-2000-25919; (2) #SMCI-2000-29767; (3) #SMCI-2001-5159; (4) #SMCI-2001-20172; (5) #SMCI-2001-26079; (6) #SMCI-2001-27064; and (7) the October 17, 2001 complaint that was not assigned a number. All of the complaints were dismissed by the inmate complaint examiner under § DOC 310.12, but plaintiff did not appeal any of these complaints to the corrections complaint examiner. Therefore, plaintiff did not have an adverse decision reviewed under § DOC 310.13 and was not advised of the secretary's decision under § 310.14. Because this constitutes a failure to exhaust administrative remedies under § DOC 310.04, plaintiff's claims relating to inadequate mental health care will be dismissed as to all defendants.

3. Exhaustion of 24-hour illumination claim

Plaintiff filed an inmate complaint (#SMCI-2000-34121), alleging that the 24-hour illumination in his cell caused him physical and mental problems. The complaint was rejected on the merits by the inmate complaint examiner under § DOC 310.12. Plaintiff then filed a request for review by a corrections complaint examiner under § DOC 310.13. The examiner dismissed the complaint and defendant Litscher accepted the decision of the examiner. Plaintiff was then advised of Litscher's decision under § DOC 310.14. Therefore, plaintiff has exhausted his administrative remedies on his 24-hour illumination claim pursuant to Wis. Admin. Code § DOC 310.04.

4. Exhaustion of extreme temperatures claim

Plaintiff filed an inmate complaint (#SMCI-2000-33026), alleging that extreme temperatures in his cell caused him physical and mental problems. The complaint was rejected on the merits by the inmate complaint examiner under § DOC 310.12. Plaintiff then filed a request for review by a corrections complaint examiner under § DOC 310.13. The examiner dismissed the complaint and defendant Litscher accepted the decision of the examiner. Plaintiff was then advised of defendant Litscher's decision under § DOC 310.14. Therefore, plaintiff has exhausted his administrative remedies on his extreme cell temperatures claim pursuant to Wis. Admin. Code § DOC 310.04.

Plaintiff argues that he should be excused for his failure to exhaust his administrative remedies because he was a class member in Jones 'El v. Berge, case no. 00-C-421-C, a case filed in this court concerning conditions of confinement at Supermax Correctional Institution. He contends that because the claims in Jones 'El overlapped with the claims in this case, exhaustion by one class member should satisfy the requirement that he exhausted his administrative remedies in this case. Plaintiff overlooks the fact that this case is an independent lawsuit for monetary relief and not a class action lawsuit. The reasons for not requiring every member of a class action lawsuit to exhaust his administrative remedies before bringing a case are inapplicable to actions brought by single individuals. Plaintiff's duty to exhaust his administrative remedies is statutory and there is no exception available to him.

Plaintiff argues also that he should be excused from exhausting his administrative remedies because he was under too much stress to complete the administrative exhaustion process. However, Congress did not provide an exception to the exhaustion requirement for inmates under stress.

Finally, plaintiff contends that he could not exhaust his administrative remedies as to the claims asserted in his October 17, 2001 and October 19, 2001 complaints because his complaints were not assigned a complaint number. This argument fails because plaintiff must exhaust his administrative remedies in accordance with the procedural rules

promulgated by the state. Pozo, 286 F.3d at 1025. Plaintiff did not file a proper complaint because the complaint raised multiple issues rather than just one. See Wis. Admin. Code § DOC 310.09(1). Plaintiff could have re-filed his grievances by listing only one problem per complaint. Had he done this, the merits of each complaint would have been considered. Once the inmate complaint examiner considered the merits, plaintiff would have received a complaint number and then could have appealed any adverse decision in accordance with the Wisconsin Administrative Code. Had plaintiff done this, he would have exhausted his administrative remedies as to each separate claim and would be able to pursue a section 1983 claim. See Wis. Admin. Code § DOC 310.04.

B. Dismissal of Particular Defendants on 24-Hour Illumination and Extreme Temperature Claims

As the foregoing discussion demonstrates, plaintiff has exhausted his administrative remedies only on his 24-hour illumination claim and his extreme cell temperatures claim. However, as explained below, I will grant defendants' motion to dismiss these claims as to defendants Hagan, Litscher and Cullen.

Defendants Hagan and Litscher will be dismissed because plaintiff does not contest their dismissal. Indeed, he concedes in his brief that they should be dismissed. Plaintiff notes that he "does not offer no argument about dismissing defendant Twila Hagan as a

member of this law suit." Likewise, plaintiff notes that "he does not dispute dismissing defendant Litscher as defendant in this matter . . . ."

Even though plaintiff has conceded dismissal of these two defendants, he does not concede the dismissal of defendants Berge and Cullen. Nevertheless, the motion to dismiss will be granted as to defendant Cullen because the only claim that could be sustained against her has not been administratively exhausted. Defendant Cullen is a psychologist. In this position, she does not have control over cell lighting and temperatures. Plaintiff concedes as much in his reply brief: "[i]t is true that defendants Hagan, Walsh and Cullen has no control over lighting or temperature and he does not dispute that otherwise." Therefore, defendant Cullen will be dismissed from this case.

Because defendant Berge is the only defendant that has not been dismissed, I will address defendants' argument that Berge should be dismissed for plaintiff's failure to state a claim against him. I conclude that plaintiff has stated viable Eighth Amendment claims against defendant Berge under Fed. R. Civ. P. 12(b)(6).

To survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a complaint must be intelligible and give the defendant notice of the claims for relief. See McCormick v. City of Chicago, 230 F.3d 319, 326 (7th Cir. 2000); Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998). Plaintiff's pro se complaint satisfies these minimal requirements. Plaintiff alleges that while incarcerated at Supermax, he was subjected to 24-hour illumination and

extreme temperatures in his cell. According to plaintiff, these conditions prevented him from advancing through the prison's level system, caused him to lose touch with reality, exacerbated his mental health problems, induced severe headaches and brought on other health related problems. Further, I understand plaintiff to allege that Berge was aware of and condoned the practice of incarcerating inmates under conditions that included 24-hour cell illumination and extreme cell temperatures. These allegations are sufficient to state a claim that defendant Berge was deliberately indifferent to plaintiff's health and safety in violation of the Eighth Amendment. See Bennett, 153 F.3d at 518 (sentence in complaint reading "I was turned down for a job because of my race" is enough by itself for complaint to state claim for employment discrimination).

Defendant Berge contends that plaintiff's complaint is insufficiently detailed. He argues that plaintiff's complaint does not demonstrate deliberate indifference because it does not allege the following: (1) that plaintiff had difficulty sleeping as a result of the lights; (2) that plaintiff was not allowed to cover his head while sleeping to mitigate the impact of the light; (3) that the lights were inordinately bright; (4) that plaintiff was denied a blanket when he was cold; (5) that plaintiff was forced to wear heavy clothing in the summer; and (6) that plaintiff was denied cool water during the summer. However, "a complaint does not fail to state a claim merely because it does not set forth a complete and convincing picture of the alleged wrongdoing." McCormick, 230 F.3d at 325. This is especially true when the

plaintiff appears pro se and has drafted his own complaint. Id. Plaintiff's complaint puts defendant Berge on notice that plaintiff is suing him for Eighth Amendment violations related to cell lighting and temperature. "A pro se civil rights complaint may only be dismissed if it is beyond doubt that there is no set of facts under which the plaintiff could obtain relief." Id. That is not the case here.

C. Qualified Immunity

Defendant Berge contends that he is entitled to qualified immunity from plaintiff's lawsuit because his conduct did not violate any of plaintiff's clearly established constitutional rights. Qualified immunity operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." Saucier v. Katz, 533 U.S. 194, 206 (2001). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). The doctrine of qualified immunity involves a two-step inquiry. The "first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question [is] whether the right was clearly established." Saucier, 533 U.S. at 200. The inquiry into whether a right is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." Id. at 201. Because of this fact-intensive inquiry, "a complaint is generally not dismissed under Rule 12(b)(6) on qualified

immunity grounds." Alvarado v. Litscher, 267 F.3d 648, 651 (7th Cir. 2001); see also Jacobs v. City of Chicago, 215 F.3d 758, 765 n.3 (7th Cir. 2000).

The rights alleged to have been violated must be sufficiently particularized to put potential defendants on notice that their conduct is unlawful. Anderson v. Creighton, 483 U.S. 635, 640 (1987). "For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.'" Hope v. Pelzer, 122 S. Ct. 2508, 2515 (2002) (citations omitted). The relevant question is whether the state of the law at the time of the challenged acts gave the defendants fair warning that the plaintiff's alleged treatment was unconstitutional. See id. at 2516. Although qualified immunity is an affirmative defense, the plaintiff bears the burden of establishing the existence of a clearly established right at the time of the alleged violations. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

1. 24-hour illumination

Under the first step of a qualified immunity analysis, a court must consider whether the alleged facts show that the defendant's conduct violated a constitutional right when

those facts are read in the light most favorable to plaintiff. In this instance, I could read the complaint as alleging that the prolonged constant illumination of plaintiff's cell was so intense it caused plaintiff physical and emotional harm in violation of the Eighth Amendment.

The second step of the analysis requires the plaintiff to show that his right to be free from 24-hour illumination was clearly established. Neither the United States Supreme Court nor the Seventh Circuit has ruled that 24-hour illumination of prison cells would establish a violation of the Eighth Amendment's prohibition on cruel and unusual punishment. That would not foreclose the possibility of finding a right clearly established if there is "such a clear trend in the case law that we can say with fair assurance that the recognition of the right by controlling precedent was merely a matter of time." Denius v. Dunlap, 209 F.3rd 944, 951 (7th Cir. 2000) (quoting Cleveland-Perdue v. Brutsche, 881 F.2nd 430, 431 (7th Cir. 1989). There is no clear trend on the issue of cell illumination. See, e.g., Ferguson v. Cape Girardeau County, 88 F.3d 647, 650 (8th Cir. 1996) (no constitutional violation found where, despite complaints about constant light, plaintiff was able to sleep and allowed to leave his cell on occasion); Keenan v. Hall, 83 F.3d 1083, 1090-91 (9th Cir. 1995) (evidence that plaintiff subjected to constant illumination that prevented him from sleeping and caused him mental and psychological problems sufficient to withstand motion for summary judgment; no discussion of qualified immunity); Shepherd v. Ault, 982

F. Supp. 643, 645 (N.D. Iowa 1997) (collecting cases).

Assuming for the purpose of this opinion only that defendant Berge was acting unconstitutionally when he subjected plaintiff to 24-hour cell illumination, I cannot say that the law on cell illumination at that time was clearly established. Accordingly, I will grant defendant's motion to dismiss this claim against defendant Berge.

2. Extreme temperature

Plaintiff's contention that he was subject to extreme cell temperatures that caused him physical and emotional harm is sufficient to allege the deprivation of a constitutional right, thereby satisfying the first step of the qualified immunity analysis.

As to the second step, prisoners are entitled to "'the minimal civilized measure of life's necessities.'" Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997) (quoting Farmer v. Brennan, 511 U.S. 825, 833-34 (1994)). This includes a right to protection from extreme temperatures. Id. at 646 (holding that cell so cold that ice formed on walls and stayed throughout winter every winter might violate Eighth Amendment); Del Raine v. Williford, 32 F.3d 1024, 1050-51 (7th Cir. 1994); Henderson v. DeRobertis, 940 F.2d 1055, 1059 (7th Cir. 1991); Shelby County Jail Inmates v. Westlake, 798 F.2d 1085, 1087 (7th Cir. 1986). To determine whether the temperatures in a particular case violate the Eighth Amendment, "[c]ourts should examine several factors in assessing claims based on low cell

temperature, such as the severity of the cold; its duration; whether the prisoner has alternative means to protect himself from the cold; the adequacy of such alternatives; as well as whether he must endure other uncomfortable conditions as well as cold." Dixon, 114 F.3d at 644.

If defendant Berge subjected plaintiff to cell temperatures that exposed him to serious risk of harm and did so for significant periods of time, during which he gave plaintiff no means to protect himself from the temperatures, he could not say that he did not know that plaintiff had a constitutional right to be free from inhumane conditions. Defendant cannot argue that he did not have fair warning that he would violate the Eighth Amendment if he kept plaintiff in a cell that was too hot or too cold for extended human habitation.

Therefore, I will deny defendant Berge's qualified immunity defense at this time. It remains plaintiff's burden to adduce evidence to show that the temperatures in his cell were not just uncomfortable or unpleasant, but so extreme as to endanger his health. Defendant Berge is free to renew his qualified immunity defense as the case develops.

D. Plaintiff's Motion for Appointment of Counsel

Plaintiff has requested that counsel be appointed to assist him. Plaintiff alleges that he suffers from mental illness, that he has no legal experience and that his incarceration prevents him from engaging in effective discovery. 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 five lawyers who he asked to represent him. In deciding whether to appoint counsel, I must determine whether 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. Zarnes v. Rhodes, 64 F.3d 285, 288 (7th Cir. 1995)(citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)).

Plaintiff is capable of reading, expressing his thoughts in writing and following directions generally. All of the filings he has submitted in connection with this case have been rationally organized and clearly written. Although he has no training in the law, he is no different in this regard from the majority of persons who file cases on their own behalf.

Plaintiff's remaining claim relating to cell temperatures are not particularly complex. The law governing Eighth Amendment cases such as his requires him to prove that the conditions to which he was subjected were "sufficiently serious" and that defendant Berge was deliberately indifferent to his health of safety. Brennan, 511 U.S. at 834. Plaintiff is not expected to provide the court with extensive legal research. His ability to succeed on his claim will rest mostly on the facts presented on a motion for summary judgment or at trial. It is true that plaintiff faces an uphill battle in proving the facts necessary to sustain his claim, but that does not mean he needs a lawyer. As for written discovery, plaintiff is capable of learning through a request for production of documents whether, during his

incarceration at Supermax, prison officials measured the temperatures in his cell or in his section of the prison. If no such evidence exists, then plaintiff can draft interrogatories to determine who else beside himself may have been a witness to his cell conditions. Because I am not convinced that appointment of counsel is warranted in this case, I will deny plaintiff's motion.

ORDER

IT IS ORDERED that

1. Plaintiff's claims against defendant Walsh are dismissed without prejudice and she is DISMISSED from this case;

2. Defendants' motion to dismiss plaintiff's claims that defendants subjected him to sensory deprivation, social isolation and inadequate mental health care is GRANTED for plaintiff's failure to exhaust his administrative remedies;

3. Defendants' motion to dismiss plaintiff's claims that he was subjected to 24-hour illumination and extreme cell temperatures is GRANTED in part and DENIED in part. It is GRANTED as to defendants Litscher and Hagan as unopposed, as to defendant Cullen for plaintiff's failure to state a claim upon which relief may be granted, and as to defendant Berge on the ground that he is qualifiedly immune from a claim that the constant illumination of plaintiff's cell violated plaintiff's Eighth Amendment rights; the motion is

DENIED as to defendant Berge on the ground that he is qualifiedly immune to the cell temperature claims without prejudice to the renewal of that defense at a later date; and

4. Plaintiff's motion for the appointment of counsel is DENIED.

Entered this 4th day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge