

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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DANIEL L. EVANS, JR.,

Petitioner,

v.

JON E. LITSCHER, Secretary of Wisconsin  
Department of Corrections, GARY R. McCAUGHTRY,  
Warden of Waupun Correctional Institution,  
LINDA ALSUM-O'DONOVAN, CAPTAIN STRAHOTA,  
CAPTAIN SCHUELER, and LIEUTENANT SALZER,

Respondents.  
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OPINION AND  
ORDER

00-C-621-C

This is a proposed civil action for declaratory, injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner is presently confined at the Waupun Correctional Institution in Waupun, Wisconsin. Petitioner alleges that respondents violated his Eighth and Fourteenth Amendment rights by placing him on nutri-loaf restriction for ten days without a hearing. Petitioner 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. Petitioner has submitted the initial partial payment required under § 1915(b)(1). Subject matter jurisdiction exists pursuant to 28 U.S.C. §§ 1331, 1343(a)(3).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has on three or more previous occasions had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioner will be denied leave to proceed in forma pauperis on his Fourteenth Amendment due process claim and his Eighth Amendment condition of confinement claim for

failure to state a claim upon which relief may be granted. I will decline to exercise supplemental jurisdiction over his state law claims.

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

#### ALLEGATIONS OF FACT

Petitioner is a prisoner at the Waupun Correctional Institution in Waupun, Wisconsin. Respondent Jon Litscher is the Secretary of the Wisconsin Department of Corrections. Respondent Gary R. McCaughtry is Warden of Waupun Correctional Institution. Respondent Linda Alsum-O'Donovan is an Institution Complaint Examiner. Respondents Don Strahota and Steve Schueler are Corrections Officer Captains. Respondent Salzer is a Corrections Officer.

On April 26, 2000, petitioner received a conduct report that charged him with disobeying orders in violation of Wis. Admin. Code § DOC 303.24. The conduct report states that in a search of petitioner's cell, a staff member found a piece of saran wrap inside a paper bag from a bag lunch served the previous evening. The paper bag was not returned in accordance with prison policy. As a result, petitioner was placed on nutri-loaf (a.k.a. "seg loaf") restriction from April 26 until May 5, 2000. This restriction means that petitioner received a meat-loaf style ration of food served on a paper towel for each of his three daily meals.

On April 28, 2000, the security office decided to take no action on the conduct report and, accordingly, no hearing was held. Nevertheless, the nutri-loaf restriction remained in effect. When questioned by petitioner about this discrepancy, prison officials explained that the nutri-loaf restriction is not considered a punishment that requires a hearing. According to the prison officials, a meal served on a tray is a privilege that can be revoked without a due process hearing if the inmate violates a prison rule such as not returning all food trays or utensils.

Petitioner filed a grievance with the Institution Complaint Examiner protesting his placement on nutri-loaf restriction without a hearing. When the complaint was dismissed, petitioner appealed the warden's decision to the Corrections Complaint Examiner who affirmed the dismissal on May 26, 2000. On August 7, 2000, petitioner filed a petition for writ of certiorari in Dane County circuit court that was dismissed because it was not filed timely.

#### OPINION

I understand petitioner to be making three claims. First, respondents violated his rights under the Eighth Amendment by subjecting him to inhumane conditions in the segregation unit when they fed him nutri-loaf for ten days. Second, respondents violated his Fourteenth Amendment due process rights when they placed him on nutri-loaf restriction without a

hearing. Finally, respondents violated state laws when they placed him on nutri-loaf restriction without a hearing.

#### I. EIGHTH AMENDMENT: CONDITION OF CONFINEMENT

Petitioner alleges that he was subjected to cruel and unusual punishment when he was fed nutri-loaf for ten days while in segregation but he provides no facts to suggest that the meals were so nutritionally inadequate as to threaten his health. Under the Eighth Amendment, prisoners are entitled to "nutritionally adequate food that is prepared and served under conditions that do not present an immediate danger to the health and well being of the inmates who consume it." French v. Owens, 777 F.2d 1250, 1255 (7th Cir. 1985) (quoting Ramos v. Lamm, 639 F.2d 559, 570-71 (10th Cir. 1980)). "A well-balanced meal, containing sufficient nutritional value to preserve health, is all that is required." Lunsford v. Bennett, 17 F.3d 1574, 1580 (7th Cir. 1994) (citations omitted). Petitioner does not allege that he ever became ill after consuming food at Waupun or that the conditions under which it was served were unsanitary. Because petitioner's detailed description of the food fails to point to any specific problems cognizable under the Eighth Amendment, petitioner fails to state a claim upon which relief can be granted.

## II. FOURTEENTH AMENDMENT: DUE PROCESS

I understand petitioner to allege that respondents violated his right to due process under the Fourteenth Amendment by punishing him without justification or a hearing. Petitioner fails to state a claim upon which relief may be granted. His allegations do not establish that he was deprived of a protectible liberty interest. A procedural due process violation against government officials requires proof of inadequate procedures and interference with a liberty or property interest. See Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). In Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." After Sandin, in the prison context, protectible liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. See Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, Sandin does not allow suit complaining about deprivation of liberty). Not receiving a meal on a tray or in discrete recognizable servings is not a freedom from restraint that imposes an atypical and significant hardship that is a liberty interest under Sandin. Because being fed nutri-loaf does not implicate a liberty interest, petitioner has no right to due process before

being placed on this restriction.

### III. State Law Claims

In addition to his Eighth and Fourteenth Amendment claims, petitioner contends that placement on nutri-loaf is a punishment requiring a hearing under Wis. Admin. Code § DOC 303.74. In the alternative, even if the prison officials' characterization of placement on nutri-loaf as a restriction rather than a punishment is correct, petitioner contends that such a restriction requires due process under Wis. Admin. Code § DOC 303.71. Both of these claims arise under the Wisconsin Administrative Code and are therefore state law claims.

Because petitioner has not raised a viable federal law claim, I decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over petitioner's state law claims. See 28 U.S.C. § 1367(c)(3). The Court of Appeals for the Seventh Circuit has recognized that "a district court ha[s] the discretion to retain or to refuse jurisdiction over state law claims." Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7<sup>th</sup> Cir. 1999).

### ORDER

IT IS ORDERED that:

- (1) Petitioner Daniel L. Evans, Jr.'s request for leave to proceed in forma pauperis on his

claims under the Eighth and Fourteenth Amendments is DENIED and the action is DISMISSED with prejudice for petitioner's failure to state a claim upon which relief may be granted;

(2) I decline to exercise supplemental jurisdiction over petitioner's state law claims;

(3) 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 the state law claims do not fall under one of the enumerated grounds, a strike will not be recorded against petitioner under § 1915(g);

(3) The unpaid balance of petitioner's filing fee is \$148.15; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

(4) The clerk of court is directed to close the file.

Entered this 5th day of December, 2000.

BY THE COURT:

BARBARA B. CRABB  
District Judge