IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TONY WALKER, individually and
behalf of all others similarly situated,

ORDER

Petitioner,

00-C-0350-C

v.

TOMMY G. THOMPSON,
DEPARTMENT OF CORRECTIONS,
JON E. LITSCHER,
CINDY O'DONNELL,
RICHARD J. VERHAGEN,
JOHN RAY,
DANIEL R. BERTRAND,
JEFFREY JAEGER,
MICHAEL DELVAUX,
ANDREW VAN GHEEM,
LAURIE WEIER,
LORA HALLET,
WENDY BURNS and
JENNIFER VOELKEL,

Respondents.

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This is a proposed civil action for declaratory, injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Green Bay

Correctional Institution in Green Bay, Wisconsin, seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has on three or more previous occasions had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief. In addition, under most circumstances, a prisoner's request for leave to proceed must be denied if the prisoner has failed to exhaust available administrative remedies.

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

ALLEGATIONS OF FACT

On May 28, 1994, respondent Tommy Thompson directed then secretary of respondent Department of Corrections, Michael J. Sullivan, to use whatever means necessary to keep

violent offenders in prison when they get close to their mandatory release dates. Respondent Department of Corrections has followed that directive.

The instructions on the inmate complaint forms say that prisoners will not be punished for using the complaint system unless they lie about a staff member and make the lie known outside the complaint system. On September 1, 1999, petitioner sent respondent Wendy Burns a complaint regarding her weak performance and her recommendation to dismiss one of his formal complaints. On September 2, 1999, respondent Burns authored a conduct report against petitioner charging him with disrespect. On September 8, 1999, respondent Laurie Weier conducted a disciplinary hearing in regard to the complaint, found petitioner guilty and sentenced him to thirty days in building confinement and a feed cell. On September 16, 1999, respondent Daniel R. Bertrand reversed the disciplinary conviction, stating that "the code prohibits the conduct report."

On January 1, 2000, petitioner wrote a complaint against respondent Jennifer Voelkel and sent it to respondent Jeffrey Jaeger with a copy to respondent Voelkel. Respondent Voelkel then wrote a conduct report against petitioner charging him with disrespect and making threats. Respondent Jaeger ignored petitioner's complaint against respondent Voelkel but approved the conduct report against petitioner. On January 7, 2000, respondent Michael Delvaux conducted a disciplinary hearing against petitioner and found him guilty of the

offenses. Petitioner was sentenced to five days of adjustment and one hundred and eighty days of program segregation in solitary confinement. In solitary confinement, light illuminates the cell twenty-four hours per day. Plaintiff was not confined to solitary confinement under the care and advice of a physician. Respondent Bertrand rejected petitioner's appeal of the decision.

Petitioner and other inmates in segregation are allowed four hours of outdoor or out of cell recreation a week except when weather does not permit, when they are not allowed any outdoor recreation. There are no indoor exercise facilities. Petitioner was denied outdoor recreation from January 12, 2000 until March 10, 2000. Inmates can choose to use the law library during their recreation hours. On April 17 and 25, 2000, petitioner used the law library during his recreation hours. As a consequence, he was denied outdoor or out of cell recreation on April 21 and 26, 2000.

OPINION

I understand petitioner to allege that respondent Thompson conspired to keep him and other prisoners in prison past their mandatory release dates in violation of the Eighth and Fourteenth Amendments. In addition, petitioner alleges he was retaliated against in violation of the First Amendment for utilizing the inmate complaint system. Petitioner alleges also that

his placement in solitary confinement without the advice of a physician violates Wis. Stat. § 302.10 and that the constant light in his cell violates his right to be free of cruel and unusual punishment protected by the Eighth Amendment. In addition, petitioner alleges that his inability to exercise outdoors during bad weather violates his rights under the Eighth Amendment because there are no indoor exercise facilities. Finally, petitioner alleges that respondents violated the Eighth Amendment by forcing him to give up out of cell recreation because of his use of the law library.

1. Conspiracy regarding mandatory release

Petitioner alleges that on May 28, 1994, respondent Thompson ordered respondent Department of Corrections to hold prisoners past their mandatory release dates. To establish a claim of civil conspiracy, petitioner must show "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'" Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979) (citing Rotermund v. United States Steel Corp., 474 F.2d 1139 (8th Cir. 1973)). Claims of conspiracies to effect deprivations of civil or constitutional rights may be brought in federal court under § 1983.

Petitioner has failed to state a claim of civil conspiracy because he has not alleged an overt act that has resulted in damage. Specifically, petitioner has not alleged that he has been held past his mandatory release date because of the actions of respondents. Moreover, even if petitioner had made such an allegation, his claim could not be heard under § 1983 because he is challenging the duration of his confinement. See Heck v. Humphrey, 512 U.S. 477, 481-82 (1994); Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973). Habeas corpus is the exclusive remedy for such claims. See id. Moreover, such a habeas claim could be heard only after petitioner had sought remedy through the state courts unsuccessfully. See Rose v. Lundy, 455 U.S. 509 (1982). Accordingly, petitioner will be denied leave to proceed in forma pauperis on this claim.

2. Retaliation for filing complaint

Petitioner alleges that he was twice retaliated against for filing complaints through the inmate complaint system. The first time, he successfully appealed the initial decision to discipline him after he filed the complaint; the second time, he did not. Although petitioner successfully appealed the decision to discipline him after he filed the first complaint, he never raised a retaliation claim regarding the discipline decision within the inmate complaint review system. Instead, petitioner challenged the discipline decision on the ground that it violated the

prison's internal regulations. 28 U.S.C. § 1997e(a) mandates that "no action shall be brought" by a prisoner under any federal law until the prisoner has exhausted all "administrative remedies as are available." See Alexander v. Hawk, 159 F.3d 1321, 1323 (11th Cir. 1998). 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). Because petitioner never raised his retaliation claim regarding the first complaint within the inmate complaint review system, he has failed to exhaust available administrative remedies with regard to it and his claim cannot be heard in federal court.

Regarding the discipline petitioner received in response to the second complaint, the record reveals that he complained about the discipline but not within fourteen calendar days of the occurrence giving rise to the complaint. Because his complaint was untimely, the complaint was rejected. Accordingly, petitioner never challenged the merits of the disciplinary decision and has failed to exhaust administrative remedies. Petitioner's failure to timely file an inmate complaint means that he has failed to exhaust his available administrative remedies and his claim cannot be heard in this court. Petitioner will be denied leave to proceed in forma pauperis on this claim.

3. Physician's care and advice in solitary confinement

Wis. Stat. § 302.10 provides that prisoners who violate prison rules may be placed in solitary confinement "under the care and advice of a physician." Petitioner claims he was not under the advice and care of a physician when he was placed in solitary confinement, but he has not exhausted his administrative remedies with regard to this claim. The record reveals that petitioner filed a complaint with regard to the claim, but that the complaint was returned without a decision on its merits because it was "unclear, and/or it does not provide sufficient or specific enough information to conduct an investigation." Nothing in the record indicates petitioner responded to the rejection either by clarifying his position or by appealing the rejection. Accordingly, he has not exhausted his administrative remedies in regard to this claim. As noted above, 28 U.S.C. § 1997e(a) mandates 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, 182 F.3d at 535 ; Petitioner will be denied leave to proceed in forma pauperis on this claim.

4. Light in solitary confinement

Petitioner contends that the presence of light in the segregation cell area at all times violates his right to be free from cruel and unusual punishment protected by the Eighth

Amendment. The Supreme Court has held that under the Eighth Amendment, prison officials may not be deliberately indifferent to the safety of prisoners. See Farmer v. Brennan, 511 U.S. 825 (1994). A prison official is deliberately indifferent when he "knows of and disregards an excessive risk to inmate health and safety; 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." Id. at 837. To raise an Eighth Amendment claim, "'[t]he infliction [of punishment] must be deliberate or otherwise reckless in the criminal law sense, which means that the respondent must have committed an act so dangerous that his knowledge of the risk can be inferred or that the respondent actually knew of an impending harm easily preventable." Snipes v. Detella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Antonelli v. Sheahan, 81 F.3d 1422, 1427 (7th Cir. 1996)). "The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments'." Del Raine v. Williford, 32 F.3d 1024, 1032 (7th Cir. 1994). Moreover, prison officials are free to make decisions that "in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Bell v. Wolfish, 441 U.S. 520, 547 (1978).

The presence of light at all times in the segregation cell is not an "excessive risk to inmate health and safety." See Farmer, 511 U.S. at 837. Moreover, because the record reveals that respondents view the light as necessary "for the inmate's own safety and security," it cannot be

considered "reckless in the criminal law sense." See Snipes, 95 F.3d at 590. Rather, it is the type of security decision that prison officials are free to make unfettered by the federal courts. See Bell, 441 U.S. at 547. Accordingly, petitioner has failed to state a claim upon which relief may be granted and will be denied leave to proceed in forma pauperis on this claim.

5. Lack of outdoor exercise during bad weather

Petitioner alleges that respondents' refusal to allow him to exercise outdoors during bad weather, coupled with the lack of indoor exercise facilities, violates his right to be free from cruel and unusual punishment protected by the Eighth Amendment. Denial of exercise may constitute an Eighth Amendment violation in extreme circumstances where lack of movement causes muscle atrophy, threatening the health of the prisoner. See Thomas v. Ramos, 130 F.3d 754, 763 (7th Cir. 1997).

However, in Thomas, 130 F.3d at 764, the Court of Appeals for the Seventh Circuit held that a prisoner's Eighth Amendment rights were not violated when he could not exercise out of his cell for seventy days because he could do exercises in his cell. Similarly, in Harris v. Fleming, 839 F.2d 1232, 1236 (7th Cir. 1988), the court of appeals held that a prisoner's rights were not violated when he spent twenty-eight days in confinement during which the only exercise was activity that he could do in a cell, such as push-ups or running in place: "Unless

extreme and prolonged, lack of exercise is not equivalent to a medically threatening situation." See also Caldwell v. Miller, 790 F.2d 589, 600 (7th Cir. 1986) (no Eighth Amendment violation even though inmates confined to cells twenty-four hours a day for a one-month period after a lockdown). Petitioner alleges only that he could not get outdoor exercise when it was too cold and that he did not have access to indoor exercise facilities for approximately sixty days. Petitioner has not alleged that lack of movement has caused muscle atrophy that threatens his health or that he was unable to exercise within his cell, such as by doing push-ups or running in place. See Thomas, 130 F.3d at 764.

Moreover, although petitioner alleges that he could not exercise outdoors from January 12, 2000 to March 10, 2000, the record reveals that petitioner filed a complaint in regard to the lack of outdoor recreation on January 26, 2000, when he had not been allowed outdoor recreation for only two weeks. In addition, the record indicates that petitioner's attempt to appeal the decision denying his complaint was rejected because his appeal was untimely. Accordingly, he has not exhausted his administrative remedies with regard to this claim and cannot proceed in forma pauperis on it.

6. Choice between exercise and law library

Petitioner alleges respondents violated his right to be free from cruel and unusual

punishment protected by the Eighth Amendment on two days when he was forced to choose between using the law library or getting physical exercise during his out of cell recreation hours. In Thomas, 130 F.3d at 764, the court of appeals considered a similar claim when the prisoner alleged that he could not exercise out of his cell because some recreation periods coincided with his medical appointments. The court of appeals found that "Although prison officials cannot indefinitely prevent an inmate from receiving exercise outside of their cell because of scheduling conflicts, the Eighth Amendment would not be violated where such a conflict occurred only for a few weeks." Id. Petitioner has alleged that the conflict he experienced between using the law library and getting out of cell exercise occurred only twice. Under the rationale of Thomas, such a conflict does not rise to the level of an Eighth Amendment violation. Moreover, the record reveals that petitioner's inmate complaint regarding this claim was rejected because he may request additional law library time if he has a pending court case or court deadline. If such additional time is available, petitioner would have no Eighth Amendment claim even if the conflict occurred on a regular basis. Petitioner has failed to state a claim upon which relief may be granted and will be denied leave to proceed in forma pauperis on this claim.

ORDER

IT IS ORDERED that:

1. Petitioner Tony Walker's request for leave to proceed in forma pauperis is DENIED. Those claims dismissed for failure to exhaust available administrative remedies are dismissed without prejudice to being re-opened upon proof of administrative exhaustion. 28 U.S.C. § 1915(g) directs the court to enter a strike when an "action" is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ." Because at least one of petitioner's claims is dismissed for failure to exhaust his administrative remedies and failure to exhaust is not one of the enumerated grounds, a strike will not be recorded against petitioner under § 1915(g);

2. 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);

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

Entered this 7th day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge