IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

LEON IRBY,

ORDER

Plaintiff,

03-C-346-C

v.

JON E. LITSCHER, Secretary, DOC;
CINDY O'DONNELL, Deputy Secretary, DOC;
JOHN RAY, Corrections Complaint Examiner (CCE), DOC;
SHARON K. ZUNKER, Director, Bureau of Health Services, DOC;
GERALD BERGE, Warden, SMCI;
TOM GONZINSKI, ICE, SMCI;
KELLY COON, ICE, Program Assistant, SMCI;
PAMELA BARTELS, Health Services Unit (HSU) Manager, SMCI,

Defendants.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

In an order dated September 2, 2003, I concluded that plaintiff Leon Irby had stated a claim upon which relief may be granted with respect to several claims: (1) defendants Kelly Coon and Gerald Berge violated his right to free speech under the First Amendment when they rejected an inmate complaint that included the word "hell"; (2) defendants Berge and Jon Litscher violated his right to be free from cruel and usual punishment by subjecting him to social isolation and sensory deprivation; (3) defendants Berge and Litscher violated

his Eighth Amendment rights by depriving him of sleep as the result of constant illumination and excessive noise; (4) defendant Pam Bartels violated his Eighth Amendment right to receive adequate medical care when she ignored his complaints of severe pain; and (5) defendants Tom Gonzinski, John Ray, Sharon Zunker and Cindy O'Donnell violated the Eighth Amendment when they denied plaintiff treatment for osteoarthritis. I dismissed various other claims as legally frivolous or for failure to state a claim upon which relief may be granted.

Now plaintiff has filed a motion for reconsideration of the September 2 order, in which he contends that I erred in failing to grant him leave to proceed on claims that: (1) he was issued a conduct report but another inmate who engaged in the same behavior was not; (2) he received conduct reports in retaliation for filing lawsuits and inmate complaints; (3) he was transferred to the Wisconsin Secure Program Facility and placed in administrative confinement for filing lawsuits; (4) he was mislabeled a schizophrenic in order to justify his placement at the Secure Program Facility; (5) defendant O'Donnell violated his right to free speech by approving the rejection of his inmate complaint for using the word "hell"; (6) defendants Richardson, Berge, Huibregtse, Biggar and O'Donnell retaliated against plaintiff for filing an inmate complaint by implementing a prison policy of prohibiting inmates from sending photocopies of legal documents to other inmates; (7) he was denied advancement through the level system in retaliation for filing lawsuits and inmate complaints; (8) he was

denied the right to be present while his legal mail was being opened.

As discussed below, I am not persuaded that I erred in denying plaintiff leave to proceed on any of these claims. Further, to the extent that plaintiff's motion may be construed as one to amend his complaint to add factual information in support of his claims, the motion will be denied. None of the additional facts plaintiff provides is sufficient to alter the earlier disposition of the claims.

I will make one modification to the September 2 order, however. In the process of reviewing the order, I have found that I improvidently granted plaintiff leave to proceed on his claim that defendants Berge and Litscher violated his right to be free from cruel and usual punishment by subjecting him to conditions that caused him to suffer social isolation and sensory deprivation. Because I have determined in a previous suit that defendants are entitled to qualified immunity on an identical claim, I will dismiss it from this suit.

Retaliation

Of the eight claims that plaintiff wishes this court to reconsider, four of them involve allegations that various defendants retaliated against him in different ways for filing lawsuits and inmate complaints. Two of the claims were not even raised in his original complaint. With respect to being given "retaliatory" conduct reports, plaintiff alleged in his complaint only that other inmates were not receiving discipline for similar offenses. In his motion,

plaintiff cites numerous paragraphs from his complaint that he contends support a claim for retaliation by issuing conduct reports. However, only one of the cited paragraphs refers to conduct reports, ¶ 346, and in that paragraph he alleges only that he receives "the most severest disproportionate punishment." Similarly, plaintiff did not allege in his complaint that defendants prohibited him from receiving photocopied documents from other inmates because he filed lawsuits or inmate complaints. Rather, he alleged only that the purpose of the rule was to deny him access to the courts. I dismissed the claim because plaintiff failed to allege that the rule prevented him from litigating a nonfrivolous lawsuit. Plaintiff does not argue in his motion that this conclusion was in error.

Plaintiff *did* allege in his complaint that defendants transferred him to the Secure Program Facility, placed him in administrative confinement and denied him advancement through the level system in retaliation for exercising his right of access to the courts. However, I dismissed these claims in the September 2 order because plaintiff failed to identify a lawsuit that instigated the retaliation. In his motion, plaintiff now identifies several suits that he alleges are the source of his adverse treatment.

To the extent that plaintiff's new allegations could be construed as a motion to amend his complaint, this motion will be denied as futile. Cognitest Corp. v. Venture Stores, Inc., 56 F.3d 771, 772 (7th Cir. 1995). A district court may dismiss a claim when it is based on allegations that are "obviously and knowingly false." Gladney v. Pendleton Correctional

Facility, 302 F.3d 773, 774 (7th Cir. 2002). This standard is met in this case. With respect to many of his allegations of retaliation, both in his complaint and in his motion for reconsideration, plaintiff alleges that *all* of the defendants named in his complaint conspired to transfer him to the Secure Program Facility and then prevent him from leaving. See, e.g., Plt.'s Cpt., dkt #2, at ¶62. Plaintiff named more than 30 individuals as defendants (and 100 unnamed defendants), including social workers, health care providers and inmate complaint examiners, none of whom would be involved in decisions to transfer or retain plaintiff in a particular institution.

It is beyond belief that all of these defendants were acting in concert to keep plaintiff at the Secure Program Facility. This conclusion is confirmed by plaintiff's new allegation that the impetus for all the animus against him consists of various lawsuits he filed in the 1980s and 1990s, none of which appear to involve the same parties as this case and the most recent of which was resolved six years before he was transferred to the facility. Allowing plaintiff to proceed on this claim would be a waste of time and expense for all involved. See Hoskins v. Poelstra, 320 F.3d 761 (7th Cir. 2003) ("District judges have ample authority to dismiss frivolous or transparently defective suits spontaneously, and thus save everyone time and legal expense.") In short, plaintiff has not shown that I erred in denying him leave to proceed on his retaliation claims. Further, plaintiff still would not state a claim for retaliation if he amended his complaint to list a string of lawsuits that he filed.

Disparate Treatment

Plaintiff repeats the allegations from his complaint that he was given a conduct report when another inmate was not given one for the same behavior. I dismissed the claim in the September 2 order because it was clear from plaintiff's complaint that the statute of limitations had expired on this claim. See Gleash v. Yuswak, 308 F.3d 758, 760-61 (7th Cir. 2002); Wudtke v. Davel, 128 F.3d 1057, 1061 (7th Cir. 1997). Because plaintiff has not challenged this conclusion, his motion for reconsideration will be denied with respect to the issue of unequal treatment.

Free Speech

In the September 2 order, I allowed plaintiff to proceed on a claim that defendants Gerald Berge and Kelly Coon rejected his inmate complaint because he used the word "hell" to describe the conditions at the Secure Program Facility. Plaintiff argues that I erred in failing to include Cindy O'Donnell in this claim because, although she agreed with plaintiff that his language was appropriate, she refused to discipline defendants Berge and Coon. This claim is legally frivolous. Plaintiff's right to free speech allows him to express his opinions to prison officials to the extent that doing so is consistent with legitimate penological interests. His rights do not extend to forcing O'Donnell, who plaintiff admits

did not censor him, to discipline prison officials who may have unlawfully censored plaintiff's inmate complaint. Therefore, plaintiff's motion for reconsideration is denied with respect to his claim that O'Donnell violated his right to free speech.

Legal Mail

Plaintiff argues that I erred in dismissing his claim that prison staff "read and censor" his mail, resulting in its being "delayed, withheld, not delivered" because he alleged in ¶368 of his complaint that his legal mail was opened outside of his presence. However, plaintiff alleged only that his "ACLU attorne[y] privileged mail" was opened, not that it was opened outside his presence or that it was done so intentionally, both of which are necessary to state a claim. See Wolf v. McDonnell, 418 U.S. 539, 577 (1974); Kincaid v. Vail, 969 F.2d 594, 602 (7th Cir. 1992). Further, ¶368 does not identify who opened his mail, when it took place or where. Plaintiff's motion for reconsideration will be denied with respect to his claim that defendants violated his right to free speech by reading, censoring or opening his mail.

Mislabeling as a Schizophrenic

Again, plaintiff's allegation that defendants purposefully mislabeled him as a schizophrenic in order to keep him at the Secure Program Facility was not included in his complaint. Even if it had been, it would not state a claim for a constitutional violation.

First, I note that plaintiff's allegation is suspect in light of the settlement agreement in Jones 'El v. Berge, No. 00-C-421-C, that no seriously mentally ill prisoners would be incarcerated at the Secure Program Facility. It is unclear why any of the defendants would intentionally diagnose plaintiff with a psychological disorder in order to justify his stay at the prison when doing so would be more likely to justify transfer rather than retention. More important, however, as I noted in the September 2 order, plaintiff is not entitled to be housed in the prison of his choice. Therefore, with few exceptions, the reason plaintiff is incarcerated at the Secure Program Facility is of no constitutional significance. If plaintiff believes that he is seriously mentally ill, he should bring this to the attention of the monitor of the settlement agreement.

Sensory Deprivation and Social Isolation

In reviewing the September 2 order, I discovered that I erred in granting plaintiff leave to proceed on his claim against defendants Berge and Litscher that certain conditions at the Secure Program Facility violated his Eighth Amendment rights because they caused him to suffer sensory deprivation and social isolation. Because defendants are entitled to qualified immunity on this claim, it must be dismissed.

Qualified immunity provides officers with protection from lawsuits for money damages when there is no clearly established law that the official's act violated the

Constitution. Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982). A plaintiff cannot show that the law is clearly established by pointing to an "abstract right." Anderson v. Creighton, 483 U.S. 635, 639 (1987). However, it is not necessary to show that there is an identical case or one with "materially similar" facts. Hope v. Pelzer, 536 U.S. 730 (2002). Rather, a right is "clearly established" when a reasonable official would know that what he or she is doing violates that right. Id.

In another lawsuit filed in this court, Freeman v. Berge, 03-C-21-C (W.D. Wis. June 3, 2003 opinion and order), I concluded that as of March 2002, there was no clearly established law that subjecting prisoners to social isolation and sensory deprivation violated the Eighth Amendment. In coming to this conclusion, I reasoned as follows:

> The legal theory under which I allowed plaintiff to proceed was first recognized by the Supreme Court in Rhodes v. Chapman, 452 U.S. 337, 347 (1981), in which the court stated that conditions "alone, or in combination, may deprive inmates of the minimal civilized measure of life's necessities." This statement was further refined in Wilson v. Seiter: "*Some* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need." The Court identified expressly only "food, warmth [and] exercise" as human needs. See also Farmer v. Brennan, 511 U.S. 825 (1994) (stating that life's necessities include food, clothing, shelter and medical care).
>
> In Jones 'El [v. Litscher, 00-C-421-C], I concluded that basic human needs include social interaction and sensory stimulation. Although the Court of Appeals for the Seventh Circuit has recently confirmed the view that the Eighth Amendment prohibits wanton infliction of psychological as well as physical pain, Calhoun v. Detella, 319 F.3d 936 (7th Cir. 2003), it has not expressly held that social isolation and sensory deprivation may serve as bases for a claim under the Eighth Amendment.

Rather, in Bono v. Saxbe, 620 F.2d 609, 614 (7th Cir. 1980), the court held: "Inactivity, lack of companionship and a low level of intellectual stimulation do not constitute cruel and unusual punishment even if they continue for an indefinite period of time." But see Hoptowit v. Mason, 682 F.2d 1237, 157-58 (9th Cir. 1982) ("The deprivation of nearly all fresh air and light, particularly when coupled with the guard's control over the window and the electric light, creates an extreme hazard to the physical and mental well-being of the prisoner in violation of the Eighth Amendment."); Ruiz v. Johnson, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999) (finding that prison officials violated Eighth Amendment when they subjected inmates to "extreme social isolation and reduced environmental stimulation"); Madrid v. Gomez, 889 F. Supp. 1146, 1264 (N.D. Cal. 1995) (placement of mentally ill inmates in segregation is cruel and unusual punishment).

I noted in Jones 'El that Bono does not stand for the proposition that claims of social isolation and sensory deprivation can never amount to violations of the Eighth Amendment. I adhere to the view that harm caused by lack of human contact and sensory stimulation may violate "contemporary standards of decency" in some instances. However, with Bono as the only case as a guide in this circuit, it would not be unreasonable for a prison official to believe that constant cell illumination, audio and visual monitoring and lack of access to the outdoors did not violate the Eighth Amendment, alone or in combination. Although the determination whether a law is clearly established is not limited to a review of cases in this circuit, I cannot say that there was such a "clear trend" in the case law from other courts that it was "merely a question of time" that the right would be recognized by the Court of Appeals for the Seventh Circuit. Jacobs v. City of Chicago, 215 F.3d 758, 767 (7th Cir. 2000). Few courts have addressed the issue directly and those that have are not in agreement regarding what the Eighth Amendment requires. Compare Ruiz, 37 F. Supp. 2d 855 and Madrid, 889 F. Supp. 1146, with Newman v. State of Alabama, 559 F.2d 283, 291 (5th Cir. 1977) (rejecting argument that deterioration of mental health implicates Eighth Amendment concerns); Everson v. Nelson, 941 F. Supp. 1048, 1051 (D. Kan. 1996) (holding that "retrogression of human development" does not state claim under Eighth Amendment); see also Gertrude Strassburger, Judicial Inaction and Cruel and Unusual Punishment, 11 Temp. Pol. & Civ. Rts. L. Rev. 199 (2001) ("[N]o state or federal court has ever held that isolation for prolonged periods of time is a constitutional violation per se.")

Since the court of appeals decided Bono, evidence has accumulated regarding

the harm that depriving inmates of social interaction and sensory stimulation can cause. See Leena Kurki & Norval Morris, Purposes, Practices and Problems of Supermax Prisons, 28 Crime & Just. 385 (2001) (evaluating studies and concluding that solitary confinement will have detrimental psychological effects unless it lasts only a short time); Maria Dorte Sestoft, et al., Impact of Solitary Confinement on Hospitalization among Danish Prisoners in Custody, 21 Int'l J.L. & Psychiatry 99 (1998) (finding that rate of hospitalization of prisoners in solitary confinement for more than four weeks was 20 times higher than prisoners in the general population); Craig Haney & Mona Lynch, Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement, 23 N.Y.U. Rev. L. & Soc. Change 477, 481 (1997) ("[C]onstitutional doctrines currently governing solitary confinement fail to recognize the nature and magnitude of the psychological trauma that can be inflicted by this form of punishment."); Stuart Grassian, Psychopathological Effects of Solitary Confinement, 140 Am. J. Psychiatry 1450 (1983) (finding that many inmates in solitary confinement for long periods of time became hypersensitive to external stimuli, suffered from hallucinations, perceptual distortions, paranoia and acute anxiety attacks, had difficulty with memory and concentration and engaged in self-mutilation). However, agreement among mental health professionals regarding the deleterious effects of solitary confinement does not translate into legal notice that defendants may have been violating the Eighth Amendment. In the absence of case law concluding that conditions similar to those alleged by plaintiff are unconstitutional, I must conclude that defendants are entitled to qualified immunity on plaintiff's claims that he was subjected to sensory deprivation and social isolation.

Qualified immunity does not apply to claims for injunctive relief. However, plaintiff cannot obtain injunctive relief on these claims because such relief is preempted by the settlement agreement. Accordingly, these claims must be dismissed.

My conclusion in Freeman applies equally to this case. Both Freeman and plaintiff are inmates at the Wisconsin Secure Program Facility and both were members of the class in Jones 'el. Both filed claims that defendants Berge and Litscher subjected them to cruel and unusual punishment by depriving them of human contact and sensory stimulation. As

with Freeman, plaintiff was allowed to proceed on a claim for money damages only (because injunctive relief was provided in the settlement agreement in Jones 'el). In addition, both plaintiffs were limited to challenging conditions that existed before the settlement agreement took effect in March 2002 (because violations occurring after this date must be remedied through the enforcement mechanisms of the settlement agreement). Regardless how the law develops in the future, the state of the law as of March 2002 cannot change. Therefore, in light of my holding in Freeman, I must conclude that defendants Berge and Litscher are entitled to qualified immunity on plaintiff's claim that he was subjected to social isolation and sensory deprivation in violation of the Eighth Amendment. Because plaintiff cannot receive injunctive relief on this claim in this suit, the claim must be dismissed.

I recognize that qualified immunity is an affirmative defense. Gomez v. Toledo, 446 U.S. 535 (1980). Generally, courts may not raise an affirmative defense on their own. Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002). However, the Court of Appeals for the Seventh Circuit has held that a district court may do so if the application of the defense "is so plain from the language of the complaint and other documents in the district court's files that it renders the suit frivolous." Gleash v. Yuswak, 308 F.3d 758, 760 (7th Cir. 2002); see also id. ("Both § 1915(e)(2)(B)(iii) and § 1915A(b)(2) require the judge to consider official immunity, which is an affirmative defense.") Under my conclusion in Freeman, it is beyond doubt that defendants will be entitled to qualified immunity; there is

no set of facts that plaintiff could prove that would enable him to overcome such a defense. Because a motion to dismiss on qualified immunity grounds is inevitable, it is "sensible to stop the [claim] immediately, saving time and money for everyone concerned." Id. at 761. Therefore, I will dismiss plaintiff's claim that defendants Berge and Litscher subjected him to social isolation and sensory deprivation.

ORDER

IT IS ORDERED that

1. Plaintiff Leon Irby's motion for reconsideration of the September 2, 2003 order insofar as it denied him leave to proceed with respect to certain of his claims is DENIED;

2. Plaintiff's motion to amend his complaint to add factual information is DENIED; and

3. On the court's own motion, plaintiff's claim that defendants Gerald Berge and Jon Litscher violated his Eighth Amendment rights by depriving him of human contact and

sensory stimulation is DISMISSED because defendants are entitled to qualified immunity.

Entered this 23rd day of September, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge